RADAR Signature Report

Erring on the Side of Hidden Harm: The Granting of Domestic Violence Restraining Orders

by

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Abstract: In deciding whether to enter a domestic violence restraining order, many judges think about their careers in addition to the merits of the cases before them. While the damage to parent–child relationships and to children's mental health caused by the overzealous entering of restraining orders is seldom if ever reported by the media, the harm caused by overtly violent acts following the failure to enter restraining orders most certainly is. In regards to restraining orders, the phrase "erring on the side of caution" is often invoked. It is more accurate, however, to characterize the judge's behavior as "erring on the side of hidden harm." Rather than judges, juries—one time judicial actors—should decide when domestic violence restraining orders are warranted.

> The great tides and currents which engulf the rest of men
> do not turn aside in their course and pass the judges by.
> —*Benjamin N. Cardozo (1921)*

On September 19, 2005, Yvette Cade went before Judge Richard A. Palumbo seeking an extension of a domestic violence restraining order against her husband, Roger Hargrave. Judge Palumbo, whether from confusion, clerical error, or a genuine belief that the extension was unwarranted, dismissed the restraining order. One month later, Hargrave walked into the cell phone store where Cade worked, doused her with gasoline, and set her on fire. Two weeks after the attack, Judge Palumbo was removed from all domestic violence cases and placed on administrative duty.

On July 20, 2006, Cade was interviewed by Nancy Grace on CNN's Headline Prime. Grace, emblematic of the media reaction, introduced the interview with:

> Tonight, a primetime exclusive. She went before a trial
> judge and begged for help, begged for protection. He
> refused to hear her pleas for help. And then her nightmare

> came true. Her estranged husband came to her office and set her on fire. But against all odds, she lived, and tonight she wants justice. And PS, to the judge that sentenced her to being burned alive, Maryland judge Richard Palumbo, you are in contempt! (Grace, 2006)

Adding to this, one of Grace's other guests, Congressman Ted Poe, commented: "Well, Nancy, you know I believe that judges need to be accountable for their actions just like we make criminals accountable. And this judge, whether it's a mistake or incompetence on his part, he needs to leave the bench" (Grace, 2006). Importantly, at no time during the show was the question of whether the appalling criminal act committed by Hargrave would have been prevented had Judge Palumbo extended the restraining order even asked. A judicial misconduct hearing scheduled for the end of August 2006 was cancelled when Judge Palumbo announced he planned to retire on August 4 because of health problems.

Economists have long realized that Food and Drug Administration (FDA) officials, in deciding whether to approve a drug, face the possibility of making two errors--they can approve a drug that turns out to be unsafe and/or ineffective, type I, or they can disapprove an effective drug that is, in fact, safe, type II--and have an incentive to make one type of error over the other.

A classic example of type I error, given by former FDA official Henry I. Miller, M.D., is the FDA's approval in 1976 of the swine flu vaccine.

> Although the vaccine was effective at preventing influenza, it had a major side effect that was unknown at the time of approval: temporary paralysis from Guilain-Barré Syndrome in a small number of patients. This kind of mistake is highly visible and has immediate consequences--the media pounces, the public denounces, and Congress pronounces. Both the developers of the product and the regulators who allowed it to be marketed are excoriated and punished in modern-day pillories: congressional hearings, television news magazines, and newspaper editorials. (Miller, 2000, p. 42)

A classic example of Type II error, given by economist Walter E. Williams, is the FDA's failure to approve the use of beta-blockers, available in Europe since 1967, until 1976.

> In 1979, Dr. William Wardell, a professor of pharmacology, toxicology and medicine at the University of Rochester, estimated that a single beta-blocker, alprenolol, which had already been sold for three years in Europe, but not approved for use in the U.S., could have

> saved more than 10,000 lives a year. Grieving survivors of those 10,000 people who unnecessarily died each year don't know why their loved one died, and surely they don't connect the death to FDA over-caution. For FDA officials, these are the best kind of victims--invisible ones (Williams, n.d.).

Economist Thomas W. Hazlett sums it up this way: "Type I deaths result in headlines reading, 'FDA-Approved Drug Kills Pregnant Mother, Congressional Hearings Slated.' Type II deaths don't generate headlines, or even little blurbs. There are no visible victims to lay on the regulator's doorstep when potential beneficiaries are only statistical probabilities" (Hazlett, 1996).

As Miller confides, "Because a regulatory official's career might be damaged irreparably by his good faith but mistaken approval of a high-profile product, decisions are often made defensively--in other words, to avoid type 1 errors at any cost" (Miller, 2000, pp. 42-3).

Although it is not politically correct to say so, women (and men) can and do use false allegations of domestic violence to gain sole custody and to get their children to hate and fear the other parent (Hines, Dunning, & Brown, 2007; Johnston, Lee, Olesen, & Walters, 2005). Even when a restraining order doesn't snowball into complete parental alienation, a judge's declaration that a father is an abuser can permanently tarnish his image in his child's eyes. The damage to father-child relationships and to children's mental health caused by the overzealous entering of restraining orders, however, is seldom if ever reported, while the harm caused by overtly violent acts following the failure to enter restraining orders most certainly is.

Just like FDA officials worrying about the headlines, judges deciding whether to enter domestic violence restraining orders have their careers to think about in addition to the merits of the particular cases before them. While Judge Palumbo was apparently oblivious to the potential for backlash to a ruling in favor of a defendant, the backlash was in fact quite predictable. Unlike Judge Palumbo, most judges, at some level, do sense the danger of a feeding frenzy whenever they rule on the appropriateness of a DV restraining order. Should they fail to grant (or extend) such an order and an act of overt violence follows, they will be blamed.

In a 1995 article of the New Jersey Law Journal, some of the advice given at an April 1994 judicial training session and recorded on a tape obtained by the Law Journal was quoted verbatim. The following is some of what the trainers had to say to the newly appointed judges in the context of temporary restraining order (TRO) hearings:

- "So don't get callous about the fact that these people are pestering you again. You know, grant the restraining order. It'll be the one time that you don't grant the restraining order that you'll be tomorrow's headlines."
- "You don't wanna be tomorrow's headlines. . . ."

- "So if anybody ever came back at you and said, 'Well, gee, that's a real reach in terms of probable cause,' you have a legislatively mandated response which is. 'I erred on the side of caution for the victim.'"
- "Quite frankly, the standard really is by a preponderance of credible evidence. That's what the law is. But what he's saying to ya, 'Don't make that mistake at three o'clock in the morning.' You may be a little tired. Err on the side of being cautious."
- "The law is, this is the standard, but that's not quite frankly what perhaps [is] the right thing to do."
- "The bottom line is we're trying to protect the victim. We don't want the victim hurt. We don't want the victim killed. So yes, you don't want your name in the paper, but you'd feel worse than that if the victim was dead."
- "If you got any hint whatsoever there's a problem, sign the TRO. Don't take the chance."
- "Let the family division sort it out." (Judicial Training, 1995, p. 14)

When it comes time for the family division to "sort it out" in a final restraining order (FRO) hearing, the Family Court judge is plagued by the same concerns that weigh on a municipal judge deciding whether to enter a TRO. Indeed, in Peterson v. Peterson (2005), the New Appellate Division quoted a trial judge telling a defendant during an FRO hearing:

> If I have to make a mistake I have to make a mistake in favor of safety. Do you understand that? Because, let me tell you something right now. Aside from the fact that I'm a judge, I'm a human being. And if I make a mistake that's going to hurt somebody, I'll never forgive myself.
>
> So if you were in my situation and I can't really tell who's being credible or not credible here, I can just tell you that you shouldn't live together right now. If you want to eventually get involved in some counseling, if you want to do it, that's a whole bunch of different things. But right now, this lady needs a time to feel safe and cool off and get her feet back on the ground, and your daughter needs the same thing.
>
> My view is that she should move back into the house. You should move out of the house, find your own place, and get on with your lives, and hopefully you'll get a lawyer; she'll get a lawyer, and through the lawyers they'll negotiate. Maybe you can go to counseling. Maybe you'll get divorced. Maybe you'll get back together. I don't know. But this is an interim solution, because I think that if I say that there was no domestic violence, although I don't think

> you intentionally did anything to harm anybody. . . . It's going to be a psychological disaster . . . . I have no problem in entering the order . . . not because you are a bad guy, because it's the right thing to do (Peterson v. Peterson, 2005, p. 124).

In regards to restraining orders, the phrase "erring on the side of caution" is often invoked. Using it to describe judicial behavior in restraining order hearings is misleading, however, for in entering a restraining order, a certain kind of harm, harm unlikely to be reported in the media, is almost guaranteed to happen, while the harm the judges wish to prevent, horrific acts of violence sure to make the papers, is highly unlikely to happen (Dutton, Corvo, & Hamel, 2009). It is more accurate to characterize the behavior as "erring on the side of hidden harm."

Similar behavior on the part of government officials, including judges, is described in Paul Chill's 2003 article "Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings" in the context of emergency child removal.

Removing a child from his or her home is plainly traumatic, but the trauma is not necessarily apprehended by the government officials making the decision to remove the child. Quoting a former caseworker describing what she saw at New York City's Emergency Children's Services, where 30 to 40 children were taken every night following removals, he notes, "[The people who make removal decisions] don't see a child having a panic attack at 3 a.m. because he is suddenly alone in the world. Or slamming his head against a wall out of protest and desperation" (Chill, 2003, p. 458, quoting Gordon, 2000). Chill remarks: "Such experiences may not only cause 'grief, terror, and feelings of abandonment' but may also 'compromise' a child's very 'capacity to form secure attachments' and lead to other serious problems" (Chill, 2003, p. 458).

Despite the trauma caused by emergency removals, "[t]he number of emergency removals ... has increased steadily for the past two decades, to the point where they now occur at nearly double the rate of 20 years ago" (Chill, 2003, p. 458). Many of these removals were unnecessary.

> [A] certain number of false positives ... can be expected from any enforcement scheme. Yet the number of such errors that actually occur is alarmingly large. According to statistics published by the U.S. Department of Health and Human Services (HHS), more than 100,000 children who were removed in 2001--more than one in three--were later found not to have been maltreated at all. And that is only the tip of the iceberg. Because definitions of maltreatment are extremely broad and substantiation standards low, it can be reasonably assumed that a significant number of other children who are found maltreated, and for whom perhaps some intervention--short of removal--is warranted, are

> nonetheless removed on an emergency basis (Chill, 2003, p. 458).

And "[w]hat accounts for the large and growing number of unnecessary removals?," Chill asks. He answers: "Although this is a complex question ..., an important factor appears to be the rise within child welfare practice of 'defensive social work'" (Chill, 2003, p. 459).

The term "defensive social work" refers to "the tendency of CPS personnel … to base removal decisions on fear--fear of job discipline, fear of civil (and even criminal) liability, and especially fear of adverse publicity resulting from the death of a child left with or returned to his or her biological parents" (Chill, 2003, p. 459). In Chill's opinion,

> Defensive social work has flourished in the past 20 years, fueled by the news media's appetite for sensational child maltreatment stories as well as by laws that purposely magnify the public visibility of child maltreatment fatalities and near fatalities. This has led to a series of removal stampedes or "foster care panics," in which thousands of children have been swept up by child welfare authorities in the aftermath of high-profile child fatalities. During such stampedes, the very creed of the government's action--often expressed as "erring on the side of safety"--invites overreaching in the name of the greater good (Chill, 2003, p. 459).

Of course, "forgotten or ignored during removal stampedes … is the range and extent of harm that can result from unnecessary removals" (Chill, 2003, p. 459).

In the case of judges, who "are supposed to operate as a check on CPS actions," Chill describes "what might be called 'defensive judging,'" in which judges "exhibit the same defensive outlook as many CPS caseworkers," since "[j]udges, like social workers, understand that a decision not to remove a child, or to return a child home who has been unilaterally seized by CPS, is much more likely to come back to haunt them than is a decision to uphold the status quo" (Chill, 2003, p. 461). Quoting "New York City Special Child Welfare Advisory Panel, Report on Front Line and Supervisory Practice," Chill maintains that judges "may order or uphold an emergency removal even on dubious evidence because they do not want to "risk making a mistake and having a child die" (Chill, 2003, p. 461). Judges interviewed for the report "'spoke of the withering media attention to decisions that turn out badly'" (Chill, 2003, n. 57). Disgustingly, the judges "nodded their heads at the suggestion that 'the weaker the case' CPS presented, the more likely it would be to prevail ('because judges would be especially afraid that something bad was going on in a home when they couldn't get clear information')" (Chill, 2003, n. 57).

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In "Criminal Law Comes Home," Harvard Law School professor Jeannie Suk describes how the urge to err on the side of hidden harm operates in the context of a practice in Manhattan that has become routine in criminal cases allegedly involving domestic violence, the imposition of de facto divorces in which the government "initiates and dictates the end of ... intimate relationship[s]" by subjecting "the practical and substantive continuation of the relationship[s] to criminal sanction" (Suk, 2006, p. 10).

The path to de facto divorce begins when a man is arrested for domestic violence. "The arrest may have come at the behest of neighbors rather than the victim herself. Or the victim may have called the police to seek specific intervention in that moment" (Suk, 2006, p. 59). Whatever led to the arrest, with it, the alleged victim's marriage to the defendant is very likely over, whether she likes it or not.

In Manhattan, "a leading jurisdiction ... considered to be 'in the forefront of efforts to combat domestic violence,'" domestic violence is defined by the D.A.'s Office as "'any crime or violation committed by a defendant against ... a member of his or her same family or household'" (Suk, 2006, p. 42). A vast majority of these cases do not involve serious physical injury, and many of the cases charged do not allege any physical injury. But "[e]ven as the 'violence' of DV has been defined down," to the point where harassment is considered a violent crime, these cases "trigger application of a 'mandatory domestic violence protocol' different from other crimes" (Suk, 2006, p. 44).

At arraignment, "the D.A.'s Office's mandatory practice involves asking the criminal court to issue a temporary order of protection (TOP) as a condition of bail or pretrial release" (Suk, 2006, p. 48). The TOPs typically prohibit all contact with the alleged victim and, naturally, with the defendant's own home if the alleged victim lives there. "Ascertaining whether the victim wants the order is not part of the mandatory protocol. The prosecutor generally requests a full stay-away order even if the victim does not want it" (Suk, 2006, p. 48). And, if children are involved, Suk's copy of a D.A.'s Office's manual instructs that since "'[a]s a rule, criminal courts are not well-suited to determine issues of custody and visitation,'" prosecutors are "to prohibit DV defendants from contacting the children 'except as permitted by a Family Court order'" (Suk, 2006, p. 57, n. 241). Add to this the proviso: "'However, in cases where there is danger of the defendant harming, intimidating, or improperly influencing the children, it is appropriate for the court to prohibit any contact.…'" (Suk, 2006, p. 57, n. 241.) In other words, as Suk puts it, "the rule is no contact with the children unless the family court modifies the particular criminal court order (which itself occurs in the unlikely event that an A.D.A. anticipates no negative impact on the children)" (Suk, 2006, p. 57, n. 241).

The de facto divorce is finalized at the plea bargain stage. "[T]he prosecutor offers the defendant a plea bargain consisting of little or no jail time (or time served) and a reduction of the charge, or even an adjournment in contemplation of dismissal, in exchange for the defendant's acceptance of a final order of protection prohibiting his presence at home and contact with the victim" (Suk, 2006, pp. 54-5). Unlike the TOP, this order is of a substantial duration. Nevertheless, "[t]he offer is particularly attractive for a defendant who has remained in jail since arraignment pending disposition of his

case; if he agrees he will be released" (Suk, 2006, p. 55). And, for someone not in jail but at risk of losing his job because of the repeated court appearances he has had to make, an offer of a restraining order with no jail time is also attractive.

Of course, a final order of protection does not formally end a marriage. "Spouses can surely remain legally married even as they obey all the prohibitions of the order, but cannot live or act like they are married" (Suk, 2006, p. 57). While no formal arrangements for custody, visitation, and support are put in place, "de facto divorce does entail de facto arrangements regarding custody, visitation, and support--that is, no custody, no visitation, and no support" (Suk, 2006, p. 58). And, in this bizarre no-man's land where criminal and family law converge, "the parties cannot contract around the result except by risking arrest and punishment of one of them" (Suk, 2006, p. 58). All the while, the wishes of the victims, for whose benefit the system supposedly exists, are completely ignored.

Why would the Manhattan D.A.'s Office insist in applying its draconian protocol to every case when it clearly leads to family breakup and the destruction of parent-child relationships? As Suk explains, "[t]he uniform application ... represents the prosecutorial response to a paradigm story in which DV victims can turn into murder victims overnight. In the oral culture of a prosecutor's office, a misdemeanor DV defendant has the potential to turn out to be an O.J. Simpson" (Suk, 2006, p. 44). Paralleling the advice given to New Jersey municipal judges, "[r]ookie prosecutors are warned that their DV misdemeanors are the cases that could get their names in the newspaper for failure to prevent something serious" (Suk, 2006, pp. 44-45). In this culture of fear, "every case is treated as a potential prelude to murder" (Suk, 2006, p. 44).

Unwarranted removals and government imposed de-facto divorces can destroy parent-child relationships and adversely affect the mental health of children. These also happen to constitute the main harm caused by unwarranted domestic violence restraining orders, harm that is unfortunately forgotten or ignored by judges erring on the side of so-called caution who, in the words of the then head of the Massachusetts Bar Association, Elaine Epstein (1993), grant restraining orders to "virtually all who apply, lest anyone be blamed for an unfortunate result" (E. Epstein, 1993, p. 1).

In addition, the benefit restraining orders confer, the protection of real victims of domestic violence, is diluted if the procedure by which the orders are entered is perceived to be unfair. As Deborah Epstein points out in "Procedural Justice: Tempering the State's Response to Domestic Violence," social science studies show that "[i]f a person feels fairly treated by state officials, he will perceive them as more legitimate and, as a consequence, will be more likely to obey their orders" (D. Epstein, 2002, p. 1905). If, on the other hand, "government power is exercised in a way that instills a sense of procedural unfairness, it undermines the likelihood of perpetuator compliance, putting victims of abuse at risk" (D. Epstein, 2002, p. 1905).

How, then, to ensure procedural fairness? A heightened standard of proof would be a start, but it would not be enough. In their 1998 examination of bench (judge) versus jury trials in juvenile delinquency cases, Martin Guggenheim and Randy Hertz concluded that "a review of appellate case law in bench trial cases raises troubling questions about the relative fairness and quality of judicial factfinding" (Guggenheim & Hertz, 1998, p. 564). Indeed, it "suggests that judges often convict on evidence so scant that only the most closed-minded or misquided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt" (Guggenheim & Hertz, 1998, p. 564). As an example they cite a Louisiana case in which a judge "convicted a youth of intentionally damaging property based on the youth's falling face-first into the wall of a store in the course of a struggle with a store manager who had caught the youth shoplifting a liquor bottle" (Guggenheim & Hertz, 1998, p. 564). Guggenheim and Hertz's conclusion is consistent with the opinions expressed in the American Bar Association's 2003 study of the Maryland juvenile justice system.

> Out of concern for fairness and the administration of justice, the U.S. Supreme Court extended the Constitutional safeguard of proof beyond a reasonable doubt to juvenile delinquency cases. There is a strong sentiment, however, that judges are not applying the standard in Maryland. One defender said, "judges are not using beyond a reasonable doubt; they are here to help them get services and get them involved." An Assistant State's Attorney in another jurisdiction agreed: "Defense counsel knows with [our] master there is a lower standard of proof than beyond a reasonable doubt, so they work it out" (Cumming et al, 2003, p. 32, emphasis omitted).

Juries, in contrast, tend to more rigidly adhere to the beyond a reasonable doubt standard (Wolf, 2003, p. 302). Moreover, as Law Professor Colleen P. Murphy observes, "As a one-time actor in the justice system, the jury is not susceptible to the cynicism that may beset a judge who routinely hears testimony. Independent of the government, the jury lacks the possible institutional bias of the judge in favoring the government or other types of litigants" (Murphy, 1993, p. 734).

Facts should be determined by several fresh, open minds, not one with a career on the line. Jurors, relatively anonymous one-time actors in the judicial system, are far less concerned with extraneous matters than are judges. In the wake of the Yvette Cade tragedy, it is more critical than ever that juries, not judges, be used to decide when domestic violence restraining orders are warranted.

REFERENCES

Chill, P. (2003). Burden of proof begone: the pernicious effect of emergency removal in child protective proceedings. *Family Court Review*, 41, 457-470.

Cumming, E ., Finley, M., Hall, S., Humphrey, A., Picou, I.P., Puritz, P. (Eds.). (2003). *Maryland: an assessment of access to counsel and quality of representation in delinquency proceedings.* Retrieved from http://www.njdc.info/pdf/mdreport.pdf

Dutton, D., Corvo, K., & Hamel, J. (2009). The gender paradigm in domestic violence research and practice, part II: The information website of the American Bar Association. *Aggression and Violent Behavior*, 14, 30-38.

Epstein, D. (2002). Procedural justice: tempering the state's response to domestic violence. *William & Mary Law Review*, 43, 1843-1905.

Epstein, E. M. (1993, June-July). Speaking the unspeakable, *Massachusetts Bar Association Newsletter*, 33, 1.

Gordon, A. (2000) *Taking liberties*. Retrieved from http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=665

Grace, N. (2006). *Interview with Yvette Cade*. Retrieved from http://transcripts.cnn.com/TRANSCRIPTS/0607/20/ng.01.html

Guggenheim, M., & Hertz, R. (1998). Reflections on judges, juries, and justice: Ensuring the fairness of juvenile delinquency trials. *The Wake Forest Law Review*, 13, 553-593.

Hazlett, T. W. (1996). *Risky behavior: long shots are better than no shot*. Retrieved from http://www.reason.com/news/show/29939.html

Hines, D., Dunning, E., & Brown, J. (2007). Characteristics of callers to the domestic abuse helpline for men. *Journal of Family Violence*, 22(2), 63-72.

Johnston, J., Lee, S., Olesen, N., & Walters, M. (2005). Allegations and substantiations of abuse in custody disputing families. *Family Court Review*, 43(2), 283-294.

"Judicial training: 'Your job is to be a wall.'" (1995, April 24). *New Jersey Law Journal*, p. 14.

Miller, Henry I. (2000). *To America's health: a proposal to reform the Food and Drug Administration*. Stanford, CA: Hoover Press.

Murphy C. P. (1993). Integrating the constitutional authority of civil and criminal juries. *The George Washington Law Review*, 61, 724-805.

Peterson v. Peterson, 374 N.J. Super. 116 (App.Div. 2005)

Suk, J. (2006). Criminal law comes home. *The Yale Law Journal*, 116, 2-70.

Williams, W. (n.d.). *We must weigh cost of one error against the other*. Retrieved from http://findarticles.com/p/articles/mi_qn4188/is_20050810/ai_n14857597

Wolf, K. C. (2003). Justice by any other name: the right to a jury trial and the criminal nature of juvenile justice in Louisiana. *William & Mary Bill of Rights Journal*, 12, 275-305.