

Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders

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This Article is the first legal scholarship to analyze domestic violence civil protection orders and response systems using the Stages of Change Model from the field of psychology. The Stages of Change Model, which describes how domestic violence survivors end relationship violence, includes five stages: (1) pre-contemplation; (2) contemplation; (3) preparation; (4) action; and (5) maintenance. According to the model, ending intimate partner violence is an iterative and complex process, and survivors typically revisit earlier stages as they progress toward maintaining freedom from violence. The model has been validated by numerous studies and is widely accepted in the psychology community. As a result, it is a powerful tool for evaluating the legal treatment of domestic violence.

A heightened focus on the civil protection order remedy is warranted because of its potential to increase the domestic violence survivor's safety and autonomy, unlike recent mandatory criminal policies that give control over arrest and prosecution decisions to the state without regard to a survivor's belief about how the action will affect her safety. The civil protection order is also the remedy that survivors most often choose to address the violence. An exploration of the individual stages in the Stages of Change Model, however, reveals deficiencies in the protection order remedy and suggests procedural rule reforms, substantive law changes, and improvements to legal and advocacy interventions. For example, while current procedural rules and judicial practices penalize petitioners for seeking the court's assistance multiple times, I propose rule changes that would allow petitioners to access the legal system designed to protect them. The Article also offers economic and safety justifications for advocacy support across the stages in response to the current system's failure to address survivors' safety planning needs in the preparation stage and the emotional and tangible resources they need to sustain an end to violence in the maintenance stage. Among other legal reforms, I identify substantive law changes necessary to the maintenance stage, such as making monetary relief statutorily available in protection orders to enable low-income or economically dependent survivors to end violent relationships. The

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advancements inspired by using the lens of the Stages of Change Model would enable civil protection orders to better respond to survivors' actual experiences and needs and encourage survivors' progression through the stages to achieve freedom from violence.

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I. INTRODUCTION

The past several decades of domestic violence reform have centered on criminalizing domestic violence and strengthening the criminal justice system's response,¹ as exemplified by the proliferation of mandatory arrest and prosecution policies² and the escalation of funds dedicated to criminal justice-oriented programs under the Violence Against Women Act (VAWA).³ Though well-intentioned, the mandatory policies focus on the state's interests and fail to take into account a domestic violence survivor's wishes and assessment of how the state action will affect her⁴ safety and

¹ See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 748 (2007) (describing criminalization efforts as being "in the forefront of domestic violence reforms"); Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 358 (2008) (describing criminalization as "the focus of U.S. domestic violence advocacy").

² Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 4 (1999) [hereinafter Epstein, *Effective Intervention*].

³ A major portion of VAWA funding is devoted to the STOP Violence Against Women Formula Grant Program, which awards grants to states to develop their criminal justice responses, with \$189 million being allocated to STOP grants in fiscal year 2010. CAMPAIGN FOR FUNDING TO END DOMESTIC AND SEXUAL VIOLENCE: FY 2010 APPROPRIATIONS BRIEFING BOOK 5, 7 (2009), available at <http://www.nnedv.org/docs/Policy/fy10briefingbook.pdf>. Grants to encourage arrest policies were allocated an additional \$60 million, by far the largest category of funding after STOP grants under VAWA's grants to combat violence against women. *Id.* at 7. VAWA funding primarily has a criminal justice focus, but has expanded to other victim services and outreach. *See id.* at 5; *STOP Violence Against Women Formula Grant Program*, U.S. DEP'T OF JUSTICE, http://www.ovw.usdoj.gov/stop_grant_desc.htm (last visited Feb. 25, 2011).

⁴ In this Article, I will typically refer to individuals who have experienced abuse as female and to perpetrators of abuse as male. This is not meant to discount the existence of domestic violence in same-sex relationships or the reality that men also experience intimate partner abuse. It is a reflection of the fact that most domestic violence is experienced by women at the hands of men, and is consistent with the general statistic that approximately 85% of victims of domestic violence are female. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS 1 (2005) ("Females were 84% of spouse abuse victims and 86% of victims of abuse at the hands of a boyfriend or girlfriend."); *see also* Jean H. Hollenshead et al., *Relationship Between Two Types of Help Seeking Behavior in Domestic Violence Victims*, 21 J. FAM. VIOLENCE 271,

welfare, thereby denying her autonomy and potentially increasing her danger.⁵ The law, however, has the potential both to foster the survivor's agency and combat oppression. Between 1976 and 1993, all fifty states and the District of Columbia enacted civil protection order laws⁶ with the

271 (2006) (“[T]he most salient risk factor for becoming a victim of violence is to be a woman”).

⁵ See *infra* Part II; see also Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 505 (1995). Rivera describes mandatory arrest policies as “philosophically in opposition to feminist and civil rights doctrines which have been founded on notions of individual and community empowerment and community-based control.” *Id.*

⁶ LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 33 (2008). In most jurisdictions, a petitioner may seek a protection order against a family member, intimate partner, or roommate, or someone who has sexually assaulted or stalked her. See, e.g., D.C. CODE § 16-1001 (Supp. 2010); WASH. REV. CODE § 26.50.010 (2011). To receive a protection order, the petitioner must prove by a preponderance of the evidence that the respondent committed domestic violence against the petitioner, as defined by the state statute. The petitioner may then be awarded safety-related relief such as an order that prohibits the respondent from assaulting, threatening, stalking, harassing, coming near, or contacting the petitioner; that awards child custody, visitation, and the possession of certain property; and that requires the respondent to vacate a shared residence, complete treatment for domestic violence and drug or alcohol abuse, and pay attorney's fees. See, e.g., D.C. CODE § 16-1005 (Supp. 2010); WASH. REV. CODE § 26.50.060 (2011).

Many improvements have been made to the protection order remedy since its inception. While early protection order laws protected married women from abusive husbands, over time, legislatures recognized the range of relationships in which domestic violence occurs and amended statutes to provide protection for dating relationships, roommates, and a broader range of family and blood relationships. See Margaret Martin Berry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 352 n.47 (1995) (explaining that as of the mid-1990s, most protection orders allowed people to file for a protection order when they were the spouse, cohabitant, or family member of the alleged abuser, or shared a child with the alleged abuser. In the mid-1990s, states began expanding the protected class to include dating relationships, former spouses, and parties who had sexual or intimate relationships.).

Legislatures also amended the statutes to be gender neutral, which expanded relief to same-sex couples and permitted men who had been abused by female partners to seek protection. Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN'S L.J. 259, 260 (2008) (describing changes made by a majority of states). In recent years, in light of evidence that one in three teenagers experiences teen dating violence, legislatures are beginning to expand statutes to offer protection to abused minors. Christian Molidor & Richard M. Tolman, *Gender and Contextual Factors in Adolescent Dating Violence*, 4 VIOLENCE AGAINST WOMEN 180, 184 (1998); see, e.g., D.C. CODE § 16-1003 (Supp. 2010) (amending the prior statute that did not address the ages of the parties to identify petitioners and respondents as being

universal goals of counteracting abuse, safeguarding domestic violence victims from further threats or violence, and protecting the survivor's peace of mind⁷ through a remedial remedy that provides "immediate and easily accessible protection"⁸ to wide-ranging injunctive relief. Indeed, the civil protection order remedy has shown promising results for increasing survivor safety and autonomy.⁹

The protection order, the most survivor-centered remedy readily available in courthouses across America, has the ability to shift power and control back to the person who has experienced violence. To be awarded a

age twelve or older); WASH. REV. CODE § 26.50.010(2) (2011) (addressing teen dating violence by expanding the age at which a petitioner can seek a protection order).

⁷ See, e.g., IND. CODE § 34-26-5-1 (2008) (maintaining that Indiana's Civil Protection Order Act "shall be construed to promote the: (1) protection and safety of all victims of domestic or family violence in a fair, prompt, and effective manner; and (2) prevention of future domestic and family violence"); N.J. STAT. ANN. § 2C:25-18 (West 2005) (declaring the legislature's intent to assure domestic violence victims "the maximum protection from abuse the law can provide. . . . Further, it is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting by providing access to both emergent and long-term civil and criminal remedies and sanctions . . ."); TENN. CODE ANN. § 36-3-618 (2010) (explaining the Tennessee Legislature's intent to provide domestic abuse victims with enhanced legal protection from violence); WASH. REV. CODE § 70.123.010 (2011) (finding that there is a "present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence"); W. VA. CODE § 48-27-101(a)-(b) (2010) (recognizing the ongoing violence victims may experience and the elevated danger at the point of separation, the legislature desired to create a "speedy remedy to discourage violence against family or household members with whom the perpetrator of domestic violence has continuing contact"); *Robinson v. Robinson*, 886 A.2d 78, 86 (D.C. 2005) (finding that safety concerns trump property rights in light of the law's broad remedial purpose).

⁸ LA. REV. STAT. ANN. § 46:2131 (1982); see also Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1070 (1993) (emphasizing the expedited nature of the proceedings because "the exigent circumstances of domestic violence require speedy determinations of whether a protection order will be issued, continued, or changed"). Legislatures also recognized that domestic violence remedies needed to be available to lay litigants and, to this end, many jurisdictions developed simplified, uniform forms for every stage of the process, from filing an initial petition to modifying, extending, or enforcing the court's order. See Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 273 (2004) (explaining how the use of simplified, standardized forms makes it easier for petitioners to proceed pro se in domestic violence protection order proceedings); Hon. Hollis L. Webster, *Enforcement in Domestic Violence Cases*, 26 LOY. U. CHI. L.J. 663, 671 (1995) (explaining that the domestic violence law is intended to make the court system "user friendly" to encourage the entry of protective orders to avoid further harm).

⁹ See *infra* Part II.B.

civil protection order—the violation of which carries criminal consequences—domestic violence survivors can file a petition that includes the allegations they wish to move forward on.¹⁰ They can request emergency safety-related relief to be awarded the day they file, the longer-term relief they desire, and a full hearing within weeks of filing. While survivors frequently do not desire a criminal response,¹¹ they do often choose to engage the civil justice system on their own terms. In fact, the protection order is now the single most commonly used legal remedy for domestic violence, with survivors frequently choosing to use only the civil justice system in their efforts to intervene in and prevent violence.¹² There are also substantial economic benefits to protection orders, with a recent study conservatively estimating that protection orders save the state of Kentucky \$85 million per year.¹³ Although the focus on the criminal justice system

¹⁰ Many state civil protection order statutes require physical abuse or threats of violence as grounds for awarding an order. This definition of domestic violence, which looks for criminal acts, can be distinguished from an advocacy-based understanding of domestic violence that recognizes the multi-faceted ways that abuse can be perpetrated, including acts of intimidation, humiliation, or isolation; economic abuse; controlling the children; controlling another's immigration status; preventing the survivor from working, attending school, or sleeping; and harming property and pets; in addition to physical assaults and threats of physical violence. See Jane K. Stoeber, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1212–14 (2009) (discussing how current statutory definitions of domestic violence rely on a criminal definition and oversimplify the problem of domestic violence by failing to include the many ways in which abusive partners exercise power and control in relationships).

¹¹ See *infra* Part II.A., II.B.3.

¹² Susan Keilitz, *Improving Judicial System Responses to Domestic Violence: The Promises and Risks of Integrated Case Management and Technology Solutions*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES 147, 149 (Albert R. Roberts ed., 2002) (finding that survivors are more likely to seek relief from violence solely in the civil system through protection orders, as compared to using the criminal justice system); see also Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008) (citing civil protection orders as the “most commonly used legal remedy for domestic violence”); EXAMINING THE WORK OF STATE COURTS, 2005, at 38 (Richard Schauffler et al. eds., 2006) (reporting the protection order caseloads in twenty-seven states in 2005 and finding that a total of 598,254 protection orders were sought in the selected states that year); PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii, 52 (2000) (determining that each year, approximately 17% of the 1.5 million female victims of domestic violence obtain civil protection orders).

¹³ TK LOGAN ET AL., THE KENTUCKY CIVIL PROTECTIVE ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTIVE ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COSTS 8 (2009) (considering a range of costs, including

predominates, heightened attention to protection orders is warranted for these multiple reasons.

But we are still near the beginning of formal efforts to respond to domestic violence, and protection orders are not a panacea for all survivors. Numerous shortcomings in the laws and processes by which civil protection orders are awarded reduce the effectiveness of orders,¹⁴ and understanding the actual process that survivors go through in ending intimate partner violence is critical to improving the remedy they most frequently rely on.

The Stages of Change Model from the field of psychology describes the process of how domestic violence survivors end relationship violence¹⁵ and is, therefore, a useful tool for examining domestic violence protection order laws and response systems. The model includes five distinct stages that emerged from researchers' interviews with women who were abused by intimate partners: (1) pre-contemplation; (2) contemplation; (3) preparation; (4) action; and (5) maintenance.¹⁶ Importantly, the model finds that the evolution through the stages occurs in a cyclical sequence, rather than a linear fashion, and survivors will typically revisit earlier stages as they move toward "maintenance."¹⁷ Essentially, ending violence is a process.

costs related to medical care, mental health, legal processes, criminal justice, lost earnings and property, and time lost for family and civic responsibilities, along with a quality of life index).

¹⁴ See, e.g., WASH. REV. CODE § 26.50.030 note (2011) (finding in 1992 that "refinements are needed so that victims have the easy, quick, and effective access to the court system envisioned at the time the protection order process was first created," and finding that domestic violence survivors who have limited English proficiency have difficulty filing petitions, court forms are inconsistent with the state's Domestic Violence Prevention Act, and problems with enforcement of orders abound). See generally *infra* Part IV.

¹⁵ See Jody Brown, *Working Toward Freedom from Violence: The Process of Change in Battered Women*, 3 VIOLENCE AGAINST WOMEN 5, 5 (1997); Jessica G. Burke et al., *Defining Appropriate Stages of Change for Intimate Partner Violence Survivors*, 24 VIOLENCE & VICTIMS 36, 36 (2009) (describing quantitative research and findings consistent with earlier qualitative studies); Jessica G. Burke et al., *Ending Intimate Partner Violence: An Application of the Transtheoretical Model*, 28 AM. J. HEALTH BEHAVIOR 122, 122–23 (2004) [hereinafter Burke et al., *Ending Intimate Partner Violence*]; Jessica G. Burke et al., *The Process of Ending Abuse in Intimate Relationships: A Qualitative Exploration of the Transtheoretical Model*, 7 VIOLENCE AGAINST WOMEN 1144, 1144 (2001) [hereinafter Burke et al., *The Process of Ending Abuse*]; Kelly H. Burkitt & Gregory L. Larkin, *The Transtheoretical Model in Intimate Partner Violence Victimization: Stage Changes Over Time*, 23 VIOLENCE & VICTIMS 411, 412 (2008).

¹⁶ Brown, *supra* note 15, at 9–10.

¹⁷ *Id.* at 9.

Consistent with feminist theory, domestic violence laws should be grounded in and responsive to survivors' actual experiences and needs.¹⁸ Roscoe Pound's call for a sociological jurisprudence,¹⁹ in which he brought together the social sciences and law in arguing that the law should respond to social needs,²⁰ is a historical antecedent to this approach to law reform. More recent attempts to make law responsive to human experience can be seen in behavioral law and economics,²¹ law and psychology,²² law and society,²³

¹⁸ ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 35–36, 59–60 (2000) (explaining that because of its roots in the methodology of consciousness-raising, feminist theory has consistently advocated that the law should be grounded in women's experiences); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 94 (1991) (explaining that a feminist approach to law reform includes "working from women's experience[s]" to "develop legal and cultural strategies that more clearly reveal the struggles we face").

¹⁹ See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609–10 (1908) (arguing that the law should strive for practical utility and stating, "[t]he sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern . . . ; for putting the human factor in the central place and relegating logic to its true position as an instrument"); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 146–47 (1912) ("[T]he conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with life."); *Id.* at 489–90 (explaining that sociological jurists examine the workings of the law, the law's social purposes, and the best means of furthering social concepts); see also ROSCOE POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* 47 (1954) (describing the law as "a social institution [designed] to satisfy social wants"); ROSCOE POUND, *JURISPRUDENCE* 350 (1959) ("Sociological jurists seek to enable and to compel lawmaking, whether legislative or judicial or administrative, and also the development, interpretation, and application of legal precepts, to take more complete and intelligent account of the social facts upon which law must proceed and to which it is to be applied.").

²⁰ Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 519 (2006).

²¹ Behavioral law and economics seeks to respond to people's actual understanding of the world and behavior, rather than classic law and economics' ideal of rationality. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1053 (2000) (arguing that law and economics can utilize a more nuanced understanding of human behavior by drawing on behavioral sciences); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 109 (2009) (explaining that behavioralists emphasize the gap between real human behavior and rationalist assumptions and recognize rationality failures).

²² See, e.g., Richard E. Redding, *How Common-Sense Psychology Can Inform Law & Psycholegal Research*, 5 U. CHI. L. SCH. ROUNDTABLE 107, 107–08 (1998) (providing examples of psycholegal research, including the examination of eyewitness testimony,

and even constitutional law.²⁴ In this Article, I draw from psychology and social science studies to improve the law in a way that is consistent with Pound's call for a sociological jurisprudence and the recent moves made by these other disciplines, and that recognizes that law does not exist in a vacuum and should be responsive to human behavior and the lived reality of domestic abuse survivors.²⁵

An awareness of the common process of ending domestic violence described by the Stages of Change Model prompts a critical examination of the legal system designed to intervene in intimate partner violence. An exploration of the model's findings reveals deficiencies in the law's response to domestic violence and suggests procedural rule reforms, substantive law changes, and improvements to legal and advocacy interventions. Recognizing that some women wish to end the relationship with an abusive partner, while others wish to maintain the relationship but without the violence,²⁶ the analysis in this Article is applicable to both decisions and is aimed at generally making survivors safer.²⁷

Part II of this Article examines the social and legal context that led policy makers to focus on criminalization at the expense of survivors' autonomy and concerns about their own safety, and explores the civil protection order's potential for increasing survivors' safety and autonomy. Part III applies the Stages of Change Model to survivors' attempts to end

jury decision-making, assessments of dangerousness and competency to stand trial, and the accuracy of children's testimony).

²³ See Lee Epstein & Jack Knight, *Building the Bridge from Both Sides of the River: Law and Society and Rational Choice*, 38 LAW & SOC'Y REV. 207, 209 (2004) (discussing how law and society's realistic approach views humans as responsive to institutions, norms, the role of power, and historical context).

²⁴ See Robert C. Post, *Constitutional Scholarship in the United States*, 7 INT'L J. CONST. L. 416, 422 (2009) ("[C]onstitutional scholarship is primarily driven by the need to ensure that constitutional law remains responsive to changing political conditions.").

²⁵ See Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 758 (2008) (noting that multiple scholars and legal movements have recognized how the law should be "attentive to the purposes and needs of society").

²⁶ Supporting a woman's decision to stay in an intimate relationship, but under different terms, is autonomy-enhancing. See generally Goldfarb, *supra* note 12, at 1489 (critiquing current laws and advocacy practices that require women to separate from their partners).

²⁷ See Susan Schechter, *Expanding Solutions for Domestic Violence and Poverty: What Battered Women with Abused Children Need From Their Advocates*, 13 BUILDING COMPREHENSIVE SOLUTIONS TO DOMESTIC VIOLENCE 1, 7-8 (2000), http://new.vawnet.org/Assoc_Files_VAWnet/BCS13_ES.pdf ("Advocates have always said that women have the right to be in safe and respectful relationships. The domestic violence movement's historic goal has been to end violence and coercion, not to have women leave their relationships.").

violence in their lives and details the five stages of this model. Part IV considers how an understanding of the stages in the model would change the construct of civil protection order laws and processes. Part IV first focuses on the legal implications of the principle that ending violence is a process. The societal expectation that leaving is the easy answer to violence masks the multiple oppressions women who are abused face and the complexities of external and internal barriers to leaving. With survivors progressing through the stages in a spiral and returning to court to seek help over time, many petitioners will need to access the protection order remedy several times, which counsels toward removing procedural barriers, as recommended in Part IV. This Article offers economic and safety justifications for advocacy support across the stages in response to the current system's failure to address survivors' safety planning needs in the preparation stage and the emotional and tangible resources they need to sustain an end to violence in the maintenance stage. Part IV also contains policy prescriptions and recommendations for substantive law changes. These include greater judicial accountability so that judicial treatment of domestic violence cases in the action stage is aligned with the legislative intent of this remedy, expanded forms of statutory relief necessary to maintain freedom from violence, and meaningful enforcement of protection orders in the maintenance stage.

II. THE PROMISE OF CIVIL PROTECTION ORDERS

A. The Social and Judicial Focus on Criminalization at the Expense of Survivor Autonomy

After a history of the government condoning violence against women,²⁸ the anti-domestic violence and second wave feminist movement of the 1970s and 1980s organized to bring to light the prevalence and harms of domestic abuse and to develop legal and social remedies to intimate partner violence, including the civil protection order remedy and shelters for battered

²⁸ See generally R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 2–4, 60 (1979) (explaining how American and European laws did little to protect women from abuse until the 1970s. In medieval Europe, for example, a husband only faced criminal penalties for killing or maiming his wife, while all other violence he perpetrated against her was permissible.); Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–41 (1996) (describing the history of domestic violence laws in the United States, the absence of criminal and civil laws until the 1970s, and the race and class bias in selectively prosecuting domestic violence once laws were enacted).

women.²⁹ In reaction to the historic absence of adequate police response to victims' calls for help³⁰ and prosecutors' abject failure to charge domestic violence crimes,³¹ the movement insisted that violence in the home should be treated as seriously as stranger violence.³² Feminists had viewed the criminal justice system as the "embodiment of institutionalized male power over women," with the battered women's movement challenging state power and patriarchy while giving voice to and aiding survivors.³³ A tenuous realignment then grew with the hope that domestic violence would become a

²⁹ See Richard J. Gelles, *Public Policy for Intimate Violence and Child Maltreatment: A Few Successes, Many False Promises*, 69 UMKC L. REV. 25, 27–28 (2000).

³⁰ Epstein, *Effective Intervention*, *supra* note 2, at 14 (explaining how police typically delayed responding to a domestic violence call until the violence had ended or informally mediated the situation); Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127, 133 (1999) [hereinafter Epstein, *Redefining the State's Response*] (reporting that in 1990 in the District of Columbia, police arrested accused batterers in only 5% of all domestic violence cases and failed to make arrests in over 85% of cases in which the police observed that the victim had sustained serious injuries).

³¹ Douglas L. Yearwood, *Judicial Dispositions of Ex-Parte and Domestic Violence Protection Order Hearings: A Comparative Analysis of Victim Requests and Court Authorized Relief*, 20 J. FAM. VIOLENCE 161, 162 (2005) (studies of the failure to prosecute domestic violence crimes show rates ranging from 60–80%).

³² Gelles, *supra* note 29, at 27. Legislatures eventually determined to combat domestic violence by enacting both civil and criminal remedies. See, e.g., N.J. STAT. ANN. § 2C:25-18 (West 2005) (insisting that "violent behavior [in domestic relationships] will not be excused or tolerated, and . . . the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation"); W. VA. CODE § 48-27-101(a)–(b) (2010) (resolving that "[d]omestic violence can be deterred, prevented or reduced by legal intervention that treats this problem with the seriousness that it deserves"); *Cruz-Foster v. Foster*, 597 A.2d 927, 931 (D.C. 1991) (finding that while the protection order law is not explicitly a civil rights statute, it was designed to combat the exploitation and abuse of women and their children).

The anti-domestic violence movement has a recent history. See generally Gelles, *supra* note 29, at 27–28 (explaining that the first shelter for battered women was created in the 1960s. Soon after, grassroots advocates engaged in political and policy reform and created statewide coalitions against domestic violence. States enacted order of protection laws and mandatory arrest legislation. Eventually, the federal government established an Office of Violence Against Women, enacted federal remedies, and awarded states block grants.).

³³ See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1676 (2004).

public issue and the state's authority would now combat intimate partner violence.³⁴

Even after instituting laws to criminalize domestic violence, police and prosecutorial conduct remained largely unchanged, so legislatures eventually instituted mandatory policies to ensure vigorous responses to domestic violence.³⁵ The historical absence of governmental response yielded to an aggressive response from the criminal justice system; mandatory arrest policies now require police to make an arrest when there is probable cause to believe domestic violence occurred.³⁶ Additionally, no-drop or mandatory prosecution policies have prosecutors view domestic violence as a crime against the state and vindicate the government's interests by proceeding with a criminal case regardless of the survivor's wishes.³⁷ While immediate police response is essential to intervene in violence and a serious approach by prosecutors was long overdue, both mandatory arrest and prosecution policies are troubling because they fail to take into account a survivor's desires and assessment of how the state action will affect her safety and welfare.³⁸

Domestic violence is understood as the abusive partner's systematic exercise of power and control over his partner,³⁹ and research shows that the survivor's ability to increase her autonomy is essential to her increased safety.⁴⁰ In many instances, however, the state replicates the abuser's control

³⁴ See *id.* (identifying tension due to questions of whether the battered women's movement could partner with the state without being "coopted by it," and whether the state would misappropriate the domestic violence issue and ultimately cause harm to abuse survivors); see also Gruber, *supra* note 1, at 758 ("[F]eminists realized the risks of using state power to make the lives of women better. . . . State institutional mechanisms had historically subverted efforts toward women's empowerment. In addition, the criminal justice system itself was infested with racial, socioeconomic, and gender biases that manifested every time criminal enforcement was increased.").

³⁵ Epstein, *Effective Intervention*, *supra* note 2, at 4.

³⁶ See, e.g., UTAH CODE ANN. § 77-36-2.2 (LexisNexis 2008); WIS. STAT. § 968.075(2) (2010), <http://legis.wisconsin.gov/statutes/Stat0968.pdf>.

³⁷ Epstein, *Redefining the State's Response*, *supra* note 30, at 134-35.

³⁸ See LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 40 (2003) (discussing ways the criminal justice system should adapt to meet victims' needs, including adopting a "mandatory action" policy whereby police would allow victims to choose an action such as deciding whether an arrest should be made, being transported to a shelter, or having the offender transported to a detoxification center).

³⁹ TJADEN & THOENNES, *supra* note 12, at iv (explaining that empirical data proves that the domestic violence perpetrated by an abusive partner is "often a part of a systematic pattern of dominance and control").

⁴⁰ Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1126 (2009).

by silencing a survivor's ability to self-determine and mandating her participation in the state-centric criminal justice system. A survivor's agency⁴¹ or autonomy⁴² is in tension with the intersecting competing coercive forces of state mechanisms of control⁴³ and actions of an abusive partner who intimidates or forces a woman not to pursue criminal action. The mandatory state policies result in greater paternalism and state coercion of abuse survivors, particularly those who are marginalized by race, class, or immigrant status.⁴⁴ Furthermore, the policies are in philosophical opposition to feminist principles of agency, self-determination, empowerment, social justice for women, and resistance of patriarchal structures.⁴⁵ It is not uncommon for prosecutors to compel a survivor's appearance at trial through the use of subpoena power and to ask the court to find her in contempt if she fails to obey the summons.⁴⁶ Some prosecutors even threaten victims that if

⁴¹ See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 96 (2d ed. 2003) (“[A]gency means the capacity to direct one’s own life through individual action and choice.” (emphasis omitted)); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 346 (1995) (identifying a feminist model of “partial agency,” which juxtaposes women’s “capacity for self-direction and resistance” with “often-internalized patriarchal constraint”); Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273, 298–300 (2007) (in defining agency, noting the importance of accounting for the impact of social norms and the barriers that impede choices).

⁴² See generally Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 826–27 (1999) (exploring the concepts of agency, self-definition, and self-direction and describing the complexity of relational interdependence, social influence on self-definition, and the role of political context); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 821 (2001) (“The concept of agency rests on the realization that autonomy for subordinated persons is always partial, contingent, and emerging.”) [hereinafter Coker, *Crime Control*].

⁴³ Coker, *Crime Control*, *supra* note 42, at 807 (“The dilemma for feminists is to develop strategies for controlling state actors—ensuring that the police come when called and that prosecutors do not trivialize cases—without increasing state control of women.” (emphasis omitted)).

⁴⁴ *Id.* at 821–23 (describing sources of restraint that operate in battered women’s lives and noting the danger that “feminist law reformers will both overestimate the state’s power to do good and underestimate the power of the state to do harm”).

⁴⁵ Rivera, *supra* note 5, at 505; see Epstein, *Redefining the State’s Response*, *supra* note 30, at 128 (encouraging activists to “identify strategies to reduce the movement’s profound dependence on state action” and to find ways to “strengthen the victim’s role in the context of an exercise of state power”).

⁴⁶ Sack, *supra* note 33, at 1681. This practice continues to be the norm across jurisdictions. There are, however, some rare and noteworthy exceptions. I was impressed when, in a recent case in Seattle, the prosecutor contacted the student attorneys in the Domestic Violence Clinic I teach to say that she was trying to reach the client to

they do not comply, the prosecutors “will refer their case to child protection” and the victims “will be in danger of losing their children.”⁴⁷ One prosecutor recently remarked to me, “We take away women’s autonomy.” Autonomy is not merely an important theoretical concept;⁴⁸ it has implications for a survivor’s safety that are dangerous to disregard.⁴⁹

An abuse survivor may not desire criminal justice involvement for a multitude of reasons, including her awareness that the arrest or prosecution of her abuser could place her in greater danger due to his escalated violence or retaliation. This is especially true in light of the short one- to three-day jail sentences that abusive partners typically face for domestic violence crimes.⁵⁰ She may also be concerned about the collateral consequences of criminal convictions on her partner and family.⁵¹ If she has had prior negative experiences with the criminal justice system,⁵² or if law enforcement has not

determine whether the client had any safety-related concerns about the prosecution moving forward.

⁴⁷ *Id.* at 1682.

⁴⁸ *See supra* notes 41–42.

⁴⁹ Studies show that the complaining witness’s input in criminal legal sanctions increases her safety. David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in *LEGAL RESPONSES TO WIFE ASSAULT* 127, 142, 156–57 (N. Zoe Hilton ed., 1993) (finding that giving women the choice of whether to drop criminal charges against the abuser gives the women bargaining power that enhances their safety); *see also* David Hirschel & Ira W. Hutchinson, *The Voices of Domestic Violence Victims: Predictors of Victim Preference for Arrest and the Relationship Between Preference for Arrest and Revictimization*, 49 *CRIME & DELINQ.* 313, 313 (2003) (finding a significant association between a victim’s desire for arrest and subsequent abuse and recommending that police take the victim’s requests into account).

⁵⁰ *See* Karla Fischer & Mary Rose, *When “Enough Is Enough”: Battered Women’s Decision Making Around Court Orders of Protection*, 41 *CRIME & DELINQ.* 414, 419 (1995) (reporting one survey respondent’s experience: “He was taken to jail. I went to the hospital, had the x-rays and he was home before I was. . . . It made me feel, as far as he was concerned, that the [previous order] was not protecting me. Because every time I called, I mean they turned around and let him right back out. . . . And what the cops put me through, it made me feel like, unless I was seriously almost dead, I wouldn’t call them again.”).

⁵¹ Criminal convictions affect employment, immigration, voting, public benefits, and many other aspects of an individual’s life. *See* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 *B.U. L. REV.* 623, 623–33 (2006) (describing increased attention to the indirect consequences of federal and state convictions); *see also* 8 U.S.C. § 1227(a)(2)(E)(i)–(ii) (2006) (classes of “deportable aliens” include individuals convicted of domestic violence, stalking, or violating a protection order).

⁵² When individuals receive hostile, unhelpful responses from police, judges, or lawyers, they are less likely to turn to these systems, whereas victims return to

been a source of safety in her community, she may be reluctant to turn to a historically discriminatory state institution because these mandatory policies disproportionately impact communities of color.⁵³ She may additionally be aware of the reality of her increased likelihood of arrest because mandatory policies increase dual arrests.⁵⁴ State intervention through arrest or prosecution, furthermore, does not guarantee future safety, as demonstrated by studies showing that mandatory criminal responses have equivocal outcomes for victim safety⁵⁵ and result in increased violence for some populations.⁵⁶

institutions that offer positive, affirming interactions. *See, e.g.*, Fischer & Rose, *supra* note 50, at 426 (“[O]ne woman described how a supportive police officer had given her a piece of paper with information about orders of protection months before she decided to seek one. She held onto this paper, underlining relevant sections, and came to view it as reassuring while she struggled to decide how to end the abuse in her life.”).

⁵³ *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Rivera, *supra* note 5, at 504–06.

⁵⁴ Mutual arrests are particularly likely when the abuser claims there was mutual violence or when officers are unwilling to determine who initiated the violence. *See* L. Kevin Hamberger & Theresa Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, 9 VIOLENCE & VICTIMS 125, 126 (1994) (reporting that after Wisconsin instituted mandatory arrest laws, arrests of women increased twelve-fold, while arrests of men increased only two-fold); Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 159–60 & n.27 (2004) (describing the shortcomings of mandatory arrest policies and how such laws have had the effect of increasing the number of abuse victims who are arrested).

In my experience litigating cases and directing domestic violence clinics, I have seen multiple examples of mandatory policies taken to extremes that are contrary to victim safety. One client who had testified for the prosecution after being beaten and strangled was then prosecuted for holding onto her ex-boyfriend’s shirt. Another client was prosecuted for spitting on her husband, a man who had committed extreme physical and sexual abuse against her and had killed the family’s dog in front of the children. In both households, the aggressor and abuser was readily apparent. Had the prosecution examined the context of these women’s acts and the history of violence in the relationships, rather than mechanically following a mandatory edict, these women would not have been defendants.

⁵⁵ *See* Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 43, 46 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (concluding that arrest has, at best, a modest and short-lived deterrence effect).

⁵⁶ *See* Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOCIOLOGICAL REV. 680, 686 (1992) (finding that unemployed and unmarried men who are arrested have increased rates of reoffense, while men who are employed and married reoffend at lower rates).

B. *The Case for Civil Protection Orders*

While extensive funds and efforts have been directed at enhancing the criminal justice system's response to domestic violence, this Article calls for a rededication to the civil justice response of the civil protection order for three reasons: (1) its pervasive utilization by survivors; (2) its proven effectiveness relative to other interventions; and (3) its autonomy-promoting character that correlates with enhanced safety.

1. *Civil Protection Orders Are the Legal Remedy Survivors Most Commonly Elect*

Civil protection orders are now the single most frequently used legal remedy to address intimate partner violence.⁵⁷ All states have, at a minimum, preliminary laws and structures in place that can be expanded upon. Further improvement of this tool is warranted because it is so widely used, and survivors profoundly rely on this court order to intervene in and prevent violence.

2. *Protection Orders Typically Increase Survivors' Safety*

Protection orders are key to intervening in domestic violence, with studies showing that “[p]rotection orders, when properly drafted and enforced, are effective in eliminating or reducing domestic abuse.”⁵⁸ Researchers have found that when abused women seek help from the civil justice system by filing for a protection order, they experience “significantly

⁵⁷ See *supra* note 12.

⁵⁸ Klein & Orloff, *supra* note 8, at 811–13; see also Victoria Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AM. J. PREVENTIVE MED. 16, 16–21 (2003) (concluding that domestic abuse survivors who obtain civil orders for protection experience a decreased likelihood of subsequent physical and non-physical domestic violence, including significantly decreased risk of weapon threats, injuries, abuse-related medical treatment, and contact by the abusive partner); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. PUB. HEALTH 613, 613–18 (2004) (finding that women who sought and qualified for protection orders had significant reductions in physical assaults, threats of bodily harm, stalking, and worksite harassment, regardless of whether the orders were granted). *But cf.* Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 510–14 (2003) (recognizing that battered women use multiple legal and non-legal strategies to prevent violence, obtaining only a short-term emergency protection order achieves some women's goals, and the lack of representation and the significant institutional barriers that persist make it difficult for many petitioners to complete the protection order process).

lower levels” of violence—including threats, physical abuse, stalking, employment-related harassment, and other risk factors for femicide—regardless of the outcome of the case.⁵⁹ One study that measured the efficacy of protection orders over an eighteen-month period found that when a woman applied and qualified for a protection order, she experienced a “rapid and significant decline in violence,” which was sustained through the duration of the study.⁶⁰ Another survey of protection order petitioners found that when women applied for orders, 98% felt more in control of their lives,⁶¹ 89% felt more in control of the relationship,⁶² and women generally reported that the act of applying for the order improved their sense of well-being.⁶³ In follow-up interviews, 80% of participants felt safer, 85% reported that their lives had improved, and over 90% felt better about themselves.⁶⁴

When judges enter orders with comprehensive relief, there is an increased likelihood that the order will reduce the abuse and increase the petitioner’s autonomy.⁶⁵ One study found that when domestic violence survivors are awarded civil protection orders, they have an 80% decrease in subsequent police-reported physical intimate partner violence.⁶⁶ Other studies, which also conclude that protection orders are effective at decreasing violence, emphasize that the level of efficacy depends on the severity of the past violence, the level of resistance the respondent exhibits during the hearing, the specificity of the relief the court orders, whether the relief is comprehensive, the abuser’s prior criminal record, and whether police and courts enforce orders.⁶⁷ Thus, receiving the court’s protection as needed over time is another key element to sustained freedom from terror and bodily harm.

⁵⁹ McFarlane et al., *supra* note 58, at 616–17.

⁶⁰ *Id.* at 617.

⁶¹ Fischer & Rose, *supra* note 50, at 417.

⁶² *Id.*

⁶³ *Civil Protection Orders: Victims’ Views on Effectiveness*, NAT’L INST. JUST. RES. PREVIEW (Nat’l Inst. of Justice, Washington, D.C.), Jan. 1998, at 1, 2 [hereinafter *Civil Protection Orders*].

⁶⁴ *Id.*

⁶⁵ Edward W. Gondolf et al., *Court Response to Petitions for Civil Protection Orders*, 9 J. INTERPERSONAL VIOLENCE 503, 513 (1994).

⁶⁶ Holt et al., *supra* note 58, at 20.

⁶⁷ See *Civil Protection Orders*, *supra* note 63, at 1 (summarizing factors that increase efficacy and that lead petitioners to feel that the orders are effective); see also Leonore Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL’Y & L. 43, 76–78 (1995) (heralding protection orders as a valuable way to obtain relief from violence that permits an abused woman to take lasting measures to gain independence).

3. *Protection Orders Enhance Survivors' Autonomy*

Protection orders are a critical point of intervention for many individuals who experience abuse because they allow survivors to advance their autonomy along with their safety. A survivor's capacity to exercise autonomy is associated with her ability to overcome the abusive partner's control.⁶⁸ When women are able to self-direct, self-define, exercise agency, and exert autonomy—as the civil protection order process should encourage them to do—they can shift the power in the relationship, reconstruct or exit relationships, and decrease violence in their lives.⁶⁹

Although many people conflate civil protection orders and criminal restraining orders, there are essential distinctions that make protection orders a more attractive option for many individuals. First, a civil protection order case is a survivor's own case, not the government's. The survivor defines the nature of the problem and chooses when to bring the case, which events to allege, and what relief to pursue in an attempt to meet her particular safety needs.⁷⁰ In most states, orders may commonly include relief that prohibits the respondent from abusing, threatening, harassing, and assaulting the petitioner and her children and from destroying their property; prevents the respondent from contacting or coming near the petitioner, children, and certain locations; requires the respondent to enter domestic violence, parenting, drug, and/or alcohol counseling; awards temporary custody, visitation, and property; orders the respondent to vacate a shared residence; and requires the respondent to pay attorney's fees.⁷¹ In addition to statutorily enumerated relief, states commonly permit civil courts to award other relief necessary to resolve and prevent violence.⁷² The wide-ranging injunctive relief available

⁶⁸ Johnson, *supra* note 40, at 1126.

⁶⁹ *Id.* at 1114.

⁷⁰ TK Logan et al., *Protective Orders: Questions and Conundrums*, 7 TRAUMA, VIOLENCE, & ABUSE 175, 180 (2006) [hereinafter Logan et al., *Questions and Conundrums*] (praising the flexibility of protection orders, which allow survivors to gain what they need from the justice system, and concluding that the orders are consistent with the Rawlsian distributive justice model because they allow for individual differences in the experience of liberty, but guarantee fundamental protections).

⁷¹ See, e.g., D.C. CODE § 16-1005 (Supp. 2010). New remedies continue to be developed; for example, recognizing a correlation between domestic violence and animal abuse, legislatures are beginning to statutorily provide protection to household pets and farm animals. See, e.g., WASH. REV. CODE § 26.50.060(1)(l) (2011) (permitting the court to award custody or control of pets and to require the respondent to stay away from areas where the pets may be found).

⁷² See, e.g., D.C. CODE § 16-1005(c)(11) (Supp. 2010) (permitting courts to order the respondent to “perform or refrain from other actions as may be appropriate to the effective resolution of the matter”).

in civil protection orders is far more comprehensive than relief offered through criminal restraining orders, which solely order the respondent not to come near, contact, assault, or threaten the victim. The civil orders are also available more immediately through the ex parte emergency order and the longer-term order that is entered within weeks. In civil litigation, the petitioner can request to dismiss the case if she determines that the civil protection order is not helpful to her, whether because it does not meet her needs or because she anticipates that increased danger would result. Her right to exercise autonomy takes precedent over any general public interest.

The civil remedy can be contrasted with the prosecutor's office deciding whether to bring charges and what to charge; subpoenaing a victim to testify, even unwillingly; and conducting plea bargains and recommending the terms of the court order, most often without seeking the abuse survivor's input. In promoting the dual goals of advancing safety and autonomy, protection orders can include relief to end the violence without insisting that the woman end the relationship, as criminal "no contact" orders do when judges enter such orders without consulting the victim. There are a multitude of reasons why a survivor may desire court protection but not wish to pursue criminal sanctions,⁷³ and protection orders offer the survivor a tailored order that holds the respondent legally accountable with the threat of criminal sanctions for its violation.⁷⁴

While there are many indications of the success of protection orders, abuse survivors still confront numerous challenges when attempting to use this legal remedy. Because the protection order is the remedy most utilized and available to victims, and in light of its potential effectiveness, it is important that this remedy be available to survivors who need to seek help from the court over time and that courts respond to individual survivors' needs. Under the most developed protection order laws and practices, protection orders can achieve safety for abuse survivors and their children, prevent violence, hold abusers accountable, challenge batterers' sense of entitlement to dominate their partners, restore women's lost resources and

⁷³ See *supra* Part II.A.

⁷⁴ If the respondent violates the protection order, criminal charges may arise from the violation, particularly when the petitioner reports the respondent's violation of an anti-violence or no-contact provision to the police. The petitioner can also bring an action to adjudicate civil or criminal contempt to enforce her order. See generally Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 53 (2000) (explaining protection orders as the "intersection of traditional community-based and justice system approaches: victim empowerment coupled with deterrence. A [civil protection order] combines a victim-initiated intervention with the power of enforcement by the criminal justice system.").

opportunities, and enhance women's agency and control over their lives.⁷⁵ This "ideal" intervention strategy, however, has suffered from "inadequate"⁷⁶ and "resistant implementation,"⁷⁷ as will be explored in Part IV. An evaluation of the Stages of Change Model reveals how protection order laws and processes can improve to encourage survivors to progress through the stages toward maintaining an end to violence, and what additional relief and institutional support is necessary for freedom from violence.

III. THE STAGES OF CHANGE MODEL

The Stages of Change Model is an important tool for understanding the dynamics of domestic violence and for evaluating violence prevention solutions. While other models explore the range of behaviors an abusive partner employs to gain and maintain power and control in a relationship,⁷⁸ the Stages of Change Model describes the process of how domestic violence survivors end relationship violence over time.⁷⁹

The Stages of Change Model, which is also referred to as the Transtheoretical Model of Behavior Change,⁸⁰ grew out of empirical

⁷⁵ Barbara J. Hart, *Arrest: What's the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207, 207–09 (1997) (asserting that any domestic violence intervention should be evaluated against these six main goals).

⁷⁶ Gondolf et al., *supra* note 65, at 504.

⁷⁷ *Id.*

⁷⁸ The Duluth Power and Control Wheel is the predominant model used to describe intimate partner violence. See *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROJECT, <http://www.theduluthmodel.org/pdf/PhyVio.pdf> (last visited July 6, 2010) (identifying the range of behaviors a batterer may use to exert and maintain power and control over an intimate partner, including physical, sexual, emotional, and economic abuse; using the children; making threats; intimidating or isolating the victim; exerting male privilege; and minimizing or denying the violence or blaming the survivor).

⁷⁹ Brown, *supra* note 15, at 5.

⁸⁰ See, e.g., James O. Prochaska & Wayne F. Velicer, *The Transtheoretical Model of Health Behavior Change*, 12 AM. J. HEALTH PROMOTION 38, 38 (1997). Although the Stages of Change Model and Transtheoretical Model of Behavior Change are names that are often used interchangeably in psychology, psychotherapy, and public health literature, the Stages of Change Model is one component of the Transtheoretical Model of Behavior Change, which uses multiple constructs of change. See Eileen A. McConaughy et al., *Stages of Change in Psychotherapy: Measurement and Sample Profiles*, 20 PSYCHOTHERAPY: THEORY, RES. & PRAC. 368, 368 (1983) (explaining that in this integrative model of change, the stages of change are a fundamental part of a transtheoretical therapy model, and the five stages of change interact with ten basic processes of change).

investigations by James Prochaska and Carlo DiClemente⁸¹ and is based on psychotherapy and behavior change theories that examine how people make changes in their lives, whether on their own or with assistance.⁸² The model conceptualizes behavior change as a process that occurs in five stages: (1) pre-contemplation, where the individual is not intending to change; (2) contemplation, where the person thinks about change; (3) preparation, an active planning stage; (4) action, where someone explicitly makes changes; and (5) maintenance, where the change is solidified.⁸³ This model is widely accepted in the field of psychology, and extensive qualitative and quantitative research shows the applicability of this model to the specific context of ending relationship violence.⁸⁴ Researchers discovered the validity of this application by conducting in-depth interviews of women who had recently experienced domestic violence or who were currently in abusive relationships and asking the women to “walk through your relationship, starting at the point when you realized that your partner’s behavior was a problem.”⁸⁵ The women described five stages of change, consistent with the

⁸¹ James O. Prochaska & Carlo C. DiClemente, *Transtheoretical Therapy: Toward a More Integrative Model of Change*, 19 *PSYCHOTHERAPY: THEORY, RESEARCH & PRACTICE* 276, 282 (1982) (citing their early studies which examined smoking cessation behaviors and reported that subjects identified four stages and differentiated between the following stages of change: (1) thinking about quitting; (2) becoming determined to stop smoking; (3) actively modifying habits and/or the environment; and (4) maintaining the new habit of not smoking).

⁸² This model has successfully been applied to describe the process of creating change regarding a variety of behaviors, including smoking cessation, weight loss or control, arthritis self-management, drug addiction, alcohol abuse, sun and radon exposure, safer sex, and the process of ending relationship violence. See, e.g., Mark A. Belding et al., *Stages and Processes of Change Among Polydrug Users in Methadone Maintenance Treatment*, 39 *DRUG & ALCOHOL DEPEND.* 45 (1995); Burke et al., *Ending Intimate Partner Violence*, *supra* note 15, at 123; Diane M. Grimley et al., *Assessing the Stages of Change and Decision-Making for Contraceptive Use for the Prevention of Pregnancy, Sexually Transmitted Diseases, and Acquired Immunodeficiency Syndrome*, 20 *HEALTH EDUC. BEHAV.* 455 (1993); Francis J. Keefe et al., *Understanding the Adoption of Arthritis Self-Management: Stages of Change Profiles Among Arthritis Patients*, 87 *PAIN* 303 (2000); Catherine A. Perz et al., *Doing the Right Thing at the Right Time? The Interaction of Stages and Processes of Change in Successful Smoking Cessation*, 15 *HEALTH PSYCHOL.* 462 (1996); James O. Prochaska et al., *Stages of Change and Decisional Balance for 12 Problem Behaviors*, 13 *HEALTH PSYCHOL.* 39 (1994); Susan R. Rossi et al., *A Processes of Change Model for Weight Control for Participants in Community-Based Weight Loss Programs*, 29 *INT’L J. ADDICT.* 161 (1994).

⁸³ Burke et al., *Ending Intimate Partner Violence*, *supra* note 15, at 123.

⁸⁴ See *supra* note 15.

⁸⁵ Burke et al., *Ending Intimate Partner Violence*, *supra* note 15, at 124–25 (describing a study of seventy-eight domestic abuse survivors and the researchers’ use of

Stages of Change Model.⁸⁶ Whereas the Stages of Change Model has often been applied to individual behavioral change that is under one person's control, such as smoking cessation, the model is flexible enough to apply to intimate partner abuse, which necessarily implicates a relationship. In the context of domestic violence, the change an individual makes is relational,⁸⁷ and an understanding of the model must take into account the influence of the partner and his reaction to this relationship change.

The Stages of Change Model assumes that progression through the stages is a dynamic process and posits that progress through the stages occurs in a cyclical, rather than linear, sequence.⁸⁸ It is expected that a survivor will revisit earlier stages as she moves toward maintenance.⁸⁹ For example, a survivor may move from pre-contemplation to contemplation to preparation, and then revisit the contemplation and preparation stages before progressing to action. Her work in each stage is of acute importance, and her stage of change or "readiness to change" reflects "motivation, efficacy, denial, and openness to seeking help."⁹⁰ People come closer to terminating violence as they progress through stages, learn more about themselves and options for freedom from the abusive relationship, and employ helping resources. Essentially, ending violence is a process that occurs in stages, and the change is frequently iterative.⁹¹

open-ended questions to prompt women to describe their experiences of abuse in their own words).

⁸⁶ *Id.* at 123; Burke et al., *The Process of Ending Abuse*, *supra* note 15, at 1144 (finding the model to be "consistent with how women describe surviving their abusive situations" in that the women talked about five stages of change that are defined in relationship to intimate partner violence).

⁸⁷ Brown, *supra* note 15, at 9 (noting that change occurs within the context of a relationship and to the relationship).

⁸⁸ *Id.* at 9–10.

⁸⁹ Brown, *supra* note 15, at 10 ("As people recycle through the stages, they potentially learn from the mistakes and keep getting higher and closer to termination, at which point the problem is no longer an issue. In this model, relapse is seen as a natural and expected part of progressing."); McConaughy et al., *supra* note 80, at 369 (cautioning that the stages cannot be assumed to be discrete and that movement is not necessarily unidirectional).

⁹⁰ Katreana L. Scott & David A. Wolfe, *Readiness to Change as a Predictor of Outcome in Batterer Treatment*, 71 *J. CONSULTING & CLINICAL PSYCHOL.* 879, 880 (2003).

⁹¹ Burke et al., *Ending Intimate Partner Violence*, *supra* note 15, at 123 (explaining how domestic violence victims may relapse between stages in the process toward maintenance).

Contrary to early theories on learned helplessness,⁹² research now shows that women who experience abuse are typically active survivors who are highly motivated to terminate the violence and are vigorously engaged in help-seeking efforts and the process of surviving violence.⁹³ Abuse survivors engage in many strategic responses and behaviors to protect their children and themselves. The Stages of Change Model reveals how women think about the violence in their lives, what survivors do as they attempt to end domestic violence, and the stages they go through in their active survival as they progress toward maintenance.

This model recognizes variances in experiences of abuse and applies to infinite forms of domestic violence. The model is not confined to legal definitions of criminal offenses, which often limit the ability to utilize the civil or criminal justice systems to only those who have experienced recognizable physical assaults.⁹⁴ With the basic premise that leaving or ending violence within a relationship is a process, effectuating change in a violent relationship is not the same from person to person. Survivors will have had varied lived experiences of violence, be at different stages of change, and progress through the stages in their own ways. It is important not to lose sight of the complexities of individual relationships and the multiple oppressions that abuse survivors face⁹⁵ so that the model serves as a tool for broadening one's understanding of domestic violence while avoiding reducing or essentializing experiences.

The next five sections detail the five stages of the Stages of Change Model and apply the stages to survivors' efforts to end domestic violence. Later, in Part IV, this Article asks judicial systems to adapt to the reality that

⁹² LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 33, 86–94 (Springer Series: Focus on Women Ser. No. 6, 1984) (applying to battered women the conclusions of an experiment in which dogs received electric shocks in an inescapable environment. The dogs eventually ceased trying to escape and became passive. Walker argued that women similarly develop “learned helplessness” and stay in abusive relationships, convinced that they are unable to escape.).

⁹³ EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 11–18, 20–24, 93 (1988) (studying over 6,000 women in fifty battered women's shelters and concluding that they “are in fact ‘survivors,’ in that they assertively and persistently attempt to do something about their abuse. They contact a variety of help sources where one would expect to find assistance. The help sources, however, do not appear to muster the decisive intervention necessary to stop the cycle of violence.”).

⁹⁴ See, e.g., D.C. CODE § 16-1001(6)–(9) (Supp. 2010).

⁹⁵ See, e.g., Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1013 (2000) [hereinafter Coker, *Shifting Power*] (noting the importance of differences, such as immigration status, migration experiences, language, and culture, in understanding the experiences of abused women).

many women go through in their lengthy process to free themselves from domestic violence.

A. *Pre-Contemplation*

In the pre-contemplation stage, the person experiencing intimate partner violence may not be aware of the problem or the extent and consequences of the problem.⁹⁶ She may minimize the problem, classifying it as an aberrant event to avoid thinking about her situation or diminishing the severity of what she experienced by comparing herself to those who have experienced more extreme violence, and may respond defensively to pressure to leave the relationship.⁹⁷ If physical violence has occurred, she may blame herself, have an alternative explanation for the occurrence, and rationalize the remnants of injuries that others observe.⁹⁸ An abuse survivor in the pre-contemplation stage likely does not perceive a need for change, have a desire to receive services, or intend to make changes.⁹⁹ Women who do not think there is anything they can do to change the problem will have difficulty envisioning options for change.¹⁰⁰

If an abuse survivor is interacting with service providers at this stage, she may be pressured to do so by family members, friends, or her employer, or she may be required to do so by court order.¹⁰¹ Because of her denial and minimization, the interaction does not reflect a personal choice or internal decision. For example, a woman may seek a protection order in response to the demands of a child protective services worker who offers this as an alternative to charging her with neglect for “failing to protect” her child from the abusive environment.¹⁰² If the respondent has been disruptive at the petitioner’s workplace or if the employer fears for the safety of other employees, an abuse survivor may reluctantly seek a protection order to prevent the respondent from coming to the workplace at the employer’s insistence. A survivor may also be an unwilling complaining witness in a criminal case, for example, when a third party has called the police or when

⁹⁶ McConaughy et al., *supra* note 80, at 369 (explaining that someone in this stage is not aware of the problem or is ignoring the problem).

⁹⁷ Brown, *supra* note 15, at 11 (explaining the many reasons why people are in the pre-contemplation stage).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ John V. Petrocelli, *Processes and Stages of Change: Counseling with the Transtheoretical Model of Change*, 80 J. COUNSELING & DEV. 22, 24 (2002) (offering ways in which someone in the pre-contemplation stage may come into contact with system actors, such as courts or counselors).

¹⁰² *See, e.g.*, D.C. CODE § 16-2301(9)(A)(i) (Supp. 2010).

the survivor calls the police for immediate intervention, but believes that arrest and prosecution will increase her danger. For women experiencing domestic violence who are thrust into the legal system against their wishes, the system's actions may not have a positive impact on safety or a sense of autonomy.

An abuse survivor in the pre-contemplation stage accepts the abusive partner's definition of the situation in which he convinces her that it is her fault that he became violent and minimizes his violence. As such, she may try to alter her behavior to accommodate her partner to avoid "causing" the violence again.¹⁰³ The abusive partner may simultaneously shirk responsibility for the violence and shower her with gifts and promises of reform, providing her with optimism that the abuse will not recur.¹⁰⁴ To move from pre-contemplation to contemplation, an abuse survivor will need to come to her own definition of the situation, recognize the violence as wrong, and realize she is not responsible for her partner's violence.¹⁰⁵ Her definition of intimate partner violence is not static and will shift as the level of violence and the abuser's contrition shifts.¹⁰⁶ Her definition will also be informed by interpersonal and sociocultural factors in which her life experiences are embedded, such as her individual and relational history; economic, political, religious, and cultural context;¹⁰⁷ and intersecting dimensions of race, class, gender, and culture.¹⁰⁸ The definitional question is central to the issue of change because a woman's readiness to make changes and to employ particular strategies will influence how she defines her situation, and her characterization of the intimate partner violence will likewise influence the strategies she chooses for combating the violence.¹⁰⁹

In addition, many women who experience domestic violence have depression, post-traumatic stress disorder, or suicidal ideation as a result of

¹⁰³ Sondra Burman, *Cognitive Problem-Solving Therapy and Stages of Change That Facilitate and Sustain Battered Women's Leaving*, in *BATTERED WOMEN AND THEIR FAMILIES* 33, 40 (Albert R. Roberts ed., 3d ed. 2007) (explaining how an abused partner is unable to view the abuser in a realistic light during this stage).

¹⁰⁴ *Id.*

¹⁰⁵ Brown, *supra* note 15, at 11, 22 (describing the primacy of the abuser's definition of the violence, but noting that abused women will have insights that challenge the partner's definition).

¹⁰⁶ Belle Liang et al., *A Theoretical Framework for Understanding Help-Seeking Processes Among Survivors of Intimate Partner Violence*, 36 *AM. J. COMMUNITY PSYCHOL.* 71, 75 (2005).

¹⁰⁷ *Id.* at 74.

¹⁰⁸ *Id.* at 75 ("Women's interpretations of male domination and violence are shaped by gender, culture, and social location in the hierarchies of class and race.").

¹⁰⁹ *Id.* at 74–75.

the trauma.¹¹⁰ As physical assaults, injuries, sexual abuse, or psychological violence becomes increasingly severe, a woman is likely to experience progressively serious psychological effects.¹¹¹ Her help-seeking ability may be hindered by avoidance responses such as “psychic numbing,” in which she denies or minimizes any awareness of the trauma.¹¹² In addition to other safety resources, survivors may need treatment to manage their symptoms and recover because the consequential responses can be debilitating.

B. *Contemplation*

In the contemplation stage, someone experiencing domestic violence begins to be aware that a problem exists and to name the violence.¹¹³ The survivor struggles to understand the problem, including its cause and potential solutions, but may resist self-identifying as “abused” or defining the situation as domestic violence based on social constructs.¹¹⁴ She will search out social, economic, and emotional support from others as she gathers information, receives feedback, and problem-solves to figure out a way to end the violence.¹¹⁵ In this stage, she considers the advantages and disadvantages of taking action in the face of obstacles and externalities,¹¹⁶ but may be overwhelmed by the factors weighing against leaving. She has not made a commitment to making change or taking action;¹¹⁷ ambivalence and internal hesitation are characteristic of this stage as she struggles with whether the situation is “bad enough” to necessitate change. As the batterer engages in seemingly inconsistent behaviors, the survivor may vacillate

¹¹⁰ Mary Ann Dutton et al., *Court-Involved Battered Women’s Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse*, 14 VIOLENCE & VICTIMS 89, 97 (1999) (reporting that in a study of 149 women seeking protection orders, 39.6% met the DSM-IV criteria for post-traumatic stress disorder and 40.1% met the criteria for acute stress disorder).

¹¹¹ *Id.* at 92 (observing that for some women, the impact of psychological abuse is more severe than the effect of physical violence).

¹¹² Burman, *supra* note 103, at 41.

¹¹³ *Id.* (explaining that a woman may be experiencing the same level of abuse as in the pre-contemplation stage).

¹¹⁴ Mahoney, *supra* note 18, at 5 (“Before the feminist activism of the early 1970s brought battering to public attention, society generally denied that domestic violence existed. Now, culturally, we know what it is, and we are sure it is not us.”).

¹¹⁵ See Brown, *supra* note 15, at 12 (explaining that the survivor is more open to receiving information and feedback in contemplation than in pre-contemplation); McConaughy et al., *supra* note 80, at 369.

¹¹⁶ See *infra* notes 158–64 and accompanying text.

¹¹⁷ Petrocelli, *supra* note 101, at 24.

between feeling that she has reason to be concerned and be motivated to change, and considering continuing in the relationship unchanged.¹¹⁸

Research shows that three factors affect a battered woman's decision to seek help: the severity of the violence, the quantity of resources available to the survivor, and her perceptions of the effectiveness of the resources.¹¹⁹ Regarding the first factor, as the abuse continues and even escalates, safety and lethality risks become more apparent, and survivors are more likely to decide to seek a protection order.¹²⁰ With respect to the second factor, women with greater resources who are able to envision multiple ways out of the relationship may be freer to conceptualize the violence as intolerable.¹²¹ Finally, the desire to seek help is influenced by the individual's prior experiences with informal and formal sources of help, including family, courts, police, and domestic violence service providers.¹²²

C. Preparation

The preparation stage is also referred to as the "decision making stage," suggesting that the domestic violence survivor has decided she is ready for change and has committed herself to the effort and challenge of changing the problem.¹²³ Several shifts in the survivor's mindset are essential for movement into the preparation stage, including no longer thinking of the violence as trivial or as her fault.¹²⁴ In the preparation stage, the survivor

¹¹⁸ Burman, *supra* note 103, at 41.

¹¹⁹ Hollenshead et al., *supra* note 4, at 273 (noting severe abuse may compound feelings of isolation from helpful resources, which reinforces an inability to end the violent relationship).

¹²⁰ See Logan et al., *Questions and Conundrums*, *supra* note 70, at 189 (discussing research results that women seeking protection orders have "severe histories of violence").

¹²¹ Liang et al., *supra* note 106, at 75. Women of different races and cultures may rely on law enforcement or advocacy services to varying degrees. Some research indicates that African-American women more frequently rely on law enforcement, rather than available advocacy services. Hollenshead et al., *supra* note 4, at 277. When African-American survivors did use advocacy services, they often utilized advocates to assist with obtaining a protection order but did not choose to participate in counseling or support groups. *Id.* Further examination into the dynamics that deter people from using these services is warranted.

¹²² Women who have experienced police indifference or brutality or encountered mainstream service providers who are not culturally sensitive will not return to these sources for help. See Liang et al., *supra* note 106, at 77 (providing examples of Haitian women and African-American women who experienced a lack of cultural sensitivity or isolation when seeking help from formal agencies and shelters).

¹²³ McConnaughy et al., *supra* note 80, at 369.

¹²⁴ Liang et al., *supra* note 106, at 74–75.

seeks others out to reconceptualize the problem and determine possible actions,¹²⁵ takes small behavioral and mental actions necessary to accomplish this change, and prepares for greater action that she anticipates undertaking in the near future.¹²⁶ Behaviors during this stage might include leaving the abuser for a period of time, seeking out safe housing options, talking to a friend about the abuse, calling a hotline for abuse victims, setting aside money,¹²⁷ contacting a legal services office to identify legal options, and investigating alternative daycare and transportation options as she plans for ways to protect herself and her children and live independently. A survivor with greater social support, access to finances, and knowledge of available legal and non-legal options will have an easier time progressing through this stage.¹²⁸ As survivors formulate strategies that fit their unique circumstances and prepare to carry out a course of action, most survivors greatly benefit from assistance from advocates.¹²⁹

D. Action

In the action stage, the survivor is motivated to change the environment and is engaged in overt behaviors to carry out strategies to protect herself from future violence.¹³⁰ Examples of “action” category behaviors include calling the police,¹³¹ leaving home, going to a shelter, seeking a civil protection order, or fighting back.¹³² Women have often experienced lengthy histories of severe abuse before progressing to this stage and seeking a protection order.¹³³

As researchers examined women’s actions in ending relationship violence, they were able to pinpoint two keys to moving from preparation into action. First, the most critical factor that enabled women to end abuse

¹²⁵ *Id.*

¹²⁶ Petrocelli, *supra* note 101, at 24 (noting that this stage is also referred to as “decisionmaking”).

¹²⁷ See Brown, *supra* note 15, at 12.

¹²⁸ Burman, *supra* note 103, at 42–43.

¹²⁹ See *infra* Part IV.B.

¹³⁰ McConaughy et al., *supra* note 80, at 369.

¹³¹ Domestic violence crimes are largely unreported. Fewer than half of all abused women ever report the violence to law enforcement. McFarlane et al., *supra* note 58, at 616 (explaining that relying on police reports for data about abuse severely underrepresents amounts and levels of violence that women experience).

¹³² Burke et al., *Ending Intimate Partner Violence*, *supra* note 15, at 125.

¹³³ Charles L. Diviney et al., *Outcomes of Civil Protective Orders: Results from One State*, 24 J. INTERPERSONAL VIOLENCE 1209, 1215 (2009) (noting that women who obtain protection orders usually do so only after “they have experienced repeated and severe violence”).

was the “single-minded determination that the abuse must end.”¹³⁴ When women had reached that conclusion, they were committed to action. Abused women repeatedly offered the same advice to others in similar situations: “Don’t let the pattern persist, no matter what.”¹³⁵ The second most essential factor was the participation in support groups, through which battered women gain information, confidence, and the support necessary to end the abuse.¹³⁶ Study participants also recommended internal and behavioral changes, such as leaving the abusive partner, seeking counseling, telling trusted others, and involving the formal justice system.¹³⁷

For women who stay in the relationship with their abusive partner, if there is to be an end to the violence, the abuser must be motivated to change because whether the abuse persists is dependent on whether he continues to perpetrate violence and seeks to maintain power and control over the partner. Some abuse survivors are able to undertake actions to successfully demand an end to the violence. For example, an abusive partner may fear divorce, recognize the consequences of violence based on police and legal system interventions, or observe changes in the survivor that render his measures futile in maintaining control.¹³⁸

E. *Maintenance*

The maintenance stage is seen as a continuation of actions necessary to sustain the desired change, rather than an absence of transformation.¹³⁹ This is an active stage in which the survivor works to maintain her progress and continues undertaking actions necessary to remain free from violence. The general guidance that “the maintenance of a change is never to be underestimated regarding the efforts needed to sustain difficult change and that adequate maintenance begins with active prevention”¹⁴⁰ is especially apt for domestic violence survivors seeking to end violence. Given the emotional connection, significance of relationships, and multitude of reasons why people remain in healthy or unhealthy relationships, it may be very difficult

¹³⁴ Brown, *supra* note 15, at 13.

¹³⁵ *Id.* at 14 (internal quotation marks omitted).

¹³⁶ *Id.* at 13.

¹³⁷ *Id.* at 14.

¹³⁸ *Id.*

¹³⁹ Petrocelli, *supra* note 101, at 24; *see also* Brown, *supra* note 15, at 14 (defining maintenance as the stage that occurs after six months of continuous action without relapse, and noting that while the domestic violence victim has accomplished a change and is better off than she was in earlier stages, she still must work to prevent a “relapse”).

¹⁴⁰ Petrocelli, *supra* note 101, at 24.

for a survivor to maintain new behaviors on her own.¹⁴¹ Some survivors will grieve the loss of positive aspects of the relationship or economic security. The survivor must also contend with fears of separation assault¹⁴² and future threats of violence, as well as the psychological consequences of trauma, which include post-traumatic stress symptoms such as hyper-vigilance and anxiety-producing flashbacks of the violence.¹⁴³ This stage is especially difficult for survivors to sustain and is perhaps the hardest stage for the legal system to grasp. Survivors often benefit from the continued utilization of support and treatment services and from tangible resources to sustain the progress of this stage.

An examination of abused women's creative survival strategies, the coping mechanisms they regularly employ, and the nature of intimate partner violence, leads to an understanding of how many women make changes in their lives to become free from violence. In a quantifiable and systematic way, the Stages of Change Model illustrates that ending intimate partner violence is a complex process that occurs over time. The model, therefore, should have repercussions for how the law approaches domestic violence and serve as a theory upon which to base and improve interventions into domestic violence.

IV. PROTECTION ORDER ADVANCEMENTS INSPIRED BY THE STAGES OF CHANGE MODEL

The identification and naming of the stages is a practice that itself has acute significance; it fosters conceptual access and raises consciousness about the survivor's needs in each stage. With the goal of helping survivors achieve freedom from violence, the identification of the stages prompts a host of questions, including: What does a survivor need at each stage to enable her progression to the next stage? Are there predictable obstacles that can be preemptively addressed? What is a survivor considering during the contemplation stage? What information does she need? What preparation will she engage in? What does she need to be able to undertake such preparatory steps leading to action? What would she do if she could? How can she maintain her progress through the stages and once she has achieved maintenance? Who is best equipped to perform the helping functions at the various stages? What does the survivor need from the judicial system, law enforcement, and domestic violence service providers? And how can the legal system support and empower a survivor or, at the very least, avoid

¹⁴¹ Burman, *supra* note 103, at 44.

¹⁴² See *infra* notes 150–52 and accompanying text.

¹⁴³ Burman, *supra* note 103, at 44.

doing greater harm during any of the stages? These are simple questions to ask, yet the answering and implementation take effort.

With the recognition that domestic violence survivors commonly go through the stages identified in the Stages of Change Model and contend with many barriers in their quest to end relationship violence, improvements can be made to the legal system designed to intervene in intimate partner violence. Part IV offers recommendations for the advancement of current protection order laws and systems in light of this process that abuse survivors undertake.

A. *Judicial Recognition for the Process of Ending Violence*

Judges' persistence in asking, "Why doesn't she leave?" reveals the societal expectation that there is an easy answer to violence: just leave. This seemingly simple solution masks the multiple oppressions domestic violence survivors face, external and internal constraints to leaving, and the complexities of relationships and violence. Procedural rules and judicial practices frequently penalize protection order petitioners for not immediately leaving and for seeking the court's assistance multiple times, and even forestall them from doing so. Petitioners may have multiple reasons for not pursuing their cases and later need the court's protection if the violence continues or escalates. This Section explores the problematic nature of these procedural rules and proposes reforms.

1. *Ending Violence Is a Process*

A key tenet of the Stages of Change Model is the principle that any change is a process. For many abuse survivors, the decision to separate from an abusive partner is an incremental process,¹⁴⁴ or their initial attempts at leaving are unsuccessful.¹⁴⁵ Studies show that, on average, women who experience intimate partner violence leave the violent partner five to seven times before fully ending the relationship,¹⁴⁶ and often endure years of severe

¹⁴⁴ Goldfarb, *supra* note 12, at 1544.

¹⁴⁵ See, e.g., Andrea J. Martin et al., *The Process of Leaving an Abusive Relationship: The Role of Risk Assessments and Decision-Certainty*, 15 J. FAM. VIOLENCE 109, 109 (2000) (reporting that half of the attempts of battered women to leave abusive relationships result in reunion with the abusive partner); James C. Roberts et al., *Why Victims of Intimate Partner Violence Withdraw Protection Orders*, 23 J. FAM. VIOLENCE 369, 369 (2008) (explaining that women's initial attempts to leave abusive relationships are frequently unsuccessful).

¹⁴⁶ JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN 79–80 (1998) (reporting that women leave abusive partners approximately five times over eight years before leaving permanently); Kathleen J. Ferraro, *Battered Women: Strategies for*

abuse prior to seeking a civil protection order.¹⁴⁷ When the severity of violence and injuries increases and the abuser employs greater coercive control tactics, women are more likely to seek help; employ legal remedies, such as seeking a protection order; and attempt to leave the abusive relationship.¹⁴⁸

Leaving is one possible act in the action stage, but many survivors who are in the contemplation and preparation stages enter a legal system where legal actors expect them to leave the relationship. In reality, when a survivor seeks a protection order, this is part of a larger course of help-seeking that includes empowerment, self-direction, gaining information and formal and informal support, and envisioning change. Even when a petitioner withdraws her case, she has progressed and may be continuing to address the violence through support services and actions outside of the legal system. The reality that it takes many attempts to leave a relationship does not mean that judges should try to identify a petitioner's stage or diagnose which victims are really leaving the relationship. The legal system expects people to use it and to enter and exit it both quickly and finally; instead, the judicial system must be available to survivors over time as a resource they can return to, whether they are staying with or leaving an abusive partner.

Just as with the process of leaving, utilizing protection orders can be seen as a process that occurs over time, rather than as a singular event.¹⁴⁹ Petitioners frequently "drop" cases or request that the court dismiss the case

Survival, in VIOLENCE BETWEEN INTIMATE PARTNERS: PATTERNS, CAUSES, AND EFFECTS 124, 133 (A.P. Cardarelli ed., 1997) (noting that women make between five and seven attempts at leaving before they are finally successful); Martin et al., *supra* note 145, at 110 (reporting that leaving often involves multiple preliminary separations before the ultimate permanent termination); June Sheehan Berlinger, *Why Don't You Just Leave Him?*, *NURSING*, Apr. 1998, at 34, 39 (finding that women leave their abusive partners an average of seven times before leaving permanently).

¹⁴⁷ See EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 234 (3d ed. 2003) (reporting that in one study, women filed for temporary protection orders after experiencing an average of thirteen violent assaults in the prior year, and in another study, one-third of protection order petitioners were assaulted ten times or more in the previous three months); Dutton et al., *supra* note 110, at 95 (reporting a study of 149 women who were seeking protection orders, which found 72% of the women had previously called the police and 84% had attempted to leave the relationship two or more times); Logan et al., *Questions and Conundrums*, *supra* note 70, at 189 (finding that protection order petitioners typically have "severe histories of violence").

¹⁴⁸ Dutton et al., *supra* note 110, at 101 (finding a strong correlation between the severity of physical violence and a battered woman's engagement with the legal system).

¹⁴⁹ See Fischer & Rose, *supra* note 50, at 427 (recommending that legal personnels' frustrations with petitioners who return to court multiple times may be decreased if they understand the context of decisions about protection orders).

because of respondents' threats of increased violence.¹⁵⁰ Upon filing for a protection order, which is an outward manifestation of the intent to make a change in the relationship, petitioners may become abundantly aware of the danger they face. Leaving or attempting to break free from an abuser's control, such as through seeking a protection order,¹⁵¹ is the most dangerous point in time for someone who has experienced domestic violence. It is now well understood that there is a high likelihood of "separation assault,"¹⁵² that leaving is a major risk factor for homicide,¹⁵³ and that women have a well-grounded fear of increased violence to themselves and their children if they attempt to leave. Moreover, fear may cause a woman to leave but also to return to an abusive partner. Multiple clients have remarked to me, "When there's a snake out to get you, you want him in front of you where you can see him, not out in the grass." Judges, therefore, should take a woman's fear of retaliation seriously. Her decision to stay in a relationship is often a rational choice to prevent her abuser from carrying out his threats against her and her children if she attempts to leave.

For some other petitioners, filing the petition may cause the abuser to terminate contact with the petitioner or relocate,¹⁵⁴ although this is less likely

¹⁵⁰ Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 193 (1993) (reporting that in a survey of domestic violence service providers, "almost nine-tenths (88.8%) of the respondents reported that some petitioners do not appear for the plenary hearing because the abuser threatens to retaliate if the woman obtains an order of protection"); Logan et al., *Questions and Conundrums*, *supra* note 70, at 185 (exploring reasons that women do not receive long-term protection orders and reporting that 35% were talked out of it by the respondent, 11% feared retaliation and did not pursue the order, 6% reported that her partner had threatened her, and 4% of women said the respondent had forced his way back into the home).

¹⁵¹ Goldfarb, *supra* note 12, at 1537–38 (noting that seeking a protection order can increase a woman's danger when the batterer perceives the action as a loss of power and escalates the violence, and identifying the importance of case evaluation, risk assessment, and safety planning).

¹⁵² Mahoney, *supra* note 18, at 6.

¹⁵³ Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 617 (2001) ("Women attempting to leave violent spouses are twice as likely to become victims of homicide than abused women who continue to cohabit with their abusers."); see also Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 274–75 (1995) ("Although divorced and separated women comprise only 10 percent of all women in America, they account for three-quarters of all battered women and report being battered fourteen times as often as women still living with their partners. Divorced or separated men, as opposed to husbands living with their wives, commit 79 percent of all spousal violence.").

¹⁵⁴ See Roberts et al., *supra* note 145, at 373 (reporting on a survey of fifty-five women who were withdrawing the petitions for protection orders they had filed, and

in cases with high levels of control. Filing for a protection order may also change the dynamics of the relationship such that the petitioner has leverage over the respondent by showing her ability to access the judicial process. Some women place stock in the hope that the abusive partner will change through counseling or treatment and withdraw their petitions when the abusive partner enters into a domestic violence treatment program.¹⁵⁵ The emotional attachment of the petitioner to the respondent is also a reason frequently given for withdrawing the petition for a protection order.¹⁵⁶ In addition, petitions are regularly dismissed because of the inability to serve a respondent.¹⁵⁷

2. *Confronting the Continuing Question: Why Doesn't She Leave?*

Despite decades of legal reform, from the moment an abuse survivor enters the legal system, she is confronted with the question, "Why didn't you leave?" Clerks pose this question when they notice allegations that date back months and years.¹⁵⁸ Judges are preoccupied with this question¹⁵⁹ and persist in asking it and variations, such as, "Why don't they just get up and leave?"¹⁶⁰ and challenging petitioners about why they don't leave "if the

finding that the most common reason given for withdrawing the petition was a concrete change by the victim or respondent, such as when either person relocates and the petitioner no longer feels that the court order is necessary).

¹⁵⁵ *Id.* at 371–74 (discussing the faith that victims of violence place in the success of domestic violence intervention programs and recommending that "the best resource we can give these women is information regarding the programs' questionable effectiveness").

¹⁵⁶ *Id.* at 369 (reporting survey results that emotional attachment was the second most frequently given reason for dismissing a petition for a protection order).

¹⁵⁷ TK Logan et al., *Protective Orders in Rural and Urban Areas: A Multiple Perspective Study*, 11 VIOLENCE AGAINST WOMEN 876, 889 (2005) (finding that lack of service on respondents prevented petitioners from securing long-term orders in 18–47% of cases, depending on the jurisdiction).

¹⁵⁸ I have witnessed clerks confronting petitioners with the affidavits they were attempting to file and demanding to know: "We were here three, seven, and ten years ago. Why didn't you file sooner?"

¹⁵⁹ See Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 578–79 (2007) (stating that judges are preoccupied with the battered woman's psyche, rather than focusing on the abuser's actions); Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2488 (1993) (explaining the degree to which battered women are judged for not leaving and the problem with this assessment in light of evidence that leaving is dangerous).

¹⁶⁰ Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1193–94 (1994) (citing *Report of the New York Task Force on Women and the Courts*, 15 FORDHAM URB. L.J. 11, 32 (1987)).

abuse is so bad”¹⁶¹ when petitioners stand before them asking to be believed and seeking the court’s protection. Police officers, prosecutors, defense attorneys, and child protective service workers frequently adopt this posture and pose this question. Petitioners not only carry the burden of proving domestic violence in a world that would rather not recognize its existence, but they also confront the general expectation that an abused person will immediately and permanently leave the relationship. The law, in fact, often demands that she must leave.¹⁶² For example, many mothers have faced neglect charges for not leaving an abusive partner; they failed to protect their children, according to abuse and neglect laws.¹⁶³

The judgment-laden question is problematic and misguided for multiple reasons.¹⁶⁴ The question focuses attention on the survivor’s responsibility for leaving and suggests her culpability in the abuse, rather than scrutinizing the abusive party’s choice of violence or asking why the respondent batters or why she had to experience the abuse at all. The sentiment that women provoke the abuse and are to blame persists because it is easier for a fact-finder to come to terms with evidence of injury if the violence can be justified as provoked.¹⁶⁵ Some judges disbelieve reports of extensive

¹⁶¹ The Mo. Task Force on Gender and Justice, *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 505 (1993) (reporting on the commonality with which judges believe that if the abuse was severe enough, the abuse survivor would have left, and their explicit expression of this belief from the bench).

¹⁶² Judges frequently enter restraining orders in criminal cases when releasing a defendant after arraignment. The victim/witness may not have knowledge of or a desire for the order barring contact.

¹⁶³ See, e.g., *In re Michael G.*, 300 A.D.2d 1144, 1144–45 (N.Y. App. Div. 2002) (issuing a neglect finding against a mother when she failed to obtain a civil permanent order of protection, did not remove herself and her child from the home, and continued to have a relationship with the child’s father).

¹⁶⁴ Shelby A.D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women From Leaving Abusive Relationships*, 12 TEX. J. WOMEN & L. 451, 456 (2003) (finding the question misguided because “[t]here is no simple answer to a question with so many complexities”); see also SHERYL J. GRANA, WOMEN AND (IN)JUSTICE: THE CRIMINAL AND CIVIL EFFECTS OF THE COMMON LAW ON WOMEN’S LIVES 139 (2002) (“‘Why doesn’t she leave?’ is the wrong question to ask. It mystifies. It transforms an immense social problem into a personal transaction and at the same time pins responsibility squarely on the victim. It obliterates both the terrible magnitude of violence against women and the great achievements of the movement against it.”); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1259 (1996) (arguing that it is impossible for people to stop asking the question, “‘Why doesn’t she leave?’” when they deny, ignore, or tolerate violence in their own lives).

¹⁶⁵ When representing clients who have endured particularly horrendous violence, I have seen clerks and judges question petitioners to a high degree about minute surrounding details. The tired questions about what she was wearing, whether she had

histories of violence because they cannot fathom that (1) it could happen to them,¹⁶⁶ or (2) they would respond in the same way. In one judge's ruling denying a woman's request for a protection order based on her allegation that her husband threatened her with a gun, the judge explained, "I don't believe anything that you're saying. . . . The reason I don't believe it is because I don't believe that anything like this could happen to me. . . . Therefore, since I would not let that happen to me, I can't believe that it happened to you."¹⁶⁷ The survivor's failure to leave earlier often negatively affects the court's view of her credibility, which can be dispositive in cases that have no corroborating evidence.

The reactive insistence on leaving makes assumptions about the simplicity of doing so and fails to recognize the process of change that occurs as survivors progress through the stages of change, which does not always occur in a linear manner. It does not account for the multiple ways a survivor does leave, attempts to leave, or chooses to remain because that seems to be the safer option. It also fails to leave room for a survivor's desire to stay in the relationship, but without the violence.¹⁶⁸ The question of leaving is easy

been drinking alcohol, and what she did in response persist. I have always sensed that these examiners needed to be able to reassure themselves that this could not happen to them. The judge may also differentiate herself from the petitioner or respondent based on race, culture, education, age, or class. *See generally* Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1681–82 (1990) ("Perhaps in the face of intimate brutality, observers feel a need to blame someone as well as a need to explain why it could not happen in their own home; perhaps these needs produce a tendency to blame victims. It seems easier—less frightening—to ask why battered women stay in relationships with their abusers than to ask why men batter.").

¹⁶⁶ Judges may suggest a psychological abnormality or pathology in victims to convince themselves of the impossibility that this could happen in their own families, when, in fact, being a woman is the most predictive factor of whether someone will become a victim of domestic violence, and an examination of the abusive partner's history of perpetrating intimate partner violence is telling. *See* Burke, *supra* note 159, at 579 (discussing courts' and society's preoccupation with a battered woman's psyche, and persistence in trying to determine why she did not leave); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983 (1991) ("Instead of focusing on the batterer, [the law] focus[es] on the battered woman, scrutinize[s] her conduct, examine[s] her pathology and blame[s] her for not leaving the relationship, in order to maintain that denial and refuse to confront the issues of power. Focusing on the woman, not the man, perpetuates the power of patriarchy.").

¹⁶⁷ MD. SPECIAL JOINT COMM. ON GENDER BIAS IN THE COURTS, GENDER BIAS IN THE COURTS 2–3 (1989).

¹⁶⁸ *See* Goldfarb, *supra* note 12, at 1499 (concluding that the focus on leaving is misguided); *Id.* at 1499 n.70 ("Missing from this picture is a recognition that battered women should have the choice to remain in a relationship and obtain the legal system's assistance to end the violence."); *see also* Brown, *supra* note 15, at 6 ("In addition, a

to ask, but it is much harder to answer questions of where she will go, how she will survive, and how she will overcome the challenges and dangers of leaving.

Leaving assumes there are opportunities for exiting the relationship and that doing so is the pathway to safety. Barriers to leaving are also reasons for returning, and an examination of any singular barrier, such as economic dependence,¹⁶⁹ children,¹⁷⁰ health-related factors,¹⁷¹ familial and societal

woman may have made critically important changes without having left the abuser. Staying in the relationship does not mean that the battered woman is inactive or that an intervention has had no effect on her.”). *But cf.* TK Logan & Robert Walker, *Civil Protection Order Outcomes: Violations and Perceptions of Effectiveness*, 24 J. INTERPERSONAL VIOLENCE 675, 688 (2009) (surveying 698 protection order recipients and finding two primary risk factors for continued violence: stalking and remaining in the relationship with the respondent after the issuance of the protection order).

¹⁶⁹ Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 22 (2007) (explaining that a survivor’s inability to be economically self-sufficient is one of the most difficult obstacles to leaving a violent relationship).

When a victim considers economic hurdles related to a lack of housing, food, transportation, employment, child care, and medical care, among other monthly expenses, the prospect of making it on her own may seem untenable. Shelters are only able to serve a small percentage of the abuse survivors who seek refuge, and temporary housing for large families or mothers with teenage boys can be virtually impossible to secure. Rural areas may lack services. If alternatives are unavailable and economic barriers are severe, there may not appear to be any options for safety.

¹⁷⁰ While the most common reason that abused mothers leave a violent partner is concern for their children’s safety, a common reason for staying is the abusive parent’s threat to seek and gain custody of their children. Mothers may not leave abusive relationships because they fear that they will lose custody; that the abusive partner will kidnap, harm, or even kill the children; or that they will face criminal charges for leaving with the children. *See* *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 751–54 (2005) (reciting the facts of the police department’s failure to respond to the mother’s telephone calls for help when the father kidnapped the children in violation of a protection order and murdered them later that night); Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57, 62–63 (2003) (explaining that courts are often skeptical when a parent raises allegations of domestic violence when seeking the custody of a child, and further finding that in 50% of the cases in a study where women raised the concern of domestic violence with a court child custody assessor, the report of violence was not mentioned in the assessor’s report to the court).

¹⁷¹ The psychological effects of battering may make it difficult to leave. *See* JUDITH HERMAN, *TRAUMA AND RECOVERY* 86 (1997) (discussing the commonality of post-traumatic stress disorder among abuse survivors). For someone who is disabled or suffering from illness, the batterer may be the person’s caretaker. A victim may rely on her partner for health insurance; once abused, she may not be able to obtain her own health insurance based on the practice of denying health insurance to domestic violence victims as a “pre-existing condition.” David Gremillion & Elizabeth Kanof, *Overcoming*

pressures, gender-role expectations, and cultural or religious mandates or norms,¹⁷² shows the complexities of making such a monumental change and the expanse of obstacles survivors must conquer.¹⁷³ Social isolation,¹⁷⁴ language barriers, immigration status,¹⁷⁵ and lack of information about available services and legal recourse also affect an abuse survivor's ability to seek help. These factors demonstrate the fiction of the ease of leaving, making the idea of an individual's choice seem illusory, given the many

Barriers to Physician Involvement in Identifying and Referring Victims of Domestic Violence, 27 ANNALS OF EMERGENCY MEDICINE 769, 772 (1996) (based on doctors' statements in medical records, some health insurance companies deny coverage to domestic violence victims based on their "pre-existing" or "high-risk" condition); Carole Warshaw, *Domestic Violence: Changing Theory, Changing Practice*, 51 J. OF THE AM. MED. WOMEN'S ASS'N 87 (1996), reprinted in JOHN F. MONAGLE & DAVID C. THOMASMA, HEALTH CARE ETHICS: CRITICAL ISSUES FOR THE 21ST CENTURY 133 (2005) (explaining that battered women have been refused health, life, and disability insurance based on their higher risk for injury and death). Some survivors lack legal resources that meet their unique needs, such as survivors of HIV-related domestic violence. Stoeber, *supra* note 10, at 1157. For other abuse survivors, drug addiction may be introduced by the partner or the survivor may use drugs as a numbing mechanism. The addiction may then impede her ability to actively focus on the preparation and action stages and prioritize escaping violence and living independently. Burman, *supra* note 103, at 43–44.

¹⁷² See generally Liang et al., *supra* note 106, at 71 (discussing the role of cultural norms in an individual's decision to end a relationship with an abusive partner). Women who have a religious or moral opposition to divorce may not consider leaving the home.

¹⁷³ See generally Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLORADO LAWYER 19 (1999) (explaining examples of barriers abused women face when trying to leave the relationship).

¹⁷⁴ As an example of the profound levels of isolation that an abuse survivor may experience, I represented a client in an immigration case whose husband had told her they were living in Boston, Massachusetts, when in fact they were residing in an entirely different part of the country. Everything that she knew of where she was in the world and the information available to her came through him.

¹⁷⁵ With the inadequacy of immigration relief, including recently enacted remedies under the Violence Against Women Act, an immigrant spouse may feel a legal dependency on an abusive spouse. There are many reasons related to immigration status for staying in a relationship. If a victim's application for adjustment of status is pending, she may determine to wait out the process. Even the newer immigration remedies available under the Violence Against Women Act require a lengthy, complex process that does not always produce positive outcomes. See Anna Gorman, *U-Visa Program for Crime Victims Falters*, L.A. TIMES, Jan. 26, 2009, <http://articles.latimes.com/2009/jan/26/local/me-crimevisa26>. Some remedies are only available to those who have cooperated with law enforcement and the prosecution of their abuser, and many women who are fearful of deportation do not employ the formal criminal justice system mechanisms. See New Classification for Victims of Criminal Activity, Eligibility for "U" Nonimmigrant Status, Interim Rule, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (codified at 8 C.F.R. pt. 103, 212, 214, 248, 274a, 299).

difficult circumstances any survivor faces and society's failure to provide alternatives to the violent home.

3. *Changes to Procedural Rules and Judicial Practices to Avoid Penalizing Survivors for Returning to Court*

Survivors typically attempt to end violence through other avenues before seeking court protection, with 75% of protection order petitioners in one study reporting that their prior help-seeking efforts had failed or were not sufficient to manage the violence.¹⁷⁶ As violence escalates, battered women often become more determined to receive a protection order and return to court. Studies have found that when women experience a greater severity and longer duration of domestic violence, their awareness that the violence is escalating prompts them to return to court for the final protection order.¹⁷⁷ Research also shows that survivors who previously dropped their petitions for protection orders are “significantly more likely” to seek and maintain full orders of protection after receiving the *ex parte* emergency order.¹⁷⁸ These findings support the proposition that courts should continue to be available as victims seek help over time, rather than penalizing victims for using the system multiple times. Especially in light of the dynamics of domestic violence, safety issues at stake, and complexities of intimate relationships, the legal system designed to prevent violence should be available for victims' use.

In some jurisdictions, procedural rules prohibit a petitioner from raising previously alleged incidents that were dismissed before they were litigated, thereby overvaluing judicial efficiency at the expense of survivor safety. Some states have adopted versions of Federal Rule of Civil Procedure 41(a)(1)(B), as demonstrated in the District of Columbia Domestic Violence Unit Procedural Rules, which instruct, “when the petition has been dismissed more than once, the Court may consider and decide whether the petition should be dismissed with prejudice.”¹⁷⁹ Filing a prior petition that was not adjudicated is the only scenario the rule identifies as grounds for dismissing a petition “with prejudice;” it notably does not target abusive litigation tactics or meritless claims. When an action is dismissed with prejudice, the

¹⁷⁶ Fischer & Rose, *supra* note 50, at 415–16.

¹⁷⁷ Dutton et al., *supra* note 110, at 91.

¹⁷⁸ Kinports & Fischer, *supra* note 150, at 193–94.

¹⁷⁹ D.C. SUP. CT. DOMESTIC VIOLENCE UNIT R. 10. This is consistent with Federal Rules of Civil Procedure Rule 41(a)(1)(B), which states, “Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.” FED. R. CIV. P. 41.

petitioner cannot raise the same allegations in a future petition.¹⁸⁰ She must wait in terror for a new assault or threat before petitioning the court for protection from violence. The District of Columbia's rule at least provides the judge with discretion, unlike the federal rule. State rulemaking bodies and courts have also applied Federal Rule of Civil Procedure 41(b),¹⁸¹ such that if a petitioner fails to appear and pursue her case and the respondent moves to dismiss the action, the dismissal acts as an adjudication on the merits. However, state courts differ on the application of Rule 41(b)¹⁸² and there is a marked trend away from state conformity with the Federal Rules.¹⁸³ Restrictive procedural rules make protective orders unavailable to survivors who need them and, paradoxically, do nothing to eliminate the violence the domestic violence courts and laws are set up to address. States should rectify procedural barriers to seeking court protection that stand in the way of petitioners receiving the injunctive or equitable relief¹⁸⁴ envisioned in the creation of these remedial actions, which were intended to be liberally construed for the protection of domestic violence victims.¹⁸⁵ State civil

¹⁸⁰ *Hanneman v. Nygaard*, 784 N.W.2d 117, 119, 121 (N.D. 2010) (calling a dismissal with prejudice a “harsh and permanent remedy when it resolves a case on the merits,” and noting that a judge can exercise discretion to dismiss an action “without prejudice” and avoid barring a future suit).

¹⁸¹ FED. R. CIV. P. 41(b) (“If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”).

¹⁸² See JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE* § 14.7 (3d ed. 1999) (state courts differ as to whether a dismissal for failure to prosecute constitutes a judgment on the merits).

¹⁸³ John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2003) (“Not only has the trend toward state conformity to the federal rules stopped accelerating—it has substantially reversed itself. . . . Federal procedure is less influential in state courts today than at anytime in the past quarter-century.”).

¹⁸⁴ See, e.g., *Cooke v. Naylor*, 573 A.2d 376, 377 (Me. 1990) (“[Protection orders are] “historically an equitable remedy, very similar to an injunction”); Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 855 (2004) (identifying protection orders as “injunctions” or a type of “equitable decree”).

¹⁸⁵ See, e.g., *Gaab v. Ochsner*, 636 N.W.2d 669, 671 (N.D. 2001) (“[The domestic violence law] is a remedial statute which we construe liberally, with a view to effecting its objects and to promoting justice. . . . The legislature intended the adult abuse laws to fill the void in existing laws in order to protect victims of domestic violence from further harm.” (internal quotation marks omitted)); *Maldonado v. Maldonado*, 631 A.2d 40, 42 (D.C. 1993) (“The Intrafamily Offenses Act is a remedial statute and as such should be liberally construed for the benefit of the class it is intended to protect.”).

procedure rulemaking bodies should decline to adopt Rule 41(a) or (b) regarding domestic violence matters because the rule is contrary to the purpose of the protection order remedy. If rulemaking bodies do adopt a version of Rule 41(a), they can adopt a discretionary rule that permits judges to dismiss claims with prejudice in limited, identified circumstances, such as when the defendant proves the petitioner has filed multiple claims with a vexatious purpose.

Respondents have also sought to use the civil procedure doctrines of collateral estoppel or *res judicata*¹⁸⁶ in three circumstances that involve petitioners returning to court to seek protection: (1) when a petitioner re-files a case after failing to appear in court or dismissing an initial petition; (2) when the petitioner seeks a subsequent order based on events that occurred after receiving a previous protection order; and (3) when a petitioner has vacated an order for protection issued after adjudication and returns to the court to seek protection based on the prior allegations. In response to the first category of claims, courts have held that a dismissed protection order petition does not result in a valid and final judgment on the merits, as required by the doctrines of collateral estoppel or *res judicata*,¹⁸⁷ and such defenses are inapplicable to non-adjudicated domestic violence claims.¹⁸⁸ Under the second category, petitions based on new facts are also not barred by *res judicata* or collateral estoppel.¹⁸⁹ Regarding the third category, under a

¹⁸⁶ *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982) (precluding claims when there has been a valid and final judgment on the merits); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. As this Court and other courts have often recognized *res judicata* and collateral estoppel relieve parties of the cost of vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.” (citations omitted)); see *Eagle v. Johnson*, 583 S.E.2d 346, 347 (N.C. Ct. App. 2003) (applying the doctrine of *res judicata* after a full trial had been held on the merits, resulting in the trial court’s denial of the petitioner’s claim for a protection order, and she filed a new petition with identical allegations the following day).

¹⁸⁷ FRIEDENTHAL, KANE & MILLER, *supra* note 182, § 14.7 (discussing how if a disposition is based on a technical procedural ground, rather than on the validity of the petitioner’s claim, the judgment is not generally considered to be “on the merits”).

¹⁸⁸ See *Hanneman v. Nygaard*, 784 N.W.2d 117, 119 (N.C. 2010) (finding that a woman’s second petition for a protection order against her ex-boyfriend, which she filed after her first petition was dismissed due to her failure to appear in court, was not barred by *res judicata* and that she could proceed on prior and new allegations).

¹⁸⁹ See, e.g., *Clagg v. Clagg*, No. 08AP-570, 2009 WL 190049, at *1 (Ohio Ct. App. Jan. 27, 2009) (holding that a woman’s petition for a domestic violence civil protection

variety of factual circumstances, some state courts have rejected the application of res judicata to protection order cases.¹⁹⁰ One example of this approach is found with courts determining that if a petitioner is experiencing ongoing fear, even without a new incident of violence, the domestic violence issues “have not been fully litigated to their finality,” thereby refusing to construe the law to require additional acts of violence.¹⁹¹ Other courts have found that “changed circumstances” preclude the application of res judicata to protection order cases.¹⁹² Courts have also noted that unfairness results if the doctrine of claim preclusion is applied too harshly in the domestic violence context, and that in “properly seeking to deny a litigant two ‘days in court,’ courts must be careful not to deprive [the litigant] of one.”¹⁹³ Similar to continuing tort claims, courts may also view the ongoing atmosphere of power and control as part of continuing grounds for a protection order.¹⁹⁴ Courts have found multiple exceptions to the application of res judicata for public policy reasons,¹⁹⁵ and domestic violence is precisely the type of

order against her former husband was not barred by res judicata and collateral estoppel because the new petition relied on facts different from her prior petition).

¹⁹⁰ See, e.g., *Wolt v. Wolt*, 778 N.W.2d 802, 808 (N.D. 2010) (stating that “other courts have also rejected application of res judicata to the granting of a domestic violence protection order” and finding that res judicata does not bar entry of a domestic violence protection order based on the same facts that led to the issuance of a disorderly conduct restraining order); *Sterling v. Sterling*, No. 02CA8, 2002 WL 31111778, at *1 (Ohio Ct. App. Sept. 16, 2002) (finding that the ex-wife should have been given notice of an impending dismissal of her domestic violence protection order against her ex-husband, and because she was not notified of the dismissal, her protection order was properly reinstated).

¹⁹¹ *Muma v. Muma*, 60 P.3d 592, 595 (Wash. Ct. App. 2002) (explaining that the purpose of res judicata is to ensure the finality of judgments, but that domestic violence issues are not fully litigated when the petitioner is in current fear of the respondent, and that any other interpretation would be contrary to the legislature’s intent to prevent further acts of domestic violence through a protection order).

¹⁹² See, e.g., *McComas v. Kim*, 105 P.3d 1130, 1135–36 (Alaska 2005) (determining that a “change of circumstance” precludes the application of the doctrine of res judicata in a protection order case).

¹⁹³ *Chen v. Fischer*, 843 N.E.2d 723, 725 (N.Y. 2005) (alteration in original) (finding that because a personal injury claim is not sufficiently intertwined with the dissolution of the marriage relationship, the separate tort action should not have been barred).

¹⁹⁴ See *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 88 (Ill. 2003) (holding that domestic violence could be considered a continuing tort for the purposes of an intentional infliction of emotional distress claim); see also *Giovine v. Giovine*, 663 A.2d 109, 114 (N.J. Super. Ct. App. Div. 1995) (holding statute of limitations for tort claims could be tolled based on evidence of battered woman’s syndrome).

¹⁹⁵ FRIEDENTHAL, KANE & MILLER, *supra* note 182, § 14.8 (providing examples of desegregation cases and cases involving the rights of Native Americans).

specialized situation that outweighs judicial economy concerns and for which a strict application of claim preclusion would undermine legislative objectives. The positions of these courts reflect a commitment to providing legal relief to those seeking the court's protection from domestic violence when they are most in need. Sometimes, the remedy has to be made available multiple times to the same litigant—whether she is seeking an order, modifying an order to more fully meet her safety needs, or even vacating an order and then petitioning for another order in the future—and this counsels toward removing statutory barriers to filing and applying procedural doctrines to fulfill legislative intent.

Judges also commonly deny protection orders to petitioners who have dropped prior orders or have failed to pursue a full order after receiving a temporary order.¹⁹⁶ Some judges have threatened abuse survivors with sanctions for repeated use of the court system.¹⁹⁷ All too often, judges fail to recognize the danger the petitioner faces, with one judge saying, “If she dropped it [once], she’ll do it again and [thus] is wasting the court’s time,”¹⁹⁸ and other judges commenting, “Oh, it’s you again,” “How long are you going to stay this time?” or “You want to go back and get beat up again?”¹⁹⁹ Clerks have also misinformed petitioners that they can only get one protection order in a lifetime.²⁰⁰ At the time when petitioners are most in need, current laws and practices may prevent petitioners from accessing the legal system designed to protect them. To address this problem, state legislatures could specify the intent to permit repetitive suits for petitioners experiencing domestic violence.²⁰¹

¹⁹⁶ PETER FINN & SARAH COLSON, U.S. DEP’T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 28 (1990) (finding that judges are reluctant to grant orders when a petitioner has delayed or dismissed a prior order); Kinports & Fischer, *supra* note 150, at 192 n.113 (reporting that women who have dropped prior protection order petitions often are denied future orders even if the respondent is a different abusive partner and many years have passed, and citing a study concluding that a majority of West Virginia magistrate judges consider petitioners “unworthy” if they have dropped a prior protection order petition).

¹⁹⁷ MD. SPECIAL JOINT COMM. ON GENDER BIAS IN THE COURTS, *supra* note 164, at 8.

¹⁹⁸ Kinports & Fischer, *supra* note 150, at 192 (alterations in original).

¹⁹⁹ MD. SPECIAL JOINT COMM. ON GENDER BIAS IN THE COURTS, *supra* note 164, at 8.

²⁰⁰ Epstein, *Effective Intervention*, *supra* note 2, at 40.

²⁰¹ FRIEDENTHAL, KANE & MILLER, *supra* note 182, § 14.8 (finding that when a statutory scheme allows for repetitive suits, claim preclusion defenses are avoided).

B. *A Greater Role for Advocacy Support*

1. *The Importance of Safety Planning: Focusing on Contemplation and Preparation*

The current civil legal response to domestic violence professes to be focused on victim safety, and police officers, safety advocates, domestic violence hotline responders, and attorneys tell people who have experienced domestic violence to go to the courthouse and get a protection order.²⁰² Upon arrival, these women are funneled through the protection order process. This practice reflects an assumption that can actually escalate survivors' risks. Too often, survivors are not treated as individuals with unique experiences of violence and safety needs, and are instead deposited into the judicial system before being counseled about safety concerns and alternative legal and non-legal options.²⁰³ Most jurisdictions do not have domestic violence

²⁰² See, e.g., Fischer & Rose, *supra* note 50, at 416 (reporting that in a study of women who were seeking protection orders, 50% said police encouraged them to obtain an order while 30% cited other public agencies as responsible for prompting them to obtain orders).

²⁰³ Availing one's self of the formal legal system is especially beneficial to those who desire enhanced law enforcement responses or potential criminal penalties. Following the entry of a protection order, a violation of the order is punishable as a criminal offense or contempt of court. Police are likely to respond more quickly and treat the matter with greater seriousness. Protection orders, therefore, offer a level of legal accountability because police have the right to arrest a respondent if there is any violation of the order, such as a violation of provisions prohibiting contact that would not otherwise be criminal, and the petitioner has the ability to determine whether she wants to pursue a contempt action.

There are, however, multiple alternatives to the formal protection order system that have been developed by individual communities, though their efficacy has not been proven. See, e.g., Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 1–2 (1999) (describing the advantages and disadvantages of Navajo Peacemaking Circles for women's autonomy and safety and recommending an informal adjudication process that draws on the strengths of Peacemaking while correcting for coercive practices); Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 522 (2010) (recommending the development of an alternative track to the civil justice system that would draw on principles of restorative justice); Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 968, 970 (1998) (identifying competing tensions of adversarial lawsuits and reconciliation, and describing the South African Truth and Reconciliation Commission as one model that promotes healing).

advocates²⁰⁴ to perform vital safety planning and counseling functions, and in the rare jurisdictions that do, the advocates are not routinely housed in courthouses.²⁰⁵ Almost all petitioners enter the system pro se, and only a fortunate few are able to obtain counsel after filing their cases.²⁰⁶ A survivor's first and only contact before filing a case, therefore, is with a court clerk who instructs her to fill out forms that initiate a legal action.²⁰⁷ Given the danger of separation assault, with the majority of homicides and serious injuries occurring when an abuse survivor tries to break free from the abuser's control,²⁰⁸ it is inherently risky to guide a survivor into fast-paced

²⁰⁴ See, e.g., WASH. ADMIN. CODE § 388-61A-0145 (2009) (“Advocacy-based counseling means the involvement of a client with an advocate counselor in an individual, family, or group session with the primary focus on safety planning and on empowerment of the client through reinforcing the client’s autonomy and self-determination.”).

²⁰⁵ Although Washington has a strong advocacy culture, “the overwhelming majority of courts in Washington State do not have domestic violence advocacy available on-site,” with only 19% of courts providing any advocacy services. Furthermore, only 29% of courts without advocates provide referrals to community-based domestic violence resources. JAKE FAWCETT ET AL., NOW THAT WE KNOW: FINDINGS AND RECOMMENDATIONS FROM THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW 71 (2008).

²⁰⁶ See Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 567 (2006) (reporting that in civil protection order cases in one Illinois jurisdiction, neither party was represented in 83.4% of cases); Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1913 (1999) (stating that, in the District of Columbia, domestic violence litigants are pro se in 74% of the cases studied (citing D.C. TASK FORCE ON FAM. L. REPRESENTATION, D.C. BAR PUB. SERVS. ACTIVITIES CORP., ACCESS TO FAMILY LAW REPRESENTATION IN THE DISTRICT OF COLUMBIA 40 (1992))).

²⁰⁷ See, e.g., KY. R. FRANKLIN FAM. CT. App. 1 (“Monday through Friday, a person who wishes to obtain an EMERGENCY PROTECTIVE ORDER should go to the Offices of Family Court and file a DOMESTIC VIOLENCE PETITION. . . . The person receiving and verifying the completed DOMESTIC VIOLENCE PETITION shall immediately present the Petition to the Family Court Judge.”); Gondolf et al., *supra* note 65, at 505 (identifying a court as a “model program” because it trains court staff to assist petitioners in completing standardized forms and to give an overview of the protection order process).

Clerks should be prepared to explain the legal process, provide information about protection orders and the relief available, and offer a list of domestic violence resources, such as shelters and support groups. Some clerks assist petitioners in filling out petitions, but safety planning and client counseling is considered beyond the boundaries of a court clerk’s role.

²⁰⁸ See *supra* notes 151–53 and accompanying text.

litigation²⁰⁹ without first introducing a safety planning protocol, connecting her to community and financial resources, or helping her understand and weigh the range of alternatives. As beneficial as the protection order remedy is for many abuse survivors, it may not be what each woman would choose if she were presented with options, and it can be outright dangerous if entered into without addressing safety needs.

If the domestic violence response system were attuned to the contemplation and preparation stages, a commitment to survivor safety and autonomy would mean having trained attorneys or advocates housed at courthouses to engage in individualized counseling and safety planning with abuse survivors before they take legal action, rather than the current norm that focuses solely on the “action” stage and channels petitioners into potentially dangerous litigation. The early involvement of an advocate or attorney trained in domestic violence would enable an abuse survivor to better progress through the stages of change as she struggles with definitional questions about domestic violence and seeks out information, resources, and ways to achieve safety and independence. Many women do not recognize the range of physical behaviors that are illegal and actionable, such as slapping, shoving, or pushing,²¹⁰ with one client commenting to me, “I’ve told you about the times he used a gun,” unmistakably indicating that she experienced multiple other less lethal forms of violence. Through conversation, clients frequently have revelations and identify the many elements of control and oppression they experienced and label events as domestic violence or rape. The survivor’s identification of the problem propels her from the pre-contemplation and contemplation stages into active preparation.

Women’s sense of empowerment and ability to take greater control over their lives is considered critical to achieving freedom from violence,²¹¹ and an informative and empathic advocacy relationship can foster such

²⁰⁹ Advance reflection is especially important given the speed at which the case progresses. The speed is essential to provide immediate protections, but the petitioner should understand that when she files a petition, she will appear before a judge that day, the respondent could be served as quickly as that same day or the following day, and the protection order hearing will occur within several weeks. Full hearings are held anywhere from five to twenty-one days following filing the petition, depending on the jurisdiction. *See, e.g.*, ARIZ. R. PROTECTIVE ORDER P. 8 (hearings are held within five court days in Arizona when the emergency order has awarded the petitioner exclusive use of the home).

²¹⁰ Arlene N. Weisz, *Legal Advocacy for Domestic Violence Survivors: The Power of an Informative Relationship*, 80 FAMS. SOCIETY 138, 142 (1999).

²¹¹ Joanne Belknap & Hillary Potter, *The Trials of Measuring the “Success” of Domestic Violence Policies*, 4 CRIMINOLOGY & PUB. POL’Y 559, 561 (2005) (“Victim empowerment is probably the most important focal point of any implementation or continuation of DV policies.”).

empowerment.²¹² In a study of abused women, researchers found that survivors desired more information on judicial options and processes and on community resources.²¹³ The individualized planning in this trusting, non-judgmental, and collaborative relationship can help someone realize and create options for becoming safer, with an attorney or advocate working with a survivor to explore the outcomes of possible actions, assess which measures to take based on her specific circumstances and goals, and plan for her safety around legal events. The logistics of relocating and the complexity and stress of legal actions can overwhelm any person, as any single event of relocation, court action, sudden financial volatility, severing a relationship, or otherwise disrupting social networks is a tremendous life stressor.²¹⁴ The current system expects abused women to undertake all of these actions simultaneously and steadfastly, but does not routinely offer needed support. Without assistance, abuse survivors report “feeling overwhelmed at a crisis point while leaving their abusive partner and confused by the maze of services and choices ahead of them.”²¹⁵ For as much crisis as someone is in when she comes to the courthouse, without safety planning that addresses physical safety, medical needs, financial resources, emotional support, and ways the petitioner can safely remain connected to her cultural or religious communities, the petitioner could leave the courthouse facing even greater danger.

The point at which a survivor seeks a protection order provides an ideal opportunity to connect her with support services. Research shows beneficial effects on survivors’ safety and health when they are given advocacy services, participate in support groups, and receive helping services such as legal representation, health care, or social services as part of the process of ending violence.²¹⁶ Battered women who are given free advocacy services report experiencing significantly less physical abuse, fewer depression-related symptoms, an enhanced quality of life, greater ease in leaving the abusive partner, and an increased ability to access community services and

²¹² Alytia A. Levendosky et al., *The Social Networks of Women Experiencing Domestic Violence*, 34 AM. J. COMMUNITY PSYCHOL. 95, 107 (2004) (emphasizing the value of an advocacy relationship that creates an empathic, noncritical environment).

²¹³ Hollenshead et al., *supra* note 4, at 272.

²¹⁴ Martin et al., *supra* note 145, at 117–18 (explaining that victims typically underestimate the stress of such changes, therefore increasing their likelihood of returning to an abusive partner).

²¹⁵ Jaffe et al., *supra* note 171, at 65.

²¹⁶ McFarlane et al., *supra* note 58, at 616; *see also* Burman, *supra* note 103, at 35 (finding that women who experience intimate partner violence usually benefit from legal and support services such as legal representation, domestic violence advocacy, crisis intervention services, support groups, and intensive one-on-one treatment).

social support, as compared with women without this advocacy support.²¹⁷ In general, when abused women are assisted by system actors who are survivor-centered in that they listen and respond to women's individual needs, these women are less at risk of re-assault.²¹⁸ Additionally, disclosing abuse and seeking the help of formal and informal networks lessens the long-term impact of domestic violence.²¹⁹ Advocacy support throughout the court process addresses survivors' symbolic and tangible fears regarding seeking court protection, including fear of the partner's retaliation, the "intimidating" nature of the court experience, shame about the reasons for which they are appearing in court, and prior negative experiences with judicial systems.²²⁰

The expense of advocates in the protection order process is justified based on economic considerations and the benefits of enhanced safety and welfare of victims. The annual direct costs associated with domestic violence in the United States exceed \$8.8 billion,²²¹ with each incident of intimate

²¹⁷ Cris M. Sullivan & Deborah I. Bybee, *Reducing Violence Using Community-Based Advocacy for Women with Abusive Partners*, 67 J. CONSULTING & CLINICAL PSYCHOL. 43, 43 (1999); see also Epstein, *Redefining the State's Response*, *supra* note 30, at 138 (reporting on a study of women leaving a battered women's shelter who received advocacy support from trained college student volunteers for six hours per week for a ten-week period, and the outcomes of each woman's progress over a two-year span. The study found that women with advocates experienced significantly less violence than women without advocacy support. Women with advocates also experienced less depression, a higher quality of life, greater ease in exiting the relationship for those who chose to do so, and a greater ability to obtain community resources and social support.).

Similarly, the positive outcomes associated with participation in support groups include increased self-esteem and reduced levels of stress, depression, and anxiety. Hollenshead et al., *supra* note 4, at 273.

²¹⁸ Johnson, *supra* note 40, at 1151; see also JUDY L. POSTMUS & MARGARET SEVERSON, VIOLENCE AND VICTIMIZATION: EXPLORING WOMEN'S HISTORIES OF SURVIVAL 57, 132-34 (2005) (A survey of 423 incarcerated and non-incarcerated women who had experienced victimization during their lifetimes showed that when survivors have positive perceptions of social support, the sense of self-efficacy, and the utilization of domestic violence services, they have better outcomes regarding physical health, depression, post-traumatic stress disorder, substance abuse, incarceration, and suicidality. In contrast, women who encountered barriers while seeking services for abuse had poorer outcomes in the categories.).

²¹⁹ Judy L. Postmus et al., *Women's Experiences of Violence and Seeking Help*, 15 VIOLENCE AGAINST WOMEN 852, 852-53 (2009).

²²⁰ Fischer & Rose, *supra* note 50, at 418-19.

²²¹ BONNIE S. FISHER & STEVEN P. LAB, ENCYCLOPEDIA OF VICTIMOLOGY AND CRIME PREVENTION, 346 (2010) (reporting the National Institute of Justice finding that the aggregate annual cost to victims of domestic violence is about \$8.8 billion, or \$67 billion (in 1993 dollars) when pain, suffering, and lost quality of life is included); see also Wendy Max et al., *The Economic Toll of Intimate Partner Violence Against Women*

partner violence resulting in health care costs of \$978 per woman (in 1995 dollars).²²² Studies show that protection orders yield substantial economic benefits to states, with a Kentucky study estimating that protection orders produced an annual benefit of \$85 million per year to Kentucky alone, and concluding that “for most women, protective orders reduce violence and save the state millions of dollars of avoided costs.”²²³ The involvement of advocates in the protection order process makes a dramatic difference in the utilization and success of obtaining court protection, with one county in Washington State reporting a 53% increase in the rates of petitions that were filed and the numbers of temporary protection orders granted after the jurisdiction began using trained advocates.²²⁴ Importantly, advocacy involvement results in dramatic safety outcomes, with research showing that women with domestic violence advocates were twice as likely to experience absolutely no violence for two years post-intervention, as compared to those without advocates.²²⁵

While the utilization of advocates is currently rare, an examination of two jurisdictions’ use of advocates can serve as a model. In Washington, D.C., the organization Survivors and Advocates for Empowerment (SAFE) employs courthouse advocates to provide crisis intervention; safety planning; support through the protection order process, including helping petitioners draft petitions and understand the evidence necessary to obtain a protection order; referrals for legal representation or social services; and assistance with emergency housing, food, and transportation needs.²²⁶ The starting salary for an advocate at SAFE is \$38,000, and each advocate assists over 500 survivors per year,²²⁷ with ten SAFE advocates working with 5,243 victims

in the United States, 19 VIOLENCE & VICTIMS 259, 259 (2004) (finding that direct costs of domestic violence exceed \$8.3 billion annually).

²²² NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, DEP’T OF HEALTH AND HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 30, (2003) (reporting the results of a 1995 study by the Centers for Disease Control and Prevention).

²²³ LOGAN ET AL., *supra* note 13, at 9, 148–49 (finding that protection orders save the state of Kentucky an estimated \$85 million per year, and that, “[r]elative to the toll that partner abuse takes on a victim’s life, the cost of a protective order is small”).

²²⁴ FAWCETT ET AL., *supra* note 202, at 21 n.24; *see also* Weisz, *supra* note 207, at 145 (noting the powerful influence of advocates to survivors’ increased participation in the legal system, and finding that women who were supported by advocates were more likely to obtain protection orders and call the police).

²²⁵ Epstein, *Redefining the State’s Response*, *supra* note 30, at 138.

²²⁶ Survivors and Advocates for Empowerment (SAFE), *Job Listing: Court Advocacy Program Advocate* (Aug. 2010) (on file with author) [hereinafter SAFE, *Job Listing*].

²²⁷ E-mail from Elisabeth Olds, SAFE Co-Exec. Dir., to author (Aug. 9, 2010) [hereinafter Olds, August 9th E-mail] (on file with author).

in 2009.²²⁸ SAFE estimates that the work of the advocates saves between \$800,000 and \$1,000,000 per year in clerks' time and attorneys' fees.²²⁹ In King County, Washington, where Seattle is located, the county prosecutor's office employs seven advocates who assisted 5,607 protection order petitioners in courthouses in 2009, with each advocate assisting an average of 800 survivors per year.²³⁰ In addition to the services provided by advocates in the District of Columbia, advocates in King County accompany petitioners to court and stand with them at counsel's table to provide information and support.²³¹ The starting salary for these system-based advocates is \$43,338 per year,²³² while community-based advocates in the region are paid less.²³³ In the major metropolitan areas of the District of Columbia and King County, the cost of advocacy support per victim is \$54 to \$72.²³⁴ Since surveys show that approximately 1,131,999 domestic violence victims obtain civil protection orders or restraining orders each year,²³⁵ an estimation of the annual cost of providing courthouse advocacy services to domestic violence survivors is \$60 to \$81.5 million.²³⁶ This amount is minimal when considering that annual direct costs of domestic violence exceed \$8.8 billion, and taking into account the violence-prevention outcomes of advocates and protection orders.²³⁷ Depending on a jurisdiction's volume of protection order petitioners, the jurisdiction could fund one or several courthouse-based

²²⁸ *Id.*; E-mail from Elisabeth Olds, SAFE Co-Exec. Dir., to author (Aug. 11, 2010) (on file with author).

²²⁹ Olds, August 9th E-mail, *supra* note 227.

²³⁰ E-mail from Sandra Shanahan, Supervisor, Prot. Order Advocacy Project, King Cnty. Prosecutor's Office, to author (Aug. 11, 2010, 10:06 PST) (on file with author) [hereinafter Shanahan, 10:06 PST E-mail].

²³¹ See SAFE, *Job Listing*, *supra* note 226.

²³² E-mail from Sandra Shanahan, Supervisor, Protection Order Advocacy Project, King Cnty. Prosecutor's Office, to author (Aug. 11, 2010, 10:39 PST) (on file with author).

²³³ Shanahan, 10:06 PST E-mail, *supra* note 230.

²³⁴ These figures were obtained by taking the total salary of the advocates at each organization and dividing that figure by the number of survivors served by that organization. In Washington, D.C., the cost of providing advocacy support to a survivor is \$72.48. In King County, providing an advocate to a survivor costs \$54.10.

²³⁵ See TJADEN & THOENNES, *supra* note 12, at iii, 52, 54 (finding approximately 1,131,999 victims of intimate partner rape, physical assault, and stalking obtain protective or restraining orders annually).

²³⁶ This calculation is demonstrative. The overall figures may be reduced by adjusting for lower salaries for advocates in rural areas. The calculation also only accounts for petitioners who obtain protection orders, and does not include those who dismiss their petitions or who seek advocacy services and determine not to file for an order.

²³⁷ See *supra* notes 221–25 and accompanying text.

advocates and recognize significant increases in survivor safety and financial savings as a result.

2. Ongoing Advocacy to End Violence

To sustain abuse survivors in the maintenance stage and effectively eliminate domestic violence, advocates and attorneys should be encouraged to return to the roots of the feminist response to domestic violence. Namely, advocates and attorneys should listen to battered women and then provide comprehensive, individualized responses to their physical, environmental, and emotional needs beyond the entry of a court order.²³⁸

After filing for or obtaining a protection order in the action stage, many petitioners urgently need assistance with tangible support²³⁹ and access to material resources²⁴⁰ to alter their vulnerability to recurring violence in the maintenance stage. In a survey of 423 women, abuse survivors reported the following services as being most helpful: food banks, subsidized day care, domestic violence shelters, subsidized housing, welfare benefits, job training, educational services, unemployment benefits, rape crisis or sexual assault counseling, and religious counseling.²⁴¹ These tangible interventions attend to women's multidimensional physical and environmental needs, which often need to be managed before the emotional effects of violence can be addressed.²⁴² Helping women obtain needed community resources and increasing their social support aids survivors in overcoming obstacles to

²³⁸ See Lisa Goodman & Deborah Epstein, *Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence*, 20 J. INTERPERSONAL VIOLENCE 479, 482–83 (2005) (“[A]dvocacy studies demonstrate[] a clear and positive impact on women’s safety. . . . The next step for the battered women’s movement must be to revisit its roots by refocusing on supporting women and incorporating an individualized responsiveness into government and community programs.”).

²³⁹ Judy Hails Kaci, *Aftermath of Seeking Domestic Violence Protective Orders: The Victim’s Perspective*, 10 J. CONTEMP. CRIM. JUS. 204, 218 (1994) (reporting results of interviews with 137 women that found that women needed assistance with housing, employment, child care, their ongoing court cases, and counseling).

²⁴⁰ See Coker, *Shifting Power*, *supra* note 95, at 1009–11 (advocating the use of a “material resources” test in determining whether to adopt various domestic violence laws, policies, or services).

²⁴¹ Postmus et al., *supra* note 218, at 855, 861; see also Cris M. Sullivan, *The Provision of Advocacy Services to Women Leaving Abusive Partners: An Exploratory Study*, 6 J. INTERPERSONAL VIOLENCE 41, 48–49 (1991) (presenting women with eleven areas of possible unmet need and finding that the most commonly chosen category was obtaining material goods or services, and that over half of all women also indicated that they desired legal assistance, education, transportation, health care, social support, employment, and services regarding their children).

²⁴² Postmus et al., *supra* note 218, at 862–63.

leaving abuse and enhances their overall quality of life. In turn, this improvement in well-being serves as a long-term protective force against future abuse.²⁴³ Advocates or attorneys can help petitioners locate and secure tangible support and can work with survivors on multiple fronts, including housing, resume-building, and financial education, all the while prioritizing safety and creating opportunities for material resources.²⁴⁴

The maintenance stage can be the most challenging stage for a survivor who feels lonely or ambivalent, questions her ability to escape from and prevent violence, or doubts her strength to remain separate from the abusive partner as she forges a new life apart from what she has known. Severely battered women are often socially isolated, and when advocates act in an ongoing emotionally supportive role and provide access to information and opportunities for escaping violence, it positively affects survivors' mental health²⁴⁵ and long-term ability to be free from violence.²⁴⁶ The advocate can reinforce the survivor's progress through the maintenance stage, help her identify tools to sustain her movement, and serve as a steady presence that encourages the survivor to achieve her goals related to ending abuse.²⁴⁷

3. Legislative and Policy Prescriptions

Based on survivors' needs during the stages of change, the positive safety-related outcomes associated with advocacy support, and economic benefits to the state, states should encourage greater utilization of advocates. Courts where petitioners can file for protection orders should have domestic violence advocates on-site to engage in safety planning, which can be accomplished by hiring advocates or contracting with local community-based domestic violence programs. For courthouse advocates, state legislatures

²⁴³ Deborah I. Bybee & Cris M. Sullivan, *The Process Through Which an Advocacy Intervention Resulted in Positive Change for Battered Women Over Time*, 30 AM. J. COMMUNITY PSYCHOL. 103, 125 (2002) (emphasizing the importance of securing tailored resources for individual women); Levendosky et al., *supra* note 213, at 107 (noting the positive mental health effects of receiving practical aid).

²⁴⁴ For example, part of financial education, economic stability, and asset-building might include helping a survivor change bank accounts to decrease the abuser's ability to track her location and monitor her finances. Andrea Kovach, *Integrating Asset-Building Strategies into Domestic Violence Advocacy*, 43 CLEARINGHOUSE REV. 148, 150 (2009) (describing long-term asset-building strategies, including microloans and individual development accounts).

²⁴⁵ Levendosky et al., *supra* note 213, at 95.

²⁴⁶ See Goodman & Epstein, *supra* note 238, at 484 (finding that intensive advocacy programs for women have more effective long-term results than treatment programs for batterers).

²⁴⁷ See Weisz, *supra* note 210, at 139 (comparing a group of women who received broad, intensive advocacy services with those who did not).

could adopt a description similar to Washington's survivor-centered definition of advocacy-based counseling:

the involvement of a client with an advocate counselor in an individual, family, or group session with the primary focus on safety planning and on empowerment of the client through reinforcing the client's autonomy and self-determination. Advocacy-based counseling uses nonvictim blaming problem-solving methods that include:

- (1) Identifying the barriers to safety;
- (2) Developing safety checking and planning skills;
- (3) Clarifying issues;
- (4) Providing options;
- (5) Solving problems;
- (6) Increasing self-esteem and self-awareness; and
- (7) Improving and implementing skills in decision making, parenting, self-help, and self-care.²⁴⁸

Several states statutorily permit victim advocates to assist petitioners in filing and serving protection order petitions and to accompany petitioners to court and offer assistance to varying degrees short of representing or advocating for the petitioner in court. Additional jurisdictions could formally recognize such roles for advocates.²⁴⁹

Survivors would also benefit from greater numbers of attorneys being trained in the dynamics and complexity of abuse, the multiple barriers that survivors face, relevant law, safety planning, and lethality assessment.²⁵⁰ "Domestic violence survivors who are represented by attorneys are significantly more likely to be awarded civil protection orders than those who are unrepresented, and their orders contain more effective and complete relief."²⁵¹ While attorneys should be encouraged to fulfill the advocacy roles described in this section, the small percentage of petitioners who obtain

²⁴⁸ WASH. ADMIN. CODE § 388-61A-0145 (2009). This chapter also identifies standards for domestic violence shelters and services, including safety requirements, living standards, and support services that must be provided, and includes laws regarding confidentiality, levels of training, and the evaluation and enforcement of the standards. *Id.* §§ 388-61A-0135, 388-61A-0140.

²⁴⁹ MICH. COMP. LAWS § 600.2950c(1)(a-c)-(2) (2009), [http://www.legislature.mi.gov/\(S\(3vzxa45nxhbdpvcqed2qj45\)\)/mileg.aspx?page=getObject&objectName=mcl-600-2950c](http://www.legislature.mi.gov/(S(3vzxa45nxhbdpvcqed2qj45))/mileg.aspx?page=getObject&objectName=mcl-600-2950c) (permitting a victim advocate to provide information about protection orders, assist the victim in the process of filing a petition and serving the respondent, conduct safety planning, and inform the victim about social services); OHIO REV. CODE ANN. § 2305.236 (West 2004) (defining "victim advocate" as "a person from a crime victim service organization who provides support and assistance for a victim of a crime during court proceedings and recovery efforts related to the crime").

²⁵⁰ Stoeber, *supra* note 10, at 1218.

²⁵¹ *Id.*

counsel typically are referred to attorneys only after filing their petitions for protection orders or receiving an unfavorable ruling.²⁵² Advocates stationed at the courthouse would be able to offer services to all petitioners to provide individualized support throughout the stages of change, from the essential safety planning that occurs in the early contemplation and preparation stages to addressing long-term maintenance needs, such as housing and employment.

More resources are needed at every level, in terms of attorneys and advocates engaged in civil advocacy with domestic violence survivors, community resources, health interventions, shelters, and transitional housing. Notwithstanding recognition that services by advocates and attorneys and the availability of safe shelters are essential to escaping violence, funding for these services has been severely cut in recent years, forcing shelters to close, organizations to lay off advocates and attorneys, and agencies to scale back services and turn away survivors in crisis.²⁵³ Taking Illinois as an example, the National Coalition Against Domestic Violence reports that 600 requests for help go unmet each day,²⁵⁴ and twenty-seven counties in the state eliminated courthouse advocates who previously had helped petitioners apply for orders for protection, provided transportation to hospitals and court hearings, and given referrals.²⁵⁵ These funding cuts dramatically affect abuse survivors' abilities to be safe and should be reconsidered.

²⁵² For example, when abuse survivors petition for a protection order in the District of Columbia, they can request that courthouse advocates refer them to attorneys. Some petitioners may then be connected with counsel in the two weeks leading up to the final hearing. See SAFE, *Job Listing*, *supra* note 226. In King County, Washington, pro bono attorneys volunteering with the Bar Association's Protection Order Revision Squad represent domestic violence survivors who have been denied protection orders. Emma O. Gillespie, *Family Law Help: A Need So Great*, BAR BULLETIN (King Cnt. Bar Ass'n, Seattle, Wash.), Apr. 2010.

²⁵³ Megan Twohey, *Domestic Violence Services See Cuts*, CHI. TRIB., Mar. 28, 2008, § 2, at 1 (The Victims of Crimes Act is the primary source of federal assistance, but in 2008, Congress cut the funding to \$550 million from \$625 million in fiscal 2006.); see also Mary R. Lauby & Sue Else, *Recession Can Be Deadly for Domestic Abuse Victims*, BOSTON GLOBE, Dec. 25, 2008, at A23 (reporting budget cuts of \$2.1 million to the Family Violence Prevention and Services Act and the congressional cap on the Victims of Crime Act, which is funded by fines and penalties by offenders and does not use taxpayer dollars); NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE COUNTS 2009, at 3 (2009), available at http://www.nnedv.org/docs/Census/DVCounts2009/DVCounts09_Report_BW.pdf (reporting the results of the 2009 National Census of Domestic Violence Services conducted by the National Network to End Domestic Violence, which found that on one day in America, 9,280 requests for services went unmet, including unmet requests for emergency shelter, transitional housing, legal representation, and childcare).

²⁵⁴ Twohey, *supra* note 253, at 1.

²⁵⁵ *Id.* at 6.

C. Avoiding Re-victimization While Taking Action in the Civil Judicial System

One of the most common actions that survivors undertake during the action stage is to seek civil protection orders, but reports of judicial mishandling of these cases paint a dramatically different picture from what legislators intended when they enacted this protective remedy. The following Section emphasizes the need to ensure that litigants are treated fairly and avoid re-victimization in the court process, and that judges order comprehensive remedies designed to address survivors' safety needs, as permitted by statute. These recommendations are imperative because of the safety implications of judges' words and evidence that judicial treatment of victims predicts whether they will return to the court system when they need help in their process of ending violence.²⁵⁶ The experience a survivor has with the court in the action stage influences whether she will regress or progress.

1. Judicial Hostility and Resistance to Protection Orders

A woman seeking a protection order in Washington testified about the grave fear she felt when her ex-boyfriend held a gun to her head, and she detailed how he persisted in stalking and threatening her.²⁵⁷ He cavalierly admitted to assaulting her.²⁵⁸ The judge entered a civil protection order, but warned the petitioner, "If you leave this courtroom and at some point you initiate contact with him, even if it's to wish him well . . . [the respondent] can come back to this court and ask me . . . to terminate it early."²⁵⁹ Why did the judge give this warning to the petitioner, who did nothing wrong? Why did this judge enter the order for only two years, when it is possible to have a permanent order in this jurisdiction? Why didn't she order the respondent to surrender his firearms, as required by federal law²⁶⁰ and permitted by the state's Domestic Violence Prevention Act?²⁶¹ The lethality risks seem obvious. In a courtroom in North Dakota, a judge rebuked a woman who returned to his courtroom to seek protection from her abusive partner, saying,

²⁵⁶ See *infra* notes 270–73 and accompanying text.

²⁵⁷ Recording: Hearing in King County Superior Court (Feb. 4, 2010 at 21:00) (on file with author).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ 18 U.S.C. § 922(g)(8) (2006) (making it a federal crime to possess a firearm or ammunition while subject to a qualifying protection order).

²⁶¹ WASH. REV. CODE §§ 9.41.800, 26.50.060(1)(k) (2011).

“If you go back one more time[,] I’ll hit you myself.”²⁶² In yet another jurisdiction, a judge admonished a battered woman, “I do not want to see you in here again,” and dismissed the case against her abusive husband.²⁶³ In a Florida court, a woman testified that her husband doused her with lighter fluid and set her on fire, and the judge responded by singing, “you light up my wife,” to the tune of *You Light Up My Life*.²⁶⁴ Judges ask petitioners why they have remained in the relationship, saying that the abuse could not have been that bad if they stayed; judges ask petitioners what they did to provoke their partners to beat them,²⁶⁵ and even ask women whether they like being beaten.²⁶⁶ Examples of improper, inappropriate, and dangerous statements and injurious questions by judges abound. These messages of violence or hostility from judges toward petitioners are not the rare exception, and they speak volumes about judicial resistance to this system that was designed to protect victims from further abuse.

Contrast these statements with a litigant’s expectations of what she will encounter in the civil justice system during the action stage of change. Numerous clients have excitedly told me, “I’m working toward my freedom,” expressing their determination and hope that this order will meaningfully end violence in their lives. Survivors seek protection orders not only to obtain safety-related relief, but also to break their silence, regain control over their bodies and lives, and exert control by making the abuse public and creating the corresponding public record of the abuse.²⁶⁷ They often seek the formal protection order remedy because they believe the law is the last recourse for making the abuser listen.²⁶⁸ The survivor expects the judge to notify the abuser of the illegality of his actions, and hopes to receive approval and reinforcement from a judge to terminate the violence in a relationship.²⁶⁹

²⁶² N. D. Comm’n on Gender Fairness in the Courts, *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. REV. 1113, 1208 (1996).

²⁶³ Rita Henley Jensen, *Battered Women and the Law*, 2 VICTIMOLOGY 585, 589 (1977–78).

²⁶⁴ SUP. CT. OF THE STATE OF FLA., REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 121 (1990).

²⁶⁵ The Mo. Task Force on Gender and Justice, *supra* note 161, at 505.

²⁶⁶ *Id.*

²⁶⁷ Fischer & Rose, *supra* note 50, at 420–23.

²⁶⁸ *Id.* at 420.

²⁶⁹ *See, e.g., id.* at 427 (“[W]hat seems important for authorities who interact with battered women is to understand that their primary function may be as communicators both to women and for women. Battered women need reassurance and support that they should not have to tolerate violence and emotional abuse in their lives. In addition, authorities will often need to send this message to the abuser, both directly or through

While many survivors are impeded from receiving the full protection order due to the abusive partner's intimidation and threats of greater violence,²⁷⁰ another significant reason that women do not leave violent partners or receive final protection orders is that when they do seek protection from courts, many are blamed, badgered, and further victimized through the judicial process.²⁷¹ Attorneys and advocates routinely report that judges do not take protection order cases seriously, do not give the allegations of violence due consideration, and do not convey that abusive behavior is problematic.²⁷² Judges bring to the bench "a lifetime of exposure to the myths that have long shaped the public's attitude toward the problem;"²⁷³ accordingly, over half of respondents in a survey reported that judges in their jurisdictions are insensitive and disrespectful toward petitioners.²⁷⁴ Domestic violence laws have significantly improved over the

deliberate and consistent response to women's requests for legal intervention."); McFarlane et al., *supra* note 58, at 617 (reporting women who sought civil protection orders viewed "the legal system as a force larger than themselves and as having power over the abuser that they themselves had lost as a result of the abuse").

²⁷⁰ Hollenshead et al., *supra* note 4, at 273 (citing barriers to the effectiveness of protection orders).

²⁷¹ MD. SPECIAL JOINT COMM. ON GENDER BIAS IN THE CTS., *supra* note 167, at v–viii (explaining that petitioners in domestic violence cases are routinely discredited, blamed, and degraded, and finding gender bias and a lack of understanding of domestic violence by judges).

²⁷² Kinports & Fischer, *supra* note 150, at 207–09 (One survey respondent reported that judges "hate orders of protection and try to move those cases in and out of the courtroom as quickly as possible."); *see also* The Missouri Task Force on Gender and Justice, *supra* note 161, at 505. The judicial system continues to treat intimate partner violence as less of a crime than property crimes and stranger violence. For example, in response to finding that a woman shoplifted a pack of cigarettes, a judge fined her \$500 and gave her two years of probation. In the next case this judge heard, a husband had shattered his wife's nose by kicking her in the face. The judge fined this man \$35. *Id.* at 510 n.98.

Until recently, judges frequently entered mutual protection orders, or orders against both parties, even when only one individual had petitioned for protection against the other. *See* Myrna Raeder, *Remember the Ladies and the Children Too*, 71 BROOK. L. REV. 311, 329 (2005). In response to the practice, many jurisdictions enacted statutes that prohibit mutual orders that have not provided for due process. *See, e.g., In re The Marriage of Yates*, 148 P.3d 304, 317 (Colo. App. 2006) (holding that mutual protection orders may only be issued after each party has met its burden of proving that he or she faces imminent danger); *Pearson v. Pearson*, 488 S.E.2d 414, 424 (W. Va. 1997) (reversing the issuance of mutual restraining orders because there was not evidence in satisfaction of the statutory requirement for mutual orders that each spouse had abused the other).

²⁷³ Epstein, *Effective Intervention*, *supra* note 2, at 39.

²⁷⁴ Kinports & Fischer, *supra* note 150, at 207–08.

past few decades, but for all of the legal victories, the treatment of the litigant, case outcome, and comprehensiveness of the relief awarded depend on the judge assigned to the case.

Judges' words from the bench carry significant safety implications. Research shows that when judges give warnings or lectures to respondents about the seriousness and wrongness of their violence, such judicial messages can positively impact respondents' future behavior.²⁷⁵ In contrast, judges who minimize the severity of domestic violence potentially embolden respondents. Studies also show that when judges listen to both parties' sides of the story, treat litigants fairly and respectfully, and consider the rights and wishes of the petitioner and respondent, petitioners feel like they have had an empowering court experience.²⁷⁶ Having this positive court experience predicts a survivor's improved quality of life, ability to overcome depression, and willingness to use the court system in the future as she progresses through the stages of ending violence.²⁷⁷ It is important to examine the nature of the victim's experience in the court system because if a petitioner is demeaned, intimidated, and ridiculed when she attempts to seek protection from the court, this response compounds the damage of the violence, and she will not see the court as a helping place that she can return to if violence recurs.²⁷⁸

Domestic abuse survivors may feel re-victimized by the court's response to the violence for a number of reasons,²⁷⁹ especially when they are blamed for their own victimization. Some judges determine that the abuse survivor brought the violence on herself and refuse to enter orders when they find the petitioner to blame. For example, in *Murphy v. Okeke*, Mr. Okeke invited

²⁷⁵ Epstein, *Effective Intervention*, *supra* note 2, at 43–44 (noting that judicial affirmations that victims do not deserve abuse help victims gain strength to separate from abusers).

²⁷⁶ Lauren Bennett Cattaneo & Lisa A. Goodman, *Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims*, 25 J. INTERPERSONAL VIOLENCE 481, 491 (2010) (measuring empowerment through rating statements such as, "I think the court considers my rights and wishes just as important as his rights and wishes," "I feel the court treats me fairly and listens to my side of the story," and "I got what I hoped for from filing for a civil protection order").

²⁷⁷ *Id.* at 481.

²⁷⁸ *Id.* at 483 (explaining that if a victim feels ignored or blamed by the judge, this treatment may make her feel worse than when she initially sought help from the civil judicial system, and she may not return to the legal system); Kinports & Fischer, *supra* note 150, at 207–08 (Survey respondents reported that judges "shame the woman and scare her [into believing] that she is not going to get the order of protection" and that some petitioners "don't return for the second hearing because of the judge's abusive behavior.").

²⁷⁹ Jaffe et al., *supra* note 170, at 63–64 (identifying the further risk that women and children may face through litigation, especially when unrepresented).

Ms. Murphy to a Fourth of July party at his home.²⁸⁰ When Ms. Murphy learned of Mr. Okeke's relationship with another woman, she began to cry and yell.²⁸¹ Mr. Okeke responded by yelling expletives at Ms. Murphy, telling her to leave, and hitting and kicking her multiple times, giving her a black eye, swollen face, bruises, and cuts on the inside of her mouth.²⁸² She required emergency medical treatment and missed work because of her injuries.²⁸³ During the civil protection order hearing, the trial judge blamed Ms. Murphy for "triggering violence" in Mr. Okeke by failing to leave quickly enough.²⁸⁴ During the companion criminal proceeding, this same judge stated:

There is no doubt in my mind that if M[s.] Murphy had behaved as a mature, rational, sober, intelligent adult, that we would not be here today. I think her behavior was obsessive, I think it was beyond irrational, I think it was more than immature . . . whatever happened in that apartment, *I think she brought upon herself*.²⁸⁵

This judicial attitude is not uncommon; over half of domestic violence service providers and attorneys surveyed reported that judges make victim-blaming commentary during protection order hearings.²⁸⁶

A majority of domestic violence attorneys and advocates report that judges in their jurisdiction rely on informal rules beyond the relevant statutes to the detriment of victims of violence.²⁸⁷ For example, some judges create artificial statutes of limitations to require filing within mere days after an abusive event occurs. When a petitioner files her petition more than a couple of days after a violent incident, some judges refuse to issue emergency protection orders because they assume the delay means that the petitioner is

²⁸⁰ 951 A.2d 783, 786 (D.C. 2008).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 786 & n.4.

²⁸⁴ *Id.* at 790 (also citing the trial judge's statement that the protection order statute was designed to prevent people in relationships "from triggering violence in others").

²⁸⁵ *Id.* The court found that because Mr. Okeke was the aggressor and criminally assaulted Ms. Murphy, the trial court abused its discretion in ordering mutual protection orders. *Id.* The court noted that at the sentencing hearing, the trial judge reiterated, "I'm very sorry Ms. Murphy was harmed by this *I think [her] own behavior brought a lot of this on her I don't think that it's appropriate to send Mr. Okeke to jail . . . given the facts in this case.*" *Id.* (alterations in original).

²⁸⁶ Kinports & Fischer, *supra* note 150, at 207–08 (Other survey respondents reported that judges ridicule petitioners, make the victim "feel like the offender," use embarrassing humiliation tactics, and make sexist comments).

²⁸⁷ *Id.* at 192 (reporting survey results).

not in danger,²⁸⁸ rather than realizing that she may have been in the contemplation or preparation stages during this period.²⁸⁹ Fact finders are dissatisfied when the survivor's actions fail to comport with how they believe an abuse victim should behave, reflecting a lack of understanding of the stages of change, and judges are particularly aggravated when the petitioner and respondent have had contact with each other. Judges interrogate petitioners: "Did you call him? Did you go by his house? How did you get to court today?" The survivor is scolded. She is in trouble for any contact with the respondent. Even in cases with evidence of severe violence and resulting injuries, judges outright deny orders when the petitioner has contacted the respondent, or claim the order will be void in such a circumstance,²⁹⁰ associating this communication with an absence of danger and fear. Such misstatements of the law create problems particularly when parties have children in common because petitioners may need to contact respondents regarding visitation or child support. Other petitioners who are in the process of ending relationship violence may desire prohibitions against further assaults or threats and the requirement that the abusive partner enter batterer's intervention counseling, but may not be ready to sever communication and contact altogether. They are statutorily entitled to this type of tailored order.

While the courtroom experience has the potential to be therapeutic and to empower survivors,²⁹¹ with judicial hostility to domestic violence and a roomful of strangers, the public courtroom may not feel safe.²⁹² The domestic violence court system, however, is positioned to help a survivor

²⁸⁸ *Id.*

²⁸⁹ The petitioner may be engaged in safety planning and seeking shelter, may not know of the legal option, may not easily be able to arrange for childcare, transportation, or time off work, or may have other reasons for her timing that do not reflect the severity of the respondent's threats to her safety. If the respondent is in jail or if the petitioner is seeking medical care due to the respondent's violence, filing a court action may not be an urgent priority. *Id.*

²⁹⁰ The Mo. Task Force on Gender and Justice, *supra* note 161, at 505 (finding that judges were telling petitioners that the order would no longer be in effect if the petitioner telephoned the respondent).

²⁹¹ Stoever, *supra* note 10, at 1192–95 (describing the therapeutic benefit of reporting violence to a judicial authority); *see also* Fischer & Rose, *supra* note 50, at 424. One woman described her experience of empowerment during her protection order hearing through her comment, "After so long of just taking it and taking it I needed to be able to show myself as much as show him that I was tired of being a victim. . . . [T]hat feeling, of fighting back and speaking out, will never leave me." *Id.*

²⁹² Logan et al., *Questions and Conundrums*, *supra* note 70, at 185 (reporting findings that one-fifth of women seeking protection orders were embarrassed by the public nature of the proceedings and that in one jurisdiction, protection order petitions were published in a weekly newspaper for the community to view).

progress through the stages of change and end violence, with supportive judicial responses having positive safety implications and outcomes for survivors.

2. *The Need for Comprehensive Relief in Protection Orders*

Legislative histories and appellate case law insist that protection order laws should be liberally construed²⁹³ to provide comprehensive protection²⁹⁴ of domestic violence victims through legal remedies that are readily accessible and effectively enforced. Such relief is fundamentally intertwined with victims' abilities to obtain safety and independence through the court during the action stage. However, studies of the implementation of such laws show that judges are not likely to grant many provisions that would make the orders more practical and that would effectively end violence.²⁹⁵

Judges typically have broad discretion to craft orders,²⁹⁶ but they frequently fail to award comprehensive relief and enter orders with less extensive relief than that sought by the petitioner.²⁹⁷ Multiple researchers

²⁹³ See, e.g., ME. REV. STAT. tit. 19-A § 4001 (2010) (requiring courts to “liberally construe” the domestic abuse laws to protect victims of domestic violence and allow them to “obtain expeditious and effective protection against further abuse,” and for courts to “promptly” enter and “diligently” enforce court orders); W. VA. CODE § 48-27-101(a)–(b) (2010) (instructing courts to liberally construe domestic violence laws to “assure victims of domestic violence the maximum protection from abuse that the law can provide” and to provide a “speedy” remedy).

²⁹⁴ See, e.g., 750 ILL. COMP. STAT. 60/102(6) (2008) (mandating that Illinois courts “[e]xpand the civil and criminal remedies for victims of domestic violence; including, when necessary, the remedies which effect physical separation of the parties to prevent further abuse”); ME. REV. STAT. tit. 19-A, § 4001(4) (2010) (requiring that courts liberally interpret protection order laws to “expand the power of the justice system to respond effectively”).

²⁹⁵ See, e.g., Dutton et al., *supra* note 110; Kinports & Fischer, *supra* note 150.

²⁹⁶ See Klein & Orloff, *supra* note 8, at 910–14.

²⁹⁷ Dutton et al., *supra* note 110, at 91. A study of the issuance of protection orders in three cities shows the frequency with which judges ordered the following common remedies within protection orders: orders prohibiting the respondent from assaulting or threatening the petitioner (92%), contacting the petitioner (55%), or coming near the petitioner's home or workplace (80%); an order to vacate a shared residence (32%); and orders requiring participation in domestic violence counseling (25%). *Id.* When parties had children in common, the orders contained the following relief: awarding child custody to the petitioner (80%), requiring the respondent to pay child support (37%), and denying visitation to the respondent (10%). *Id.* It is striking that although these courts frequently awarded child custody to the petitioner, a child support order did not typically accompany the award of custody. Also striking is the fact that in 8% of cases, the judge did not award the prohibition against further abuse and assault. *Id.* One would expect that this relief would be awarded whenever the judge found that the entry of an order was

have found “striking and disparate incongruencies between victim requests and court ordered relief,”²⁹⁸ which suggests that many petitioners do not receive the help they need in the action stage from the civil protection order remedy or the relief necessary to maintain freedom from violence. In a national study, 42.9% of domestic violence service providers reported that judges are “typically unwilling to consider awarding certain remedies” that are specifically authorized by statute, such as custody, child support, and other financial relief.²⁹⁹ Judicial application of protection order laws is, therefore, frequently contrary to legislative intent that requires courts to:

[s]upport the efforts of victims of domestic violence to avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse and, when necessary, reduce the abuser’s access to the victim and address any related issues of child custody and economic support, so that victims are not trapped in abusive situations by fear of retaliation, loss of a child, financial dependence, or loss of accessible housing or services.³⁰⁰

The failure to award wide-ranging relief to address violence is further demonstrated by the results of a study of a random sample of 200 cases in which protection orders were entered after a finding of domestic abuse from a domestic violence court considered to be a “model program.”³⁰¹ Researchers found that only half of the petitioners’ requests for “no contact” orders were granted by the court, and of those petitioners, only 21% received orders that completely prohibited contact and did not contain exceptions.³⁰² This finding is remarkable given that the prohibition against contact does not involve property or child custody. It also reflects the extent to which courts fail to listen to survivors’ assessments of what they need for their safety, contrary to the lessons of social science studies that a survivor has unique insights about what she needs to be safe.³⁰³ When parties had children in common, only 48% of petitioners who requested custody were granted any form of custody, and only 27% of these petitioners were granted sole

appropriate based on past domestic violence, particularly because this behavior is already criminal.

²⁹⁸ Yearwood, *supra* note 31, at 162 (discussing his own study and Edward Gondolf’s research).

²⁹⁹ Kinports & Fischer, *supra* note 150, at 205.

³⁰⁰ 750 ILL. COMP. STAT. 60/102(4) (2008).

³⁰¹ Gondolf et al., *supra* note 65, at 505–06.

³⁰² *Id.* at 510.

³⁰³ D. Alex Heckert & Edward W. Gondolf, *Battered Women’s Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault*, 19 J. INTERPERSONAL VIOLENCE 778, 796 (2004) (finding that a domestic violence victim’s perception of risk is a “reasonably accurate predictor of repeated assault”).

custody.³⁰⁴ Regarding financial support, only 12% of requests for monetary support were granted, while attorney's fees were awarded at a higher rate.³⁰⁵ The general refusal to grant financial maintenance, child support, rental or mortgage assistance, or temporary possession of property makes it very difficult for low-income petitioners to create a separate household. Although federal law requires a respondent to surrender weapons when a protection order is issued,³⁰⁶ petitioners' requests for weapons to be confiscated were only granted in 12% of cases.³⁰⁷

While some judges refuse to require the respondent to stay away from the petitioner, others do not heed a petitioner's request for an order that only prohibits violent contact. The majority of states permit petitioners to select relief that could allow for the continuation of the relationship,³⁰⁸ such as merely entering an order that prohibits the respondent from assaulting, harassing, threatening, or abusing the petitioner, and that requires him to participate in counseling. Even where such contact is permitted statutorily, judges may still refuse to enter such tailored orders or may deny any form of protection altogether.³⁰⁹

To be consistent with legislative intent, judges should be trained on how to enter individually tailored and comprehensive relief that is responsive to a petitioner's particular safety needs. Research shows that when judges deny valid requests for protection orders, petitioners are subjected to more threats of violence than those who receive protection orders.³¹⁰ While the process of

³⁰⁴ Gondolf et al., *supra* note 65, at 510; *see also* Yearwood, *supra* note 30, at 166 (finding similar rates of custody orders).

³⁰⁵ Gondolf et al., *supra* note 65, at 510–11.

³⁰⁶ 18 U.S.C. § 922(g)(8)(B) (2006).

³⁰⁷ Gondolf et al., *supra* note 65, at 511. The rate of confiscation was even lower in a review of Utah cases which found that judges required respondents to surrender firearms in only 4.5% of cases where sentencing guidelines were followed. Diviney et al., *supra* note 133, at 1214.

³⁰⁸ Because a petitioner can generally choose which relief she seeks, she can choose to not request the "stay away" or "no contact" provisions, while electing to seek the "no assault" and counseling provisions. However, in several states, a civil order that does not end the relationship is a statutory impossibility. *See* Goldfarb, *supra* note 12, at 1504 & n.110 (citing N.J. STAT. ANN. § 2C:25-28.1 (West 2007) (forbidding defendants from occupying the same residence as the victim when temporary or final restraining orders are issued)).

³⁰⁹ *See* Angela Moe Wan, *Battered Women in the Restraining Order Process: Observations on a Court Advocacy Program*, 6 VIOLENCE AGAINST WOMEN 606, 622 (2000) (describing a commissioner who refused to grant orders permitting contact between the parties and who outright denied orders to women who wished to maintain contact, despite the fact that such orders were statutorily permitted in the jurisdiction).

³¹⁰ Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women?*, 15 AM. J. FAM. L. 59, 67 (2001).

petitioning alone has value, as even the women who were denied orders experienced less subsequent violence than women who did not file for a protection order at all,³¹¹ it is critical to a survivor's success in the action stage that orders are entered when merited and that judges enter relief necessary to end violence. The next section recommends advancements in training, court observation, and judicial complaint processes to persuade judges to enter more appropriate orders.

3. *Measures for Increased Judicial Accountability*

The descriptions of judicial resistance to domestic violence cases illustrate the need for continuing efforts at judicial education.³¹² Such training should consist of information on the dynamics of domestic violence, including the Power and Control Wheel;³¹³ the Stages of Change Model, based on the notion that ending violence is a process; external and internal barriers to ending violence so that judges understand why leaving is not an easy answer; lethality risks, especially highlighting the dangers of threats to kill,³¹⁴ attempted strangulation,³¹⁵ stalking,³¹⁶ and weapons in the home;³¹⁷ protection order laws and the wide range of options available to judges as they enter remedies; and local advocacy and social service resources. Some jurisdictions mandate judicial training when judges are first assigned to hear

³¹¹ *Id.*

³¹² See 42 U.S.C. § 13992 (2006) (providing funding for judicial training under the Violence Against Women Act); Epstein, *Effective Intervention*, *supra* note 2, at 49 (“[J]udicial training must be targeted toward the eradication of existing anti-victim biases within a larger framework of promoting procedural justice.”).

³¹³ Domestic Abuse Intervention Project, *supra* note 78.

³¹⁴ Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L INST. FOR JUST. J. 14, 16 (2003) (concluding that the Danger Assessment study determined that “women whose partners threatened them with murder were 15 times more likely than other women to be killed”).

³¹⁵ See Int'l Ass'n of Chiefs of Police, Nat'l Law Enforcement Policy Ctr., *Domestic Violence—Concepts and Issues Paper* (2006), reprinted in NANCY K. D. LEMON, DOMESTIC VIOLENCE LAW 672, 674–76 (3d ed. 2009) (recommending that agencies adopt a risk assessment checklist, particularly one with questions regarding strangulation and choking, because the victim's risk is often higher when strangulation has occurred).

³¹⁶ Logan & Walker, *supra* note 168, at 685 (finding that stalking is associated with high levels of threats and violence and that it is a “critical risk factor” in post-protection physical, sexual, and psychological violence and injury, even after controlling for prior physical and sexual violence).

³¹⁷ Campbell et al., *supra* note 314, at 16 (reporting that the Danger Assessment study found that “when a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed”).

domestic violence cases,³¹⁸ and this is an important beginning. Ongoing periodic trainings should be held while judges serve this rotation so that judges can talk to experts about their questions and points of confusion so once they are regularly hearing domestic violence cases in their courtrooms. Such ongoing education that reinforces the importance and efficacy of protection orders, the very real challenges of escaping violence, and the significance of the judicial role could help prevent judicial fatigue and frustration with domestic violence cases. Ongoing training could also include sessions on vicarious trauma and burnout.

To hold judges accountable, communities can utilize court monitoring or “court watch” programs, and court observers, counsel, and litigants can be encouraged to file judicial complaints when judges make egregious remarks. Court watch programs have been created in a small number of communities to track compliance with protection order laws, document judges’ treatment of litigants, monitor whether judges and prosecutors are handling protection order violations seriously, motivate judges to change inappropriate or harmful behavior, and educate the community about how the judicial system handles domestic violence cases.³¹⁹ These programs require staff to draft and publish reports of the collected data and necessitate a sustained commitment by community, university, and law school volunteers to be a presence in courtrooms. Gender and Justice Commissions and Judicial Bias Task Forces were similarly formed in the 1990s with funding from the Violence Against Women Act.³²⁰ Additional reviews of courts continue to be warranted because, several decades later, the same problems persist.

Current judicial complaint processes do not sufficiently hold judges accountable to prevent the behaviors described in the preceding paragraphs, and should be improved to increase their effectiveness. Bad decision-making in rulings can be corrected through appeal or mandamus, although navigating this process is an imposing challenge for the majority of domestic violence petitioners who are pro se and who would be pursuing appeal without the protection of a court order. Many of the concerns raised in this Article are

³¹⁸ See, e.g., CAL. GOV’T CODE § 68555 (West 2009) (requiring a domestic violence session as part of the orientation and annual training program for judges hearing domestic violence matters).

³¹⁹ See Sarah M. Buel, *Family Violence Court Watches: Improving Services to Victims by Documenting Practices*, TEX. PROSECUTOR July-Aug. 1999, at 16, 16–19, 22 (identifying court watch programs as “an effective mechanism to bring about needed changes in the system”); Stoeber, *supra* note 10, at 1206–07 & n.194 (describing the judicial accountability benefits of community observation).

³²⁰ See generally Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN’S STUD. 1, 50–55 (1996) (describing the development of the task force movement, its processes, and its findings, which are briefly summarized as, “they ain’t pretty”).

issues of judges' appalling behavior, inappropriate demeanor, bad faith, or egregious errors, which are categorized as judicial misconduct.³²¹ Attorneys, however, lack incentives for filing judicial complaints, finding that it would be contrary to their clients' interests³²² and their own professional reputations;³²³ in fact, attorneys rarely file such complaints.³²⁴ Pro se litigants face multiple barriers in making complaints, including a fear of retaliation, lack of knowledge about actionable behavior, and lack of access to the complaint process, such that relying on litigants as the source of complaints is not an effective means of ensuring judicial propriety. The procedures of impeachment, address, recall, and removal are used exceptionally infrequently, and private or public admonition, reprimand, and censure are also rare.³²⁵ This author was able to identify only one example of

³²¹ Mary Ellen Keith, *Judicial Discipline: Drawing the Line Between Confidentiality and Public Information*, 41 S. TEX. L. REV. 1399, 1405 (2000); see also TEX. CONST. art. V, § 1-a(6) (providing that any justice of the courts may be removed from office for "willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice"); CYNTHIA GRAY, HANDBOOK FOR MEMBERS OF JUDICIAL CONDUCT COMMISSIONS 28 (1999) (explaining that Canon 3B(4) of the Model Code of Judicial Conduct regarding courtroom demeanor requires judges to be "patient, dignified, and courteous to litigants," and stating that charges of judges being impatient, impolite, or lacking judicial temperament generate a large portion of judicial complaints); Cynthia Gray, *How Judicial Misconduct Commissions Work*, 28 JUST. SYS. J. 405, 406 (2007) (explaining that, across states, grounds for investigation and discipline "frequently include willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, persistent failure to perform judicial duties, habitual intemperance, and conviction of a crime").

³²² Samuel K. Benham, *Judicial Purgatory: Strategies for Lawyers*, 58 DRAKE L. REV. 585, 593 (2010) (reviewing case law and concluding that lawyers find that filing a complaint for judicial misconduct is not in their clients' best interests because the complaints do not affect the outcome of the case that the judge has presided over, and may enrage the judge and cause the judge to be unsympathetic to the attorney's clients or to the clients' arguments).

³²³ David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 933-34 (2009) ("The most obvious disincentive to complaining of judicial misconduct . . . is the loss of goodwill with the bench. . . . The potential impact that filing a complaint of judicial misconduct could have on an attorney's career cannot be overestimated.").

³²⁴ *Id.* at 910 (reporting that only one out of every 83,000 licensed attorneys file a complaint of judicial misconduct against a judge in the United States each year).

³²⁵ Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353, 386 (2000) (noting that only 200 state court judges were removed from office between 1985 and 1995); Alex B. Long, "Stop Me Before I Vote for this Judge Again": *Judicial Conduct Organizations, Judicial*

a judge being sanctioned for bias against domestic abuse victims, which included “outspoken insensitivity” concerning domestic violence and sexual assault cases.³²⁶ Of the complaints that are filed by attorneys, litigants, or other individuals, almost all are dismissed,³²⁷ and heightened confidentiality provisions³²⁸ protect judges’ reputations while preventing the public from learning of problematic behavior.³²⁹ In sum, current processes tend to value judicial independence³³⁰ at the expense of judicial accountability.³³¹ Accountability should be improved through aggressive and competent enforcement of judicial rules of ethics, greater public access to the results of disciplinary investigations and hearings, and semi-annual reports to the public about judicial misconduct and resulting disciplinary action.³³² Court watch observers can be encouraged to file judicial complaints when there is cause to do so because such observers are not associated with the litigation and are uniquely positioned to observe trends in judicial behavior, notify the presiding judge of highly dangerous judicial behavior, and issue reports to the public.

Accountability, and the Disciplining of Elected Judges, 106 W. VA. L. REV. 1, 19–20, 22 (2003) (describing these processes and barriers to their use).

³²⁶ *In re Romano*, 93 N.Y.2d 161, 163 (1999) (removing the judge from his office for multiple offenses, including a case the judge presided over in which a husband assaulted his wife in violation of a civil protection order, and the judge remarked, “What’s wrong with that? You’ve got to keep them in line once in a while.”).

³²⁷ See Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439, 439–40, 449 (2009) (identifying ongoing issues following the implementation of the Judicial Council and Disability Act of 1980. For example, the chief judge of the circuit makes the initial review of all complaints and may dismiss them outright.); Keith, *supra* note 321, at 1404–05 (citing a report finding that, for the years 1997 and 1998, Michigan had a sanction rate of 0.4%, New York 3%, Washington 3.8%, California 5.1%, Wisconsin 5.3%, Arkansas 5.8%, and Texas 6.3%).

³²⁸ Long, *supra* note 325, at 23 (describing the range of confidentiality provisions across states’ judicial conduct organizations).

³²⁹ Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 363 (2010) (arguing for expanded free speech rights to allow attorneys to impugn judicial integrity in order to preserve litigants’ access to courts, due process rights, rights to a competent judiciary, and rights to fair proceedings).

³³⁰ *Bradley v. Fisher*, 80 U.S. 335, 347 (1871) (“For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.”).

³³¹ The strength of the judiciary relies on the public’s confidence that judges are ethical and fair.

³³² Long, *supra* note 325, at 42, 46–47.

D. *The Challenge of Maintaining Freedom from Violence*

Maintaining an end to violence requires much determination and active work by a domestic violence survivor. Most survivors would benefit from ongoing economic and advocacy support as they embark on the maintenance stage of change. Meaningful enforcement of civil protection orders on a survivor's terms is also essential to whether the order effectively ends violence.

1. *Substantive Law Changes to Provide Economic Relief*

When an abuse survivor leaves her abusive partner, there is a fifty percent likelihood that her standard of living will fall below the poverty line.³³³ Research also shows that with low levels of household income and high economic dependence on an abusive partner, there is a corresponding greater severity of violence,³³⁴ that economic dependence is the greatest predictor of a survivor's inability to end an abusive relationship;³³⁵ and that chronic economic exploitation exacerbates trauma and depression, and decreases a survivor's self-efficacy.³³⁶ Women seeking protection orders are frequently dependent on an abusive partner for basic needs such as childcare, transportation, food, clothing, housing, and medical insurance,³³⁷ and abusive partners commonly engage in economic abuse. They may financially disrupt or sabotage the victim's life by stealing her identity,³³⁸ making false

³³³ Orloff, *supra* note 153, at 617–18.

³³⁴ Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 367, 367 (2003) (citing studies that document that household income predicts the level of violence in a home).

³³⁵ Kovach, *supra* note 244, at 149 (reporting that economic dependence is an even greater predictor than safety factors).

³³⁶ Adrienne E. Adams et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 568 (2008).

³³⁷ Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 477 (2003) (“A study of women seeking civil protection orders in Washington, D.C., found that 28% were dependent on their partner for help with child care, 26% for food or clothing, 18% for transportation, 15% for a place to live or money for rent, and 5% for medical insurance.”).

³³⁸ Kovach, *supra* note 244, at 148 (providing examples of economic abuse, including withholding access to financial resources, damaging the survivor's credit, accumulating debt, and fraud).

reports to public housing authorities,³³⁹ or turning off the survivor's utilities.³⁴⁰ In the maintenance stage, petitioners frequently need immediate financial relief to enable them to leave an abusive household, meet basic survival needs, and create a home apart from an abusive partner, but many state protection order laws fail to make monetary relief available.³⁴¹ One survivor's comment highlights this tension: "The restraining order may stop the batterer from coming into the apartment, but the legal paper did nothing to help me pay for the rent, other bills, or food."³⁴² In light of the many economic barriers to ending violence and living free from abuse, opportunities for economic maintenance should be statutorily available in orders of protection.

Legislatures should follow Delaware's example³⁴³ and amend protection order laws to explicitly include child support, maintenance, and mortgage or rental assistance,³⁴⁴ and to immediately cover medical, property, and

³³⁹ My clients' abusers have made false reports to public housing authorities, such as by claiming that the number of people residing in the house exceeds the limits on the housing contract or falsely reporting drug activity.

³⁴⁰ Anique Drouin, Comment, *Who Turned Out the Lights?: How Maryland Laws Fail to Protect Victims of Domestic Violence from Third-Party Abuse*, 36 U. BALT. L. REV. 105, 122–25 (2006) (reporting on the frequency with which abuse survivors report that their utilities have been disconnected by the abuser, and the resulting economic hardship with reconnection fees and the temporary loss of services).

³⁴¹ See, e.g., COLO. REV. STAT. § 13-14-101(2.4)(a) (2010) (failing to identify any monetary provisions in protection orders in Colorado); D.C. CODE § 16-1005(c)(8) (Supp. 2010) (permitting judges to award costs and attorney fees); HAW. REV. STAT. § 586-3 (2004) (including no financial relief in Hawaii's statute); IDAHO CODE ANN. § 39-6306(f) (2010) (identifying attorney's fees and service fees as the only monetary relief statutorily permitted); WASH. REV. CODE § 26.50.060(1)(g) (2011) (listing the forms of relief available in protection orders under Washington State's Domestic Violence Prevention Act, with monetary fees being limited to administrative court costs, service fees, reasonable attorney's fees, and the cost of electronic monitoring).

³⁴² Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 227, 238 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

³⁴³ DEL. CODE ANN. tit. Ann. 10, § 1045(6), (7) (2011) (permitting judges to order the respondent to pay "support for the petitioner and/or for the parties' children . . . including temporary housing costs," and "pay to the petitioner or any other family member monetary compensation for losses suffered as a direct result of domestic violence committed by the respondent, including medical, dental and counseling expenses, loss of earnings or other support, cost of repair or replacement of real or personal property damaged or taken, moving or other travel expenses and litigation costs, including attorney's fees").

³⁴⁴ Most protection order statutes include the option for judges to enter an "order to vacate" against the abusive partner, assuming the petitioner has some interest in the

employment expenses directly related to the violence. Currently, many states do not make monetary relief, other than court fees and attorney's fees, available in orders of protection and instead require petitioners to file lengthy domestic relations actions in the family court.³⁴⁵ In other states, litigants have sought to have courts determine that child support and other monetary relief are available in protection orders under provisions allowing for other forms of relief that are "appropriate to the effective resolution of the matter."³⁴⁶ For example, after being denied monetary relief by the trial court in the District of Columbia, Jacqueline Powell successfully argued to the appellate court that "she and her children were dependent upon her husband for support, and this financial dependency was a major factor in the perpetuation of the long history of violence in the family."³⁴⁷ She further asserted that "the only effective remedy given the background of violence was for the family to live apart from the husband at a place unknown to him, or alternatively for the house to be made secure both financially and physically, which remedies required monetary relief."³⁴⁸ Over twenty years after *Powell v. Powell*, litigants in the District of Columbia continue to seek monetary relief under the "other" provision because the protection order statute only specifically enumerates "costs and attorney fees."³⁴⁹ Several state protection order statutes that do explicitly identify the availability of spousal support limit this relief to marital relationships legally recognized by the jurisdiction,³⁵⁰ thereby excluding same-sex and unmarried couples.

Even in jurisdictions where monetary relief is available, many judges insist that their dockets are too full and refuse to order maintenance and child support in civil protection order cases, leading researchers to conclude that

property, such as having her name on the lease or having paid rent. This "solution" to housing is far from perfect, as the abuser now knows precisely where to find the domestic violence survivor and the petitioner must now bear the cost of the housing.

³⁴⁵ See, e.g., WASH. REV. CODE § 26.50.060(1)(g)–(j) (2011) (only permitting judges to order respondents to pay court costs, attorney's and service fees, and electronic monitoring).

³⁴⁶ D.C. CODE § 16-1005(c)(11) (Supp. 2010); *Powell v. Powell*, 547 A.2d 973, 974–75 (D.C. 1988) (holding that the trial court had authority to order child support and other monetary relief under the catch-all provision permitting the court to order other relief to resolve the matter of family violence).

³⁴⁷ *Powell*, 547 A.2d at 974.

³⁴⁸ *Id.*

³⁴⁹ D.C. CODE § 16-1005(c)(8) (Supp. 2010).

³⁵⁰ See, e.g., ARK. CODE ANN. § 9-15-205(a)(4) (2009) (listing temporary spousal support as a possible remedy); CAL. FAM. CODE § 6341(a), (c) (West Supp. 2011) (permitting the award of spousal support in civil restraining orders); GA. CODE ANN. § 19-13-4(6), (7) (2003) (allowing courts to award spousal support "as required by law"); MO. REV. STAT. § 455.523(2), (4) (2003) (permitting the award of maintenance when the parties are "lawfully married").

“the courts are not willing to address any form of financial compensation for domestic violence victims.”³⁵¹ These judges instead instruct petitioners to file separate domestic relations actions, but the award of temporary or pendent lite maintenance or child support can take months in the family court branch. Another significant impediment to relying on domestic relations cases is that petitioners may not qualify for maintenance or alimony if they had a romantic relationship but were not married or domestic partners.³⁵² For unmarried petitioners who are financially dependant on an abusive partner, the economic hurdles to ending an abusive relationship cannot be resolved in domestic relations proceedings. The purpose of civil protection orders is to rapidly provide relief to help a person become safe, and reliance on lengthier domestic relations proceedings that either do not satisfy the immediate economic need or exclude entire classes of individuals leaves many victims without options. Although legislatures have instructed courts to interpret domestic violence laws to provide protection so that petitioners’ “lives will be as secure and as uninterrupted as possible,”³⁵³ in order for lives to be “uninterrupted,” economic sustainability is required.

Courts and judicial actors should also proactively publicize the availability of monetary relief through state crime victims compensation programs funded by the Victims of Crime Act.³⁵⁴ Every state has a statutorily created crime victims compensation program for physically injured victims that provides limited-amount reimbursement for certain crime-related expenses commonly incurred by domestic violence survivors—such as medical expenses, lost wages, and counseling expenses—that are not reimbursed through insurance or other means.³⁵⁵ There are currently, however, multiple barriers to receiving reimbursement from such programs that could be statutorily remedied. In addition to crime victims generally being unaware of such programs, many programs require that crime victims

³⁵¹ Yearwood, *supra* note 31, at 165–66 (basing his conclusion on a study that showed judges granting requests for temporary child support in only 5.1% of cases and for support payments in 2.2% of cases).

³⁵² D.C. CODE § 16-916(a)–(b) (Supp. 2010) (providing maintenance for spouses or domestic partners).

³⁵³ KY. REV. STAT. ANN. § 403.715(1) (LexisNexis 1999).

³⁵⁴ *Crime Victim Compensation: An Overview*, NATIONAL ASSOCIATION OF CRIME VICTIM COMPENSATION BOARDS, <http://nacvcb.org/index.asp?bid=14> (last visited Mar. 22, 2010); *see, e.g.*, MO. REV. STAT. § 595.020 (2000 & Supp. 2008) (describing Missouri’s program).

³⁵⁵ MO. REV. STAT. § 595.015 (2000) (listing potential expenses covered by Missouri); *Crime Victims’ Compensation Program Guidelines*, MO. DEPARTMENT OF PUBLIC SAFETY, <http://www.dps.mo.gov/dir/programs/cvc/guidelines.asp> (last visited Feb. 7, 2011) [hereinafter *Mo. CVC Guidelines*] (stating that there is total maximum limit of \$25,000 per crime victim).

report the crime to the police within hours of being victimized.³⁵⁶ Programs also commonly oblige crime victims to cooperate with law enforcement as a requirement of receiving services.³⁵⁷ Recipients of funds must also not have “provoked” the situation that led to the injury,³⁵⁸ and survivors with a prior drug or violent crime conviction may be ineligible for any services.³⁵⁹ There are scores of commonly incurred expenses that are noticeably absent from many programs, including coverage for stolen or damaged property, relocation, mortgage payments or rent, utilities, food, clothing, crime scene clean-up, tuition reimbursement, and pain and suffering.³⁶⁰ Legislatures should examine their state protection order laws to consider what further violence-related expenses should be shouldered by perpetrators of violence, and jurisdictions can expand coverage of Crime Victims Compensation programs and reduce barriers to access so that abuse survivors in poverty and those who are economically dependent on their partners have greater ability to leave an abusive household.

³⁵⁶ MD. CODE ANN., CRIM. PROC. § 11-810 (LexisNexis 2010) (requiring that law enforcement or judicial records show that the crime was reported within 48 hours of its occurrence).

³⁵⁷ MO. REV. STAT. § 595.015.6 (2000); *Mo. CVC Guidelines*, *supra* note 355 (explaining that the program interprets cooperation to include reviewing mug shots, pressing charges, and appearing in court to testify).

³⁵⁸ MD. CODE ANN., CRIM. PROC. § 11-810 (LexisNexis 2010) (prohibiting a victim from receiving compensation if “(i) the victim initiated, consented to, provoked, or unreasonably failed to avoid a physical confrontation with the offender; or (ii) the victim was participating in a crime or delinquent act when the injury was inflicted”); MO. REV. STAT. §§ 595.025.3(3), 595.035.3 (2000) (requiring consideration of whether the victim “provoked, incited, or contributed to the [victim’s] injuries or death”); *Mo. CVC Guidelines*, *supra* note 355 (defining contributory conduct to include the victim verbally inciting the offender, physically inciting the offender, or riding in an automobile with a person who is under the influence of alcohol or drugs, and using a reasonable person standard); *see also Help for Crime Victims: Who Can File*, WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, <http://www.lni.wa.gov/ClaimsIns/CrimeVictims/FileCoverage/WhoCanFile/Default.asp> (last visited Mar. 22, 2010).

³⁵⁹ *Mo. CVC Guidelines*, *supra* note 355.

³⁶⁰ *Mo. CVC Guidelines*, *supra* note 355; *cf. Compensation*, NEW YORK STATE OFFICE OF VICTIM SERVICES, <http://www.cvb.state.ny.us/Services/VictimCompensation.aspx> (last visited Mar. 22, 2010) (also covering a limited amount of “essential personal property” that was destroyed in the violence, transportation expenses for medical and court appointments, costs related to living at a domestic abuse shelter, and costs to secure and clean a crime scene).

2. *The Enforcement of Orders on Survivors' Terms*

While studies show a marked decrease in the levels of violence based on seeking a protection order, respondents do violate protection orders at high rates, particularly through re-assaulting or contacting petitioners.³⁶¹ The effectiveness of protection orders largely depends on the response by law enforcement and the judicial system to violations of the order.³⁶² The legal system, however, frequently fails to appropriately enforce protection orders, whether through the lack of adequate police response to protection order violations or the failure of prosecutors' offices to bring criminal charges. In a study of Utah's protection order violations, fewer than half of the cases resulted in arrest and incarceration, which were statutorily mandated by state sentencing guidelines for all protection order violations.³⁶³ Those who were incarcerated served very brief sentences.³⁶⁴ When the petitioner publicly documents the abuse and a judge grants a protection order and tells the respondent that violation of the order will result in criminal penalties, the petitioner has a false sense of security and faith that the criminal justice system will rapidly respond to protect her.³⁶⁵

³⁶¹ SUSAN L. KEILITZ ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE 37–40 (1997) (finding that three months after receiving a protection order, 72% of respondents reported having “no problem” with the respondent, and after six months' time, 65% experienced no problems.); Logan & Walker, *supra* note 168, at 675, 677, 685 (reviewing studies of protection order violations showing that a range from 23 to 70% of petitioners experience protection order violations, and surveying 698 protection order recipients and finding that three out of five women experienced violations of their orders); McFarlane et al., *supra* note 58, at 616 (reporting that in a study of 150 women who sought protection orders, eighty-one women were granted orders and thirty-six of these women (44%) experienced at least one violation over an eighteen-month period. The most common violation was the respondent's failure to stay a certain distance (200 feet) away from the petitioner's home or workplace, and study participants also experienced stalking and threats of violence.). The range in results between studies is likely due to methodological differences in how violations are measured. There are especially dramatic differences between examining police-reported violations and victim self-reports because many violations are not reported to law enforcement.

³⁶² Diviney et al., *supra* note 133, at 1211.

³⁶³ *Id.* at 1209 (finding that the majority of defendants were not sentenced in accordance with federal and state guidelines, and that, in addition to routine deviations from the guidelines regarding arrest and incarceration, less than one-quarter of defendants were sentenced to attend the “mandatory” domestic violence intervention program).

³⁶⁴ *Id.* at 1217.

³⁶⁵ Fischer & Rose, *supra* note 50, at 417 (reporting that 95% of surveyed women seeking protection orders expressed confidence that the police would quickly respond to any violations).

Important to the maintenance stage and the survivor's ability to sustain an end to the violence, several jurisdictions have experimented with holding compliance reviews or judicial review dockets periodically during the duration of the protection order. In Rhode Island, for example, courts routinely hold review hearings in cases where the abusive parent is permitted to have visitation with his or her child to ensure compliance with the order, measure the perpetrator's progress in treatment, and employ a system of graduated sanctions, as needed.³⁶⁶ Most courts do not currently monitor the respondent's compliance with the treatment ordered in a protection order, such as domestic violence, drug, or alcohol treatment or psychological evaluations, and it is very difficult for petitioners or counsel to ascertain whether the respondent is enrolled and participating in the court-ordered treatment. Judicial reviews would inform the respondent that he will be held accountable over a period of time, provide greater judicial oversight opportunities for courts to assess the respondent's compliance with the domestic violence order, and give petitioners an opportunity to report violations in addition to the traditional avenues.

Enforcement is a key element to the effectiveness of protection orders, and ending violence requires a sustained commitment by the actors in all systems—legislative, judicial, law enforcement, community advocacy, and social service systems. It is not enough to simply enter the protection order; the same judicial system must be prepared to enforce it if a petitioner returns presenting evidence of violations of the order. The piece of paper that is the order should represent a greater commitment by the legislative and judicial systems to supporting a survivor's efforts and ability to end violence.

V. CONCLUSION

If we as a society take seriously the promise of ending violence, the administration of protection order laws and systems should reflect a priority for protecting people from abuse. When domestic violence survivors find themselves in a system that does not account for common processes of ending violence and fails to recognize the complexities of domestic violence and the need for individualized responses, the legal system fails survivors and may even place them in increased danger.

Courtrooms have the potential to be therapeutic and empowering, and, at a minimum, a site where the law is applied, but there are multiple examples of judicial resistance, fatigue, and failure to be alarmed by alarming facts. The Stages of Change Model teaches that the judicial system's expectations should shift to accommodate the fact that ending violence is a process, and

³⁶⁶ *Domestic Violence Court*, JUDICIARY OF RHODE ISLAND, <http://www.courts.ri.gov/family/domesticviolence.htm> (last visited Oct. 25, 2009).

that procedural rules should correspond with this reality. Identifying the stages a survivor progresses through and the transformational role advocates can play in helping a survivor move toward maintenance validates the need for greater utilization of advocates. While the solution to violence often requires a comprehensive civil protection order, the resolution is not as simple as a legal order, but also necessitates social and economic support and enforcement of the order.

The civil protection order remedy has great potential to take the terror that people experience in their homes seriously and enhance survivors' safety and autonomy, making all the difference in a person's survival. With procedural and substantive law changes and additional commitment and effort by the legislative, judicial, and community advocacy systems, the promise of the protection order can be a reality.