

# Annotated Bibliography Witness Intimidation

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## INTRODUCTION

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This annotated bibliography was compiled to reflect resources collected for Æquitas' Initiative on Witness Intimidation (IWI).<sup>1</sup> It has been organized using four different content areas – legal research and literature, social science research and literature, assessment, and policy and practice. The first section contains legal literature that describes and analyzes the legal foundations of witness intimidation, including Supreme Court decisions, statutes, and relevant case law. The second section contains social science research about the experience and occurrence of witness intimidation, as well as implementation of laws and policies to address it. The third section contains reports of assessments and evaluations of the problem of witness intimidation in communities. The final section, policy and practice, contains best practices and policies to be implemented based on the assessment and research foundations described above.

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## LEGAL RESEARCH AND LITERATURE

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*Andrew King-Ries, Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutors, 39, CREIGHTON L. REV. 441 (2006)*

Victimless prosecution in domestic violence cases was an effective means of fighting domestic violence prior to the *Crawford* decision and subsequent Supreme Court decisions, due to the fact that victim statements admitted through hearsay exceptions allowed the state to proceed without the victim. The forfeiture by wrongdoing rule is analyzed in this article, as an exception to confrontation law. King-Ries explores the *Crawford* decision and the forfeiture by wrongdoing rule, as well as difficulties using the rule in domestic violence prosecutions. He addresses solutions to the difficulties and indicates additional requirements necessary when applying the forfeiture by wrongdoing rule in cases without a victim. He concludes by reiterating that offenders have an incentive to remove their victims from appearing in court, and thus seek to have their charges dismissed under the confrontation clause. King-Ries believes that the forfeiture by wrongdoing rule is a method to address this form of intimidation.

*Charles Doyle, Congressional Research Service, Obstruction of Justice: An Abridged Overview of Related Federal Criminal Laws (2007)*

This report reviews the six general obstruction provisions which include: “18 U.S.C. 1512 (tampering with federal witnesses), 1513 (retaliating against federal witnesses), 1503 (obstruction of pending federal court proceedings), 1505 (obstruction of pending Congressional or federal administrative proceedings), 371 (conspiracy), and contempt.” The report details the crimes involved in these provisions, possible sentences, and a general explanation of the provision.

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Clifford S. Fishman, *The Child Declarant, The Confrontation Clause, and the Forfeiture Doctrine*, 16 *WIDENER L. REV.* 279 (2010)

The situation discussed in this article arises under fairly narrow circumstances: a child witness or victim possesses important information about a crime and who committed it, but is unavailable to testify and has made previous testimonial statements. Fishman summarizes Supreme Court decisions relating to the Sixth Amendment confrontation clause and testimonial statements, including *Crawford*, *Davis*, and *Giles*. He reviews how testimonial statements are defined in each decision and how the forfeiture by wrongdoing doctrine in *Giles* is introduced. He describes situations in which forfeiture would be applicable to analyze forfeiture and the child declarant. Fishman next applies the forfeiture doctrine to the child declarant and discusses the procedural setting for this application. He introduces factors supporting forfeiture including the child's vulnerability, the nature of the abuse, and subsequent wrongdoing. Fishman concludes that *Giles* impedes prosecution of defendants where a child may be the only witness, and that the criminal justice system must do a better job protecting children.

Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of "Domestic Violence Context"*, 13 *LEWIS & CLARK L. REV.* 711 (2009)

Tuerkheimer's desire is that this article guides lower courts post-*Giles* and helps create impetus for improving prosecution of battering. She describes the history leading to the *Giles* decision, including the importance of the *Crawford* and *Davis* decisions in understanding the forfeiture by wrongdoing rule and testimonial versus non-testimonial statements. She then introduces the *Giles* case and the opinions of the Supreme Court Justices. She also discusses application of the *Giles* decision in the context of lethal and non-lethal domestic violence cases and the impacts it has on both. Tuerkheimer concludes that *Giles* is the first time the Court has affirmed the relevance of the context in which domestic violence occurred to understanding forfeiture.

Douglas Beloof & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 *COLUM. J. GENDER & LAW* 1 (2002)

The authors opine that current hearsay rules are inadequate, particularly in cases where victims report abuse, as batterers often pressure victims to recant statements or to not appear at trial, creating a failure of the criminal case. Beloof and Shapiro propose two exceptions to the hearsay rule to promote truth finding in these cases. The first addresses the problem of witness recantation by allowing unsworn prior inconsistent statements of victims to be admitted, pending availability of the victim for cross-examination. The second proposed exception addresses the problem of victims not appearing at trial by admitting their prior statements, pending screening by a judge for reliability. Beloof and Shapiro outline the process for the exceptions, as well as their constitutionality. Potential objections and issues raised by the proposed exceptions are further discussed. The authors close with one final problem – the issue of mandatory prosecution procedures in domestic violence cases and how to bring together the proposed exceptions within that context. The authors conclude the article by emphasizing the need to change hearsay rules to allow for more successful criminal prosecutions in domestic violence cases.

Herb Tanner, Jr., *Forfeiture by Wrongdoing in a Post-Giles World*, 3 *THE VOICE* 1 (2009)

The *Giles* decision confirmed forfeiture by wrongdoing, which is discussed at length in this analysis. Tanner introduces the *Giles* case and describes the recent history of forfeiture – including the designation of testimonial versus non-testimonial statements as decided by the *Davis v. Washington* and *Hammon v.*

*Indiana* cases. He describes the concepts of equitable forfeiture, exceptions to hearsay and forfeiture, and practical implications of these rulings. Tanner discusses possibilities for proving forfeiture, including identifying sufficient wrongdoing and intent to make the victim unavailable. He also discusses the future of prosecutions moving forward after the *Giles* decision, including important procedures in investigation and prosecution to prove forfeiture. Tanner concludes by emphasizing the need for thorough investigation in order to implement forfeiture.

*Jessica Smith, UNC School of Government, Understanding the New Confrontation Clause Analysis: Crawford, Davis and Melendez-Diaz (2010)*

Smith creates a detailed guide for dealing with confrontation clause issues occurring after the *Crawford*, *Davis*, and *Melendez-Diaz*. She details the impacts of the *Crawford* decision and breaks down when *Crawford* issues may arise as well as its relationship to hearsay rules. Smith also examines issues that arise with cross-examination at trial and the *Melendez-Diaz* ruling. She continues her analysis by defining testimonial evidence and providing examples. She presents exceptions to the *Crawford* rule as well as information regarding the waiver of confrontation clause rights, prior opportunities to cross-examine, and retroactivity of Supreme Court decisions. Smith concludes with proceedings to which the *Crawford* rule is applied, including criminal trials, sentencing, termination of parental rights, and juvenile delinquency hearings.

*Kyle R. Taylor, The Obstruction of Justice Nexus Requirement After Arthur Andersen and Sarbanes-Oxley, 93 CORNELL L. REV. 401 (2008)*

The concepts of obstruction of justice, witness tampering,, and the nexus requirement are explored in this Note by Kyle Taylor. Taylor introduces the statutory definitions of obstruction of justice and witness tampering, and notes the difficulty in defining and following these statutes for the nexus requirement. The Note analyzes the Court's decisions in *Arthurs Andersen* and *Aguilar* and concludes that both decisions are intended to increase restrictions on the courts and prosecutors in document destruction cases. Taylor outlines relevant statues in detail and examines the use of the nexus requirement, and details additional options the court may have in such cases. He continues with case law and commentary on the nexus requirement and concludes with the need to enforce the Court's restrictions in order to achieve justice.

*Linda Mohammadian, Sexual Assault Victims v. Pro Se Defendants: Does Washington's Proposed Legislation Sufficiently Protect Both Sides? 22 CORNELL J.L. & PUB. POL'Y 491 (2012)*

The complex relationship between the trauma sexual assault victims face in criminal proceedings and the rights of defendants in such proceedings are discussed in this examination of new legislation proposed in the state of Washington. The legislative updates include that should a defendant waive his/her right to counsel and represent him/herself, restrictions should be put in place on how the defendant questions the victim. Mohammadian discusses origins and limitations of the rights of self-representation and confrontation. She details the proposed legislation and examines concerns sexual assault victims face, public policy issues, the constitutionality and rationale of the legislation, and the maintenance of the defendant's rights. Her analysis concludes that the proposed legislation is necessary to protect victims in the case of defendant self-representation, but steps must also be taken to educate jurors on sexual assault as well as the rights of defendants in order to protect both parties.

*Nathan James, Congressional Research Service, Judicial Security: Comparison of Legislation in the 110<sup>th</sup> Congress (2007)*

Murders of judges, their loved ones and other court staff led Congress to designate increased court security as a legislative priority. Judges and other court personnel are often targets of threats and aggressive actions. Studies have raised questions about the ability of the United States Marshal Service to protect the federal judiciary. The 109<sup>th</sup> and 110<sup>th</sup> Congresses introduced legislation to increase judicial security by a number of means, including increased funding, amending criminal codes to provide greater protection, and providing funding for states to protect judges and witnesses. The 110<sup>th</sup> Congress introduced H.R. 660 and S. 378 to accomplish these goals. Additionally, H.R. 933 and S. 79 were introduced to provide short-term witness protection in the United States Marshal Service, and H.R. 2325 to allow federal judges and others duty-bound to represent the United States in court to carry firearms. Additional provisions include increased sentences. If the court system is unable to protect their own, it is less likely that victims and witnesses will believe that the system is safe.

*Ralph Ruebner & Eugene Goryunov, Giles v. California: Sixth Amendment Confrontation Right, Forfeiture by Wrongdoing, and a Misguided Departure from the Common Law and the Constitution, 40 U. TOL. L. REV. 577 (2009)*

The authors contend that the requirement to prove an element of intent in forfeiture analysis is inconsistent with the common law at the time the nation was founded. Ruebner and Goryunov analyze historical underpinnings of forfeiture in common law, and defend the conclusion that common law did not include an intent element. They continue their analysis with the Supreme Court decision in *Giles v. California* and the differences between forfeiture and waiver. They surveyed how different jurisdictions approach the forfeiture doctrine and the wide differences in how the element of intent is interpreted.

*Sarah M. Buel, Putting Forfeiture to Work, 43 U.C. DAVIS L. REV. 1295 (2010).*

The author discusses the forfeiture doctrine and how it should be implemented in the court system today. Buel addresses witness tampering's prevalence and how abusers often threaten victims, which prohibits them from testifying in court. She emphasizes the need for a more robust forfeiture doctrine in order to fulfill the legislative intent of the doctrine. The forfeiture doctrine not only protects the public, it also protects the victims, and brings the court's attention to the batterers' illegal conduct. It was established in *Giles v. California* that even if the batterer kills his victim, he could invoke his confrontation rights under the Sixth Amendment to keep her past statements out of the trial, unless the state can prove he killed with the intent of preventing her testimony. In response to the holding, this author states that if an offender's conduct causes an intimate partner violence (IPV) victim not to testify, it should result in a forfeiture of the right to confront his accuser. Further developing a forfeiture doctrine, that protects an IPV victim from abuse and witness tampering, can greatly improve the court system and justice system in the United States.

*Tim Donaldson & Karen Olson, "Classic Abusive Relationships" and the Inference of Witness Tampering in Family Violence Cases After Giles v. California, 36 LINCOLN L. REV. 45 (2008)*

The authors discuss *Giles v. California* in the framework of abusive relationships and witness tampering. Donaldson and Olson discuss the opinions of the Supreme Court Justices involved in the *Giles* decision as well as details presented in the case itself. They continue with the history of the wrongdoing exception

and the use of inferences in that exception. Modern usages of inferences in applying wrongdoing are discussed along with the intent-to-silence doctrine. Inferences that can be gathered from “classic abusive relationships” are integral in identifying witness tampering and in the admission of statements made by a victim whose absence resulted from a defendant’s actions to keep him/her out of court. The authors conclude that many facets of classic abusive relationships must be considered in order to more successfully prosecute cases and raise awareness of witness tampering.

*Tim Donaldson, Combating Victim/Witness Intimidation In Family Violence Cases: A Response to Critics of the “Forfeiture by Wrongdoing” Confrontation Exception Resurrected by the Supreme Court in Crawford and Davis, 44 IDAHO L. REV. 643 (2008)*

Donaldson recognizes forfeiture by wrongdoing as an essential component to combatting witness intimidation in family violence cases. He analyzes criticisms of forfeiture by wrongdoing – including those who argue it is not enough and those who argue it goes too far. To combat these arguments, Donaldson presents a detailed history of the concept of forfeiture by wrongdoing. He then presents a number of criticisms of forfeiture and discusses these criticisms in the context of the aforementioned history. Criticisms include that the forfeiture rule is closer to that of waiver, that equitable forfeiture may eliminate the intent-to-silence requirement that some think should apply, and that the scope of wrongdoing is too broad or too narrow. Donaldson concludes that forfeiture is essential to combat witness intimidation.

*Thomas D. Lyon & Julia Dente, Child Witnesses and The Confrontation Clause, 102 J. CRIM. L. & CRIMINOLOGY 118 (2012).*

*Crawford v. Washington* ruled that the admission of testimonial hearsay that has not been cross-examined violates a criminal defendant’s right to confront witnesses. One of the exceptions to *Crawford* is the doctrine of forfeiture by wrongdoing in which a defendant’s confrontation rights are denied should it be shown that the defendant’s actions caused the unavailability of the declarant. This article examines the impacts that *Crawford* and related decisions have on child witnesses and victims of sexual assault, including the dynamics of child sexual abuse and how perpetrators attempt to silence their victims.

*Tom Harbinson, Using the Crawford v. Washington “Forfeiture by Wrongdoing” Confrontation Clause Exception in Child Abuse Cases*

Harbinson reviews the *Crawford v. Washington* decision and its importance to forfeiture by wrongdoing in child abuse cases. He begins with how prosecutors can ensure that statements made by the child are admissible in court, indicating the admissibility of testimonial statements if the accused was responsible for procuring the child’s unavailability. He indicates case how prosecutors should use acts committed during the crime to show procurement by mentioning cases where it was used successfully. The incidences of Post-Traumatic Stress Disorder, Acute Stress Disorder, and Traumatic Stress Disorder among child victims can also be used to successfully prove procurement, resulting in the admissibility of testimonial statements. Harbinson concludes that it is essential for prosecutors to understand and implement the forfeiture by wrongdoing exception in the aftermath of the *Crawford* decision.

Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 *TEX. L. REV.* 857 (2009)

This article opens with a discussion of the *Giles v. California* decision and its subsequent restrictions on the doctrine of forfeiture by wrongdoing. It discusses cases in which a defendant murdered the declarant and hearsay evidence was admitted to convict the admitted murderer. These cases are now likely to be re-tried in light of the *Giles* decision. Lininger emphasizes that because of the *Giles* and *Crawford* decisions, batterers have come to learn that prosecutors are more likely to drop a case without live testimony from the accuser, therefore providing incentive for witness tampering and intimidation. He continues to examine and criticize the *Giles* decision and to introduce a new jurisprudential framework for courts to assess a defendant's intent to cause a declarant to be unavailable. He concludes with suggesting a new forfeiture rule and amendments to Rule 804(b)(6) of the Federal Rules of Evidence in order to prevent defendants to benefit from silencing their accusers.

Josephine Ross, *When Murder Alone is Not Enough: Forfeiture of the Confrontation Clause After Giles*, 24 *CRIM. JUSTICE* 34 (2009)

This discussion of the *Giles* case and its impacts begins with a review of the facts of the case and a review of additional relevant cases such as *Crawford* and *Davis*. Ross details the Supreme Court Justice opinions from the case, including Justice Scalia's majority opinion, Justice Souter's concurrence (with Justice Ginsburg joining), and dissent by Justice Breyer (with Justices Stevens and Kennedy joining). She analyzes these opinions in the context of both the prosecution and defense, and she presents tips for both in regards to forfeiture. She continues with a review of prosecuting and defending domestic violence murders, forfeiture in non-murder cases, and the nuances of testimonial statements. Ross concludes that the different opinions presented in *Giles* can benefit both prosecutors and defense attorneys in forfeiture and that the decision has forever changed domestic violence prosecutions.

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## SOCIAL SCIENCE RESEARCH AND LITERATURE

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Amy E. Bonomi, et al., "Meet me at the hill where we used to park": *Interpersonal Processes Associated with Victim Recantation*, 73 *SOC. SCI. AND MED.* 1054 (2011).

This article analyzes the reasons domestic violence victims recant their stories in cases about to reach the court system. Researchers assessed multiple factors to determine what motivates victims to recant, and the affects of witness tampering/influencing by the perpetrator. Two research questions were formulated: (1) interpersonal processes associated with the victim's intention to recant, including what the couple was discussing before and after it became clear that the victim would recant her story; and (2) how the couple constructed the recantation plan once it was clear that the victim intended to recant. Through data compilation of 25 couples where the perpetrator was incarcerated, researchers obtained jail phone recordings of conversations to analyze the dynamics of perpetrators manipulating victims to influence recantation. The study found witness tampering is a significant problem in domestic violence cases. Through the phone conversations it was evident that perpetrators manipulated victims to recant by: minimizing the effects of the abuse, appealing the to the victim's sympathy by mentioning dislike of prison conditions, the impossibility life without him/her, or by insinuating that she may have mental problems. It is evident prosecutors must work harder to hold these perpetrators accountable for their actions.

*Elizabeth Connick & Robert C. Davis, Examining the Problem of Witness Intimidation, 66 JUDICATURE 439 (1983)*

This article examines the problem of witness intimidation by analyzing studies completed in the late 1970's that researched the prevalence and nature of intimidation. One of these studies analyzed the intimidation of victims and witnesses by intermingling with offenders and others in courthouses before cases are heard. Introducing reception centers that assist victims and witnesses and keep them from contact with offenders mitigated this problem. The studies also looked at who is most likely to be threatened by intimidation. This article then reviewed new research on the nature of intimidation, whether or not responses to intimidation are adequate, official perceptions of intimidation, and ways to improve the criminal justice system response to intimidation.

*Julie L. Whitman & Robert C. Davis, Nat'l Center for Victims of Crime, Snitches Get Stitches: Youth, Gangs, and Witness Intimidation in Massachusetts (2007)*

The National Center for Victims of Crime conducted a study to better understand factors deterring youth witnesses from reporting gang crime and subsequently refusing to testify against perpetrators, and to indicate policies that encourage victims and witnesses to report crimes and cooperate with the criminal justice system. The study consisted of three components – a large-scale online survey, in-person interviews with youth, and in person interviews with seven public officials. The report details the methodology of the study and presents ten key findings, including the prevalence of gang activity, reporting of crimes, community norms regarding reporting, and relationships with law enforcement. The report indicates six recommendations to increase witness participation in the criminal justice system and to better respond to witness intimidation. The recommendations include increasing efforts to build close ties between law enforcement and youth, increasing the safety of crime reporting, countering community norms against “snitching” by utilizing marketing campaigns, reaching out to parents, keeping in touch with witnesses, and more aggressively using the tools available to protect witnesses. The report concludes with the desire that its recommendations will help reduce prevalence of witness intimidation and increase participation of witnesses in the justice system.

*Kerry Murphy Healey, Nat'l Institute of Justice: Research in Action Victim and Witness Intimidation: New Developments and Emerging Responses (Oct. 1995)*

This article discusses witness intimidation and its effects on both individual victims and the community at large. It states that individuals who witness or are victims of violent crimes are at a higher risk for experiencing intimidation. The article addresses approaches that prosecutors and law enforcement can take in order to prevent witness intimidation, as well as victim services. In addition, the article highlights how witness intimidation occurs, the types of intimidation, and how to respond to it.

*Michal Gilad, Who Will Protect the Children? The Untold Story of Unaccompanied Minors in Witness Protection Programs, WHITTIER J. CHILD & FAMILY ADVOCACY (2013) (forthcoming)*

The unique characteristics of unaccompanied children and adolescents that enter witness protection programs are analyzed in this report. The structure of witness intimidation programs designed for adults is failing unaccompanied minors; which the author demonstrates with an example of a young woman returning to the gang she needed protection from and subsequently being murdered by the gang. The report details the increasing use of minors as necessary witnesses and the need to protect them from

harm. The impacts of life in witness protection programs are discussed, as well as the special needs that minors face when entering the program. Existing practices and laws are analyzed for effectiveness, and recommendations for improvement are offered.

*National Gang Intelligence Center, National Gang Threat Assessment: Emerging Trends (2011)*

This report reviews and updates findings from a 2009 assessment of gang activity, and identifies criminal threats. There are over 1.4 million individual gang members comprising more than 33,000 gangs in the United States. The assessment found that gangs are responsible for an average of 48% of violent crime overall and up to 90% of violent crime in certain jurisdictions. Gangs are engaging in nontraditional crimes such as human trafficking and white-collar crime such as mortgage fraud. Gangs are increasingly establishing cross border relationships with organized crime in Central America, and gang members who are incarcerated continue to engage in gang activity while in prison. Gang members are acquiring more high-powered weaponry and are increasingly targeting law enforcement and military targets. The increasing levels of adaptability and sophistication of gangs make them a dangerous threat to safety and security in the United States.

*Public Safety Canada, Organized Crime Research Brief: Witness Protection Programs (2011)*

This brief emphasizes the extreme importance of witness protection programs in the fight against organized crime, due to the fact that witness intimidation is one of the defining characteristics in criminal investigations of organized crime. The brief reviewed the 2009 Standing Committee on Public Safety and National Security review of the Canadian federal witness protection programs, as well as the characteristics of witness protection programs in various countries. The report reviewed the successes and challenges of the programs in the selected countries, and found that most witness protection programs were managed by police forces and were legislatively based. The level of protection in the programs is dictated by the risk faced by the witness. It also found that most witnesses involved in the programs were involved in crime, and that each program faces a unique set of needs. It concluded that there is little credible research on witness intimidation and its involvement in failed prosecutions of organized crime.

*Roger Tarling, Lizanne Downs, & Tracy Budd, Victim and Witness Intimidation: Key Findings from the British Crime Survey, 124 RESEARCH FINDINGS (1998)*

The British Crime Survey completed in 1998 asked victims and witnesses of crimes if they had ever experienced intimidation following the offense; this report analyzes those findings. The report begins with a summary of the key points found in the survey of victim and witness intimidation. For example, the survey found that 8% of all incidents led to victim intimidation, which rose to 15% if there were factors that indicated the potential for intimidation (such as the victim having knowledge of the offender). The percentage of witnesses who experienced intimidation is the same – 8%, and witnesses are more likely to be intimidated by the original offender. There are two offenses in the law related to witness intimidation. A multidisciplinary working group has provided further recommendations to combat victim and witness intimidation in Great Britain. The report analyzes victim intimidation including its extent, different crimes and the subsequent risk of intimidation, the harasser's relationship with the victim, the type of abuse, reporting to the police, and the possible reasons for intimidation. Witness intimidation was analyzed similarly, including its extent, the relationship of the witness to the offender, the type of abuse, and reporting to the police. The report concludes that the survey indicates

that intimidation is an extremely complex issue and that criminal justice professionals should be especially vigilant to protect witnesses in certain types of cases, such as domestic violence crimes.

*Videtta Brown, Gang Member Perpetrated Domestic Violence: A New Conversation, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 396 (2007)*

This paper opens with the overall difficulty of prosecuting domestic violence cases, especially because victims are typically reluctant to testify for varying reasons. As the characteristics of domestic violence and the typology of abusers evolve, so do those of victims involved in such cases. Brown asserts the increased prevalence of gangs and gang members should become a new facet in the investigation and prosecution of domestic violence crimes, as abusers involved in gangs introduce a unique set of challenges to criminal justice practitioners. Challenges include increased victim fear of testifying due to retaliation not only from her partner, but also from gang members. Brown explores domestic violence among teens and young adult women, and compares and contrasts their experiences to those of adult victims of domestic violence. She then transitions to the nuances of gang culture and challenges presented by gang members as abusers, and why young women get involved with gang members. She concludes with suggestions for additional research into how best to protect victims and prevent them from becoming victimized in the first place, and to better incorporate and understanding of gangs in the investigation of domestic violence crimes.

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## ASSESSMENT

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*Kelly Dedel, Center for Problem-Oriented Policing, Witness Intimidation (2006)*

On these webpages, Dedel discusses problems related to witness intimidation. She highlights many factors in witness intimidation, and analyzes each to determine what responses should occur to prevent witness intimidation. There is a general description of witness intimidation - what it is, what forms it takes, which is often responsible for intimidation, and why it may occur. Dedel mentions witness intimidation can occur on a case-by-case basis, where the people related directly to the case itself are receiving threats, or the intimidation can occur on a community scale. She provides case examples, as well as a description of who could be a victim of witness intimidation. She ends with simple guide to beginning an examination of the problem of witness intimidation in your community. *See also* Kelly Dedel, *Problem Oriented Guides for Police, Problem Specific Guides Series, Guide No. 42, Witness Intimidation*, Community Oriented Policing Services, U.S. Department of Justice, July 2006, <http://www.cops.usdoj.gov/Publications/e07063407.pdf> (A practice piece for DOJ's Office of Community-oriented Policing that describes the problem of witness intimidation and reviews factors that increase its risks).

*Cartel Working Group, International Competition Network, Obstruction of Justice in Cartel Investigations (2006)*

The Cartel Working Group emphasizes that its member agencies have made detection, investigation, and prosecution of cartels their highest priority. However, cartels have become adept at obstruction of justice in such investigations. The Cartel Working Group summarizes what anti-cartel enforcers are doing to prevent the obstruction of justice. Definitions and types of obstruction are discussed, including witness tampering. These types of obstruction are discussed using case examples and tips for deterrence. The

Working Group details why the prosecution of obstruction of justice is important in the overall movement to prosecute cartels, and investigates why so few prosecutions are occurring. The report concludes with information regarding punitive measures for different types of obstruction of justice across the world.

*Forum on Witness Reluctance, Pennsylvania Commission on Crime and Delinquency, Report to the Commission (2007)*

The Pennsylvania Commission on Crime and Delinquency established a forum to discuss concerns facing the Pennsylvania criminal justice system; this report focused on the reluctance of non-victim witnesses to come forward in investigations. The Forum presented a summary of its findings, including a discussion of the extent of the problem of reluctant witnesses and the lack of empirical evidence about the impact of reluctant witnesses on prosecution. The Forum also reviewed causes of a witness's reluctance to come forward, such as fear or retaliation and social rejection. Efforts to address the problem and encourage witness participation were discussed, including community engagement and use of rewards. The Forum concluded that witness intimidation and lack of participation is a deep-seated issue in Pennsylvania and requires a long term, comprehensive plan to address.

*Los Angeles County District Attorney's Jailhouse Witness Protection Task Force, Final Report (2004)*

The need for witness protection for witnesses both in and out of custody is of utmost importance in the criminal justice system. Los Angeles County District Attorney's Office challenged the Jailhouse Witness Protection Task force with reviewing current witness protection procedures and protocols, and with recommending improvements to ensure witness safety and security. The task force identified seven areas where issues arise: jail phone recording and monitoring, inmate mobility within the jail, inmates as workers, classification requests and processing, alternative housing and transportation, California witness protection programming, and training. Investigation into these areas revealed a number of problems, which the group responded to with an overall recommendation of creating a witness protection unit in the sheriff's department to ensure witness protection. Additional recommendations were included for each area of focus; a description of the methodology behind the investigation was also included. The group concluded that the jail remains an extremely dangerous place for witnesses and that protection is vital in maintaining justice.

*New York State Law Enforcement Council, Legislative Priorities (2008)*

The New York State Law Enforcement Council presented legislative priorities to combat the rise of gangs in New York State. The Council also presents statistics on the rise of violent crime and gang involvement both in New York State and New York City. The Council recommends that New York work to improve enforceability of gang crimes by defining "gang" in the legal code and establishing enhanced penalties for drug crimes. They also emphasize the need to protect witnesses in these cases by raising penalties for witness tampering and intimidation, encouraging communities to fight back against intimidation, and provide increased resources for law enforcement to prevent witness intimidation and prosecute gang crime.

*Warwick Maynard, Police Research Group Crime Detection and Prevention Series: Paper No 55, Witness Intimidation Strategies for Prevention (1994)*

This study from the United Kingdom began in August 1993 and concludes in February 1994; it was commissioned due to concern that witness intimidation was disrupting partnership between police and the public. The purpose was to determine the extent of witness intimidation via a large-scale survey and to understand the circumstances of intimidation via in-depth interviews. Findings were that in high crime housing areas, 13% of victims who report crimes and 9% of witnesses who report face subsequent intimidation and that for those who did not report crime, 6% of victims and 27% of witnesses did not report for fear of intimidation. Circumstances of intimidation were (and remain) complex – some of these complexities include: intimidation before the suspect is apprehended is difficult to prevent; the need for changes in police response; and that other criminal justice agencies have important roles in the reduction of witness intimidation.

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## **POLICY AND PRACTICE**

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*Amy Anderson, et. al., Justice in Jeopardy: Victim and Witness Intimidation in Maryland*

The authors of this paper research and analyze victim and witness intimidation in the state of Maryland. They begin by defining witness intimidation and describing the nature of intimidation – why victims are reluctant to come forward during investigations. They indicate the two types of intimidation – overt and implicit – using examples of each type of intimidation. They concede that it is difficult to quantify the seriousness of witness intimidation, but they include a detailed interview with individuals at the Maryland Crime Victim's Resource Center to demonstrate anecdotal evidence of intimidation's severity. The authors indicate what makes an individual a likely target and the factors that increase the likelihood of intimidation. They continue by detailing intimidation both in the courtroom and in correctional facilities and possibilities at reducing witness intimidation in both areas. They conclude with the importance of acting against witness and victim intimidation in order for criminal justice system to properly investigate and prosecute criminal cases.

*Vera Institute of Justice, Enhancing Responses to Domestic Violence, Promising Practices From the Judicial Oversight Demonstration Initiative – Prosecuting Witness Tampering, Bail Jumping, and Battering From Behind Bars (2006)*

This publication discusses the implications and problems that occur between an arrest and trial of domestic violence cases. Specifically, it highlights Milwaukee, Wisconsin's District Attorney's Office practices and procedures for protecting victims from witness tampering, intimidation, and other violence while perpetrators are behind bars. Through the use of previously tried cases, the article shows how frequently witness intimidation occurs while the perpetrator is awaiting trial, and how the DA's office seeks to prosecute those offenders for intimidation in addition to the domestic violence charge. The article also mentions key practices for educating law enforcement and attorneys, as well as victims, to help eliminate witness intimidation and tampering.

*Free to Tell the Truth – Preventing and Combating Intimidation in Court: A Bench Book for Pennsylvania Judges (Pennsylvania Commission on Crime and Delinquency, 2011)*

This bench book introduces intimidation both in and out of the courtroom as an issue that judges and court staff should be keenly aware of. It introduces specific forms of intimidation outside the courtroom that the judge should continuously be conscious of, as well as forms of intimidation that the judge should prohibit in the courtroom. The process of creating a safe and secure courtroom is discussed as a number of different strategies. Each strategy is explained and accompanied by examples and any relevant legal support or analysis. Strategies include judicial control of the courtroom, protective orders (both in and out of the courtroom), conditions of bail, exclusion of spectators, and testimony from outside the courtroom. If witness intimidation still occurs, judges may respond numerous ways, including contempt of court and admission of hearsay by an unavailable witness. The bench book details legal guidelines of these responses and how responses may be implemented in order to best protect witnesses and respond to concerns of witness safety.

*International Network to Promote the Rule of Law, Witness Protection in Countries Emerging From Conflict (2009)*

The issue of witness intimidation and the need for witness protection is seen in countries emerging from conflict; however, these countries face unique challenges in this regard. Challenges include a lack of infrastructure and resources that can be dedicated to the criminal justice system. The authors of this report looked to discover both short and long term strategies for witness protection in criminal trials in countries emerging from conflict. Some of the short term strategies include identifying who needs protection, when they need it, and how to provide it – such as policing, close protection, change of infrastructure, and trial observation by independent bodies. Some longer-term solutions identified include procedural protection and the development of formal witness protection programs. The authors stress the need for independent investigation in much of the criminal justice system in countries emerging from conflict in order to ensure the safety of witnesses and the fairness of legal proceedings. The report concludes with a list of international standards regarding witness protection and a compilation of resources for those working to reduce witness intimidation in countries emerging from conflict.

*Jason Guida & Colin Durrant, Reducing Gang Violence in the Commonwealth of Massachusetts: Prosecution, Policing and Prevention; A Three-Pronged Approach (2005)*

After the increase of gang violence in the summer of 2004, the Massachusetts Senate Joint Committee on Public Safety identified a need to work collaboratively with the criminal justice system to address and act upon root causes of gang crime. A three-pronged strategy was developed to identify how legislative and executive agencies should respond to the threat of increased violence. Recommendations regarding budget and legislative actions are presented, as well as examples of how to implement the three prongs. These include (1) Enhanced Prosecution and Punishment, (2) Community Policing and Law Enforcement, and (3) Prevention Programs. The report concludes that the increased activity of violent gangs in Massachusetts should spur lawmakers and allied criminal justice professionals to act on effective prevention, investigation and prosecution of gang crime.

*John Anderson, National Gang Center Bulletin, Gang-Related Witness Intimidation (2007)*

Anderson posits that witness intimidation by gang members is a significant problem in the United States criminal justice system and that it has become so prevalent in gang culture it is now part of typical gang dynamics. The scope of witness intimidation is presented, detailing the number of gang members and gangs (760,000 and 24,000, respectively), and that witness intimidation was seen as a common occurrence in 66% of respondents to the 2000 National Youth Gang Survey (ranging from 44% in smaller areas to 82% in larger areas.) Anderson details the nature and extent of intimidation – including direct intimidation (physical violence, overt threats) and implicit intimidation (community fear of a gang). Strategies to protect witnesses are reviewed, including witness protection and relocation strategies and comprehensive witness security policies. He concludes that there is a pervasive issue of witness intimidation occurring by gang members that is impeding the criminal justice system.

*North Carolina Administrative Office of the Courts, North Carolina Domestic Violence Best Practices Guide for District Court Judges (2010, Updated June 2012)*

The North Carolina Administrative Office of the Courts created this guide to identify for courts the best practices and to recommend procedures and policies that should be enacted in domestic violence cases. These recommendations are to “improve victim safety, offender accountability, and court efficiency” (p.4) while ensuring all parties are entitled to due process. The research presented in this guide was gathered from a 2007 study completed by the North Carolina Administrative Office of the Courts, national research and established best practices, and consensus of the advisory committee reviewing the guide. The guide begins with a list of the 14 best practices, including a brief summary and a link to the details presented in the “Implementation Strategies and Recommended Court Procedures” section. This section presents the how and why of these best practices, many of which allude to the need to account for and prevent witness intimidation. Examples and opportunities for additional training related to the procedures are included, as well as updates from new research, case law, and legislation up through June 2012.

*Peter Finn & Kerry Murphy Healey, Preventing Gang-and Drug-Related Witness Intimidation, ISSUES AND PRACTICES IN CRIMINAL JUSTICE (1996)*

This extensive article reviews issues related to witness intimidation in gang and drug cases. It begins with the definition, types, extent, and perpetrators of witness intimidation. It reviews the components of a comprehensive witness intimidation program, including traditional approaches to witness security and how they are implemented. Relocation of intimidated witnesses and prevention of intimidation in courtrooms and jails are examined using examples from different jurisdictions and differing methods for implementation. Part II reviews how to develop or improve a witness intimidation program – steps on how to develop a program and legal issues that can arise are presented. The article provides additional resources by listing organizations and materials that deal with witness intimidation, experts in witness security, sample programs from around the nation, and sample forms to be used in developing a witness protection program. This is a detailed resource for all criminal justice professionals wishing to learn more about witness intimidation and related programs.

*Praxis International, The Blueprint for Safety: Supplement – Training Memo: the Implications of Forfeiture by Wrongdoing for Prosecution of Domestic Abuse Related Cases*

This supplement to Praxis International’s Blueprint for Safety reviews the use of Forfeiture by Wrongdoing in cases involving domestic violence. A brief overview of United States Supreme Court Cases

that deal with forfeiture by wrongdoing are presented, including *Crawford*, *Davis*, and *Giles*. It continues with an analysis of Minnesota Supreme Court Cases that also deal with forfeiture by wrongdoing, including the evaluation of the defendant's actions. This training memo provides guidance in evaluating these actions to determine whether the defendant intended to procure the unavailability of the witness. It continues with an analysis of the use of forfeiture by wrongdoing in domestic violence cases. In order to fully understand the forfeiture doctrine and implement it, prosecutors and courts must understand forfeiture in the context of the battering relationship and demonstrate how aspects of the battering relationship are indeed intended to make the witness unavailable. The memo concludes with a number of recommendations for practice for use of forfeiture by wrongdoing in cases involving domestic violence.

*Sarah Buel, Witness Tampering, 2 SAFVIC ON THE SCENE 1 (2007)*

Buel introduces witness tampering as the most common crime committed by batterers, but as the least common one to be charged, prosecuted, and sentenced. She maintains batterers will continue to threaten and intimidate their victims as long as the legal system allows them to do so, and that the legal system has long been ignoring the consequences of not addressing the issue of witness tampering. She describes ten of these consequences, including an increase in the number of victims unable to testify, an increase in the number of violent offenders going free, and higher rates of domestic violence as offenders avoid punishment, among many others. She mentions that the motives for tampering with witnesses are varied, but that it is important to address any and all possible reasons. Some methods to increase charging of witness intimidation is to ensure law enforcement thoroughly investigates domestic violence cases to determine the principal aggressor and to have officers document excited utterances and other critical evidence. She concludes that law enforcement officers are a critical step in combatting witness tampering and that witness security is paramount in the criminal justice process for domestic violence cases.

*Tamara E. Hurst, Prevention of Recantations of Child Sexual Abuse Allegations, 2 CENTERPIECE 1 (2010)*

Recantation of allegations is one of the most common reasons prosecutors do not go forward with a case, particularly in cases of child sexual abuse. This paper seeks to answer the question, "Can recantations be prevented?" A literature review involving child sexual assault recantations is presented, but Hurst concludes that it is difficult to identify a firm percentage of cases in which recantation occurs. She also presents warning signs that recantation may occur, including lack of familial support, media attention on the victim and their family, and a lack of understanding of the legal system. In order to prevent recantation, Hurst describes the steps that should be taken by different members of the criminal justice profession. For example, first responders should take care to listen to the victim and take his/her statement without leading questions, and should remove the victim from the presence of the alleged offender while taking the statements. Other possibilities for prevention include engaging non-offending caregivers in group therapy and using multidisciplinary teams to effectively respond to allegations of child sexual abuse. Hurst concludes that there must be reforms in the investigative process in order to prevent recantation, as further trauma brought on by investigation and prosecution is often the reason for recantation.

*Tanuj Bhushan & Pranati, Witness Protection in India and United States: A Comparative Analysis, 2 INT. JOURNAL OF CRIMINAL JUSTICE SCIENCES 13 (2007)*

The differences between witness intimidation laws and policies in India and the United States are examined in this paper. Bhushan and Pranati emphasize the need for a response to witness intimidation due to the fact that it has a profound impact on both the government's ability to enforce its policies and it

erodes society's confidence in the government. The article introduces some of the difficulties witnesses face in India and describes how and why witnesses may become 'hostile.' It continues with a description of the Indian position on witness protection and a brief description of the American position. It concludes with recommendations for development in the Indian legal code to better protect witnesses, including anonymity of witnesses, waiver of the defense's right to confrontation, and the need for consolidated legislation. Bhushan and Pranati conclude that India has a difficult path to improve its response to witness intimidation, and that the United States is an example to work towards.

*Kerati Kankaew, Thailand's Witness Protection Programme*

Kankaew argues that as the world has grown there has been an increase in crime, and with that increase, evolving dynamics and sophistication of criminals, thus making the criminal justice system increasingly critical to a just society. Witnesses are an integral part of the criminal justice system, and Kankaew argues the witness protection must be a priority for the criminal justice system. She begins with the definition and objective of witness protection. Laws and strategies for implementing those laws in Thailand are included, as well as special measures, benefits of witness protection, and overarching principles governing witness protection. The author presents problems and obstacles the criminal justice system faces in regards to witness protection, and indicates possible solutions for more effective responses to intimidation and witness protection.

*The State of New Jersey, Executive Summary: A Strategy for Safe Streets and Neighborhoods (2007)*

This executive summary introduces violent crime as one of New Jersey's most significant public safety problems, and that gangs and gang activity are a major contributor to these problems. The New Jersey State Police Gang Survey indicated that 43% of municipalities reported gang presence, indicating a need for new approaches to combat the growing problem. The new approach focuses on three areas: enforcement, prevention, and reentry. Each area is presented with five action items that are then explained and detail their execution. Enforcement focuses on targeting gangs and gang members who engage in violence and carry weapons, prevention focuses on targeting at-risk youth and providing necessary programs and services to prevent entry into gangs, and reentry focuses on reducing recidivism rates for gang members and reducing reentry into the gang community. The executive summary ends with a description of the actors of oversight and accountability for the strategy, including the Governor's Oversight Committee for Safe Streets and Neighborhoods and describing the different coordinating councils involved in the program.

*United Nations Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime (2008)*

The United Nations Office on Drugs and Crimes presents this comprehensive guide to protecting witnesses involved in criminal proceedings involving organized crime. The guide begins with the core issue of witness intimidation and its definition. It continues with an introduction of UN mandates involving witness protection, and the process to implement those mandates. The origin of witness intimidation and examples of varied approaches from different countries are discussed, including approaches in both permanent and ad hoc international criminal courts. Key elements of witness intimidation are discussed, including different participants in the criminal proceedings and the crime itself. Current methods of witness protection are also discussed, including witness assistance programs. Setting up a witness protection program is analyzed and presented with examples and procedures, including the responsibilities of participants in the programs, as well as relocation and identity change

procedures. Challenges facing witness protection, including new forms of crime, globalization and advancing technology may impact the face of witness protection. Overall, witness protection programs are to be considered the last possible option in witness security, and the programs should be regularly examined and updated in order for crimes to be more efficiently investigated and prosecuted.

*Use of Video Surveillance In and Near Courtrooms to Reduce Victim and Witness Intimidation*

The low conviction rate in Philadelphia can be partially attributed to commonplace intimidation of victims and witnesses. Intimidation is typically a crime of opportunity, and that opportunity often arises in the courthouse. Although Philadelphia has taken strides to reduce intimidation via weapons through the use of X-rays and metal detectors, intimidation remains a pressing issue. In order to reduce intimidation, the author suggests the use of carefully placed video cameras around the courthouse and in courtrooms to dissuade individuals from intimidating others. Technical considerations are presented, as well as the legality of the cameras. The importance of the public's privacy is recognized in the suggested policy framework, including allowing individuals to know they are being recorded.

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