

STOP THE KILLING: POTENTIAL COURTROOM USE OF A QUESTIONNAIRE THAT PREDICTS THE LIKELIHOOD THAT A VICTIM OF INTIMATE PARTNER VIOLENCE WILL BE MURDERED BY HER PARTNER

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I. INTRODUCTION	278
II. THE EVOLUTION OF THE DA	283
III. EXTRAJUDICIAL USES OF THE DA	285
IV. EXISTING AND POSSIBLE USES OF THE DA IN COURT PROCEEDINGS	287
A. Apparent Need for the Information.....	287
B. Types of Proceedings in Which the DA May Be Relevant; Applicability or Inapplicability of Rules of Evidence	288
C. Admissibility or Consideration Required by Legislative Act	291
V. WHEN THE EVIDENCE RULES GOVERN ADMISSIBILITY, WILL THE DA BE ADMISSIBLE?	293
A. What Might Be Offered into Evidence?	293
B. For What Relevant Purpose is the Evidence Offered: A Hearsay or Non-Hearsay Purpose?	294
1. The Victim's Answers to the DA Questions.....	294
a. Character Evidence Rules	294
b. The Hearsay Rule.....	295
i. Possible Hearsay Exceptions	295
ii. A Nonhearsay Purpose.....	298
2. The DA Score and/or Category of Risk.....	299
a. Non-Evidentiary Purpose.....	299
b. Nonhearsay Purpose.....	300

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3. When the IPV Victim is the Defendant	300
a. Expert Testimony	302
i. <i>Daubert</i>	305
ii. <i>Frye</i> Jurisdictions	309
C. Risk of Unfair Prejudice	310
D. Recommended Future Steps	311
VI. CONCLUSION	312

I. INTRODUCTION

A divorced mother had obtained a temporary protective order against her ex-husband because of his physical abuse and harassment.¹ But he was not required, as a condition of the protective order, to surrender any firearms.² Nor had the court—which was unconvinced that there was danger to the children—ordered his visitation of their three children to be supervised.³ Fearing for their safety, but having to comply with the court's order for visitation, the mother exercised caution by meeting her ex-husband in a public park to deliver the children for visitation with him.⁴ The father shot and killed his ex-wife and all three children with a .22 caliber rifle, then shot himself.⁵ Clearly the judge had underestimated the degree of risk to the family. Providing judges with a tool to help them better evaluate dangerous situations, whether in family law proceedings or in the criminal arena, would be a great public service.

By conservative estimates, every year in the United States between 1.3 and 4.8 million women are physically and/or sexually assaulted by their intimate partners.⁶ More American women seek medical care resulting from

1. Tyeesha Dixon & James Drew, *When Abusers Become Deadly: Shootings Highlight Concerns About Violent Ex-Spouses*, THE BALTIMORE SUN, Nov. 25, 2007, at 1B (reporting father's fatal shooting of ex-wife and their three children then shooting himself, during unsupervised visitation exchange, despite mother's having obtained a temporary protective order).

2. *Id.* The applicable Maryland law did not provide for surrender of firearms as part of a temporary protective order. MD. CODE ANN., FAM. LAW § 4-505 (LexisNexis 2006 & Supp. 2008), amended by H.B. 302 & S.B. 268, 2009 Leg., 424th Sess. (Md. 2009). In 2009 the Maryland law was amended to authorize a judge entering a temporary protective order to force a respondent to surrender any firearms in his or her possession to law enforcement authorities.

3. See Dixon & Drew, *supra* note 1 (the spouses met in a park "to exchange the children").

4. *Id.*

5. *Id.*

6. PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN at iv (2000) available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [hereinafter TJADEN & THOENNES, FULL REPORT]; NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTR. FOR DISEASE CONTROL & PREVENTION, UNDERSTANDING INTIMATE PARTNER VIOLENCE, FACT SHEET (2006), available at www.cdc.gov/ncipc/dvp/ipv_factsheet.pdf.

intimate partner violence (IPV)⁷ than for injuries caused by auto accidents, rapes, and muggings combined.⁸ IPV is the leading cause of death among African American women between ages 15 and 45.⁹ Women are killed far more often by their intimate partners than by any other type of killer.¹⁰ Statistically,

7. Intimate partner violence (IPV), historically referred to as domestic violence, is defined as the physical, sexual, or psychological harm by a current or former partner or spouse. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTR. FOR DISEASE CONTROL & PREVENTION, *Supra* note 6. There are four categories of intimate partner violence: physical, sexual, threats, and psychological/emotional. LINDA E. SALTZMAN, JANET L. FANSLAW, PAMELA M. MCMAHON & GENE A. SHELLEY, INTIMATE PARTNER VIOLENCE SURVEILLANCE 11 (2002), available at [http://www.cdc.gov/ncipc/pub-res/ipv_surveillance/Intimate Partner Violence.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_surveillance/Intimate%20Partner%20Violence.pdf).

The Centers for Disease Control and Prevention ("CDC") defines physical violence, such as punching, slapping, or choking, as the intentional use of physical force with the potential for causing physical harm, injury, disability or death. *Id.* at 11-12. The CDC divides sexual violence into three categories: abusive sexual contact; the use of force to compel a person unwillingly into a sexual act; and the attempted or completed sexual act with a person who is unable to understand the condition of the act or decline participation or express unwillingness to engage in the act because of intimidation, disability, illness, or intoxication by drugs or alcohol. *Id.* at 12.

The CDC defines threats as including the use of words, gestures, or weapons to express intent to injure, physically harm, disable, or kill. *Id.* It describes psychological or emotional violence, most often preceded by physical and sexual violence, as the use of coercive tactics such as humiliation; control of both the victim's movements and access to money or other resources; withholding of information; and isolating the victim from her friends and family. *Id.* at 12-13.

IPV exacts huge monetary and nonmonetary costs on individuals, families, and society. The CDC estimated the monetary costs to be near \$4.1 billion annually in 2003. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTR. FOR DISEASE CONTROL & PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 30 (2003), available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf. The actual costs may be considerably higher. The 2008 "White Paper" estimates that IPV costs over \$306 million in Ohio alone. KENNETH STEINMAN & TIMOTHY R. SAHR, WHITE PAPER ON IMPROVING FAMILY VIOLENCE PREVENTION IN OHIO 12 tbl.2 (2008), available at http://healthpolicyohio.org/pdf/OFVP_WhitePaper.pdf.

8. Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORD L.J. 159, 160 (2003). See also Michael T. Morley, Richard Albert, Jennie L. Kneeder & Chrystiane Pereira, *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 208-09 (2003).

9. Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, Nancy Glass, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich, Susan A. Wilt, Jennifer Manganello, Xiao Xu, Janet Schollenberger, Victoria Frye & Kathryn Laughon, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089 (2003) [hereinafter Campbell, et al., *Femicide*]. For American women overall, IPV was the seventh leading cause of premature death. *Id.*

10. Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Rebecca Block, Doris Campbell, Mary Ann Curry, Faye Gary, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich & Susan A. Wilt, *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L INST. JUST J. 14, 18 (2003) [hereinafter Campbell, et al., *Assessing Risk Factors*]. Intimate partner killings account for 40 to 50 percent of deaths in families in the United States. *Id.*

then, women have more to fear from their jealous or controlling husbands, obsessed or jilted lovers, or vindictive ex-husbands, than from random strangers.¹¹ Approximately 76 percent of IPV homicides and 85 percent of IPV attempted homicides have been preceded by stalking and harassment.¹²

Some victims of IPV are able to extricate themselves from abusive relationships. Many others stay, believing that they – or their children – will be at greater risk of being murdered by their abusers if they leave.¹³ Unfortunately, a significant number of both of these groups of victims are eventually killed, or suffer nearly fatal injuries, at the hands of their current or ex-partners.¹⁴ Both physically leaving and legal separation are associated with increased risk of intimate partner homicide.¹⁵ Tragically, some of the victims who stay see murdering their abuser as the only way out of the relationship, and act accordingly.¹⁶ A New York State study reports that in 70-80 percent of intimate

Between 1976 and 1996, the percentage of female versus male victims increased from 54 percent to 72 percent of IPV killings. Campbell, et al., *Femicide*, *supra* note 9. The percentage of intimate partner homicides involving male victims decreased correspondingly during this period. *Id.* “Each year, IPV results in an estimated 1,200 deaths and 2 million injuries among women and nearly 600,000 injuries among men.” Ctr. for Disease Control, *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence – United States, 2005*, MORBIDITY & MORTALITY WKLY. REP., Feb. 8, 2008, at 113.

11. Angela Browne, *Violence Against Women by Male Partners: Prevalence, Outcomes, and Policy Implications*, 48 AM. PSYCHOLOGIST 1077, 1077 (1993). See also Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 181 (1997) (“Statistics agree that between one-third to two-thirds of all murdered women are killed by their batterers.”) [hereinafter Raeder, *The Better Way*]; Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1467-69 (1996) (reporting statistics on IPV and spousal murder) [hereinafter Raeder, *Prior Acts*].

12. Judith M. McFarlane, Jacquelyn C. Campbell, Susan Wilt, Carolyn J. Sachs, Yvonne Ulrich & Xiao Xu, *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUD. 300, 311 (1999).

13. See Han, *supra* note 8, at 164-65 (listing reasons why women stay in abusive relationships).

14. Campbell, et al., *Femicide*, *supra* note 9, at 1091. See also *supra* note 10.

15. Margo Wilson, Holly Johnson & Martin Daly, *Lethal and Nonlethal Violence Against Wives*, 37 CANADIAN J. OF CRIMINOLOGY 331, 340-41 (1995); Myrna Dawson & Rosemary Gartner, *Differences in the Characteristics of Intimate Femicides*, 2 HOMICIDE STUD. 378, 395 (1998); Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3, 3 (1993).

16. Cf. MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (LexisNexis 2006) (providing admissibility of evidence of expert testimony as to battered spouse syndrome and evidence of “repeated physical and psychological abuse” of the IPV victim/now defendant by the homicide or first degree assault IPV abuser/now victim). See generally Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Women's Syndrome Expert Testimony For Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379 (1993); DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW (1996) (criticizing use of such evidence); Irvin B. Nodland, *Defending Battered Women: Everything She Says May Be Used Against Them*, 68 N.D. L. REV. 131 (1992); Raeder, *The Better Way*, *supra* note 11, at 178-79 (discussing pertinent social

partner homicides, no matter which partner was eventually killed, the man was found to have physically abused the woman before the murder.¹⁷

In an effort to help female¹⁸ IPV victims better assess their degree of risk of being killed by their partner, Dr. Jacquelyn Campbell of the Johns Hopkins School of Nursing developed a questionnaire referred to as the Danger Assessment (the DA).¹⁹ This tool has evolved through several iterations since its first version was employed in 1985.²⁰ It asks the victim to “use a calendar to indicate the approximate dates during the past year when the victim was abused by her perpetrator,” and to answer “yes or no” questions relating to frequency or severity of violence; weapons use; drug and alcohol use; threats to murder the victim or children; control and possessiveness; threats by the abuser to commit suicide; whether the victim has children from another relationship; unemployment; and other issues related to the abusive relationship.²¹ Several

science research and proposing that it would be more helpful and less unfairly prejudicial to present background evidence regarding batterers’ profiles than evidence that the victim suffered from battered woman syndrome); Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 790 (1996) (companion article, introducing the argument that the focus should not be on battered woman syndrome but to provide background information “about the dynamics of domestic violence” and “the nature of battering relationships”) [hereinafter Raeder, *Double-Edged Sword*].

17. Campbell, et al., *Assessing Risk Factors*, *supra* note 10, at 18. *See also* Campbell, et al., *Femicide*, *supra* note 9, at 1089 (the majority of intimate partner homicides, both male and female, involve some form or history of male battery of the female partner).

18. A much higher percentage of victims killed by IPV are female rather than male. Campbell, et al., *Femicide*, *supra* note 9, at 1089.

19. The DA is one of the best known IPV risk assessment tools. Lisa A. Goodman, Mary Ann Dutton & Lauren Bennett, *Predicting Repeat Abuse Among Arrested Batterers: Danger Assessment Scale in the Criminal Justice System*, 15 J. INTERPERSONAL VIOLENCE 63, 65 (2000).

20. *See* Jacquelyn C. Campbell, Daniel W. Webster & Nancy Glass, *The Danger Assessment: Validation of Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 657, 661-62 (2009) [hereinafter Campbell, et al., *The Danger Assessment*]; Jacquelyn C. Campbell, *Nursing Assessment for Risk of Homicide with Battered Women*, 8 ADVANCES IN NURSING SCI. 36, 38-41 (1986) (discussing the use of the original version of the DA) [hereinafter Campbell, *Nursing Assessment*].

21. Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 918-19 (2006); Nat Stern & Karen Oehme, *Increasing Safety for Battered Women and Their Children: Creating a Privilege for Supervised Visitation Intake Records*, 41 U. RICH. L. REV. 499, 510 (2007); JACQUELYN C. CAMPBELL, DANGERASSESSMENT.ORG (2003), available at <http://www.dangerassessment.org/WebApplication1/pages/da/DAEnglish.pdf> [hereinafter CAMPBELL, DANGERASSESSMENT.ORG].

Increased IPV homicide risk is associated with the presence of stepchildren in the home, unemployment, prior violence, drug or alcohol abuse, gun use, forced sex, and abuse during pregnancy. Campbell, et al., *Femicide*, *supra* note 9, at 1091-92; Angela Browne, Kirk R. Williams & Donald G. Dutton, *Homicide Between Intimate Partners: A 20-Year Review*, in HOMICIDE: A SOURCEBOOK OF SOCIAL RESEARCH 149, 160 (M. Dwayne Smith & Margaret A. Zahn eds., 1999).

decades of social science research have vetted the accuracy of its evaluation of the constellation of factors reported in a particular relationship.²²

Various versions of the DA are currently used in numerous settings: by first responders (police, ambulance attendants, and paramedics);²³ by social workers, domestic violence shelter volunteers, and other counselors of IPV victims;²⁴ and by criminal law enforcement investigators and prosecutors in assessing whether and how to proceed with pressing charges.²⁵ Several questions arise: if the DA is helpful in gauging the degree of risk in a particular relationship, should it also be admissible in court proceedings?²⁶ Do the current rules of evidence permit its introduction in family law proceedings?²⁷ In criminal proceedings?²⁸ Some states have enacted statutes that require the use of risk assessment tools like the DA in, for example, bail review and sentencing proceedings.²⁹ Are such statutes necessary for admissibility of the DA?³⁰

This article will provide background on the evolution of the DA, the research underlying it, and its extrajudicial and judicial uses to date. It then will explore the DA's potential for use in various court proceedings, with regard to applicable requirements for admissibility into evidence regarding (1) relevance, (2) character evidence, (3) hearsay, (4) expert testimony and scientific evidence, and (5) the risk of unfair prejudice. Because the DA results are sometimes counterintuitive, the authors of this article argue that informing courts of the process involved in the DA analysis would be helpful to the factfinder.³¹ The article will conclude that under the current rules pertaining to

22. See *infra* Part V.B.3.a.

23. See *infra* Part III.

24. JANICE ROEHL, CHRIS O'SULLIVAN, DANIEL WEBSTER & JACQUELYN CAMPBELL, INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY, FINAL REPORT 4 (2005), <http://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf> [hereinafter ROEHL, ET AL., VALIDATION STUDY]; E-mail from Dorothy J. Lennig, Esq., Domestic Violence Legal Clinic, House of Ruth, to Lynn McLain, (July 29, 2008, 16:19 EST) (on file with author) ("[W]hen a victim calls the House of Ruth or some [other] domestic violence programs, staff/attorneys use the lethality assessment/danger assessment to advise their clients about safety planning.").

25. See Jan Roehl & Kristin Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, 21 JUST. SYS. J. 171, 186-88 (2000) (discussing use of risk assessment instruments used by justice system officials to provide better protection for victims, more appropriate sanctions and treatment for offenders, and better allocation of scarce resources, from prosecutor time to prison beds) [hereinafter Roehl & Guertin, *IPV*].

26. See Campbell, *Nursing Assessment*, *supra* note 20; *infra* Parts IV.B, V.

27. See *infra* Part IV.B.

28. For example, either the propensity rule; the hearsay rule; Federal Rules of Evidence 403 or its state corollary; or the confrontation clause will likely exclude such evidence when offered in a criminal trial on the merits against a defendant charged with a subsequent assault or murder of the abused victim. See *infra* Parts IV.B.-C., V.

29. See *infra* Part IV.C.

30. *Id.*

31. See ROBIN HASSLER, BYRON JOHNSON, MICHAEL TOWN & NEIL WEBSDALE, MINNESOTA CTR. AGAINST VIOLENCE & ABUSE, LETHALITY ASSESSMENTS AS INTEGRAL

evidence, a properly administered DA should be admissible in many – but not all – judicial settings.³² Even where the DA results ought not be admitted, expert testimony regarding the probative value of various factors relevant to the degree of risk may be proper.³³ We suggest that the adoption of statutes providing explicitly for the consideration of risk assessments may hasten the process toward more frequent judicial consideration of them.³⁴

II. THE EVOLUTION OF THE DA

Since the late 1970's, as researchers clamored to create instruments that could accurately predict the threat of physical violence, over thirty-three IPV screening tools have been created.³⁵ The DA is one of the best known of these IPV risk assessment tools,³⁶ and is one of a handful currently in use by agencies and service providers throughout the country.³⁷ The DA was originally developed in 1985 for use in a health care environment, to enable practitioners to evaluate IPV risk and consult with at-risk patients.³⁸ It has been revised several times as a result of input from battered women, law enforcement agencies, and victims' advocates.³⁹ The DA instrument was empirically validated in 2003.⁴⁰

The DA calculates risk of lethal or nearly lethal violence based on the cumulative presence of various risk factors associated with the killing of female victims of IPV.⁴¹ Among others, these factors include stalking,⁴² prior physical

PARTS OF PROVIDING FULL FAITH AND CREDIT GUARANTEES (1998-2005), <http://www.mincava.umn.edu/documents/ffc/chapter9/chapter9.html> (“[W]e have had judges tell us they would love to have objective assessments of the potential for lethal violence in a given relationship. Such information would be extremely useful in the judicial handling of domestic cases. . .”; “With [appropriate training], the judge can then place restrictions upon the abuser in accordance with the judge’s informed assessment of risk of lethal violence.”)

32. This article addresses whether the DA could be properly considered in various court proceedings; tactical concerns as to whether such use would be advisable for one’s clientele are beyond the scope of this article. *See infra* Part V. While judges and criminal prosecution participants in the Round-Table, *see supra* note ††, generally believed the DA would be useful in the civil court, IPV victims’ advocates expressed concerns that its use could be a double-edged sword, with unintended adverse consequences.

33. *See infra* Part V.B.3.a.

34. *See infra* Part V.D.

35. Eve Waltermaurer, *Measuring Intimate Partner Violence (IPV): You May Only Get What You Ask For*, 20 J. Interpersonal Violence 501, 504 (2005).

36. Goodman, et al., *supra* note 19, at 65.

37. ROEHL, ET AL., VALIDATION STUDY, *supra* note 24, at 1, 4.

38. The original instrument was fifteen questions long and asked victims about the presence or absence of certain risk factors. Campbell, *Nursing Assessment*, *supra* note 20, at 37, 40.

39. Campbell, et al., *The Danger Assessment*, *supra* note 20, at 657, 661-62; ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS AND CHILD ABUSERS (Jacquelyn C. Campbell, ed., Sage Publications 1995) [hereinafter ASSESSING DANGEROUSNESS].

40. *See infra* Part V.B.3.a.

41. Campbell, et al., *The Danger Assessment*, *supra* note 20, at 653.

assault, history of estrangement, substance abuse, forced sex, battery while pregnant, the presence of a step-child in the home, the victim's leaving for another partner, the perpetrator's access to a handgun, and unemployment of the batterer.⁴³

Certain risk factors are more heavily weighted in the DA because they have been found to be more significantly correlated with near-lethal or lethal outcomes.⁴⁴ For example, a woman who was assaulted or threatened with a handgun is twenty times more likely to be the victim of homicide than when a handgun was not used; the mere presence of a gun in the home increases the homicide risk by a factor of eight.⁴⁵

The DA is administered in two sections.⁴⁶ In the first part, the victim identifies, on a calendar, days on which abusive incidents occurred.⁴⁷ The calendar section facilitates recall of events while they are relatively fresh.⁴⁸ The second part of the DA is an interview.⁴⁹ The victim is asked a series of twenty "yes" or "no" questions regarding the presence or absence of risk factors.⁵⁰ Each risk factor is assigned a particular point value, based on actuarial

42. See Raeder, *Prior Acts*, *supra* note 11, at 1468 ("ninety percent of women killed by their husbands or boyfriends were stalked"). One definition of a stalker is "[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family." CAL. PENAL CODE § 646.9 (West 1995).

43. Campbell, et al., *The Danger Assessment*, *supra* note 20, at 656. See also Goodman, et al., *supra* note 19, at 65.

44. Campbell, et al., *The Danger Assessment*, *supra* note 20, at 662. Of course, this is simply an actuarial assessment of risk. Absence of the correlates "does not necessarily indicate that violence will not become lethal." MINN. ADVOCATES FOR HUM. RTS., ASSESSING LETHAL AND EXTREMELY DANGEROUS BEHAVIOR 3 (2003), <http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/@LethalityModule.PDF>. Nor does their presence necessarily mean that the relationship will become fatal. NEIL WEBSDALE, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, LETHALITY ASSESSMENT TOOLS: A CRITICAL ANALYSIS 4 (2000), http://new/vawnet.org/Assoc_Files_VAWnet/AR_lethality.pdf. "While such instruments appear to be helpful to courts as supplemental information sources in making decisions about sentencing and the allocation of resources, and there is anecdotal evidence of their value in enhancing victim safety, solid information on the reliability and validity, and particularly on the accuracy of prediction, of risk assessment instruments is lacking." Roehl & Guertin, *IPV*, *supra* note 25, at 191.

45. Campbell, et al., *Femicide*, *supra* note 9, at 1092. See also Campbell, et al., *Assessing Risk Factors*, *supra* note 10, at 16 ("When a gun was in the house, an abused woman was six times more likely than other abused women to be killed.").

46. CAMPBELL, DANGERASSESSMENT.ORG, *supra* note 21.

47. *Id.*

48. See John Hopkins Univ. Sch. of Nursing, *Psychometric Data: Danger Assessment* (2005), <http://www.dangerassessment.org/WebApplication1/pages/psychometric.aspx> [hereinafter *Psychometric Data*]; *Danger Assessment Calendars*, <http://www.dangerassessment.org/WebApplication1/pages/da/calendar2009.pdf>.

49. CAMPBELL, DANGERASSESSMENT.ORG, *supra* note 21.

50. *Id.*

research.⁵¹ The greater the number of highly weighted “yes” responses, the greater the victim’s risk of a fatal outcome.⁵²

Based on their scores, victims fall within four different danger categories: from lowest to highest, these are “Variable Danger,” “Elevated Danger,” “High Danger,” and “Highest Danger.”⁵³ Under the DA protocol, a woman assessed as being in “Variable Danger” is informed by the interviewer of that fact, but is also informed that one’s risk can change quickly and to watch for certain warning signs.⁵⁴ Women at “Elevated Danger” are advised to seek safety assistance from social services support groups, law enforcement, and the judiciary.⁵⁵ Women at either the “High” or “Highest” level of danger require assertive safety measures from criminal justice professionals, such as denial of bail for the batterer, heightened parole supervision, and only supervised child visitation.⁵⁶

III. EXTRAJUDICIAL USES OF THE DA

The DA has been used throughout the country in various extrajudicial contexts to assess the degree of risk to individual victims. Health professionals use the DA to counsel their patient-victims.⁵⁷ Indeed, the DA is readily accessible on the internet, so that any victim can consult and self-administer it, at no charge.⁵⁸

Police and other first responders in some jurisdictions have been trained, upon responding to a domestic violence call, to inquire from a shortened eleven-question DA.⁵⁹ Based on the answers they receive, they determine how dire the situation is.⁶⁰ If they receive certain “yes” answers, they are directed to call a hotline, with the victim’s permission, and offer the victim the opportunity to talk to a counselor by telephone.⁶¹

51. See John Hopkins Univ. Sch. of Nursing, *Danger Assessment* (2005), <http://www.dangerassessment.org/webapplication1/pages/product.aspx>; *Psychometric Data*, *supra* note 48.

52. *Psychometric Data*, *supra* note 48.

53. Jacquelyn Campbell & Anna D. Wolf, *Intimate Partner Violence Risk Assessment: Implications for Women’s Safety*, slide 41-42, http://www.son.jhmi.edu/research/Homicide/Lethality_Assessment.pps.

54. *Id.* at slide 43.

55. *Id.*

56. *Id.*

57. See Campbell, *Nursing Assessment*, *supra* note 20, at 40-41.

58. CAMPBELL, DANGERASSESSMENT.org, *supra* note 21. It should be noted that the DA forms contain specific instructions to “[p]lease talk to your nurse, advocate, or counselor about what the Danger Assessment means in terms of your situation.” *Id.*

59. Karen L. Bune, *Lethality Screen for Domestic Violence Situations*, LAWOFFICER.COM, Apr. 2, 2008, http://www.lawofficer.com/news-and-articles/columns/Bune/Lethality_Screen_for_Domestic_Violence.html.

60. *Id.*

61. *Id.*

One of these programs, the Domestic Violence Lethality Assessment Program for First Responders ("LAP") instituted in a region in Maryland, was reported in 2007 to have yielded

strong indications that lives are, indeed, being spared and that victims at the highest risk of being killed are seeking services they would not have otherwise accessed. The voluntary expansion of the LAP from a mere four law enforcement agencies and two domestic violence programs in 2005 to currently 57 agencies and 18 programs is further demonstration of the widespread belief that the LAP is a worthwhile tool.⁶²

A study of the LAP, conducted by Dr. Pamela C. Ovwighi, showed that, between July 1, 2006 and 2007:

[O]f 1295 screens that were administered, 57.9% of victims screened in at "high danger." Of those, 45.2% spoke to a counselor at the time of screening and 15.4% availed themselves of program services in the weeks after the screening. Moreover, 95.4% of the "high danger" victims that MSCFV [a domestic violence counseling service] served as a result of the LAP screening had never sought services from the program before. This outcome corroborates Jacqueline Campbell's research that indicates only 4 percent of domestic violence murder victims nationwide had ever availed themselves of domestic violence program services. The results of this study strongly suggest that the LAP is an effective method for linking domestic violence victims who are in high danger with programs that can help them.

Between January 2006 and June 2007, 3,334 lethality screens were administered in Maryland, which is an average of six per day. Of those, 1,805 victims (54%) were assessed by officers as having the greatest risk of being killed by their abusers. Of this group, 890 victims (49%) agreed to speak on the phone with a hotline counselor on the scene after the officer placed the call. Of those 890 victims statewide, 284 (32%) have sought domestic violence program services.⁶³

Once contacted by a victim, numerous lay social service or nonprofit organization counselors, as well as civil attorneys at domestic violence shelters, clinics, and attorneys in private practice, use the DA to advise their clients

62. MARYLAND NETWORK AGAINST DOMESTIC VIOLENCE, THE LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS 2-3 (on file with author).

63. *Id.* (citing PAMELA C. OVWIGHI, LETHALITY SCREENING FOR DOMESTIC VIOLENCE VICTIMS: WHO IS BEING REACHED? (2007) (on file with authors)).

regarding safety planning.⁶⁴ Some prosecutors have used it to assess what degree of protection to seek, including, for example, whether to oppose bail.⁶⁵

IV. EXISTING AND POSSIBLE USES OF THE DA IN COURT PROCEEDINGS

The “bottom line” of the DA – ranging from “Variable Danger” to “Extreme Danger” – is but one of its components. Both the assessed risk category and other components might be useful in a myriad of court proceedings. Admissibility will turn on what is being offered into evidence, in what type of proceeding, and for what purpose. Thus far, some judicial uses are reported to have been made; indeed, in some jurisdictions use of the tool has been sanctioned or required by statute.⁶⁶ One might first ask, why do the authors believe there is a compelling need that a reliable DA can satisfy?

A. *Apparent Need for the Information*

Reports of serious under-recognition of risk factors and resulting tragedies are all too easy to find.⁶⁷ In one 2007 Maryland case, for example, a mother reported to the family court judge that her husband had been committed to a mental hospital for threatening to commit suicide and, after his release, had threatened to kill his children.⁶⁸ The judge, relying on court-appointed therapists who saw “no signs of acute danger,” denied the mother’s requests for a protective order.⁶⁹ A second judge denied her request to stop her husband’s child visitations.⁷⁰ In March 2008, during an unsupervised visitation with their three children, ages 6, 4, and 2, the father drowned the children in a hotel bathtub and then tried to overdose on pills and slit his own throat.⁷¹ Because the science underlying the DA proves the high significance of suicide threats, a judge informed by the DA would have been more likely in this case to take steps to protect the children.⁷²

64. See ROEHL, ET. AL., VALIDATION STUDY, *supra* note 24, at 1, 4-5.

65. See Roehl & Guertin, *IPV*, *supra* note 25, at 186.

66. See *infra* Part IV.C.

67. See *supra* notes 1, 3-5 and accompanying text.

68. Melissa Harris, *Father Seeks to Plead Guilty to Killing Children*, THE BALT. SUN, Aug. 23, 2008, at 1A; Freeman Klopott, *Courts Failed Her and Her Kids, Mother of Slain Children Says*, THE EXAMINER, Apr. 4, 2008, at 4.

69. Klopott, *supra* note 68, at 4.

70. Kelsey Volkmann, *Judicial System Failed Slain Children, Friends Say*, THE EXAMINER, Apr. 2, 2008, at 4.

71. Harris, *supra* note 68, at A1; Klopott, *supra* note 68, at 4 (the father reportedly admitted that he had drowned the children).

72. See HASSLER, ET. AL., *supra* note 31 (reporting that judges have said they “would love to have objective assessments of the potential for lethal violence”).

There are, of course, other issues: for example, judges may discredit the testimony of a spouse who reports facts “favorable” to “her side” of the case. Although there has been an overall reduction in IPV nationally, criminal justice interventions are reported not to have significantly contributed to the decline. William Wells & William DeLeon-Granados, *The Decline of Intimate Partner Homicide*, 252 NAT’L INST. JUST. 33, 34 (2005). In many cases

B. *Types of Proceedings in Which the DA May Be Relevant; Applicability or Inapplicability of Rules of Evidence*

Components of the DA may be relevant in many types of proceedings. On the civil side, IPV could be relevant to the granting of temporary or permanent protective orders,⁷³ as well as to legal separations, divorce, child custody, visitation, and adoption.⁷⁴ The same information may be relevant in juvenile proceedings regarding shelter care, child-in-need-of-assistance, termination of parental rights, or delinquency.⁷⁵ The relevance would be the same whether the matter arises before a judge or a court-assigned mediator.

In the criminal arena, ultimately, either the abuser or the victim may be charged with a crime, such as assault or murder. If the alleged abuser is charged, the DA may be relevant (and likely admissible) to prove future risk in a bail review hearing,⁷⁶ a sentencing proceeding,⁷⁷ to prove past conduct in a

police refuse to arrest, prosecutors fail to charge, and judges fail to impose adequate penalties. See generally Raeder, *Prior Acts*, *supra* note 11, at 1477-87 (demonstrating the need to change attitudes toward domestic violence); Raeder, *The Better Way*, *supra* note 11, at 159-60 (discussing need to "debunk" "myths that surround battered women and their batterers"); Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93 (2005) (arguing that courts provide less protection to unmarried partners).

Only approximately 17 percent of women who are the victims of IPV seek and obtain protective orders. PATRICIA TJADEN & NANCY THOENNES, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE* 52 (2000). Perhaps many do not seek judicial remedies because they have no faith in the system to either believe them or protect them. *Id.* at 51; see also WEBSDALE, *supra* note 44, at 5 (citing battered African-American women who were reluctant to report abusers or disclose personal information to advocates, police, or other criminal justice personnel, both because the system has historically oppressed the African-American community and because they may be seen as "snitches" within it; asserting that Asian-American women also are particularly reluctant to discuss victimization).

73. In Maryland state courts, for example, there are two types of civil protective orders. There is a first stage, temporary, ex parte protective order, for the granting of which only "reasonable grounds" are needed. MD. RULE 3-731 (LexisNexis 2009) (district court commissioner); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1501 to 3-1504 (LexisNexis 2006); MD. CODE ANN., FAM. LAW §§ 4-501 to 4-511 (LexisNexis 2006). There is also a second stage, "final" protective order (which lasts for no more than six months' duration). Here the burden of persuasion is by clear and convincing evidence. MD. CODE ANN., CTS. & JUD. PROC. § 3-1505; MD. CODE ANN., FAM. LAW § 4-506. Remedies can include orders for the alleged abuser to "get out of the house," "stay away," make "no contact," and obtain counseling (or, possibly, mediation). Surrender of guns may be ordered as part of a final protective order. MD. CODE ANN., FAM. LAW § 4-511.

74. See A.B.A. Steering Committee on the Unmet Legal Needs of Children, *Judicial Checklist*, 39 FAM. L.Q. 5, 5 (2005) (listing factors for judges to consider).

75. See, e.g., *Terry S. v. Dep't. of Health & Soc. Servs.*, 168 P.3d 489 (Alaska 2007) (child in need of assistance); *Dep't of Children & Family Servs. v. M.L.*, 984 So. 2d 606 (Fla. Dist. Ct. App. 2008) (shelter case); *In re B.W.*, 651 S.E.2d 332 (Ga. Ct. App. 2007) (shelter case); *In re M.B.*, 595 N.W.2d 815 (Iowa Ct. App. 1999); *In re Jenna K.K.*, 855 N.Y.S.2d 700 (N.Y. App. Div. 2008) (termination of parental rights).

76. See generally WAYNE H. THOMAS, JR., *BAIL REFORM IN AMERICA* (1976); MARY A. TOBORG, *PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES*

revocation of probation or parole hearing, or (though not likely admissible) in a trial on the merits.

The same is true if the abused victim is charged. Here the defendant/abuse victim may be offering the evidence either to show traditional self-defense or perhaps to show "battered spouse syndrome," thus justifying a preemptive strike against the batterer, such as killing him while he was sleeping.⁷⁸ The restrictive rules of evidence governing the admissibility of the DA evidence for such purposes are strictly applied only in civil or criminal trials "on the merits": trials resulting in civil judgments for the plaintiff or the defendant, or in criminal verdicts of guilty or not guilty.⁷⁹

The evidence rules do not apply to most of the other proceedings mentioned above.⁸⁰ The resultant flexibility allows the judge presiding over

(1981). In Maryland, for example, a district court commissioner reviews the statement of probable cause and sets an initial bail. The next day, a district court judge conducts bail review and considers the possibility of pretrial release under Maryland Rule 4-216. If the case is removed to circuit court, often the defense requests another bail review there.

77. See Roehl & Guertin, *IPV*, *supra* note 25, at 191 ("While such instruments appear to be helpful to courts as supplemental information sources in making decisions about sentencing and the allocation of resources, and there is anecdotal evidence of their value in enhancing victim safety, solid information on the reliability and validity, and particularly on the accuracy of prediction, of risk assessment instruments is lacking. A number of legal and ethical issues have been raised and remain unresolved. Yet a small but significant number of courts and court-connected agencies *are* using risk assessment instruments and procedures, and several studies are under way to test their purported value."). See also Raeder, *The Better Way*, *supra* note 11, at 159 ("When faced with a charming defendant without any prior criminal record, profile information can influence a judge's decision concerning the defendant's release before trial and/or whether to impose a sentence that will give him a 'wake-up call,' instead of a mere slap on the wrist.").

78. See Campbell, et. al., *Femicide*, *supra* note 9, at 1089.

79. See FED. R. EVID. 1101(b) & (d) (delineating proceedings in which rules of evidence apply and do not apply); LYNN McLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL §§ 101:1 to 101:2 (2001) (discussing applicability of evidence rules in Maryland and in federal courts).

80. In the criminal arena, the evidence rules do not strictly apply in grand jury proceedings; in proceedings for the initial setting of bail and bail review (pretrial release); release after conviction and before sentencing; or sentencing in non-capital cases. See, e.g., 18 U.S.C. § 3661 (2000) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); MD. RULE 5-101(b)(1) (LexisNexis 2009) (grand jury); MD. RULE 5-101(b)(6) (pretrial and pre-sentencing release); MD. RULE 5-101(b)(9) (non-capital sentencing); *Querubin v. Commonwealth*, 795 N.E.2d 534, 544 (Mass. 2003) (rules of evidence do not apply at bail proceedings); *Snow v. Commonwealth*, 537 N.E.2d 578, 579 (Mass. 1989) ("Hearsay statements may be used by a judge in reaching a decision concerning the amount of bail."); *State v. Porter*, 310 N.W.2d 926, 927 (Neb. 1981) ("the latitude allowed a sentencing judge . . . is almost without limitation as long as it is relevant to the issue"); *State v. Engel*, 493 A.2d 1217, 1225 (N.J. 1985) (extrajudicial confession of codefendant, though inadmissible at trial, admissible at bail hearing in limited circumstances).

Strictly following the evidence rules is also not required in proceedings for revocation of probation. See *Black v. Romano*, 471 U.S. 606, 609 (1985) (listing procedural requirements for probation revocation); *Minnesota v. Murphy*, 465 U.S. 420, 436 n.7 (1984) (admissibility

those proceedings to hear evidence that would be inadmissible under the rules. The only limit is that *if the judge's ultimate decision is based on unreliable evidence*, the losing party's constitutional due process right will have been violated.⁸¹ Importantly, evidence (including hearsay evidence) need not be admissible under the evidence rules in order to be considered reliable.⁸² To attack a judge's decision successfully on this constitutional basis, the losing party would have to show not only that (1) the judge let in *unreliable* evidence, but also that (2) the judge's decision either (a) *explicitly* or (b) *necessarily* rested on that evidence, i.e., there was not enough other evidence to support the judge's decision.⁸³ This is a very difficult burden to meet.

of evidence at a revocation hearing is more informal than at trial); *Ash v. Reilly*, 431 F.3d 826, 829-30 (D.C. Cir. 2005) (rejecting application of confrontation rights to parole revocation hearings); *United States v. Rondeau*, 430 F.3d 44, 48 (1st Cir. 2005) (parole revocation); MD. RULE 5-101(c)(2) (court has discretion whether to strictly apply the evidence rules in proceedings for revocation of probation).

Crime Victims' Rights, 18 U.S.C. §§ 3771 et seq. (2009), inspired the widespread adoption of state statutes or constitutional provisions that authorize or require consideration of victim impact statements during the sentencing stage. *See, e.g.*, MO. CONST. art. 1, § 32, cl. 1 (victim's right "to be heard" at sentencing); U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 commentary (2008) (stating that the presentence investigation is essential in determining the facts relevant to sentencing); KY. REV. STAT. ANN. § 421.520(2) (LexisNexis 2005) (impact statement may contain victim's recommendation for an appropriate sentence); MO. REV. STAT. § 217.762 (2004) (presentence investigation shall include a victim impact statement).

On the civil side, the evidence rules do not strictly apply in hearings on ex parte temporary protective orders or on "final protective orders. *See, e.g.*, MD. RULE 5-101(b)(12) (codified rules do not apply in proceedings which were not bound by common-law rules of evidence).

Nor do they apply in proceedings on juvenile detention and shelter care under MD. RULE 5-101(b)(11), and the court has discretion to apply them or not in juvenile disposition hearings under MD. RULE 5-101(c)(6).

81. *See White v. Illinois*, 502 U.S. 346, 363-64 (1992) (Thomas, J., concurring in part and concurring in the judgment, joined by Scalia, J.) ("Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them."); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005) ("[T]he relevant provision at sentencing is the due process clause, not the confrontation clause"); *United States v. Aspinall*, 389 F.3d 332, 342-43 (2d Cir. 2004) (due process requirement applies to probation revocation proceedings, but the confrontation right does not); *In re Billy W.*, 875 A.2d 734, 749-51 (Md. 2005) (although the rules of evidence do not "strictly apply" in certain kinds of proceedings, including juvenile, disposition, and permanency planning hearings, sentencing hearings, probation revocation, and administrative hearings, proponent must demonstrate that "evidence proffered for admission is sufficiently reliable and probative prior to its admission"); *Travers v. Balt. Police Dep't*, 693 A.2d 378, 386 (Md. Ct. Spec. App. 1997) (although the rules of evidence are relaxed in administrative proceedings, the evidence adduced "must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process").

82. *E.g.*, *In re Billy W.*, 875 A.2d at 750-51; *Bethlehem Steel Co. v. Ziegenfuss*, 49 A.2d 793, 798 (Md. 1946).

83. *See, e.g.*, *Kade v. Charles H. Hickey Sch.*, 566 A.2d 148, 149, 152 (Md. Ct. Spec. App. 1989) (reversing agency's decision that was based on unreliable hearsay).

When there is a jury trial on the merits, however, the trial court's correct application of the evidence rules is strictly enforced. An incorrect ruling will result in reversal if the appellate court finds that wrongly admitted evidence was likely to have affected the jury's decision.⁸⁴ In criminal appeals in some states, the state bears the heavy burden of proving "beyond a reasonable doubt that the error in no way influenced the [guilty] verdict."⁸⁵

By contrast, in bench trials on the merits, the judge is likely to be more lenient in admitting evidence that may be inadmissible under the evidence rules.⁸⁶ This more casual treatment is appropriate because the appellate court assumes that a judge did not rely on inadmissible evidence even if the judge let it in. To win a reversal in this situation, the appellant would have to show that the judge either explicitly or necessarily relied on that evidence.⁸⁷ Divorce and child custody cases are always tried to the bench,⁸⁸ while the fact finder in a criminal case may be either the judge or a jury.⁸⁹

C. *Admissibility or Consideration Required by Legislative Act*

A statute requiring admissibility of particular evidence will trump an exclusionary rule of evidence, as long as the rule is not constitutionally mandated.⁹⁰ Absent a statutory directive and in a proceeding to which the evidence rules apply, the rules will govern.⁹¹ Absent a statutory directive and in a proceeding where the evidence rules do not apply, admissibility will be at the discretion of the judge, subject to due process constraints.⁹²

Some United States jurisdictions have directly addressed the admissibility of the DA or findings based on other risk assessment tools by adopting statutes

84. *E.g.*, *Lee v. State*, 950 A.2d 125, 134 (Md. 2008); *Dorsey v. State*, 350 A.2d 665, 678 (Md. 1976) ("[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.").

85. *See Dorsey*, 350 A.2d at 678.

86. *See, e.g.*, *In re Beverly B.*, 530 A.2d 766, 771 (Md. Ct. Spec. App. 1987) (trial court's decision was affirmed, where it had admitted inadmissible hearsay, but its opinion made clear that it did not rely on hearsay).

87. *E.g.*, *Howell v. State*, 195 A.2d 592, 593 (Md. 1963) (per curiam).

88. Cynthia Callahan, John F. Fader II, Thomas C. Ries & Richard J. Gilbert I, *Maryland Family Law* (MB) Ch. 2, § 2-2 (4th ed. 2009).

89. 25 JAMES WM. MOORE, *MOORE'S FEDERAL PRACTICE* §§ 623.02, 623.04 (3d ed. 2009).

90. *See infra* note 122 and accompanying text.

91. *See, e.g.*, FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by an Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.").

92. *See supra* notes 79-81 and accompanying text.

requiring their consideration.⁹³ In Ohio, "Amy's Law," passed in response to the attempted murder of a woman by her former husband while he was free on bail, requires the judge to use a risk assessment tool similar to the DA in making bail or bond-setting decisions.⁹⁴ Minnesota requires a risk assessment of a domestic violence offender before sentencing.⁹⁵ The resulting evaluation provides the judge with recommendations for limitations on contact with the victim and other measures that should be taken to ensure the victim's safety.⁹⁶

Colorado's Domestic Violence Risk Reduction Project was tasked with finding screening and assessment tools to assist the criminal justice system with identifying risk levels for domestic offenders.⁹⁷ Successes with the Domestic Violence Screening Instrument (DVSI) and Spousal Assault Risk Assessment (SARA) tools have resulted in mandated risk assessment by the Colorado Departments of Probation,⁹⁸ which use the DVSI.⁹⁹ Probation departments in Connecticut use the Kingston Screening Instrument for Domestic Violence (K-SID) to inform their recommendations.¹⁰⁰

New York has created specialized domestic violence courts that incorporate a social science approach with a view toward both protecting victims' safety and extending therapeutic resources to offenders.¹⁰¹ Additionally, the New York Domestic Violence Court uses risk assessment to

93. See *supra* Part IV.

94. Michael Brigner, *Amy's Law: New Ohio Domestic Violence Bail Statute Adds Safety Precautions for Crime Victims and the Public*, 18 OHIO DOMESTIC RELATIONS J. 17, 17 (2006) (referencing OHIO REV. CODE ANN. § 2919.251 (West 2006)). Risk assessments are also routinely used in sentencing in Colorado, Connecticut, Delaware, Nebraska, and Vermont, as well as in Canada. Roehl & Guertin, *IPV*, *supra* note 25, at 178, 184.

95. MINN. STAT. § 609.2244 (2009) ("A presentence domestic abuse investigation must be conducted and a report submitted to the court by the corrections agency responsible for conducting the investigation. . .").

96. *Id.*

97. Rebecca Love Kourlis & Amy Barry Houghton, *The Impact of Family Violence on the Colorado Judicial Branch* 28 COLO. LAW. 13, 13-14 (1999). Colorado statutes require probation officers to complete DV risk assessments as presentence evaluations and police who have received complaints of domestic violence from two or more opposing persons, must – in determining whether one or more have committed a crime – consider, *inter alia*, "the likelihood of further injury to each person," and must follow statutory user-friendly restraining order forms. COLO. REV. STAT. § 18-6-803.6 (2004).

98. Kourlis & Houghton, *supra* note 97, at 13.

99. *Id.*

100. ROEHL, ET AL., VALIDATION STUDY, *supra* note 24, at 4.

101. Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1300-02 (2000); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1520 n.52 (1998); Editorial, *Improving New York's Courts*, N.Y. TIMES, Jan. 4, 1997, § 1, at 22 (describing New York State's plan to create specialized domestic violence courts); see also N.Y. State Div. of Criminal Justice Servs., *N.Y. State Domestic Violence Courts Program Fact Sheet*, <http://criminaljustice.state.ny.us/ofpa/domviolcrtfactsheet.htm> (last visited Nov. 2, 2009) (explaining background information about New York Domestic Violence Courts).

evaluate substance abusers for treatment options as an alternative to punitive measures.¹⁰²

V. WHEN THE EVIDENCE RULES GOVERN ADMISSIBILITY, WILL THE DA BE ADMISSIBLE?

When there is no statute authorizing the admissibility of the components of the DA, the evidence must first pass muster under the evidence rules, if they apply to the particular type of court proceeding.¹⁰³ If the evidence rules do not exclude the evidence, its admission also must not offend a party's constitutional rights.¹⁰⁴ Admissibility will turn on what piece of the DA is being offered, for what purpose, and on whether it is being offered for or against a criminal defendant (in the latter case either the defendant's constitutional right to present witnesses in his favor or his right to confront adverse witnesses may be implicated¹⁰⁵).

A. *What Might Be Offered into Evidence?*

In addition to the DA, pertinent social science literature, as well as expert testimony regarding the DA, may be offered into evidence. The DA includes at least five separable items:

- (1) Introductory explanatory text, i.e., what the victim read (or was told) about the DA;
- (2) The questions posed in the DA and the alleged victim's answers;
- (3) The resulting numerical "score" in an individual case;
- (4) The category of risk of murder or severe injury where this score falls: "Variable" (1-7), "Increased" (8-13), "Severe" (14-17), or "Extreme" (18 or more); and
- (5) A comparison of this person's risk of being killed or severely injured, compared to that of other adults who have been abused by their intimate partners.

It is possible, of course, that one or more of these pieces may be admissible and others not.

Social science literature regarding the reliability of the DA may also be offered. Expert testimony may be offered regarding the predictive value of individual factors present in the particular case and/or of the aggregate of such factors. Experts also might be asked to testify regarding the particular victim's

102. See Tsai, *supra* note 101, at 1301.

103. See *supra* Part IV.B-C.

104. See *supra* notes 81-83 and accompanying text.

105. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...").

resulting numerical score and/or classification in one of the four categories of risk of being fatally or near-fatally injured.

Regardless of the type of proceeding, whether any or all of these items might be admissible in evidence depends first on whether they are relevant¹⁰⁶ and, if so, how.

B. For What Relevant Purpose is the Evidence Offered: A Hearsay or Non-Hearsay Purpose?

Admissibility often depends on not only what piece of evidence is offered but also for what purpose.¹⁰⁷ Different analyses will apply, for example, to the admissibility of (1) the victim's out-of-court answers to the DA questions; (2) the DA score and/or category of risk; and (3) materials shown and explanations made to the victim about the DA.

1. The Victim's Answers to the DA Questions

If the evidence is offered to show what actually happened between the alleged victim and the alleged abuser and the evidence rules apply to the proceeding, the victim's out-of-court answers to the DA questions must not only satisfy the character evidence rules but also will have to satisfy the hearsay rules. A statement such as, "He broke the bathroom door down after the birthday party last month and beat me," would be hearsay if offered to prove the abuser's conduct.

a. Character Evidence Rules

Although the character evidence rules pose formidable obstacles to the admissibility of the DA evidence, there are no novel issues under the exclusionary character evidence "propensity rule" when the DA answers are offered as proof of acts other than the one at issue at trial (e.g., the defendant assaulted the victim on other occasions, therefore this helps to show that he battered her this time, which at the time of the court proceeding is in the past).¹⁰⁸ Under the character evidence rules, the DA evidence presents no

106. See FED. R. EVID. 402. "The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are 'a presupposition involved in the very conception of a rational system of evidence.' Thayer, *Preliminary Treatise on Evidence* 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests." *Id.* at Advisory Committee's Note.

Because the vast majority of states have codes of evidence following the organization of the Federal Rules of Evidence, this article will sometimes merely cite to the Federal Rules.

107. See *infra* notes 110-12 and accompanying text.

108. Federal Rules of Evidence 404 retains the common law's general rule of exclusion of character evidence if offered to prove that, on a particular occasion, a person acted in conformity with his or her character. FED. R. EVID. 404(a), (b). The Advisory Committee Note to Federal Rules of Evidence 404 explains:

Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his

challenge that distinguishes it from a witness who testifies to having seen the earlier assaults. The “propensity rule” currently applicable under Federal Rule of Evidence 404 and its state corollaries generally excludes such “other acts” evidence,¹⁰⁹ though that evidence may be admissible for a limited purpose such as proving the defendant’s motive¹¹⁰ or intent.¹¹¹ It is also admissible in a hearing when seeking a protective order, because then the *predictive* quality of past acts as to *future* acts *not yet committed* is at issue.¹¹²

b. The Hearsay Rule

The exclusionary “hearsay rule,” however, will exclude proof of the victim’s answers if it is offered to prove that what the victim reported when answering the DA questions was true, unless a “hearsay exception” applies.¹¹³ Typically the evidence will be offered against the alleged batterer.¹¹⁴

i. Possible Hearsay Exceptions

The victim’s answers will fall within the hearsay exception for excited utterances¹¹⁵ only if the statements were made while she was under immediate,

character. This use of character is often described as “circumstantial.” Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

109. *Id.* at 404(b). Professor Raeder has proposed amending the federal rules to permit evidence of past acts of domestic violence, similarly to how Federal Rules of Evidence 413-15 treat past instances of sexual assault or child molestation. See Raeder, *Prior Acts*, *supra* note 11, at 1505-06 (proposing adding a subsection (4) to Federal Rules of Evidence 404(a)).

110. *E.g.*, *United States v. Aramony*, 88 F.3d 1369, 1378 (4th Cir. 1996); *Roshan v. Fard*, 705 F.2d 102, 105 (4th Cir. 1983) (in a civil assault case in which both parties claimed self-defense, reversible error to preclude defense from showing that defendant had been an informant whose evidence had resulted in plaintiff’s earlier conviction on drug charges, as it would establish a “strong motive” for plaintiff to attack defendant).

111. *E.g.*, *United States v. Peden*, 961 F.2d 517 (5th Cir. 1992) (in prosecution for sexual abuse of a mentally “slow” 15-year-old, no abuse of discretion in admitting evidence of defendant’s prior conviction for sexual abuse of a minor, as it went to his intent to take advantage of one incapable of resisting or unable to appreciate the act). See generally Raeder, *Double-Edged Sword*, *supra* note 16, at 789; Raeder, *Prior Acts*, *supra* note 11, at 1488-1505; Raeder, *The Better Way*, *supra* note 11, at 160-61, 167-71, 185.

112. *Coburn v. Coburn*, 674 A.2d 951, 958-60 (Md. 1996).

113. FED. R. EVID. 802.

114. For a discussion of the hearsay rule when the *victim* is charged with a crime, see *infra* Part V.B.3.

115. See FED. R. EVID. 803(2) (“The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . *Excited utterance*. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”). See, e.g., *United States v. Fell*, 531 F.3d 197, 231-32 (2d. Cir. 2008) (ruling no abuse of discretion to admit mother’s statements to a bartender that she was afraid of her son, soon after police had arrived to arrest her son for assaulting his mother); *United States v. Arnold*, 486 F.3d 177, 186 (6th Cir. 2007) (affirming

continuing distress caused by the assault and they concern only that assault. These requirements may sometimes be met if a first responder asks only "What happened?"¹¹⁶

But if the first responder begins asking more pointed questions, the victim's answers may lose the spontaneity required to qualify as excited utterances.¹¹⁷ Additionally, under the United States Supreme Court's recent confrontation clause cases, *Crawford v. Washington*¹¹⁸ and *Davis v. Washington*,¹¹⁹ once a police officer's primary goal changes from emergency response to investigation of a past crime, the victim's answers will become

the admission of statements as excited utterances when the victim exited her car, approached the police officers as they arrived, crying and upset, and exclaimed that the defendant had threatened her); *United States v. Abraham*, 386 F.3d 1033, 1037 (11th Cir. 2004) (ruling no plain error in admitting in a 911 call that defendant was abducting caller's mother and sister at gun point) (no *Crawford* issue raised to court); *United States v. Jackson*, 124 F.3d 607, 618 (4th Cir. 1997) (affirming mother's statement to police, at her home, that defendant had been threatening members of the family and had a gun, which she had secured upstairs, was properly admitted as an excited utterance).

116. *E.g.*, *United States v. Hadley*, 431 F.3d 484, 496 (6th Cir. 2005) (ruling no abuse of discretion in admitting as excited utterances out-of-court statements made by defendant's wife to the police upon their arrival); *United States v. Alexander*, 331 F.3d 116, 120-24 (D.C. Cir. 2003) (affirming the proper admission of a 911 call 15 to 20 minutes after alleged threats, and after victim first called her mother, as an excited utterance; fact that part of statement responded to operator's question did not preclude admissibility); *United States v. Iron Shell*, 633 F.2d 77, 83, 85-86 (8th Cir. 1980) (ruling no abuse of discretion to admit nine-year-old assault victim's statements to police officer in response to question "What happened?," between 45 minutes and 75 minutes after the assault; factors to consider include whether statement was in response to inquiry, lapse of time, declarant's age and physical and mental condition, the characteristics of the event, and the subject matter of the statements); *Manno v. State*, 623 A.2d 677, 678, 688-90 (Md. Ct. Spec. App. 1993) (affirming court properly admitted as excited utterances decedent's statements to treating paramedic and corporal in response to their questions, as to what her name was, what had happened, and – when she replied that her boyfriend had shot her – what her boyfriend's name was and where he lived); *Johnson v. State*, 492 A.2d 1343, 1348 (Md. Ct. Spec. App. 1985) (A police officer testified that when he arrived at the scene, the victim's face and ears were bleeding and she was yelling that she had been beaten and robbed. The victim's statement to him was held to be an excited utterance even though it was made after he had gotten her "calmed down a little bit," and asked her "point blank" what had happened.).

117. *See Winzer v. Hall*, 494 F.3d 1192, 1198 (9th Cir. 2007) ("[A] statement made after the declarant has had an opportunity to reflect or discuss the matter with others does not carry 'the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.'" (quoting *Idaho v. Wright*, 497 U.S. 805, 817 (1990))); *Mouzone v. State*, 452 A.2d 661, 666 (Md. 1982) ("Despite the fact that [declarant] may still have been somewhat shaken from the incident, it is beyond credibility to suggest that her coherent and descriptive responses to Danko's questions were impulsive or spontaneous. Rather, we hold that Byrd's statement was the product of thoughtful consideration and thus outside the excited utterance exception to the hearsay rule."), *overruled on other grounds by Nance v. State*, 629 A.2d 633, 643 (Md. 1993).

118. 541 U.S. 36 (2004) (holding that the confrontation clause generally bars the admission of out-of-court statements that qualify as testimony absent the defendant's opportunity to cross-examine the declarant).

119. 547 U.S. 813 (2006).

“testimonial.”¹²⁰ If the statements are determined to be testimonial, they will then be inadmissible – even if they fall within a hearsay exception – if offered against a criminal accused, unless either (1) the victim also testifies at trial and is subject to cross-examination; or (2) the victim is unavailable to testify at trial but either (a) the defendant earlier had an opportunity to cross-examine her regarding the statement or (b) the defendant waives or forfeits his right to cross-examine.¹²¹

Even if the victim’s statements do not qualify as excited utterances, depending on the particular code of evidence that is applicable, other hearsay exceptions may apply. In Maryland state courts, for example, if the victim testifies at trial but contradicts her statements made during the DA, any written answers she has signed, or any audiotaped or videotaped answers she gave during the DA, would be admissible as substantive evidence when offered by either the prosecution or the defense under the hearsay exception for certain prior inconsistent statements.¹²²

If the victim is unavailable to testify,¹²³ the “forfeiture by wrongdoing” hearsay exception might apply.¹²⁴ This exception will apply only if the trial judge finds that the alleged abuser’s subsequent¹²⁵ wrongdoing intentionally caused the victim’s inability to testify (e.g., through murder or intimidation).¹²⁶ In 2008, the United States Supreme Court held in *Giles v. California* that in this situation, too, when the defendant’s wrongdoing was intended to prevent the

120. *Id.* at 822 (“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”). *See, e.g.,* *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 552 (Mass. 2005) (holding victim’s statements to her mother were nontestimonial, but victim’s statements to police officer were testimonial; “Statements made in response to questioning by law enforcement agents are *per se* testimonial, except when the questioning is meant to secure a volatile scene or to establish the need for or provide medical care.”). *Contra* *State v. Bobadilla*, 709 N.W.2d 243, 249 (Minn. 2006).

121. *Crawford*, 541 U.S. at 59-60 n.9.

122. MD. RULE 5-802.1(a) (LexisNexis 2009).

123. The unavailability must be for a reason listed under Federal Rules of Evidence 804(a), except unavailability due to a valid privilege will not qualify for purposes of forfeiture by wrongdoing. *See* *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002) (defendant did not waive his confrontation right regarding his wife’s out-of-court statements when he exercised his marital privilege to prevent his wife from testifying), *rev’d on other grounds*.

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

125. *See* *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (suggesting that the wrongdoing must be intended to prevent the speaker’s *testifying* at a court proceeding, such as a divorce, custody, or criminal trial).

126. FED. R. EVID. 804(b)(6); MD. RULE 5-804(b)(5); MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2006). *See* *Giles*, 128 S. Ct. at 2963 (the intent requirement is mandated by the confrontation clause of the Federal Constitution).

victim from testifying and it had that result, the defendant also will have forfeited the right to cross-examine, and there will be no confrontation clause bar to admissibility.¹²⁷

ii. A Nonhearsay Purpose

Even if the evidence does not fall within a hearsay exception, neither the hearsay rule¹²⁸ nor the confrontation clause¹²⁹ will exclude the evidence if it is offered for a relevant limited, nonhearsay purpose. Several nonhearsay uses of the victim's DA answers are plausible.

First, if the victim testifies for the prosecution at a criminal trial, her prior statements must be provided to the defense.¹³⁰ Then, if her trial testimony

127. 128 S. Ct. at 2963; *see also* Crawford v. Washington, 541 U.S. 36 (2004). The extent to which *Giles* left open the door for proof of forfeiture as a result of the abuser's patterns of conduct and their psychological effects on the victim, *see, e.g.,* Raeder, *Prior Acts*, *supra* note 11, at 1480, is a highly important question that is beyond the scope of this article.

128. FED. R. EVID. 801, 802. *See, e.g.,* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 173 n.18 (1988); Tennessee v. Street, 471 U.S. 409, 409 (1985) (when defendant testified that his confession had been a coerced repetition of accomplice's confession, it was proper to allow state to introduce, in rebuttal, accomplice's confession for nonhearsay purpose, with limiting instruction, not to prove truth of accomplice's assertions but to prove what happened when defendant confessed); United States v. Johnson, 529 F.3d 493, 501 (2d Cir. 2008) ("We agree with the government that such use of hearsay for an unimportant nonhearsay purpose of setting the stage and explaining background can be appropriate, if the hearsay statement does not assert matter of significant importance to the question of the defendant's guilt."); United States v. Price, 458 F.3d 202, 207, 211 (3d Cir. 2006) (holding that the district court did not error by admitting out-of-court statements for the nonhearsay purpose of establishing background context for the police response).

129. *E.g.,* Tennessee, 471 U.S. at 414; United States v. Jimenez, 513 F.3d 62, 81 (3d Cir. 2008) ("Nonhearsay use of evidence as a means of demonstrating a discrepancy does not implicate the Confrontation Clause."); United States v. Van Sach, 458 F.3d 694, 701 (7th Cir. 2006) ("When recorded evidence [of a conversation between the accused and an informant] is admitted in the absence of testimony by an informant who recorded the conversation, the Confrontation Clause of the Sixth Amendment is not violated if the statements are non-testimonial and are not offered for the truth of the matter asserted. It is well settled that non-hearsay statements are admissible if they are offered to provide context." The district court gave a proper limiting instruction to the jury.); United States v. Faulkner, 439 F.3d 1221, 1226 (10th Cir. 2006) ("One thing that is clear from *Crawford* is that the Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement.").

130. FED. R. CRIM. P. 26.2 (stating that a criminal defendant is entitled to obtain prior statements of witnesses who have testified for the government). Formerly, production was compelled by the Jencks Act, 18 U.S.C. § 3500 (1982), enacted after the decision in *Jencks v. United States*, 353 U.S. 657 (1957). *E.g.,* United States v. Lewis, 35 F.3d 148 (4th Cir. 1994); Robinson v. State, 730 A.2d 181, 181 (Md. 1999) (statements made by arresting officers to Internal Affairs Division of police department were "Jencks/Carr" statements that must be produced by state, despite any confidentiality provisions in statute, which dealt with rights of police officers); Carr v. State, 397 A.2d 606, 615 (Md. 1979) (when state's witness had identified defendant as the one who shot the victim, it was reversible error for court to refuse to compel production of witness's signed prior inconsistent statement; "To deny to

differs (i.e., is more harmful to the defendant) from the answers she gave in the DA, the defense may impeach her by her prior inconsistent statements.¹³¹ Second, if she testifies consistently with her DA answers but is impeached and her prior consistent answers would help to rehabilitate her, the prosecutor may have them admitted on the limited issue of her credibility.¹³² Third, a DA or any part of it may be offered for the limited purpose of explaining the basis for a testifying expert's opinion.¹³³

2. The DA Score and/or Category of Risk

Because the DA calculation assumes the *truth* of the victim's out-of-court answers, if the evidence rules exclude the victim's answers, the DA calculation would be inadmissible hearsay as well when offered to prove the risk of future lethal or serious injury. But the DA score and/or category of risk may be admissible for a non-evidentiary purpose or for a limited nonhearsay purpose.

a. Non-Evidentiary Purpose

In a non-jury trial such as one for child custody, the judge might be asked to make his or her own risk assessment, using the DA format. If the victim testifies to some of the DA factors at trial and the judge – as the fact finder – believes the victim's testimony, the judge might wish to use the DA format to reach his or her own assessment of risk to the victim and her children.¹³⁴ The judge would not be relying on the victim's out-of-court answers to the DA questions, but would be relying on the DA's explanatory text and the supporting social science literature. The information could be brought to the judge's attention by counsel, or sua sponte as a result of judicial training on risk assessment.

defense counsel the tool necessary for . . . adequate cross-examination under these circumstances amounts . . . to a denial . . . of due process of law.”).

131. FED. R. EVID. 613(b).

132. MD. RULE 5-616(c)(2) (LexisNexis 2009); *Holmes v. State*, 712 A.2d 554, 560 (Md. 1998). See also *Tome v. United States*, 513 U.S. 150 (1995) (holding that statements made after declarant had alleged motive to fabricate are inadmissible as substantive evidence but declining to opine as to whether they could be admissible as to credibility); Lynn McLain, *Post-Crawford: Time to Liberalize the Substantive Admissibility of a Testifying Witness's Prior Consistent Statements*, 74 UMKC L. REV. 1, 40 (2005) (urging amendment of Federal Rules of Evidence 801(d)(1)(B) so that it would permit, subject to Federal Rules of Evidence 403, substantive use of all prior consistent statements that a jury logically would find relevant to rebut any allegations offered to impeach the witness, as well as adoption of a rule specifically permitting substantive use of the witness's prior consistent complaint of sexual assault); Raeder, *Prior Acts*, *supra* note 11, at 1468, 1512-17 (proposing the creation of a hearsay exception for “trustworthy statements of a domestic homicide victim who has suffered at least three previous instances of domestic violence at the hands of the defendant”).

133. See *infra* Part V.B.3.a.

134. However, in a criminal jury trial, the United States Supreme Court's decision in *United States v. Booker* requires that the jury alone find facts that are ultimately used by the judge to increase a convicted defendant's sentence. 543 U.S. 220, 245 (2005).

In this situation, the court might take judicial notice of the pertinent social literature as “legislative facts”¹³⁵ or “background/social context facts”¹³⁶ to which the evidence rules do not apply (a “non-evidentiary” purpose). The judge then could make the numerical and category assessments herself.¹³⁷ This approach might help a judge who, without the benefit of the DA, might undervalue the degree of danger added by a particular factor, such as the alleged abuser’s unemployment, ownership of a gun, suicidal ideation, or the alleged victim’s having a child that is not the abuser’s. The judge’s use of the DA might well prevent tragedies.¹³⁸

b. Nonhearsay Purpose

If an expert testifies and relies on the DA, the expert’s explanation of the DA and its method of calculating risk may be admissible for the limited purpose of explaining the basis of the expert’s opinion.¹³⁹ Federal Rule of Evidence 703 and its state corollaries permit the trial judge to rule that even inadmissible hearsay, if “of a type reasonably relied upon by experts in the particular field,”¹⁴⁰ may be disclosed to the jury on direct examination if “their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”¹⁴¹ In that event, a limiting instruction under Rule 105 would be appropriate.¹⁴²

3. When the IPV Victim is the Defendant

In the situation where a defendant alleges that she acted in perfect self-defense – or imperfect self defense, as a preemptive strike against her

135. See FED. R. EVID. 201 (rule governing judicial notice of adjudicative facts); *Garner v. Louisiana*, 368 U.S. 157, 195 (1961) (“[T]his Court has many times taken judicial notice of well-known economic and social facts.”); *Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 322 n.12 (1st Cir. 2004) (“‘Adjudicative’ facts, which are governed by Fed. R.Evid. [sic] 201, are ‘simply the facts of the particular case.’ ‘Legislative facts,’ by contrast, include facts ‘which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.’ For example, in *Muller v. Oregon*, the Supreme Court took judicial notice of extensive sociological research that supported shorter working hours for women in evaluating the rationality of statutes mandating such hours. Judicial notice of legislative facts is not governed by Rule 201.”) (citations omitted).

136. See Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559 (1987) (describing the “rapidly increasing” use of social science research results “to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case,” though they neatly fit neither category of legislative or adjudicative facts).

137. See generally, e.g., Joseph A. Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51 (1988).

138. See *supra* Part II.

139. FED. R. EVID. 703. See *infra* Part V.B.3.a.

140. FED. R. EVID. 703.

141. *Id.*

142. See FED. R. EVID. 105 (governing limiting instructions).

batterer¹⁴³ – the hearsay analysis will change. Her fear of the batterer becomes relevant.¹⁴⁴ The defendant may choose to offer her out-of-court statements to show her state of mind. Direct assertions of her state of mind (“I am afraid he will kill me next time.”), offered to prove that state of mind, will be hearsay but will fall within the hearsay exception of Federal Rule of Evidence 803(3) and its state corollaries.¹⁴⁵ Statements offered as circumstantial evidence of her state of mind (“He will kill me next time.”), offered to prove merely a belief she had and not that she was factually correct, will be nonhearsay when offered for this purpose.¹⁴⁶

143. See *supra* note 16 and accompanying text.

144. See *Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004) (victim’s statements were admitted properly as evidence of her mental state because defense implied that she had committed suicide); *Cooley v. State*, 849 A.2d 1026, 1032 (Md. Ct. Spec. App. 2004) (witness’s out-of-court statement recounting that his cousin told him someone said that defendants would kill witness if he talked was admissible to prove witness was aware of threats, which was relevant to explain his inconsistent testimony at trial), *rev’d on other grounds*, 867 A.2d 1065 (Md. 2005); *Case v. State*, 702 A.2d 777, 779-80 (Md. Ct. Spec. App. 1997) (when murder defendant’s defense was that the victim had invited him into her home and that the gun went off by accident, trial judge properly admitted, as relevant to whether victim had invited him in and voluntarily positioned herself close enough to him that she could be accidentally shot, the victim’s out-of-court statements of her fear of the defendant; evidence of a domestic violence protective order that prohibited the defendant from entering the victim’s home was also properly admitted for this purpose); *Green v. State*, 569 A.2d 741, 747-48 (Md. Ct. Spec. App. 1990) (evidence was erroneously admitted when non-hearsay purpose was not relevant to a material issue).

145. Federal Rules of Evidence rule 803(3) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . *Then existing mental, emotional, or physical condition.* A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

See, e.g., *United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007) (“To be admissible under the state-of-mind exception, ‘a declaration . . . must mirror a state of mind, which, in light of all the circumstances, including proximity in time, is reasonably likely to have been the same condition existing at the material time.’” (citation omitted); *Horton v. Allen*, 370 F.3d 75, 85 (1st Cir. 2004) (“The premise for admitting hearsay statements evidencing state-of-mind is that such statements are reliable because of their ‘spontaneity and [the] resulting probable sincerity.’” (citation omitted)); see generally LYNN MCLAIN, 6A MARYLAND EVIDENCE: STATE & FEDERAL §§ 803(3):1, 803(3):3 (2001).

146. E.g., *United States v. Quinones*, 511 F.3d 289, 312 (2d Cir. 2007) (“This court has recognized that ‘the mere utterance of a statement, without regard to its truth,’ may circumstantially evidence ‘the state of mind of the declarant,’ and, as such, does not constitute ‘hearsay.’” (citation omitted)); *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1249-50 (6th Cir. 1995) (declarants’ racist comments offered in discrimination case to show declarants’ racial attitudes); *United States v. Mayhew*, 380 F. Supp. 2d 961, 971 (S.D. Ohio 2005); *United States v. Lentz*, 282 F. Supp. 2d 399, 421-22 (E.D. Va. 2002) (declarant’s making of plans beyond date of her disappearance); *Balt. City Passenger R.R. Co. v. Knee*, 34 A. 252, 253 (Md. 1896) (witness whose presence at place was in dispute could properly

As an unintended consequence of the DA, the defendant may offer the statements made to her either in the text of the form or orally by her counselor ("You are in extreme danger of being killed.") for the nonhearsay purpose of showing their effect on her state of mind.¹⁴⁷ Again they would be relevant to prove that she thought she was in grave danger.

Such evidence could also be relevant in a divorce proceeding, for example, as to why the victim changed the locks or left the family home. The victim would offer it to show that her acts were not culpable constructive or actual "abandonment" of her spouse. The confrontation clause would pose no bar in these scenarios, as it does not apply either in civil cases, or in criminal cases when the criminal accused offers the evidence.¹⁴⁸

a. Expert Testimony

In any type of proceeding, either side of the case could call an expert witness who testifies that his or her profession reasonably relies upon the DA to make statistically valid generalized predictions of risk.¹⁴⁹ The expert could be

prove it by evidence that he had related to another person about facts which he could have learned only there).

147. *E.g.*, *United States v. Lentz*, 524 F.3d 501, 529 (4th Cir. 2008) (missing person poster was relevant to show its effect on reader, defendant); *United States v. Song*, 436 F.3d 137, 139 (2d Cir. 2006); *Moore v. Plaster*, 313 F.3d 442, 444 (8th Cir. 2002) (evidence relied on by prison officials in disciplining prisoner properly admitted in 42 U.S.C. § 1983 action); *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 382-83 (3d Cir. 2002) (doctor's statement to employer was properly admitted for limited purpose of showing why defendant did not allow plaintiff employee to return to work); *Fed. Deposit Ins. Corp. v. Stahl*, 89 F.3d 1510, 1520-21 (11th Cir. 1996) (error to exclude transcript of telephone conversation on hearsay grounds when offered to show effect on hearer, i.e., his knowledge of reported problems); *Tracinda Corp. v. DaimlerChrysler AG*, 362 F. Supp. 2d 487, 495-96 (D. Del. 2005) (news article admissible to prove that readers were aware of its contents); *Greenwald v. State*, 157 A.2d 119, 125 (Md. 1960) (statements admitted not for their truth but because acted on by witnesses); *Shunk v. Walker*, 589 A.2d 1303, 1309-10 (Md. Ct. Spec. App. 1991) (reasons why mother sought modification of child custody order [Authors' Note: mother's state of mind, as opposed to merits of her concerns, would ordinarily be irrelevant]).

148. *See supra* note 105 and accompanying text.

149. FED. R. EVID. 703. The rationale for the approach codified by Federal Rules of Evidence 703's permitting expert testimony that is based on hearsay not admitted in evidence is set forth as follows in a pre-Federal Rules of Evidence decision of the United States District Court for the Southern District of New York:

Opinion testimony by an acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others, which is trustworthy and which is practically unobtainable by other means, is competent even though the firsthand sources from which the information came be not produced in court. . . . [I]t has been said that "the requisites of an exception to the hearsay rule" are "necessity and circumstantial guaranty of trustworthiness." In other words, when hearsay evidence is offered it is admissible if resort to it be essential in order to discover the truth and if the surroundings persuade the court that the information adduced by the expert as a basis of his opinion is reliable.

asked to testify to his or her opinion regarding the degree of risk correlating to a particular factor or group of factors (the existence of those factors in the case would have to be proven by other evidence).¹⁵⁰ If the court permits an expert to so testify however, the details of the DA will also be admissible, in the discretion of the court, for the nonhearsay purpose of showing the basis for the expert's opinion.¹⁵¹

United States v. Aluminum Co., 35 F. Supp. 820, 823 (S.D.N.Y. 1940) (citations omitted). See also United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971):

The rationale for this [expert testimony] exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.

Whether particular information meets the required standard of reliability is to be determined by the court as a preliminary question of fact under Federal Rules of Evidence 104(a). See, e.g., United States v. Bamman, 737 F.2d 413, 416 (4th Cir. 1984) (no error in excluding testimony of prison psychologist whose opinion was "speculative and second-hand"). Courts must make a "finding as to what data experts in the field find reliable" and may not substitute their "judgment for that of the experts." Indian Coffee Corp. v. Proctor & Gamble Co., 752 F.2d 891, 894-95 (3d Cir. 1985). If the court in its discretion, e.g., Horton v. W. T. Grant Co., 537 F.2d 1215, 1218 (4th Cir. 1976), finds that a sufficient showing of reliability has been made and admits the expert testimony, the fact finder in evaluating the expert opinion will again consider the reliability of its basis. See e.g., United States v. Arias, 678 F.2d 1202, 1206 (4th Cir. 1982) (DEA expert's reliance on drug sample sent by another DEA agent was "a factor to be considered by the jury in assessing the weight of his testimony...").

150. E.g., United States v. Libby, 475 F. Supp. 2d 73, 85-88 (D.D.C. 2007) (declining to admit evidence offered by defendant in support of his state of mind defense, absent his testimony, without which the proffered evidence was irrelevant); Bryant v. State, 900 A.2d 227, 239-40 (Md. 2006) (no abuse of discretion in excluding, as unhelpful and confusing to jury, defense expert's psychological profile of defendant, which included evidence of defendant's impulse control disorder, as this evidence was not relevant where defense was one of mistaken identity, and there was insufficient evidence on the record to support the witness's testimony); People v. Goldstein, 843 N.E.2d 727, 731-33 (N.Y. 2005) (reversible error to admit testimonial statements of people interviewed by state's psychiatric witness as basis for her opinion that defendant was not insane); Hartless v. State, 611 A.2d 581, 589-92 (Md. 1992).

151. In a jury trial, however, the judge may so rule only if he or she has determined those details to be sufficiently helpful to the jury in evaluating the expert's opinion so as to substantially outweigh the risk of any unfair prejudice from their admission. Federal Rules of Evidence 703 provides in part: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

For examples of bases found sufficiently reliable see Mannino v. Int'l Mfg. Co., 650 F.2d 846, 852-53 (6th Cir. 1981) (studies and literature); Baumholser v. Amax Coal Co., 630 F.2d

In order for the expert opinion to be admissible, it must meet three general requirements. First, the subject must be appropriate for expert testimony.¹⁵² Second, the witness must be qualified as an expert in that subject matter.¹⁵³ Third, a sufficient factual basis for the expert testimony in the particular case must be laid.¹⁵⁴

There are two subparts to the first requirement. Initially, the opinion must be helpful to the trier of fact.¹⁵⁵ Second, if based on a scientific principle, the underlying principle must be either: (a) recognized by statute¹⁵⁶ or (b) be shown to have met the particular jurisdiction's criteria for scientific evidence. In

550, 552-53 (7th Cir. 1980) (statistics from questionnaire sent out relating to case); Higgins v. Kinnebrew Motors, Inc., 547 F.2d 1223, 1225-26 (5th Cir. 1977) (statistics from United States Department of Labor, Bureau of Labor Statistics); Plant v. Simmons Co., 321 F. Supp. 735, 737-39 (D. Md. 1970) (data from United States Bureau of Labor Statistics and Federal Reserve Board; technical paper by officials of population and systems divisions of Bureau of Census, published by Department of Commerce; and Economic Report of the President). See also Milton Co. v. Council of Unit Owners of Bentley Place Condo., 729 A.2d 981, 987-88 (Md. 1999) (no abuse of discretion to admit, for this purpose, surveys interpreted by experts, so that jury could evaluate conflicting experts' testimony).

With regard to Federal Rules of Evidence 703's effect on a criminal defendant's right of confrontation see, e.g., United States v. Abbas, 74 F.3d 506, 512-13 (4th Cir. 1996) (no violation of defendant's right of confrontation); United States v. Lawson, 653 F.2d 299, 301-03 (7th Cir. 1981) ("[T]he introduction of expert testimony based in large part on hearsay may raise serious constitutional problems if there is no adequate opportunity to cross-examine the witness"; under facts of case, no violation of confrontation right); United States v. Genser, 582 F.2d 292, 298-99 (3d Cir. 1978) (no violation); United States v. Williams, 447 F.2d 1285, 1289-90 (5th Cir. 1971) (no violation of confrontation right in testifying expert's reliance on records that were not introduced). Cf. United States ex rel. Del Vecchio v. Illinois Dep't of Corr., 795 F. Supp. 1406, 1422-23 (N.D. Ill. 1992) (no violation of defendant's confrontation right to admit, at sentencing hearing, experts' testimony as to opinions of non-testifying experts regarding defendant's sanity; defendant had an adequate opportunity to cross-examine the testifying witnesses about, and offered no reason to doubt their testimony as to the reliability of the reports of the non-testifying experts).

152. FED. R. EVID. 702. Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

153. *Id.*

154. *Id.*

155. *Id.*

156. The trial court need not apply the *Frye-Reed* test to statutorily approved tests. See, e.g., Armstead v. State, 673 A.2d 221, 232 (Md. 1996) (DNA evidence is recognized by statute). The only way to contest the validity of the underlying principles involved would be to argue that the statutes violate one's constitutional right to due process of the law. See, e.g., State v. Tanner, 457 So. 2d 1172, 1176 (La. 1984) (breath test results suppressed because state failed to prove its regulations were sufficient to ensure accurate results, because they did not require testing the "known alcohol standard" for purity). The DA is recognized, for some purposes, by statute in several jurisdictions. See *supra* Part IV.C.

federal court, *Daubert v. Merrell Dow Pharmaceuticals Inc.* supplies the standard,¹⁵⁷ in a number of states,¹⁵⁸ the *Frye* “general acceptance” standard applies.¹⁵⁹ Under *Daubert*, having achieved “general acceptance” is not an absolute prerequisite, but merely one of several considerations.¹⁶⁰

i. *Daubert*

Under the *Daubert* standard, the judge assesses reliability by looking at those of the following factors that are relevant to a particular question:

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. . . .

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility. . . .

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error. . . .

Finally, “general acceptance” can yet have a bearing on the inquiry. A “reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.” Widespread acceptance can be an important factor in ruling particular evidence admissible, and “a known technique that has been able to attract only minimal support within the community,” may properly be viewed with skepticism.¹⁶¹

How would the DA fare under a *Daubert* analysis by a trial judge charged with excluding unreliable evidence? This question will turn on the judge’s evaluation of the credibility of any testifying experts and of the social science literature presented to the court. The literature seems to support the conclusion that the DA can meet the *Daubert* standard.

The DA and other similar IPV risk assessments are merely a type of actuarial tool, one that relies on statistical and scientific methods to predict

157. 509 U.S. 579 (1993).

158. *E.g.*, *People v. Leahy*, 882 P.2d 321, 325 (Cal. 1994); *Marsh v. Valyou*, 977 So. 2d 543, 544 (Fla. 2007); *Reed v. State*, 391 A.2d 364, 368 (Md. 1978); *State v. Copeland*, 922 P.2d 1304, 1310 (Wash. 1996).

159. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

160. 509 U.S. at 597.

161. *Id.* at 591-95 (citations omitted).

future violence.¹⁶² Judges make predictions of violence in many settings, including bail hearings, sentencing proceedings, and hearings on whether to grant protective orders.¹⁶³ Since at least the 1920's, some United States courts have also used actuarial approaches to inform parole release decisions.¹⁶⁴

Due to the chronic nature of intimate partner abuse and high rates of recidivism, IPV risk prediction lends itself to actuarial analysis.¹⁶⁵ Predictive accuracy is high because IPV is typically a series of crimes repeatedly involving the same perpetrator and the same victim.¹⁶⁶ Research suggests that re-abuse between the same two people occurs between twenty-five and fifty percent of the time.¹⁶⁷ A New York study found the re-arrest rate for domestic violence offenders to be sixty-two percent.¹⁶⁸

IPV risk assessment tools are derived from a combination of theoretical principles and scientifically established risk factors.¹⁶⁹ The instruments correlate certain identified risk factors to potentially violent outcomes such as re-abuse or death.¹⁷⁰ These risk factors "consistently co-occur with

162. See generally Kirk Heilbrun, *Prediction Versus Management Models Relevant to Risk Assessment: The Importance of Legal Decision-Making Context*, 21 LAW & HUM. BEHAV. 347 (1997); Dale E. McNeil & Renee L. Binder, *Screening for Risk of Inpatient Violence: Validation of an Actuarial Tool*, 18 LAW & HUM. BEHAV. 579 (1994).

163. See Steven R. Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 HARV. J.L. & PUB. POL'Y 173, 198 (1986) ("judges already make predictions of future behavior when they set money bail, impose sentences, and approve parole.").

164. See Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 507-08 (2008) (explaining the current use by some states of actuarial tables in calculating the eligibility for release); Adam L. Pollock, Comment, *Using Parole to Constitutionally Reconcile the Criminal Punishment Goals of Desert and Incapacitation*, 8 U. PA. J. CONST. L. 115, 137 (2006) (explaining the use of guideline-based (actuarial) parole release). This use may be most easily recognized regarding the punishment of "sexual predators." See, e.g., Andrew J. Harris, *Risk Assessment and Sex Offender Community Supervision: A Context-Specific Framework*, 70 FED. PROBATION 36 (2006) (discussing developments in the use of actuarial approaches to risk assessment tools used in civil commitment laws against sexual offenders); Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275 (2006) (discussing the advantages and disadvantages of actuarial prediction, and how the rules of evidence should be interpreted in allowing expert testimony, based on these actuarial predictions, in sentencing sexual predators).

165. See Campbell, et al., *Femicide*, *supra* note 9, at 1089 (explaining that because of the high rates of prior abuse by partners, the best way to prevent future femicide is to identify battered women at risk before it is too late).

166. *Id.* at 1091.

167. Donald G. Dutton & P. Randall Kropp, *A Review of Domestic Violence Risk Instruments*, 1 TRAUMA, VIOLENCE, & ABUSE 171, 172 (2000).

168. NORA K. PUFFETT & CHANDRA GAVIN, PREDICTORS OF OUTCOME AND RECIDIVISM AT THE BRONX MISDEMEANOR DOMESTIC VIOLENCE COURT 2 (2004).

169. Arlene N. Weisz, Richard M. Tolman & Daniel G. Saunders, *Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions*, 15 J. INTERPERSONAL VIOLENCE 75, 75-79 (2000); Dutton & Kropp, *supra* note 167, at 172-73.

170. Dutton & Kropp, *supra* note 167, at 174-76.

abusiveness.”¹⁷¹ The high likelihood of IPV recidivism¹⁷² reduces the possibility of an IPV risk instrument falsely identifying a non-repeat abuser as a high-risk repeat abuser.

1. *Validation of Risk Factors*

The DA was first designed by a health professional to help abused women understand their risk of being murdered by their partners.¹⁷³ In 2003, the fifteen risk factors were empirically confirmed in an eleven-city case control study.¹⁷⁴ Investigators at each site collaborated with local law enforcement personnel, medical examiners, and domestic violence agencies.¹⁷⁵

IPV homicide cases were identified by extracting homicide data from medical examiner records from 1994 to 2000.¹⁷⁶ Information was obtained about lethal cases by interviewing “proxy informants,” friends and family of the decedents.¹⁷⁷ Researchers identified two potential proxy informants from the police or medical examiner records who might be familiar with the victim and her relationship with the perpetrator.¹⁷⁸ Proxies were contacted by mail, and if no response was received they were contacted again by phone or in person.¹⁷⁹ Victims of attempted femicide¹⁸⁰ and controls¹⁸¹ (other women who had been physically abused by their intimate partners, but were not victims of attempted murder) were personally interviewed.

In addition to the use of proven psychometric variables for violence, the DA incorporates the victim’s perception of violence as a factor for re-abuse.¹⁸² Although not as predictive as the other DA factors, research has indicated that combining the woman’s perception of violence with the other DA factors greatly increases the accuracy of risk prediction.¹⁸³

171. *Id.* at 173.

172. *See supra* notes 165-66 and accompanying text.

173. *See generally* Campbell, et al., *The Danger Assessment*, *supra* note 20; Campbell, *Nursing Assessment*, *supra* note 20.

174. Campbell, et al., *Femicide*, *supra* note 9, at 1089.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1093.

181. *Id.* at 1090.

182. *Id.* at 1092; Dutton & Kropp, *supra* note 167, at 174-75; *see* Weisz, et al., *supra* note 169, at 76, 86 (discussing how the focus in domestic violence has shifted to the victim’s ability to predict violence).

183. *See* Weisz, et al., *supra* note 169, at 86.

2. *Peer Review*

The DA has been the subject of over thirty peer reviews¹⁸⁴ and has been praised for using published empirical evaluation of psychometric properties such as test-retest and internal consistency reliability.¹⁸⁵ In a second validation study, independent researchers evaluated three popular risk assessment instruments: the K-SID, SARA, and DA.¹⁸⁶ Of the three, only the DA was designed to predict risk of homicide.¹⁸⁷ Yet, of the three, the DA was also the most consistent in predicting repeat non-homicidal re-assault.¹⁸⁸

3. *Known or Potential Error Rate*

A third validation study, the Risk Assessment Validation Experiment (RAVE), evaluated the DA and other risk assessment instruments.¹⁸⁹ In the RAVE, a sample of 1,307 battered women from shelters, family courts, hospitals, and community programs were given a risk assessment at baseline.¹⁹⁰ Sixty percent were re-interviewed in 9 months; 31 percent of the women who were re-interviewed had been re-assaulted.¹⁹¹ The DA's predictive validity was again confirmed; results of the study showed that the DA was predictive of both re-assault and severe re-assault.¹⁹²

Research has confirmed that the DA, like other risk assessment tools, is helpful both in informing a victim about her potential risk and in helping professionals identify and understand potential risk.¹⁹³ When scientifically evaluated for accuracy in predicting fatal or near fatal outcomes, the DA was found to be a significantly reliable predictor of female homicide and near homicide, but not a perfect predictor.¹⁹⁴ One study concluded that the DA is

184. See John Hopkins Univ. Sch. of Nursing, *Danger Assessment Reference List* (2005), <http://www.dangerassessment.org/WebApplication1/pages/references.aspx> (listing DA references).

185. JAN ROEHL & KRISTIN GUERTIN, CURRENT USE OF DANGEROUSNESS ASSESSMENTS IN SENTENCING DOMESTIC VIOLENCE OFFENDERS 11 (1998).

186. D. ALEX HECKERT & EDWARD W. GONDOLF, PREDICTING LEVELS OF ABUSE AND REASSAULT AMONG BATTERER PROGRAM PARTICIPANTS 14 (2004), <http://www.ncjrs.gov/pdffiles1/nij/grants/202997.pdf>.

187. *Id.* at 48.

188. *Id.*

189. JANICE ROEHL, CHRIS O'SULLIVAN, DANIEL WEBSTER & JACQUELYN CAMPBELL, INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY: THE RAVE STUDY PRACTITIONER SUMMARY AND RECOMMENDATIONS: VALIDATION OF TOOLS FOR ASSESSING RISK FROM VIOLENT INTIMATE PARTNERS (2005), <http://www.ncjrs.gov/pdffiles1/nij/grants/209732.pdf>.

190. *Id.* at 3.

191. *Id.* at 3, 14.

192. *Id.* at 12 tbl.10.

193. ROEHL, ET AL., VALIDATION STUDY, *supra* note 24, at 16.

194. *Id.* at 21.

quite reliable in correctly identifying extreme-risk victims (high sensitivity).¹⁹⁵ If the DA has a weakness, it is in producing false positives, meaning it tends to over-predict extreme risk of lethal outcomes.¹⁹⁶ This suggests that possible further calibration may enhance specificity. Until that time, however, providing appropriate protective measures for all identified as at extreme risk would be judicious. Because the DA is valid, has been subjected to peer review, and has a known and low rate of error, there is good reason to believe that it passes the *Daubert* test.

ii. *Frye* Jurisdictions

In *Daubert* jurisdictions, courts apply the *Daubert* test both to scientific evidence and to non-scientific expert testimony.¹⁹⁷ By contrast, *Frye* jurisdictions generally apply the *Frye* test only to novel scientific techniques in the “hard” sciences.¹⁹⁸ Certainly the underlying actuarial, mathematical principles applied in the social science research underlying the DA pass the *Frye* test. Whether social science conclusions must also pass the test, when they are based on those actuarial principles, is a significant threshold question.¹⁹⁹ The authors believe that *Frye* is inapplicable to those conclusions, which are not matters of “hard” science.²⁰⁰ If *Frye* does not apply to the DA, the test for

195. *Id.* Validity has two components: sensitivity and specificity. Sensitivity refers to the instrument’s ability to accurately identify women who are at high risk. *See generally id.*

196. *Id.* Specificity refers to the instrument’s ability to correctly identify those women who are not at high risk. *See generally* Campbell, et al., *Assessing Risk Factors*, *supra* note 10.

197. *See e.g.*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

198. The Maryland Court of Appeals, for example, has held that the *Frye* test does not apply to “medical opinion evidence,” such as expert testimony that a person suffered from post-traumatic stress disorder, as the opinion was not “presented as a scientific test the results of which were controlled by inexorable physical laws.” *State v. Allewalt*, 517 A.2d 741, 745 (Md. 1986). Nor, clearly, is the DA presented as being “controlled by inexorable physical laws.”

199. *See supra* note 198. On the other hand, the Maryland Court of Appeals has held that a physician’s opinion that a person’s sickness was caused by mold should not have been admitted without a *Frye* hearing “to determine whether the medical community generally accepts the theory that mold exposure causes the illnesses that respondents claimed to have suffered, and the propriety of the tests [the witness] employed to reach his medical conclusions.” *Montgomery Mut. Ins. Co. v. Chesson*, 923 A.2d 939, 947 (Md. 2007). *See also* Raeder, *The Better Way*, *supra* note 11, at 165 (“Like *Daubert*, *Frye* is also a difficult standard to apply to psychological testimony”).

200. If *Frye* is held to apply, however, the DA can meet it if the DA is shown to be “generally accepted” by the pertinent scientific community. *See supra* note 159 and accompanying text. At least one court has so held. In *re* Commitment of Simons, 821 N.E.2d 1184, 1192 (Ill. 2004) (actuarial risk assessments meet *Frye* test, as they are generally accepted by mental health experts, and were properly admitted in bench trial on issue of risk of recidivism).

admissibility would be relevance weighed against the risks of unfair prejudice, confusion or distraction of the jury, or undue consumption of trial time.²⁰¹

C. Risk of Unfair Prejudice

When evidence passes muster under the more specific evidence rules, there remains one more hurdle: the judge has discretion under Federal Rule of Evidence 403 or its state corollaries to exclude the evidence if its probative value is "substantially outweighed by the danger of unfair prejudice,"²⁰² confusion of the issues, or misleading the jury,²⁰³ or by considerations of undue delay,²⁰⁴ waste of time, or needless presentation of cumulative evidence."²⁰⁵ Opponents of DA evidence surely will argue that it should be excluded on each of these grounds in jury trials: the contentions will be that the jury will give it too much weight; the jury will overlook the fact that the DA is based on the victim's truthfulness and that it must decide whether the victim was telling the truth; the jury will misapprehend the probability aspect of the DA and believe it to be an infallible predictor. Opponents will argue that hearing expert testimony thus will add little of value and much confusion, so that admitting DA evidence is not worth the considerable time it will take to perform direct and cross-examinations of either an expert – or worse, of competing experts.

These arguments should generally succeed in a *criminal trial on the merits* when DA evidence is offered *against* an accused, and should generally fail when the evidence is offered *by* an accused. Because of the relaxed rules in proceedings like bail hearings and sentencing proceedings, however, DA

201. See *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) ("Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation."). Judge Butzner, writing for the court of appeals, recognized the dangers of admitting unreliable scientific evidence:

There are good reasons why not every ostensibly scientific technique should be recognized as the basis for expert testimony. Because of its apparent objectivity, an opinion that claims a scientific basis is apt to carry undue weight with the trier of fact. In addition, it is difficult to rebut such an opinion except by other experts or by cross-examination based on a thorough acquaintance with the underlying principles. In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts.

Id. But he also pointed out that "[a]bsolute certainty of result or unanimity of scientific opinion is not required for admissibility. 'Every useful new development must have its first day in court.'" *Id.* (citation omitted).

202. *E.g.*, *Old Chief v. United States*, 519 U.S. 172, 172 (1997).

203. *E.g.*, *United States v. LaRouche*, 896 F.2d 815, 826-27 (4th Cir. 1990); *Eng v. Scully*, 146 F.R.D. 74, 81 (S.D.N.Y. 1993).

204. *E.g.*, *United States v. Lancaster*, 96 F.3d 734, 744-45 (4th Cir. 1996).

205. FED. R. EVID. 403.

evidence should survive a Rule 403 argument even when offered against a defendant in those settings. Conditions of release, such as relinquishing a firearm, may be valuably informed by the DA²⁰⁶ and, as a result, innocent lives may be saved.

The authors of this article believe that the DA evidence also should be leniently admitted in civil proceedings, particularly on motions for protective orders and in family law matters regarding divorce,²⁰⁷ child custody and visitation.²⁰⁸ The judge should have the benefit of current social science regarding factors correlated with greater risk of re-assault and of lethal or near-lethal injury.

D. Recommended Future Steps

Increased efforts should be made to provide judicial training regarding the DA, so that the judge's knowledge is not limited to what the parties provide. To ensure admissibility in certain proceedings, such as bail, sentencing, protective orders, and family law proceedings, particular jurisdictions should choose to take legislative action so providing. The statutes should be flexible enough to embrace future iterations as informed by continuing empirical research. Absent such a statute, the drafters of the DA may well be advised to amend the form so that it will better comport with a particular jurisdiction's existing hearsay exceptions.²⁰⁹ If the applicable rules and statutes do not permit requiring the forfeiture of guns at crucial times such as the entry of restraining orders or setting of bail conditions, the jurisdiction ought to take steps to make that precaution possible.²¹⁰

206. See Campbell, et al., *Assessing Risk Factors*, *supra* note 10 (regarding protection orders in states that include firearm search and seizure provisions). See *supra* notes 1-4 and accompanying text.

207. Domestic violence is relevant to proving grounds for absolute or limited divorce, such as excessively vicious conduct, cruelty of treatment, or constructive desertion. It also may be relevant to alimony and division of marital property, as pertinent to the "circumstances that contributed to the estrangement" of the parties. *E.g.*, MD. CODE ANN. FAM. LAW. § 8-205(b) (LexisNexis 2006).

208. Domestic violence may need to be proven to contest a batterer's request for joint or sole custody or to have restrictions placed on the batterer's visitation. See Rona Marech, *Experts Question Family Legal System; Children's Death Raise Issue of Adequate Protection in Custody Disputes*, THE BALT. SUN, Apr. 1, 2008, at 4A ("I think people do not realize how much connection there is between domestic violence and child abuse," said Dorothy Lennig, the director of the domestic violence legal clinic at the House of Ruth.").

209. In Maryland, for example, providing for the victim to sign her statements will make them admissible as substantive evidence at trial if she testifies inconsistently with them. See *supra* note 122 and accompanying text. It should be noted that doing so may also make the statements discoverable by the other party in litigation. Similarly, introduction of her statements at trial will waive any otherwise applicable privilege, such as lawyer-client, if her statements were made to her attorney.

210. See *supra* notes 2, 45, 206, and accompanying text.

VI. CONCLUSION

The Danger Assessment questionnaire posed to victims of intimate partner violence has great potential for more widespread use in court. Use of the DA in the criminal justice system in screening cases will increase the likelihood that the most dangerous offenders will be most aggressively prosecuted; use in bail review, sentencing, and probation decisions will increase the likelihood that the victims at highest risk will receive appropriate protective measures. Use in the civil arena of family law should decrease the chance that courts underestimate the degree of risk to mothers and children, and help to avert future tragedies of femicide, infanticide, and the abuser's subsequent suicide. Many of these uses should be permitted under existing rules already available to courts, though particular jurisdictions may well choose to ensure admissibility by enacting statutes specifically addressing risk assessment evidence.