EXPANDING RAPE SHIELD LAWS: BREAKING THROUGH PREJUDICE FOR BETTER PROTECTION OF BATTERED WOMEN

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INTRODUCTION

Most people are familiar with stories of battered women who seem unable to sever ties with their abusers. Despite more than four decades of research providing reasons for this behavior, confusion and misunderstanding are still pervasive in the attitudes toward battered women. Recently, the singer Rihanna garnered widespread criticism after an interview with Oprah Winfrey in which she stated she still loved her ex-boyfriend Chris Brown.[1] Brown was charged with, and eventually pled guilty to, felonious assault in 2009 after he attacked Rihanna, leaving her face badly swollen and bloodied.[2] In response to Rihanna's interview with Oprah, comedian Joan Rivers tweeted, "Rihanna confessed to Oprah Winfrey that she still loves Chris Brown. Idiot! Now it's MY turn to slap her."[3]

Rivers' tweet was not the first time Rihanna, rather than Brown, became the target of public outrage. Hostile reactions to Rihanna's unwavering expressions of love and concern for her abusive ex underscore the general belief that an abused woman can easily abandon the relationship.

The judicial system is not immune to the expectation that an abused woman can—and should—immediately leave an abusive partner. In a recent Kentucky case, a male defendant challenged the entry of a civil order of protection against him on the grounds that the court had excluded evidence that his girlfriend slept with him after the alleged violence; this was thought to be relevant to demonstrate

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[1] Justin Myers, *Rihanna Has Forgiven Chris Brown - Are We Right to Remain Angry on Her Behalf?*, THE HUFFINGTON POST (Oct. 9, 2012), http://www.huffingtonpost.co.uk/justin-myers/rihanna-chris-brown-can-we-stay-angry_b_1866691.html.

[2] Alan Duke, *Brown Sentenced for Rihanna Assault; Other Incidents Surface*, CNN JUSTICE (Aug. 25, 2009), http://articles.cnn.com/2009-08-25/justice/chris.brown.sentencing_1_robyn-rihanna-fenty-sentencing-probation-report?_s=PM:CRIME.

[3] Brandi Fowler, *Rihanna and Joan Rivers Go Head-to-Head on Twitter*, E-ONLINE (Aug. 25, 2012), http://www.eonline.com/news/340922/rihanna-and-joan-rivers-go-head-to-head-on-twitter.

that she was not afraid of him.[4] Although the court reached the right conclusion and decided to exclude the evidence, the case demonstrates that civil orders of protection are an area of the law susceptible to the prejudicial effects of these common misconceptions about battered women.[5] For this reason, rape shield laws should be extended to exclude evidence of consensual sex between the victim and her abuser in civil actions seeking an order of protection.

After presenting the facts and holding of *Durham v. Metzger* in Part I, Part II of this Article examines the domestic violence myth that a woman's failure to leave her abuser indicates a lack of fear. The development of rape shield laws is discussed as an example of how rules of evidence can be used to exclude certain types of evidence that consistently result in jury confusion. Part III concludes by discussing the necessity of protecting victims seeking orders of protection and argues that extending rape shield laws to civil actions for such orders accomplishes that goal.

I. THE CASE: *DURHAM V. METZGER*

In *Durham*, the victim, SM, filed a petition seeking entry of a Domestic Violence Order against Gary Durham.[6] In the petition, SM claimed that Durham "threw something and hit [her]," that he "pushed [her] down and put a collaspable [sic] baton to [her] face and reared back like he was going to hit [her] with it."[7] Although these incidents occurred two days before SM filed her petition, her petition also alleged previous acts of violence by Durham.[8] The petition stated Durham previously hit her with "different items," that he threatened her, and that he grabbed her by the ankle and pulled her out of bed.[9]

The family court held a hearing on the petition and SM testified to the events in the petition.[10] During cross-examination, Durham's attorney questioned SM about the two days between the alleged violence and the filing of her petition.[11] Specifically, he asked whether SM slept in the same bed as Durham for those two nights and whether she and Durham engaged in consensual sexual relations.[12]

The family court stopped the questioning and determined that evidence of consensual sex between the parties was not relevant and therefore inadmissible.[13] The court ultimately found that Durham perpetrated acts of domestic violence

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[4] Durham v. Metzger, No. 2011-CA-001105-ME, 2012 WL 1556490, at *2-3 (Ky. App. May 4, 2012).

[5] *See generally id.*

[6] *Id.* at *1.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Durham*, 2012 WL 1556490, at *1.

[11] *Id.*

[12] *Id.* at *2.

[13] *Id.* at *1.

against SM and entered a Domestic Violence Order against him.[14] Durham appealed.[15]

On appeal, Durham argued that the family court erred in excluding testimony about consensual sex between the parties.[16] Durham argued that the evidence was relevant to show SM's state of mind immediately following the alleged incident of domestic violence.[17] According to Durham, if SM engaged in consensual sex with him, it indicated that she was not in fear of imminent physical injury.[18]

The Court of Appeals of Kentucky held that the family court did not err in excluding testimony regarding whether SM and Durham engaged in consensual sex following the alleged incident of domestic violence.[19] Under the Kentucky Rules of Evidence (KRE), evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable."[20] However, the Rules also state that relevant evidence may be excluded if the probative value of the evidence is outweighed by undue prejudice.[21] First, the court noted that consensual sexual relations between SM and Durham did not necessarily make it more or less probable that she feared imminent physical injury from Durham.[22] Furthermore, the prejudicial effect of evidence regarding sexual relations between the parties far outweighed its minimal probative value.[23]

II. LEGAL BACKGROUND

A. Evidence of Prior Sexual Activity

Myths about rape are not new and persist despite constant debunking.[24] On August 19, 2012, Republican candidate for the U.S. Senate, Todd Akin, provoked a national debate over misconceptions about rape when he stated that pregnancies resulting from rape were "really rare" because a woman's body "had a way to try to shut that whole thing down."[25] According to medical historian Vanessa Heggie,

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[14] *Id.*

[15] *Id.*

[16] *Durham*, 2012 WL 1556490, at *2.

[17] *Id.*

[18] *See id.*

[19] *Id.*

[20] *Id.* (citing KY. REV. STAT. ANN. § 401 (West 2012)).

[21] *Id.*

[22] *Durham*, 2012 WL 1556490, at *2 (citing KY. REV. STAT. ANN. § 401 (West 2012)).

[23] *Id.*

[24] Vanessa Heggie, *"Legitimate Rape"—a Medieval Medical Concept*, THE GUARDIAN, Aug. 20, 2012, http://www.guardian.co.uk/science/the-h-word/2012/aug/20/legitimate-rape-medieval-medical-concept.

[25] John Eligon & Michael Schwirtz, *Senate Candidate Provokes Ire with "Legitimate Rape" Comment*, N.Y. TIMES (Aug. 19, 2012), http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html?_r=0.

> the idea that a woman had to orgasm in order to conceive (although not necessarily at exactly the same time as her male partner) was widespread in popular thought and medical literature in the medieval and early modern period. By logical extension, then, if a woman became pregnant, she must have experienced orgasm, and therefore could not have been the victim of an "absolute rape."[26]

Within the judicial system, myths about rape led to the practice of routinely admitting evidence of a victim's prior sexual history in rape and sexual assault cases.[27] The relevancy of this evidence arose from the belief that women should be chaste, and that a woman who was sexually active was of "bad moral character."[28] A woman that was "of bad moral character" was less credible.[29] Additionally, if a woman had consented to sex with a man on prior occasions, people believed it was more likely she had also consented to sexual activity on the occasion in question.[30]

As social research began to contradict these cultural myths, legislative and judicial treatment of sexual history evidence also changed.[31] This section provides a brief history of these cultural attitudes and how they were reflected in the judicial opinions and perpetuated by the laws of the time.

1. Criminal Cases

a. Rape Mythology

Psychological and sociological theories offer many explanations for society's need to believe a stereotype that so few rape cases seem to fit.[32] One of the most important is the psychological need to deny that rape is something that could happen to anyone.[33] "The specter of rape limits the lives of almost all women, controlling their movements and participation in the outside world."[34] Rather than face this possibility, it is easier and psychologically safer to believe that the victim is lying or that she "was asking for it."[35] A woman who believes that a rape victim somehow caused her attack consequently believes that that woman can shield herself from rape by dressing or acting a certain way.[36]

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[26] Heggie, *supra* note 24.

[27] Patrick J. Hines, *Bracing the Armor: Extending Rape Shield Laws to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 881 (2011).

[28] *Id.* at 882.

[29] *Id.*

[30] *Id.*

[31] *See id.* at 883.

[32] *See* Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 681-82 (1998).

[33] *Id.* at 675.

[34] *Id.* at 672.

[35] *Id.* at 675-76.

[36] *Id.* at 675.

Regardless of the theory applied, the effect is that the myth becomes a lens through which all evidence in any rape case is viewed. The extent to which the victim in any rape case conforms to this perceived "ideal" victim in turn affects the assessments of the victim's credibility.[37] In the prototypical rape narrative, the victim is young, attractive, and respectable.[38] At the time of the rape, she is modestly dressed.[39] She has no promiscuous past or lascivious inclinations.[40] When attacked, she fiercely resists but is overcome by the perpetrator.[41] Thus, a victim who is out late at night, who dresses provocatively, or who has a reputation for being sexually active is less likely to be believed by jurors.[42]

Packineau v. United States illustrates how courts in the 1950s and 1960s treated cases involving allegations of misconduct that did not fit the "ideal" rape case.[43] In *Packineau*, the two defendants were convicted of raping the victim after the district court excluded testimony regarding the victim's prior sexual behavior.[44] The appeals court reversed, reasoning that if "an ordinary person [was] called on to make an appraisal" of the victim's accusation against the defendants, his or her "reaction would certainly be very different" if he or she had known that the victim had been cohabiting with a man a few months prior "than it would be if she were the unsophisticated young lady she appeared to be."[45] The court's analysis also emphasized the victim's failure to report the rape until two days after the event allegedly occurred.[46]

b. Rape Shield Laws

In the 1970s, women's rights activists engaged in concerted efforts to reform rape law and educate the public about sexual assault stereotypes.[47] Recognizing that it was often the victims who ended up on trial, they sought to protect victims from the intrusive and humiliating probe into their intimate personal histories that

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[37] Hines, *supra* note 27, at 882.

[38] Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 434 (1996).

[39] *Id.* at 397.

[40] *See id.*

[41] *Id.* at 411.

[42] Orenstein, *supra* note 32, at 672-76.

[43] *See* Packineau v. United States, 202 F.2d 681, 688 (8th Cir. 1953). Although a few cases did exclude evidence of the victim's past sexual activity, these cases were usually distinguishable because there was very strong corroborating evidence against the defendant from the start. *See, e.g.*, State v. Geer, 533 P.2d 389, 391-93 (Wash. Ct. App. 1975) (finding evidence relating to victim's past conduct with other men was properly excluded by the lower court where the defendant broke into the home late at night, intimidated the victim with a hunting knife, and victim's ultimate submission at point of hunting knife was not consensual).

[44] *Packineau*, 202 F.2d at 682.

[45] *Id.* at 685-86.

[46] *Id.* at 685.

[47] *See* Hines, *supra* note 27, at 883; *see also* Lauren M. Hilsheimer, *But She Spoke in an Un-Ladylike Fashion!: Parsing Through the Standards of Evidentiary Admissibility in Civil Lawsuits After the 1994 Amendments to the Rape Shield Law*, 70 OHIO ST. L.J. 661, 671 (2009).

accompanied a criminal trial.[48] Courts began to accept that evidence of past sexual behavior had little or no relevance when attempting to make a determination as to whether a woman had consented to sex on a given occasion.[49] In 1974, Michigan became the first state to enact evidentiary rules that excluded evidence of a victim's sexual activity in criminal cases.[50] By the early 1980s, nearly all the states and the federal government had passed similar legislation.[51]

Rule 412 took effect in 1978.[52] The purpose of Rule 412 was to limit the admission of evidence regarding a victim's past sexual activity.[53] Congress articulated the following interests behind the enactment of Rule 412:

> 1) protecting sexual harassment victims and ensuring that their private lives would not be subject to intensive public scrutiny;
> 2) encouraging victims to report their crimes and to testify in the subsequent trial; and
> 3) ensuring defendants still had an opportunity to present an adequate defense.[54]

At the time it was enacted, Rule 412 only applied to criminal prosecutions for rape or assault with the intent to rape.[55]

2. Extension to Civil Cases

In 1994, Congress amended Rule 412.[56] As amended, Rule 412 applies not only to criminal prosecutions for rape or sexual assault with the intent to rape, but to any criminal prosecution involving sexual misconduct.[57] Furthermore, the amended Rule 412 applies in civil cases, but only those that involve alleged sexual misconduct.[58] Rule 412(a) places a general ban on evidence relating to a victim's sexual activity or sexual predisposition.[59] Subsection (b) of Rule 412 then sets

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48 Hilsheimer, *supra* note 47, at 666.

49 Hines, *supra* note 27, at 882-83.

50 *Id.* at 883.

51 *Id.*

52 Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2 (a), 92 Stat. 2046; *see also* Michelle J. Anderson, *From Chastity Requirement to Sexual Sexuality License: Consent and a New Rape Shield Law*, 17 GEO. WASH. L. REV. 51, 80-94 (2002) (for a detailed discussion of state and federal rape shield laws).

53 *See* § 2 (a), 92 Stat. 2046 ("[I]n a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.").

54 *See* 124 CONG. REC. H1195 (daily ed. Oct. 10, 1978); 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann) (clarifying that while the rape shield law is meant to protect rape victims from embarrassment, "it does not do so, however, by sacrificing any constitutional right possessed by the defendant").

55 *See* 92 Stat. 2046.

56 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141(b), 108 Stat. 1919.

57 *Id.*

58 *Id.*

59 FED. R. EVID. 412(a) ("Prohibited Uses. The following evidence is not admissible in a civil or

forth several exceptions to the general ban in subsection (a).[60] In addition to extending the protections of Rule 412 to certain civil cases, the 1994 amendment also shifted the burden of proving admissibility to the party seeking to admit evidence under Rule 412.[61]

Outside Rule 412, evidence that is relevant is generally presumed to be admissible.[62] However, under Rule 403, relevant evidence may nevertheless be excluded if "its probative value is substantially outweighed by a danger of . . . unfair prejudice."[63] Thus, the *party seeking to exclude* evidence pursuant to Rule 403 bears the burden of justifying its exclusion.

In contrast, Rule 412 creates a presumption of inadmissibility for evidence of a victim's sexual behavior or sexual predisposition.[64] The *party seeking to admit* evidence under Rule 412 bears the burden of justifying its inclusion.[65] The evidence is only admissible under Rule 412(b)(2) if the proponent of the evidence can show that "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[66] Additionally, Rule 412 prohibits evidence regarding the victim's reputation unless the victim herself puts her reputation at issue.[67]

George v. Commonwealth demonstrates how relevant evidence may nonetheless be excluded if the proponent fails to overcome the prejudicial nature of the evidence.[68] In *George*, the defendant appealed his convictions for, *inter alia*, first-degree sodomy and first-degree rape arising from a five-day period in which George held the victim, D.C., captive in their apartment.[69] George and D.C. had

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criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition.").

60 FED. R. EVID. 412(b) ("Exceptions: (1) Criminal Cases. The court may admit the following evidence in a criminal case: (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights. (2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.").

61 *See* FED. R. EVID. 412(b)(2).

62 *See* FED. R. EVID. 402; *see also* FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

63 FED. R. EVID. 403.

64 *See* FED. R. EVID. 412.

65 FED. R. EVID. 412(b)(2).

66 *Id.*

67 *Id.*

68 *See* George v. Kentucky, No. 2001-SC-1067-MR, 2003 WL 22227195 (Ky. Sept. 18, 2003).

69 *Id.* The charges were two counts of terroristic threatening, one count of kidnapping, six counts of first-degree sodomy, five counts of first-degree rape, and one count each of second-degree assault and second-degree persistent felony offender. George had beat D.C., first with his fists and then with a broom stick and a mop handle. *Id.* at *1. D.C. testified that during the five days in question, she

previously been involved in an on-and-off relationship.[70] George defended the rape and sodomy charges by asserting that the sexual activity between him and D.C. was consensual.[71] George sought to introduce letters D.C. wrote to him while he was in prison.[72] In the letters, D.C. professed her love for George and described sexual acts she wished to perform with him.[73] These acts included the types of acts he was ultimately convicted of forcing D.C. to submit to during the five-day period in question.[74]

The appeals court agreed with George that the evidence of D.C.'s subsequent desire for consensual sexual activity with him was relevant and might indicate it was more likely that she had consented to sex with him during the five days in question and that no rape had occurred.[75] However, the court held that it was not error to exclude the letters due to their sensational, provocative, and highly prejudicial contents.[76]

The amended Rule 412 extended protection to victims in civil cases, but with a significant limitation.[77] Only those civil cases involving sexual misconduct are subject to the evidentiary standards of Rule 412.[78] As a result, victims seeking orders of protection do not receive the safeguards of Rule 412, unless they are alleging sexual misconduct. A victim like SM, who sought an order of protection for non-sexual misconduct, would not receive the protection of Rule 412.

B. Evidence of Fear or Apprehension

Just as cultural myths about rape and sexual assault influenced and shaped legislative and judicial responses to victims of those crimes, cultural myths regarding domestic violence have affected the legislative and judicial treatment of battered women. In *People v. Bush*, for example, the defendant stabbed and killed her abusive husband.[79] During closing argument, the prosecutor told the jury that

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performed oral sex on George four or five times, that they had anal sex three to five times, and that they had vaginal sex four or five times. When asked whether she felt forced to perform or submit to these acts or to have sex with George on each of these occasions, she stated that she submitted to the sex acts because she was afraid that he would beat her if she did not comply. *Id.* at *4. The ordeal ended when George finally went to work. *Id.* at *1. D.C. called her mother, who then called police. *Id.* at *4. When police arrived, D.C. appeared to be in shock and was taken to the hospital where physical evidence of rape was discovered. *Id.* at *2.

[70] *Id.* at *1.

[71] *Id.* at *2.

[72] *Id.*

[73] *Id.*

[74] George, 2003 WL 22227195 at *2.

[75] *Id.*

[76] *See id.* at *3. Additionally, George had been able to present some evidence in support of his theory that the sex was consensual. *Id.* On cross-examination, D.C. admitted that they had a very active sex life, that she still loved George, and that she visited him in jail twice a week. *Id.* at *2.

[77] *See* FED. R. EVID. 412.

[78] *Id.*

[79] People v. Bush, 148 Cal. Rptr. 430, 431 (Ct. App. 1978).

the victim did not deserve to die for "slapping a woman."[80] While the first incident of violence did involve a slap, evidence on the record revealed subsequent violence that included throwing the defendant on the ground, pinning her down, threatening to kill her, kicking her, and striking her hard enough in the stomach when she was pregnant that she experienced abdominal cramping and vomited blood.[81] The appeals court held that the prosecutor's statement was not reversible error because he was "merely drawing the jury's attention to evidence tending to suggest that defendant's stabbing of her husband was not commensurate with the force which he had used against her."[82]

The cultural myths surrounding domestic violence, particularly misconceptions about why women stay in abusive relationships, informs this discussion of the relevance of evidence regarding a victim's sexual activity. One of the most common myths about women in abusive relationships is that if a woman stays with her abuser, she must not really be afraid of him or, alternatively, the abuse must not be that bad.[83] However, social and psychological research has shed light on the internal experiences of battered women.[84] The research has revealed that a woman's decision to stay in an abusive relationship most often results from a combination of the psychological effects of the abuse and a rational evaluation of her situation and her chances of successfully leaving and supporting herself.

1. Psychological Factors

Leaving a violent relationship is a more complex process than making a simple decision to leave. Because most abusers do not begin the abuse until well into the relationship, victims tend to write off the first acts of abuse as aberrational and believe the abuser when he apologizes and promises to change.[85] Furthermore, an abuser convinces his or her victim that the victim herself is responsible for the violence.[86] As a result, the victim believes that she can control her abuser's anger by altering her behavior so as not to provoke him.[87] Each time a victim's attempt at controlling her abuser's rage fails, she experiences a sense of personal failure and shame.[88] By the time she understands that the violence is a permanent aspect of her relationship with the abuser, a woman may be deeply emotionally invested in

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[80] *Id.* at 439.

[81] *Id.* at 433-34.

[82] *Id.* at 439.

[83] Judith A. Wolfer, *The Top Ten Myths About Domestic Violence*, 42 MD. B.J. 38, 40 (June 2009).

[84] Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1305 (1993).

[85] Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 336 (1997).

[86] *Id.*

[87] *Id.*

[88] *See id.* at 338.

the relationship and a variety of practical and psychological pressures may influence her decision to stay.[89]

The first and most famous theory to articulate the destructive psychological impact of long-term abuse is called "battered woman syndrome."[90] According to this explanation, repeated and unpreventable abuse demoralizes the victim and creates a feeling of helplessness and hopelessness.[91] Believing that escape is impossible, women simply stay in the relationship, even though help may be available.[92] Thus, this theory posits that staying in an abusive relationship is a natural human response to the abuse and not an indication that a woman is either abnormal or to blame for the abuse.[93]

One of the most controversial explanations for why women stay in abusive relationships is that they simply do not want the relationship to end.[94] Women tend to place a great deal of importance on the value of social relationships, including those with intimate partners.[95] In many abusive relationships, a woman's ideal outcome is for the abuse to stop, but for the relationship to remain intact.[96] Because periods of abuse are interspersed with periods of respect, companionship, caring, and intimacy, the woman may feel hopeful about the relationship and desire to forgive her abuser.[97] Remembering what the relationship was like before the abuse started may fuel the belief that someday the relationship may again be free of abuse.[98]

2. Rational Considerations

More commonly, victim advocates attempt to explain a battered woman's decision to stay as a rational decision resulting from a woman's consideration of her own unique situation and the values she assigns to competing priorities.[99] Many times, a victim lacks the resources to leave her abuser.[100] She may have nowhere to go and may be financially dependent upon her abuser.[101] She may be

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89 *Id.* at 337.

90 Meier, *supra* note 84, at 1305.

91 *Id.*

92 *Id.*

93 *Id.* More modern theories have linked battered woman syndrome to PTSD adding additional explanations for the victims' demeanor and behaviors that tended to make them seem irrational or not credible as witnesses. *See id.* at 1313.

94 Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1499 (2008).

95 *Id.* at 1500.

96 *Id.*

97 *Id.*

98 *See* Dalton, *supra* note 85, at 337.

99 Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes out of the Battered Woman*, 81 N.C. L. REV. 211, 268 (2002).

100 Wolfer, *supra* note 83, at 40.

101 *Id.*

isolated from friends and family and may be too embarrassed to ask for help.[102] Faced with having to secure shelter, food, employment, and possibly childcare, a victim may feel overwhelmed and paralyzed by the thought of leaving.[103]

Women also face a variety of social concerns resulting from their desire to protect their families.[104] A woman may fear that if she leaves, she will lose her children or she may be reluctant to separate her children from their father.[105] The woman may still care for her abuser and may feel responsible for him.[106]

Alternatively, the "decision" to stay may not be a decision at all.[107] A woman may have attempted to leave, sometimes several times, only to be hunted down and dragged back to face increased violence from her abuser.[108] The risks of a battered woman being seriously injured or killed by her batterer are at their highest within the first two years of her separation from the batterer.[109] Violence triggered by a battered woman's attempt to end a relationship, called "separation assault," transforms a seemingly irrational decision to continue the relationship into a carefully calculated strategy for self-preservation.[110] Contrary to the belief that a failure to leave the relationship indicates that the victim is not really afraid of her abuser, the decision to stay may demonstrate just how deeply she fears her abuser.

In *State v. Hundley*, the court recognized that there was "no easy answer to why battered women stay with their abusive husbands."[111] The defendant in *Hundley* left her abusive husband after ten years of marriage.[112] During the marriage, he knocked out several of her teeth, broke her nose at least five times, repeatedly broke her ribs, and threatened to cut out her eyeballs and to cut off her head.[113] The day he died, her husband tracked the defendant to the motel room where she was staying.[114] He broke in while the defendant was in the shower, beat her, threatened to kill her, and forced sexual intercourse with her.[115]

When the defendant shot and killed her husband, he was unarmed, had his back to her and was not blocking her path to the door.[116] In deciding to allow the defendant to present evidence of prior abuse by the decedent to establish imminent fear, the court noted that "[q]uite likely emotional and financial dependency and

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102 *Id.*
103 Dalton, *supra* note 85, at 337.
104 Wolfer, *supra* note 83, at 40.
105 *Id.*
106 *Id.*
107 *See* Burke, *supra* note 99, at 268.
108 *Id.*
109 *Id.* at 268-69.
110 Goldfarb, *supra* note 94, at 1502.
111 State v. Hundley, 236 Kan. 461, 479 (1985).
112 *Id.* at 467.
113 *Id.*
114 *Id.* at 462.
115 *Id.*
116 *Id.*

fear are the primary reasons for remaining in the household. [Victims] feel incapable of reaching out for help and justifiably fear reprisals from their angry [abusers] if they leave or call the police."[117]

3. Countering Mythology Through Changes in Laws

Over the past three decades, changing attitudes about domestic violence have spawned several important legal reforms.[118] Mandatory arrest laws require police to arrest suspects upon evidence that an act of domestic violence has been committed.[119] All fifty states and the District of Columbia allow officers to make warrantless arrests upon such a showing of probable cause.[120] Furthermore, no-drop prosecution policies compel prosecutors to prosecute domestic violence cases even when the victim asks that the charges be dropped or when the victim refuses to cooperate in the prosecution.[121]

Increasingly, expert testimony educates jurors about the effects of long-term abuse and seeks to dispel persistent myths. Beginning with the landmark case *State v. Kelly* in 1984, courts have admitted expert testimony as relevant to dispel the myths and misconceptions juries hold about battered women and their ability to leave abusive relationships.[122] In *Kelly*, the court noted, "[t]he crucial issue of fact on which this expert's testimony would bear is why, given such allegedly severe and constant beatings, combined with threats to kill, defendant had not long ago left decedent[.] . . . [T]he experts point out that one of the common myths, apparently believed by most people, is that battered wives are free to leave."[123]

III. PROPOSAL: EXPAND RAPE SHIELD LAWS

Rape shield laws should be extended to exclude evidence of consensual sex between the victim and her abuser in civil actions for an order of protection that do not involve allegations of sexual abuse or misconduct. The primary way to keep judges and juries from drawing erroneous inferences from irrelevant evidence about a victim's behavior—including, for example, a victim's choice of where to sleep for two nights following an incident of abuse[124]—has been to admit expert testimony. While this may be effective in high profile murder trials, few women

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[117] *Hundley*, 236 Kan. at 467.

[118] Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819 (2011).

[119] *Id.* at 1822.

[120] *Id.*

[121] *Id.* at 1821.

[122] State v. Kelly, 478 A.2d 364, 377 (N.J. 1984).

[123] *Id.*; *see also* State v. Koss, 551 N.E.2d 970, 973 (Ohio 1990) ("Expert testimony on the battered woman syndrome would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any 'common sense' conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier.").

[124] *See supra* notes 6-12 and accompanying text.

seeking orders of protection can afford expert testimony to educate judges on why women stay with their abusers after incidents of violence. Victims courageous enough to take the first step in overcoming all these obstacles by seeking protective orders do not deserve additional fear and intimidation by the court.

Durham v. Metzger demonstrates the persistence of mythologies surrounding women in abusive relationships. According to the myth, a woman who fails to leave after the first incident of abuse is not really afraid of her abuser. That myth assumes that leaving an abusive relationship, especially one in which the victim lives with her abuser, is always possible for the victim. In *Durham*, the defendant took this line of reasoning a step further, arguing that if the victim had engaged in sexual activity with him after the alleged abuse then she could not possibly be afraid of him.

Countering arguments like those made by the defendant in *Durham* and overcoming the mythology described above is no small feat. Under the current rules of evidence, a victim's sexual activity with the defendant can be admitted in a civil case where the victim seeks an order of protection but does not allege sexual abuse or sexual misconduct. Thus, the evidence that the defendant needs to exploit this mythology is admissible unless the judge determines that the sexual history evidence is more prejudicial than it is probative. If the victim presents her case to a judge that already subscribes to the mythology, he will be unlikely to find the evidence prejudicial or to bar its admission.

Victims seeking orders of protection share the same concerns about coming forward as victims of rape and sexual assault—concerns which rape shield laws were enacted to address. One goal of enacting rape shield laws was to protect victims from intrusive inquisitions and judicial scrutiny of a victim's personal life. Additionally, the legislature recognized the danger of misuse of the evidence to draw prejudicial inferences about the victim and her experience in the relationship. Thus, rape shield laws are particularly suited to protect victims seeking orders of protection.

Orders of protection are particularly important to victims of domestic violence and serve many purposes. It is the first legal intervention in a victim's case and puts the victim in touch with community resources available to help her complete the process of separating from her abuser.[125] A protective order sends a message to the victim and the abuser that the community believes it is important to protect the victim and to hold the abuser accountable.[126] Judicial behavior that is supportive of battered women has a positive effect on how women view the judicial system and their own power to end the violence.[127] Moreover, most victims are only able to escape from an abusive situation after several attempts to do so, and in

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[125] Manning v. Willet, 221 S.W.3d 394, 398 (Ky. Ct. App. 2007).

[126] *Id.*

[127] *See id.*

fact subject themselves to greater risk of physical harm by attempting to leave the relationship.[128]

When a victim finally reaches out for help and files for an order of protection, the consequences of the court failing to grant the order can be devastating. The perpetrator may feel like his actions have been condoned. Victims may lose faith in the system and will often refuse to call the police or seek further assistance from the courts when they are again abused out of fear that they will be arrested for violating the order.

Failure to obtain the order of protection deprives the victim of more than just protection from further abuse. Studies have shown that the mere act of applying for a protective order is associated with helping victims improve their sense of well-being and control.[129] In one study, for example, over seventy percent of the participants reported an immediate improvement in their lives, while in follow-up interviews that number increased to eighty-five percent; eighty percent reported that they felt safer.[130] Given all the benefits victims experience from obtaining a protective order, the law should do everything possible to ensure that judges are not distracted by irrelevant evidence.

Moreover, the purported relevance of subsequent "consensual" sex between a victim and her abuser dissipates when the history of abuse between the perpetrator and the victim is considered. Part of the problem with "consent" stems from the way the law has defined rape.[131] As of 2011, most jurisdictions require the prosecutor in a rape case to prove the perpetrator used force in addition to proving nonconsensual sex.[132] The implication is that sex is "consensual" if the perpetrator does not physically overcome the victim's attempts to fight him off. In reality, a victim may refrain from fighting back and thus appear to "consent" because she suffered abuse in the past and fears more abuse if she tries to resist. Although the victim submits to her abuser's request, the sex may nonetheless be unwanted and nonconsensual—and its effects just as traumatic—as if the victim had experienced physical force.[133]

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[128] Goldfarb, *supra* note 94, at 1502.

[129] *See* JEFFREY FAGAN, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS, (1995) (noting that protective orders provide the benefits of being victim-initiated, timely, and offering "a wide range of specific interventions or relief that addresses extralegal concerns of safety and economic being").

[130] *See* Susan Keilitz, et al., *Civil Protection Orders: Victims' Views on Effectiveness,* U.S. DEP'T OF JUSTICE (Jan. 1998), *available at* https://www.ncjrs.gov/pdffiles/fs000191.pdf.

[131] *See* Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape As Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 157 (2011).

[132] *Id.*

[133] *See* Robin West, *Desperately Seeking a Moralist,* 29 HARV. J. L. & GENDER 1 (2006) (discussing the difference between consensual sex and unwanted, "nonconsensual sex" that falls short of the legal definition of rape).

CONCLUSION

Durham v. Metzger demonstrates that there are no legal protections in place to counter the mythology that a woman who has consensual sex with her abuser following an incident of violence is not in need of a protective order. Legal reforms that prohibit evidence relating to a victim's sexual activity with the defendant in proceedings for civil protective orders are necessary to prevent judges from perpetuating the myth that women who do not leave abusive partners are not really afraid of them. Additionally, extending rape shield laws to exclude evidence of consensual sex between victims and abusers in civil actions for an order of protection will encourage victims to come forward and seek protective orders. The extension of the law is essential to protecting victims from intrusive examinations of their personal lives, and to eliminating the prejudicial effects of existing stereotypes as they apply to battered women.