

NEW YORK STATE BAR ASSOCIATION Journal



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Social Equity in Cannabis Legalization

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**A Key Issue as
New York Considers
Legalization
This Month**
Aleece Burgio

NYSBA Plays Key Role in National Access
to Justice Measure

Domestic Violence Survivor-Defendants:
New Hope for Humane and Just
Outcomes

Presumptive ADR in New York State

**LAW PRACTICE
MANAGEMENT:
CONTRACT
PREPARATION AND
NEGOTIATING**

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Journal

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Domestic Violence Survivor-Defendants: New Hope for Humane and Just Outcomes

By Cynthia Feathers



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Over time, a community's sense of justice and fairness can shift, and such cultural changes can impact criminal sentencing laws. In New York, such a dynamic played out regarding drug crime sentencing laws. More than a decade ago, a movement coalesced to revamp Rockefeller Drug Laws, which required long prison terms for many people convicted of drug offenses and were ultimately deemed draconian and not in the best interests of society. A series of major changes included the elimination of mandatory prison sentences for some offenses; the reduction of minimum prison terms for others; and judicial discretion to offer treatment alternatives to people whose substance abuse was a contributing factor to their convictions for nonviolent crimes.

Now a critical shift is happening in the treatment of domestic violence victims who commit crimes due to their own victimization. The change is long overdue. The relevant numbers are staggering. Family violence is the number one cause of injury to women in the United States; attacks by abusers result in more injuries requiring medical treatment than rapes, muggings, and motor vehicle accidents combined.¹ Three out of four women serving sentences in New York prisons suffered severe physical violence at the hands of an intimate partner during adulthood.² Further, two out of three women serving time in a New York prison in 2005 for killing a person close to them were abused by the victim of the crime.³

TRAUMA AND SENTENCING

Criminal justice laws in New York have not kept up with the social sciences. In other realms, effective trauma-informed approaches have been developed. For example, in the past decade, to develop appropriate treatment models, the federal government has studied how trauma, substance abuse, and mental health interact; and trauma-informed practices have also been attempted in child welfare and juvenile justice contexts. When it comes to how to respond to domestic violence survivors who commit crimes, New York's Penal Law has not reflected a real recognition of the impact of such trauma. The new law takes an important step in that direction.

It is well-established that trauma – or an individual's response to events experienced as threatening, terrifying or overwhelming – reshapes that person's world view and affects all aspects of life, including health, self-worth, and behavior. People who experience the trauma of domestic violence often report self-blame, extreme fear, a sense of betrayal, and a view of the world as a dangerous place. Every thought and act is about survival – the victim's and her children's. New York laws are moving past outmoded notions that severely punish domestic violence victims who do protect themselves by acts against their abusers, or who commit crimes as a result

of the coercion of the abuser. In other circumstances, survivors may turn to drugs or alcohol to cope with the effects of trauma and subsequently commit crimes connected to their substance abuse. An informed view is that, because these survivors' decisions and actions are driven by trauma, in appropriate cases, the emphasis should be on rehabilitation and treatment, not punitive imprisonment and prolonged separation from family and society.⁴

The first attempt by New York to show compassion and mercy for domestic violence victims who committed crimes was a failure, for numerous reasons.⁵ An exception to Jenna's Law (the 1998 Sentencing Reform Act), codified in Penal Law § 60.12, was designed to provide sentencing relief to some survivor-defendants. But the exception was too narrowly drawn, applying only to certain homicides and assaults committed against the abuser, even though domestic violence victims commit a range of crimes due to abuse. The law also did not provide for meaningful sentence reductions, nor did it permit alternatives to incarceration. After 12 years on the books, the exception had been applied to only one defendant.

COALITION'S CRUSADE

Last year, significant progress was finally achieved. A decade-long crusade by the Coalition for Women Prisoners – a broad group including legislators, judges, survivors, currently and formerly incarcerated persons, defense lawyers, and domestic violence advocates – resulted in the overhaul of sentencing laws for domestic violence survivors. Signed into law in May 2019, the Domestic Violence Survivors Justice Act (DVSJA) gives judges discretion to sentence certain survivors to much shorter prison terms, and in some cases, to community-based alternatives to incarceration.⁶ The new law also makes resentencing available for some previously sentenced survivors. While covering people of all genders, the DVSJA is expected to benefit mainly women and transgender individuals, because of the highly disproportionate impact of domestic violence on them.

Like the drug law reforms, the DVSJA signifies a recognition that prior sentencing statutes were too harsh and inflexible. Shorter sentences and treatment options should be offered, and retroactive relief should be available. Unlike the drug law reforms, however, the DVSJA provides only for discretionary, not mandatory, relief.

While the new law holds significant potential to bring survivor-defendants home sooner to their families, discretionary relief cannot be granted unless a three-part test is met: (1) that at the time of the offense, the survivor was a victim of substantial physical, sexual or psychological abuse by an intimate partner or relative;

(2) that the abuse was a significant contributing factor to the crime; and (3) that a sentence under standard sentencing provisions would be unduly harsh. The test applies for both prospective sentencing and retroactive resentencing. Four categories of crimes are excluded: first-degree and aggravated murder, terrorism, and sexual offenses.

Individuals seeking resentencing must be currently incarcerated and serving a sentence of at least eight years. An important feature of the new law is that, where these applicants meet threshold eligibility requirements, they have the right to assigned counsel throughout the resentencing litigation.

As to the “unduly harsh” element, for both sentencing and resentencing, the re-traumatizing impact of lengthy incarceration may be one of the relevant factors, given the parallels between the conditions inherent in incarceration and domestic violence: for example, a lack of autonomy, a lack of privacy, punishment inflicted for minor infractions, and privileges earned through compliant behavior.

For resentencing candidates, the question appears to be whether the sentence originally imposed was excessive, in light of the abuse suffered and myriad other factors, which might include evidence of an applicant’s good record achieved while in State prison. Finally, it may well be that our evolving standard regarding appropriate punishment for survivors, and our rising consciousness about the plight of criminalized survivors, will cause judges to find some original sentences to be “unduly harsh” and the result of outdated sentencing notions.

LEGISLATORS AND JUDGES

Three State legislators are widely lauded by advocates for their leadership in the passage of the legislation. Assembly Member Jeffrion Aubry (D-Queens) long championed and sponsored the Assembly bill, along with former State Senator Ruth Hassell-Thompson (D-Bronx), who fought for the Senate version from the early days. More recently, Senator Roxanne Persaud (D-Brooklyn) led the charge in the Senate in sponsoring the DVSJA.

The broad coalition seeking reform in the sentencing of domestic violence victims also included New York judges. One such judge was the Honorable Marcy L. Kahn, whose legal career has included nearly three decades as a judge in New York City Criminal Court and Supreme Court, and more recently, several years as an associate justice at the Appellate Division, First Department. She is now retired from the bench.

Judge Kahn became involved in the DVSJA as a result of her role as a chair and a member of the Women in Prison Committee of the New York Chapter of the National Association of Women Judges. In offering

insights regarding the drafting of the DVSJA legislation, she drew upon her experience with drug law reform and in visiting many domestic violence survivors in prison. “The DVSJA is a good law in part because it is the product of the perspective of so many stakeholders, and it affords protection not only for crimes against abusers, but also for crimes committed at the behest of the abuser,” she asserted. Judge Kahn opined that the law would not have passed if not for the leadership of the two women who led the Women in Prison Project of the Correctional Association of New York (CANY), a nonprofit advocacy organization.

ADVOCATES' ROLE

Those advocates, Jaya Vasandani and Tamar Kraft-Stolar – who in turn emphasize the invaluable leadership of many other individuals and groups – now serve as co-directors of the Women & Justice Project, a nonprofit that partners with women impacted by incarceration. Vasandani and Kraft-Stolar observed that a primary aim of the DVSJA was to broaden the narrow scope of the prior Penal Law § 60.12 exception, including by providing for relief where the defendant’s crime was not against the abuser. They noted that this aspect of the DVSJA is one of many indications that the new law does not require the abuse to be simultaneous to the offense.

In 2012, prosecutors raised concerns that, by providing for relief as to crimes not committed against the abuser, the proposed law would not adequately consider the rights of innocent victims. There were two responses to such concerns. First, abusers often coerce or compel survivors to commit a range of crimes – through threats, violence, manipulation, and creating a culture of fear. Second, survivor-defendants are also victims. Both types of victims deserve compassion and justice. Further, some innocent victims might well support lenience toward perpetrators upon learning that their criminal acts flowed from abuse and coercion.

Prosecutors also expressed concerns in 2012 about the potential impact of the bill on public safety. The CANY explained that such fears are unfounded. The vast majority of survivors convicted of crimes directly related to their abuse have no prior felony convictions, no history of violent behavior, and extremely low recidivism rates.⁷ As to the final factor, out of 38 women convicted for murder and released from 1985 to 2003, not a single one returned to prison for a new crime within three years of release.⁸

Advocates have noted that the criminal justice landscape has changed since the DVSJA was opposed in 2012. A deeper understanding about survivors by all participants in the criminal justice system could mean that humane treatment of these victims will not end when they com-

mit crimes because of their abuse. When appropriate, perhaps no charges or lesser charges will more often be brought. Surely, in some worthy cases (more than one in the first 12 years), severe abuse will be deemed an appropriate mitigating factor, and alternative sentences will be imposed on survivor-defendants.

SURVIVORS' STORIES

A striking feature of the Coalition's DVSJA efforts was the central role played by survivors of domestic violence who had been, or still were, in State prison for their crimes. Two survivors who were leaders in the DVSJA campaign testified before the State Senate in 2012. Both women were charged in the killing of their abuser, and both exemplified a truth set forth in the Assembly Memorandum in Support of the DVSJA: that survivors who have suffered abuse often become involved in the criminal justice system in part because of inadequate protection, intervention, and support.

One survivor, Kim Dadou Brown, who served 17 years in prison before she was paroled, detailed harrowing years of brutality she endured – and failures by police, the courts, and also defenders to take her accusations seriously. She declared that the DVSJA is essential so that the criminal justice system will protect victims of abuse, not turn against them, and will not condemn survivors who protect themselves, but will instead give them a real opportunity to rebuild their lives.

Another survivor, LadyKathryn Williams-Julien, also described years of severe abuse; the lack of protection from police and hospitals that treated her after beatings; and the lack of insight shown by a prosecutor who disparaged her for not leaving her abuser. Thanks to the intervention of domestic violence advocates, her case had a far more positive outcome than that of Ms. Brown. After the first jury could not reach a verdict, advocates persuaded prosecutors to reconsider their position.

The District Attorney reduced the charges, and the survivor was sentenced to five years of probation and an alternative-to-incarceration program. Such alternatives may include mental health treatment, drug and alcohol rehabilitation, and community service programs. The services this survivor received built her confidence and helped her find her voice and reclaim her life. She urged that courts should have the discretion to consider what led to survivors' crimes and give domestic violence victims a second chance.

A window into how women survivors have reacted to the DVSJA was provided by Juli Kempner, who has spent two years as part of a volunteer visiting project at Bedford Hills, New York's only maximum security prison for women. She has had contact with scores of domestic violence survivors, whose offenses stemmed

from their histories of abuse, many of whom face sentences of 25 years to life. Some are in their 30s and have been behind bars since age 16, while others are in their 50s and will not be eligible for parole until they are in their 70s. Most of these women had no previous history of crime.

When the DVSJA was enacted, there was "a ripple of hope" in State prisons for women. Survivors who had lost hope suddenly changed their thinking. The new law quickly became the talk of survivors and their families. "Everyone I've been able to communicate with looks forward to the opportunity to come home and make meaningful contributions to their communities," Kempner reported.

DVSJA IMPLEMENTATION

Even before the DVSJA was enacted, four appellate defender offices in New York City took the lead in the implementation of the resentencing provisions. They reached out to the Mayor's Office of Criminal Justice about the role they could play and strategized together. Drawing upon lessons learned from implementation of drug law reforms, they developed a strategy for outreach to clients to inform them about the new law; prepared pro se packets of materials for other resentencing candidates; and developed protocols to connect incarcerated individuals with appropriate provider offices in the county of conviction. In addition, the New York City appellate providers have provided a training curriculum on sentencing and resentencing under the DVSJA.

The New York State Department of Corrections and Community Supervision (DOCCS) was helpful in providing lists of nearly 500 incarcerated women and 12,000 incarcerated men who met threshold eligibility requirements, and in allowing for the provision of pro se packets in prison libraries, according to Kate Skolnick, a Supervising Attorney at the Center for Appellate Litigation. She said that early implementation challenges have included obtaining prison, court, and police records, and dealing with differing procedures among the criminal courts.

One of the most proactive upstate legal communities has been Onondaga County, where the Assigned Counsel Program (ACP) of the county bar association and the Hiscock Legal Aid Society (HLAS) have collaborated to develop a DVSJA program to provide effective resentencing representation, according to Kathleen Dougherty and Linda Gehron, Executive Directors of the ACP and HLAS, respectively.

These Syracuse-based offices contacted all of the potentially eligible women in prison who had been convicted and sentenced in Onondaga County; and they made, or plan to make, in-person prison visits to all resentencing clients. Further, given the demanding nature of the

resentencing applications and hearings, the ACP will assign two private trial attorneys from its panel to every applicant, whereas HLAS has full-time attorneys available for such representation.

To achieve efficiency in representation, the ACP and HLAS collaborated to develop resources and protocols for the private attorneys involved. These attorneys had a special interest in the DVSJA, volunteered to serve, and agreed to undergo a DVSJA training regimen. Dougherty said that the county judges were supportive and understanding of the need for a first and second chair and the benefits of representation by a cadre of specially trained attorneys. In addition, investigators, experts, mitigation specialists, and social workers will be necessary for many resentencing applications.

Gehron noted that the HLAS resentencing representation process starts with an initial in-house legal and social work assessment regarding the merits of each claim and then proceeds to gathering necessary documentation and making a resentencing motion, followed by hearings and, if necessary, appeals.

Onondaga County is a “*Hurrell-Harring* county.” When the state was sued for denying effective representation to criminal defendants in *Hurrell-Harring v. State of N.Y.*, Onondaga and four other counties were added to the suit. After the Court of Appeals allowed the lawsuit to go forward,⁹ a settlement approved by Albany County Supreme Court in 2015 resulted in state funding to the five subject counties to improve the quality of representation to criminal defendants, with guidance by the State Office of Indigent Legal Services. Because the state has fully funded Settlement implementation, the aforementioned DVSJA resources are available to private attorneys who take these cases on an assigned basis. More recently, state funding has been provided to all other counties to supplement local funding for the mandated defense of criminal defendants unable to afford counsel.¹⁰

Both New York City and upstate providers have focused initially on incarcerated women, in part because of the far more manageable numbers; and they are developing strategies for advising incarcerated men of their rights and providing resentencing representation where needed. Syracuse attorney Alan Rosenthal, who has four decades of criminal defense experience, developed the Onondaga County training materials. He opined that the biggest implementation hurdle will not be addressing certain thorny phrases or silences in the DVSJA, but in shifting the consciousness of prosecutors, defense attorneys, and judges about victims, trauma, and sentencing.

STATEWIDE AND PRO BONO EFFORTS

To coordinate and support statewide efforts, a 19-member DVSJA Statewide Defender Task Force was established by the New York State criminal defense bar in January 2020. Co-chairs Skolnick and Rosenthal plan to focus on analyzing DVSJA challenges for sentencing and resentencing and developing strategies to meet those challenges; drafting legal memoranda regarding relevant issues; staying abreast of DVSJA trial and appellate-level litigation around the State; developing and sharing practice materials statewide on relevant websites¹¹ and listservs; and establishing a DVSJA training program for criminal defense attorneys. Pro bono programs have been launched to support this effort.

Defender agencies and pro bono groups are supporting resentencing applicants in a variety of ways, including in helping to prepare the required initial request for permission to make a resentencing motion and to be assigned counsel. The resentencing applicants must meet threshold eligibility criteria for permission to apply and be assigned counsel. To clear this hurdle, many incarcerated survivors need assistance. Working with Kate Mogulescu, Assistant Professor of Clinical Law at Brooklyn Law School, the New York City law firm of Cleary Gottlieb launched a pro bono project to provide the needed assistance.

Lawyers visit the Bedford Hills Correctional Facility to assist women with determining eligibility for resentencing and complete the necessary paperwork, and then they file the documents with the sentencing court. Cleary lawyers have met with numerous survivor-defendants since the December 2019 launch of the project, according to Jennifer Kroman, Cleary’s Director of Pro Bono Practice and leader of the project.

TRAINING JUDGES AND LAWYERS

As an essential element of effective DVSJA implementation, Judge Kahn highlighted the need for training judges about the DVSJA. “Trauma-informed sentencing is not a familiar concept to many criminal judges. There needs to be a greater understanding about the effects of abuse over a long period of time and what the impact of trauma looks like.” She noted that sometimes a male defendant will receive a far more lenient sentence than a female defendant who committed the same crime – perhaps because the crime by the woman who protects herself may provoke greater outrage and offend our sensibilities. Moreover, sometimes not enough consideration is paid to the low risk of recidivism by survivor-defendants and to the fact that the criminal acts were an aberration, committed due to abuse, Judge Kahn observed.

A former prosecutor herself, the judge asserted that training is also needed for prosecutors in domestic vio-

lence and the DVSJA. Prosecutors should not be too quick to seek lengthy sentences for survivors and should instead consider whether justice and society would be better served by lenience, rehabilitation, and reintegration of the survivors into society, she reflected.

Rosenthal noted that many victims do not recognize their own victimization. “They are so traumatized that they do not know how wrong the abuse is and don’t pursue relevant defenses.” He emphasized the importance of DVSJA training for criminal defense attorneys, many of whom do not have extensive experience in representing domestic violence victims or others suffering from trauma, including how to sensitively conduct interviews to elicit salient information.

TWO EARLY CASES

To date, few applications for sentencing or resentencing have been decided under the DVSJA. The Legal Aid Society of New York City has reported that in January 2020, upon the consent of the prosecutor, a defendant was resentenced under the DVSJA in a Brooklyn case. For her conviction for first-degree manslaughter, this defendant had originally been sentenced to 10 years of imprisonment, followed by five years of post-release supervision. She was resentenced to time served, or five years of imprisonment, followed by three years of post-release supervision. This resulted in the survivor, who had been released to community supervision, being discharged from her sentence.

In a Poughkeepsie case, *People v. Addimando*, the defense presented extensive evidence regarding the abuse of the defendant by her partner – the homicide victim. In April 2019, the jury rejected a justification defense and convicted the defendant of second-degree murder. A mother of two young children, the defendant had no prior record of crime or violence. While the proof of abuse was not deemed to constitute self-defense, it was relevant as sentencing mitigation. At a September 2019 hearing to determine the defendant’s eligibility for a DVSJA sentence, defense attorneys John Ingrassia and Ben Ostrer relied upon the trial proof of abuse, as well as additional testimony presented.

A domestic violence expert was called to address many myths, including that abusers have an anger management problem and should be easily identifiable, or that it is inexplicable that a victim does not leave her abuser. The expert explained that domestic violence is complicated, abusers act out of a need for control, and victims often feel conflicted. Despite the abuse, they may still love the abuser, do not want to break up the family, and want the abuse to stop, but not to lock up the abuser. Further, trying to leave can be very dangerous, and in fact often proves fatal, the expert explained. The defen-

dant’s treating therapist also testified and detailed the injuries she observed, the defendant’s contemporaneous reports about the abuse by her partner, her fears, and her many attempts to leave him.

In a decision rendered February 5, the trial court held that the defendant would not be sentenced under the DVSJA, because there was insufficient proof that abuse allegedly perpetrated by the victim against the defendant was a significant contributing factor to the crime.

NATIONAL MODEL

The DVSJA is unique and can inform advocacy efforts nationwide, according to Andrea Yacka-Bible, a Supervising Attorney at the Legal Aid Society in New York City, who previously served as a legal advocate at the National Clearinghouse for the Defense of Battered Women, a nonprofit based on Philadelphia. She also noted that, in the past decade, there has been a growing acknowledgement that incarceration can be re-traumatizing to survivor-defendants.

“It is enormous progress that the New York State Legislature and the Governor have recognized that, if you show that substantial abuse was a significant contributing factor in committing the crime, there should be the possibility of a lesser sentence, and that there is a right to counsel for resentencing motions,” she observed. In sum, the DVSJA represents an important step forward in achieving justice for victims of domestic violence. The new law places New York in the lead nationwide in recognizing the role abuse can play in crime, Yacka-Bible concluded.

1. Stark and Flitcraft, *Violence among Inmates, an Epidemiological Review*, Handbook on Family Violence (1988); Uniform Crime Reports, Special Report: Violence among Family Members and Intimate Partners, FBI (2003, rev. Jan. 2005).

2. Browne, Miller, and Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization among Incarcerated Women*, Int’l. J. of Law & Psychiatry 22 (3–4) (1999).

3. New York State Department of Correctional Services, *Female Homicide Commitments: 1986 vs. 2005*, 14 (July 2007).

4. This more informed view is consistent with an amendment to Penal Law § 1.05 (6) (2006 N.Y. Laws, ch. 98), which states that the purpose of sentencing statutes includes: “To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection” [emphasis added].

5. Kraft-Stolar et al., *From Protection to Punishment: Post-Conviction Barriers to Justice for Domestic Violence Survivor-Defendants in New York State*, Cornell Legal Studies Research Paper No. 11-21, June 1, 2011, at 11–13.

6. 2019 N.Y. Laws, ch. 31.

7. Canestrini, *Follow-up Study on Bedford Hills Family Violence Program*, NYS DOCS Research Unit (1994), at 4.

8. Kraft-Stolar, *From Protection to Punishment*, *supra*, at n.22.

9. 15 N.Y.3d 8.

10. See Executive Law § 832 (4). NYSBA strongly supported state funding for mandated representation of criminal defendants throughout New York State.

11. One website containing DVSJA resources for resentencing applicants and criminal defense attorneys is found at <https://www.ils.ny.gov/content/domestic-violence-survivors-justice-act>.