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ACCESS TO SAFETY AND JUSTICE: SERVICE OF PROCESS IN DOMESTIC VIOLENCE CASES

Jane K. Stoever
jstoever@law.uci.edu
University of California, Irvine ~ School of Law

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Abstract: Every day, in courthouses across America, numerous domestic violence protection order cases are dismissed for lack of personal service, even though law enforcement is tasked under federal law with effectuating service. Service of process presents substantial access to justice and access to safety issues for domestic violence survivors who seek legal protection, as nearly 40% of petitioners for civil protection orders are unable to achieve personal service on those against whom they seek protection. Research shows that the civil protection order remedy is the most effective legal means for intervening in and eliminating abuse, yet petitioners who fail to achieve personal service—whether because respondents evade service or are impossible to locate yet continue threats and abuse—are left without vitally needed protection. Procedural rules operate to inhibit the legal remedy's effectiveness and create a two-stage dilemma by: (1) often requiring notice prior to the temporary protection order stage, which can create danger pre-hearing, and (2) requiring personal service for a full protection order when danger may still exist and the respondent may successfully evade service.

In stark contrast, other areas of the law—including antitrust, bankruptcy, domestic and international business, eviction, divorce, and termination of parental rights—readily permit alternative service methods. In seeking to understand the law's differential treatment of domestic violence, this Article explores the historic origins of the heightened notice and service requirements for domestic violence remedies and the ongoing race, class, and gender implications, including as displayed by the #MeToo movement. In proposing expanded service methods that satisfy due process rights and address procedural justice, the Article examines both the respondent's interests and the petitioner's constitutionally protected right to a hearing on the merits, which is not normally acknowledged. States need not wait for tragedy before making the protection order remedy more accessible, as has been the pattern for several states that have adopted alternative service means for domestic violence remedies.

* Clinical Professor of Law and Director, Domestic Violence Clinic, University of California, Irvine School of Law. LL.M., Georgetown University Law Center; J.D., Harvard Law School; B.A., University of Kansas. I wish to thank Patricia Cyr, Michele Gilman, Michele Goodwin, Jill Hasday, Sarah Katz, Laurie Kohn, Tamara Kuennen, Lisa Martin, Ann McGinley, Jessica Miles, David Min, Natalie Nanasi, Justin O'Neil, Henry Stoever, Jane P. Stoever, Shauhin Talesh, Emily Taylor Poppe, and David Ziff for their helpful comments. I am grateful to Vanessa Gomez, Janista Lee, Jasmine Nickelberry, Anne Osborn, Ingrid Peterson, and Judith Ramos for their research assistance.

INTRODUCTION

Barbara came to my domestic violence clinic in Orange County, California, after learning that her boyfriend had committed horrific acts of sexual abuse against her eight-year-old daughter from a prior relationship.[1] He fled when Barbara discovered his abuse and called the police, but Barbara and her daughters live in fear of his return. We received judicial permission to serve via publication a termination of parental rights case concerning the younger child they had in common,[2] but, at the time,[3] California law required personal service for domestic violence civil protection orders, which we were unable to achieve. Heightened procedural requirements for domestic violence remedies impeded the effectiveness of this safety remedy and left Barbara and her daughters without needed court protection.

Over one thousand miles away in Seattle, before Rebecca Jane Griego was murdered at age twenty-six by her ex-boyfriend, Jonathan Rowan, she sought a domestic violence protection order.[4] She detailed in her court pleadings her inability to personally serve Jonathan despite his continued threats, writing, "[Jonathan] called me to tell me I cannot find him but he can find me . . . and to look over my shoulder because I would see him

1. Clients have given permission to share the details contained within this Article and their names and identifying information have been changed to protect confidentiality.

2. Court pleadings and orders are on file with the Author.

3. On behalf of Barbara and multiple other clients, the domestic violence clinic that I direct at the University of California, Irvine School of Law sought legislative reform to permit alternative service for domestic violence civil restraining orders. *See* Assemb. B. 2694, 2017–18 Leg., Reg. Sess. (Cal. 2018). Effective January 1, 2019, petitioners can seek judicial permission for service by publication, mail, or other methods upon showing diligent efforts at personal service and that the respondent appears to be evading service. Act of Aug. 27, 2018, ch. 219, sec. 3, § 6340(2), 2018 Cal. Stat. 2498 (codified at CAL. FAM. CODE § 6340(2) (West 2018)). Electronic service is not explicitly available, and petitioners bear the responsibility to motion for alternative service, issues that are explored in Parts II and V, *infra*.

4. Jim Brunner & Nick Perry, *Months of Stalking End with Two Dead at UW*, SEATTLE TIMES (Apr. 3, 2007, 7:18 PM), https://www.seattletimes.com/seattle-news/months-of-stalking-end-with-2-dead-at-uw/ [https://perma.cc/7YJY-535K].

again."[5] Tragically, two weeks later Jonathan came to Rebecca's office at the University of Washington and fatally shot her before killing himself.[6] Following her daughter's death, Rebecca's mother recalled how in the weeks before Jonathan murdered her daughter, Rebecca "felt a crippling fear as she and her sister tried time and again to track down [the] abusive ex-boyfriend and serve him legal papers."[7]

Given the life-threatening nature[8] of domestic violence,[9] many abuse survivors seek court protection from further abuse in the form of civil protection orders.[10] The moment of separation from an abusive partner and the ensuing period when seeking to remain free from abuse are now known to be times of heightened danger and lethality.[11] During this period of acute danger, when survivors of abuse and stalking are most in need of legal protection, it may be denied because of victims' inability to personally serve abusive partners.

Personal service—or in-hand delivery of a summons to the opposing party by a person authorized by law—is required for domestic violence

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5. *Id.*

6. *Id.*; Seattle Times Staff, *UW Staffer Killed by Stalker*, SEATTLE TIMES (Apr. 2, 2007, 10:46 PM), http://www.seattletimes.com/seattle-news/uw-staffer-killed-by-stalker/ [https://perma.cc/38PM-NX2W].

7. Nick Perry, *Family of UW Worker Seeks New Law*, SEATTLE TIMES (Feb. 21, 2008, 12:34 AM), https://www.seattletimes.com/seattle-news/family-of-uw-worker-seeks-new-law/ [https://perma.cc/JKH7-KR8N].

8. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE: ATTRIBUTES OF VICTIMIZATION, 1993–2011, at 3 (2013), https://www.bjs.gov/content/pub/pdf/ipvav9311.pdf [https://perma.cc/KV9V-K7V5] (analyzing homicide data and concluding that women are more likely to be killed by an intimate partner than by any other person known or unknown to them); Susan Sorenson & Douglas Wiebe, *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412, 1412–16 (2004) ("Firearms are more common in the households of battered women and their partners than among the general population, which is cause for concern, given the lethality of firearms."). In two-thirds of these households, the intimate partner used the gun(s) against the woman, usually threatening to shoot/kill her (71.4%) or to shoot at her (5.1%). *Id.* at 1414.

9. Domestic violence may consist of physical or verbal force, sexual abuse, acts of coercion or intimidation, the denial of access to resources, deprivation of liberty, or life-threatening situations that result in psychological or physical harm and subordinate the abused partner. *See* EVAN STARK, COERCIVE CONTROL 85–87 (Claire Renzetti & Jeffrey L. Edleson eds., 2007) (discussing the need to broaden definitions of domestic violence beyond physical abuse to include psychological, emotional, and other tactics and harms).

10. 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"). Note that different jurisdictions use the terms civil protection order, protective order, restraining order, domestic violence order, order for protection, order of protection, or peace bond to refer to the same civil legal remedy regarding intimate partners and family members. For clarity, this Article uses the term "civil protection order."

11. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1091 (2003).

civil protection orders in most jurisdictions.[12] Although the Violence Against Women Act (VAWA)[13] prohibits states from charging petitioners for service of process in domestic violence cases, and states require law enforcement agencies to serve protection order petitions and court orders on respondents without charging fees to petitioners,[14] many respondents in domestic violence cases purposefully and successfully evade service.[15] For example, a recent study in Seattle determined that police were unable to accomplish service in more than 40% of protection order cases due to their inability to locate the subject.[16] On any given day in courthouses across America, more than one-third of domestic violence civil protection order cases are continued or dismissed for lack of personal service.[17] Department of Justice statistics further show that approximately one-third of issued civil protection orders are not personally served as required in

12. *See, e.g.*, CAL. FAM. CODE § 243 (West 2018) (requiring personal service for protection orders); LA. CODE CIV. PROC. ANN. art. 1261(b) (2019) (only permitting alternative service on corporations); *infra* note 150 and accompanying text.

13. 34 U.S.C. §§ 10450, 10461 (2018).

14. *Id.* (requiring jurisdictions to certify that their laws and the practices of their courts and law enforcement agencies do not make domestic violence victims pay costs associated with the "filing, issuance, registration, modification, enforcement, dismissal, or service of a warrant, protection order, petition for a protection order, or witness subpoena"). The prohibition on charging fees is based on compliance requirements of the VAWA Services Training Officers Prosecutors (STOP) Violence Against Women Formula Grants and the VAWA Community Defined Solutions to Violence Against Women (CDS) (formerly entitled Grants to Encourage Arrest Policies and Enforcement of Protection Orders). Currently, all states, territories, and some tribes receive STOP grants, and many communities and tribes receive CDS funds. SARAH HENRY & MONICA N. PLAYER, NAT'L CTR. ON PROT. ORDERS & FULL FAITH & CREDIT, VAWA PROHIBITION ON FEES FOR SERVICE OF PROTECTION ORDERS: IMPLICATIONS FOR LAW ENFORCEMENT AGENCIES (2011), http://www.bwjp.org/assets/documents/pdfs/vawa_prohibition_on_fees_for_service_of_protection_orders.pdf [https://perma.cc/KQ8H-TR8A].

15. The author has numerous case examples on file. *See also Restraining Order Dismissed for Lack of Service*, LIEBER & GALPERIN LLP, http://losangelesrestrainingorderattorney.com/uncategorized/restraining-order-dimissed/ [https://perma.cc/D2GR-JRCS] (reporting that Kenya Moore, the Real Housewives of Atlanta reality television star, was forced to dismiss her civil restraining order case against her ex-boyfriend, Matt Jordan, because she could not serve him, although Jordan was calling Moore approximately thirty times per day and threatened her after she blocked his phone number).

16. *Rebecca Griego Bill Passes Senate Unanimously*, U.S. ST. NEWS (Feb. 12, 2008); *see also* Natalie Singer, *Legal Delays Add to Victims' Fears*, SEATTLE TIMES (Oct. 6, 2007, 2:02 AM), https://www.seattletimes.com/seattle-news/legal-delays-add-to-victims-fears/ [https://perma.cc/Z8CL-2E9Z] (reporting that in Seattle in 2006, only 58% of the 1,076 domestic violence temporary protection orders (TPO) sent to the police department for service were successfully served).

17. Singer, *supra* note 16; *see also* SURVIVORS & ADVOCATES FOR EMPOWERMENT (DC SAFE), INC., DC DOMESTIC VIOLENCE COURT WATCH PROJECT: 2012 REPORT 29 (2013), https://courtwatchdc.files.wordpress.com/2013/08/2012courtwatchreport.pdf [https://perma.cc/SH3D-AC2F] (identifying that in the District of Columbia in 2012, 34% of cases were continued for lack of personal service and 12% of cases were dismissed for lack of service).

domestic violence cases; in contrast, only 4% of criminal restraining orders remain unserved.[18] Whether abusers intentionally evade service or are otherwise unable to be located for personal service, these service requirements impede access to safety and justice for many abuse survivors.[19]

Between 1976 and 1993, all fifty states and the District of Columbia enacted domestic violence civil protection order statutes.[20] States must now ensure that petitioners have procedural access to hearings for these state-created remedies.[21] Rather than defaulting to the broader state civil procedure codes, civil protection order remedies often have more stringent procedural rules imposed through family code provisions[22] or under procedural rules governing domestic violence courts.[23] Such heightened procedural requirements operate to decrease the legal remedy's effectiveness by making such protection inaccessible to many victims, as shown by Rebecca and Barbara's experiences.

The current personal service requirement in domestic violence protection order cases stands in stark contrast to the alternative means of service permitted in many other areas of the law. Alternative service

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18. Monica Rhor, *Orders Often Fail to Restrain Violence*, ORANGE COUNTY REG. (Mar. 18, 2006, 3:00 AM), https://www.ocregister.com/2006/03/18/orders-often-fail-to-restrain-violence/ [https://perma.cc/WKR8-HCAB] (additionally reporting that over 40,000 California civil and criminal domestic violence protection orders were not served as of 2006).

19. EMILIE MEYER, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, CIVIL PROTECTION ORDERS: A GUIDE FOR IMPROVING PRACTICE 4 (2010), https://www.ncjfcj.org/sites/default/files/cpo_guide.pdf [https://perma.cc/W7TC-RQTX] (noting that barriers to accessing protection orders have gone unnoticed and unaddressed, and specifying that "the ability of the system to protect victims can be impeded by barriers in both service and enforcement").

20. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 28–32 (1999) (discussing the enactment of protection order remedies across the United States); 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) (conducting a fifty-state survey concerning the recently enacted remedy); *Domestic Violence/Domestic Abuse Definitions and Relationships*, NAT'L CONF. ST. LEGISLATURES (Jan. 8, 2015), http://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx [https://perma.cc/GB3C-GNMT] (mapping state laws regarding domestic violence or abuse and definitions of qualifying relationships and conduct that constitutes abuse).

21. *Infra* note 37 and accompanying text.

22. *See, e.g.*, CAL. FAM. CODE § 243 (West 2018) (requiring personal service for domestic violence cases).

23. *See* D.C. SUPER. CT. DOM. VIO. R. 5(a)(3); *cf.* D.C. SUPER. CT. R. CIV. PRO. 5 (identifying multiple options for service, including leaving pleadings and summons with the clerk's office if the opposing party has no known address); Anderson v. Sherman, 178 Cal. Rptr. 38 (Ct. App. 1981) (Where the petitioner can validly accomplish service of process under either the provisions of the Code of Civil Procedure or an alternative statute, the requirements for service under a specific statute prevail over the more general provisions of the Code of Civil Procedure.).

methods are explicitly permissible in business,[24] eviction,[25] bankruptcy,[26] and criminal cases,[27] in which liberty and financial interests are at stake. Alternative means of service are also available in other legal realms concerning intimate and familial relationships. For example, marriages can be dissolved, child custody and support can be awarded, and parental rights can be terminated following notice through publication in a newspaper of general circulation or by posting notice at a designated location.[28] While articles from the past two decades discuss general trends toward electronic service,[29] and New York now allows electronic service

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24. *See, e.g.*, FED. R. CIV. P. 4; CAL. CORP. CODE § 15908.06 (Deering 2018) (publishing at least once in a newspaper is sufficient for notice of dissolution of limited partnership); DEL. CODE ANN. tit. 9, § 280 (West 2018) (providing that dissolution of corporations may be notified by publication); LA. CODE CIV. PROC. ANN. art. 1261(b) (West 2019) (permitting alternative service on corporations); Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442, 446 (Civ. Ct. 2008) (holding that N.Y. C.P.L.R. 308 does not directly authorize service of process by email, but service by email is sufficient where other modes are unavailable).

25. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1162, 1946 (West 2018) (providing alternative service where personal service is unavailable, including leaving a copy with someone of suitable age and discretion or affixing a copy in a conspicuous place on the property); 735 ILL. COMP. STAT. ANN. 5/9-211 (West 2018) (providing alternate service by leaving a copy to a person over the age of thirteen years residing on the premises, or by sending a copy via certified or registered mail); IND. CODE ANN. § 32-31-1-9 (West 2018) (giving notice to any resident or affixing a copy of the notice to a conspicuous part of the premises when the tenant is not present).

26. Jeanne Finegan, *The Web Offers Near, Real-Time Cost-Efficient Notice*, AM. BANKR. INST. J., June 2003, at 1–7.

27. *See* FED. R. CRIM. P. 4 ("A summons is served on an individual defendant . . . by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address."); ALA. R. CRIM. P. 3.4 (authorizing service of summons in the same manner as civil service except for publication, which includes the option of leaving a copy at the person's abode); MASS. R. CRIM. P. 17 ("A summons shall be served upon a witness by delivering a copy to him personally, by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing to the witness' last known address.").

28. *See, e.g.*, CAL. CIV. PROC. CODE § 413.30 ("Where no provision is made in this chapter or other law for the service of summons, the court in which the action is pending may direct that summons be served in a manner which is reasonably calculated to give actual notice to the party to be served and that proof of such service be made as prescribed by the court."); CAL. FAM. CODE § 215 (West 2018) (providing that a motion for modification of custody, visitation, or child support may be served by mail); *id.* § 4724 (permitting service by certified mail or other means for child support delinquency); CAL. WELF. & INST. CODE § 294 (West 2018) (providing alternative service methods in dependent child proceedings); *id.* § 366.26 (providing for service by mail to terminate parental rights or establish guardianship of children adjudged dependent of the court); Application for Order for Publication or Posting (Family Law), CAL. CTS., http://www.courts.ca.gov/documents/fl980.pdf [https://perma.cc/QDF9-3JY8] (court form for requesting notice through publication or posting).

29. *See* Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 339 (2003); Frank Conley, *Service with a Smiley: The Effect of E-Mail and Other Electronic Communications on Service of Process*, 11 TEMP. INT'L &

for divorce,[30] alternative service is either not explicitly available in domestic violence cases or is exceedingly difficult to utilize.[31] Service of process doctrine has generally evolved, but not with respect to domestic violence remedies.

Service of process is intended to alert respondents to pending legal proceedings that affect their rights.[32] In approaching the issue of service in domestic violence cases, this Article prioritizes actual notice for the reasons detailed below, rather than merely satisfying technical service of process requirements. Alternative service is not intended to simply produce default judgments. Instead, research and extensive experience litigating domestic violence cases reveal litigants' challenges in accessing the courts,[33] and the normative solutions for service of process rules that this Article identifies would better provide actual notice and reflect evolving technology and ways of living.[34]

Service of domestic violence protection orders is both an issue of access to justice[35] and access to safety, as such orders can provide critical protection at home, school, work, and wherever the protected person may be in the world. As the U.S. Supreme Court explained in *Mullane v. Central Hanover Bank & Trust Co.*,[36] once the state creates a remedy, it cannot deprive the petitioner of a hearing on that claim without due

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COMP. L.J. 407 (1997); Finegan, *supra* note 26, at 1–7; John M. Murphy III, Note, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J. LEGAL COMMENT 73 (2004); Angela Upchurch, *"Hacking" Service of Process: Using Social Media to Provide Constitutionally Sufficient Notice of Process*, 38 U. ARK. LITTLE ROCK L. REV. 559, 587 (2016); William Wagner & Joshua R. Castillo, *Friending Due Process, Facebook as a Fair Method of Alternative Service*, 19 WIDENER L. REV. 259, 263 (2013).

30. Hollow v. Hollow, 747 N.Y.S.2d 704, 706–08 (Sup. Ct. 2002). In the first case to authorize e-service under rule 308(5) of the New York Civil Practice Law and Rules, email service was acceptable in a divorce case when sent to a defendant who had been living in Saudi Arabia for two years and had only communicated with plaintiff through email, and other methods of service were impracticable. *Id.* at 708. The court allowed e-service, in combination with service through international registered and standard mail. *Id.*

31. *Infra* Part II. Regarding electronic service, the District of Columbia recently amended its service rules to be the first jurisdiction to explicitly permit electronic service for civil protection orders. D.C. SUP. CT. DOM. VIOL. R. 5(a)(3)(A)(i) (West 2018). California, in contrast, did not allow electronic service for domestic violence matters when it recently amended its laws to permit alternative service. Act of Aug. 27, 2018, ch. 219, sec. 3, § 6340(2), 2018 Cal. Stat. 2498 (codified at CAL. FAM. CODE § 6340(2) (West 2018)).

32. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950).

33. *Infra* Part II.

34. *Infra* Part V.

35. The concept of access to justice encompasses a broad range of strategies to meet the legal needs of those who cannot afford counsel, including procedural access and justice issues. *See infra* notes 38, 126–136 and accompanying text.

36. 339 U.S. 306 (1950).

process of law.[37] Because claims cannot be heard and substantive relief cannot be granted without satisfying service requirements, procedural rules requiring personal service in domestic violence cases present procedural access barriers. Instead, procedural rules should embrace procedural fairness and be designed to provide notice to respondents *and* safeguard the rights of litigants who need to utilize the legal remedies.[38]

The obstruction of access to safety and justice is particularly dire for unrepresented individuals with limited means. Courts recognize that counsel is often of "central importance"[39] to achieving service, but most abuse survivors lack the means to hire an attorney or private process server,[40] and court staff generally will not answer questions about service of process or provide other basic legal information.[41] Abused individuals, who must already contend with the physical and psychological effects of

37. *Id.* at 314–15; *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (holding that, under the Due Process Clause, states cannot limit the rights to adjudicatory procedures when doing so is "the equivalent of denying them an opportunity to be heard on their claimed right").

38. *See* Rebecca Aviel, *Family Law and the New Access to Justice*, 86 FORDHAM L. REV. 2279, 2292 (2018) ("[I]f there are not enough lawyers to work the system, then we will change the system so that it relies less on lawyers."); Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 746 (2015) (explaining that demand-side reform requires the simplification of evidentiary and procedural rules so that pro se litigants can meaningfully participate in the court system).

39. *See* Kleeman v. Rheingold, 614 N.E.2d 712, 716 (N.Y. 1993).

40. JANE C. MURPHY & ROBERT RUBINSON, FAMILY MEDIATION: THEORY AND PRACTICE 161 (2009) (reporting that approximately 80% of family law litigants who technically qualify as indigent and are eligible for free legal assistance are unable to obtain representation); Margo Lindauer, *Damned If You Do, Damned If You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 AM. U. J. GENDER SOC. POL'Y & L. 797, 808 (2012) (identifying that the number of pro se litigants in family law cases is rapidly increasing); *see also* AM. PSYCH. ASS'N, VIOLENCE & SOCIOECONOMIC STATUS 2 (2016), https://www.apa.org/pi/ses/resources/publications/factsheet-violence.pdf [https://perma.cc/SJW8-55KY] ("Women who are physically assaulted are significantly more likely to have unstable employment than women who do not experience intimate partner violence." (citations omitted)); *id.* ("Seventeen percent of cities cited domestic violence as the primary cause of family homelessness."); Campbell et al., *supra* note 11, at 1091 tbl.1 (finding that women with income of under $10,000 are the largest category of women to experience domestic violence); *Domestic Violence Survivors*, NAT'L CONSUMER L. CTR., https://www.nclc.org/special-projects/domestic-violence-survivors.html [https://perma.cc/UDE5-EEN9] ("Many of these survivors of domestic violence, in addition to facing physical and emotional concerns, face serious financial concerns after separating from an abuser.").

41. Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 47 (2002) (identifying common refusal to provide information about service, statutes of limitations, methods of enforcing orders, and other basic rule-related information that is not fact dependent).

domestic violence, report feeling extremely helpless, scared, and alone in their efforts to serve their abusers.[42]

Although individuals of any age or racial, ethnic, economic, sexual, or gender identity can experience domestic violence, low-income women of color and lesbian, gay, bisexual, and transgender individuals experience the highest rates of severe domestic violence.[43] Low-income women of color are also most commonly the petitioners seeking court protection from abuse and are most affected by the access to justice gap.[44] In sum, those who are most vulnerable to severe and lethal abuse are left to navigate court processes and make service attempts on their own. Often, police and abuse survivors cannot achieve personal service, meaning procedural requirements operate to impede the laws intended to protect victimized individuals against further abuse.

This Article examines why domestic violence protections differentially demand personal service. Societal and legal reluctance to recognize domestic violence, bolstered by persistent disbelief of abuse survivors,[45] have resulted in differential treatment of and heightened standards for

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42. *See* Perry, *supra* note 7.

43. U.S. DEP'T OF JUSTICE, IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 5 (2016) ("Sexual assault and domestic violence are crimes that disproportionately impact women, girls, and lesbian, gay, bisexual, and transgender (LGBT) individuals in the United States."); NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DIV. OF VIOLENCE PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 2 (2013), http://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf [https://perma.cc/6U2S-RX2W] (concluding that 44% of lesbian women and 61% of bisexual women have experienced rape, physical violence, and/or stalking by an intimate partner); WOMEN OF COLOR NETWORK, WOMEN OF COLOR NETWORK FACTS & STATS COLLECTION: DOMESTIC VIOLENCE IN COMMUNITIES OF COLOR 2 (2006), https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf [https://perma.cc/3TTA-N6KG] ("African American females experience intimate partner violence at a rate 35% higher than that of white females, and about 2.5 times the rate of women of other races.").

44. Tonya L. Brito et al., *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3028 (2015) ("Although the population of low-income Americans most affected by the civil justice gap is disproportionately minority, race and racial inequality are understudied areas of inquiry in the access to justice literature."); *see* Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 349 (2008).

45. *See generally* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2167–68 (1996) (detailing the husband's historic right of chastisement and how courts characterized marriage as existing beyond law and in a "sphere separate from civil society"); Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protective Orders*, 67 VAND. L. REV. 1015, 1018 (2014) (identifying the recency of the state's response to domestic violence); Courtney Fraser, Comment, *From "Ladies First" to "Asking for It": Benevolent Sexism in the Maintenance of Rape Culture*, 103 CALIF. L. REV. 141, 168 (2015) (identifying how consent is imputed for women who knew their attackers, and providing the example of a Texas county in which from 2008 to 2012, grand juries "failed to return an indictment in 51 percent of acquaintance rape cases, even when there was photographic evidence of the assault or when the defendant confessed to the rape").

domestic violence relief, including in the civil context.[46] The recent popularization of the #MeToo movement[47] reveals how claims of severe and pernicious abuse often have to be made by multiple abuse survivors for allegations against an individual to be believed.[48] This was true of Harvey Weinstein, Matt Lauer, Charlie Rose, Larry Nassar, and dozens of other high-profile individuals,[49] including Rob Porter, a top aide in President Donald Trump's White House who resigned amidst allegations and photographic evidence that he had abused his former wives.[50] Following Porter's resignation, Trump tweeted, "Peoples[']] lives are

46. Stoever, *supra* note 45, at 1015.

47. The hashtag #MeToo was started over a decade ago by African American activist Tarana Burke as a grassroots movement to aid sexual assault survivors in underserved communities. Based out of Harlem, she identified the lack of services in her community and began a movement of African American women talking to each other and sharing their stories. Zahara Hill, *A Black Woman Created the "Me Too" Campaign Against Sexual Assault 10 Years Ago*, EBONY MAG. (Oct. 18, 2017), www.ebony.com/news-views/black-woman-me-too-movement-tarana-burke-alyssa-milano [https://perma.cc/8TYP-8QHC]; ME TOO MOVEMENT, https://metoomvmt.org [https://perma.cc/V93Q-QN4P]. On October 15, 2017, building from this movement, actor Alyssa Milano tweeted, "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem." Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976 [https://perma.cc/6FMQ-8D5D].

48. *See* Petula Dvorak, *Like Trump, Many People Refuse to Believe Domestic Violence Victims. That Has to Stop.*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/local/like-trump-many-people-refuse-to-believe-domestic-violence-victims-that-has-to-stop/2018/02/12/7459e23a-100c-11e8-9570-29c9830535e5_story.html?utm_term=.cee871810de6 [https://perma.cc/5N67-CB9E]; Catherine A. MacKinnon, Opinion, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html [https://perma.cc/8MQX-WKGD] (noting that in cases of campus sexual assault, "it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person"). The cases receiving national attention typically involve allegations by multiple individuals. For example, Eric Schneiderman, the Attorney General of New York who was a prominent figure in the #MeToo movement for taking action against Harvey Weinstein, was recently accused by four women of domestic violence that included choking, death threats, and severe sexual and psychological abuse. Jane Mayer & Ronan Farrow, *Four Women Accuse New York's Attorney General of Physical Abuse*, NEW YORKER (May 7, 2018), https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse [https://perma.cc/B65W-3B7L].

49. *See generally* Doug Criss, *The (Incomplete) List of Powerful Men Accused of Sexual Harassment After Harvey Weinstein*, CNN (Nov. 1, 2017, 2:05 PM), www.cnn.com/2017/10/25/us/list-of-accused-after-weinstein-scandal-trnd/index.html [https://perma.cc/RK2U-8KAC].

50. Michael D. Shear & Emily Cochrane, *The F.B.I., Domestic Abuse and the White House: A Timeline of the Rob Porter Scandal*, N.Y. TIMES (Feb. 13, 2018), https://www.nytimes.com/2018/02/13/us/politics/rob-porter-fbi-white-house-timeline.html (last visited Feb. 12, 2019).

being shattered and destroyed by a mere allegation"[51]—a common sentiment raised about intimate abuse claims.[52] The hearing concerning Dr. Christine Blasey Ford's allegation of sexual assault against now-Supreme Court Justice Brett Kavanaugh further shows survivors on trial, disbelief and distrust of claimants, and how even when survivor testimony is deemed "credible," abuse may not matter to decision makers.[53] Making domestic violence remedies procedurally accessible, rather than maintaining current procedural barriers, is essential to correct historic injustice and abuse and to prevent further intimate partner violence.

Part I identifies the dangers of domestic violence, the escalation of abuse at the time of separation, and how civil protection orders often successfully prevent further harm.

Part II details procedural rules regarding domestic violence cases, including rules requiring the petitioner to give notice to the respondent prior to seeking a temporary emergency order, rules mandating personal service for protection order cases, and rules requiring dismissal of cases for lack of service. Danger related to these rules is discussed, along with how, while VAWA[54] requires that law enforcement effectuate service in domestic violence cases, insufficient resources are currently devoted to this task.

Part III evaluates due process rights and concerns. It is well established that procedural due process requires notice of a legal proceeding and an opportunity to be heard or to respond, and service of process ensures the respondent's right to notice.[55] Significantly, the petitioner also has a constitutionally protected interest in a hearing on the merits of his or her claim "at a meaningful time and in a meaningful manner,"[56] and court rules must allow access to such a hearing.[57] Respondents simply do not have a due process right to evade service or avoid litigation, and if

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51. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018, 7:33 AM), https://twitter.com/realDonaldTrump/status/962348831789797381 [https://perma.cc/6DHM-4F56].

52. *See generally* Deborah Epstein & Lisa A. Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women*, 167 U. PENN. L. REV. (forthcoming 2019) (manuscript at 1) (on file with author) (discussing how "routinely women survivors face a Gaslight-style gauntlet of doubt, disbelief, and outright dismissal of their stories").

53. *See* Erica Werner, *Some GOP Senators Concede Ford's Credibility, but Point to Lack of Corroboration*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/business/economy/some-gop-senators-concede-fords-credibility-but-point-to-lack-of-corroboration/2018/09/27/6d97c484-c287-11e8-b338-a3289f6cb742_story.html?noredirect=on&utm_term=.defb1af1653d [https://perma.cc/M7FU-2FR8] ("Republican senators could not deny Thursday that Christine Blasey Ford appeared credible as she testified before the Senate Judiciary Committee. So they didn't even try.").

54. 34 U.S.C. §§ 10450, 10461 (2018); *see also infra* Section II.C.

55. *See* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999).

56. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982).

57. *Id.*; Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

procedural rules are so stringent as to prevent petitioners from achieving service, petitioners are denied the right of access to the courts.

Part IV theorizes about the differential treatment of domestic violence cases, compared to service requirements in other areas of the law in which liberty, privacy, and financial interests are at stake. It examines the states' historic acceptance of domestic violence and ongoing exceptionalism regarding domestic violence remedies. It further discusses demographic data and the racial, gender, and class-based implications of procedural barriers to court protection for abuse survivors, along with fact finders' common disbelief and dismissal of abuse claims.

Part V identifies law reform that would make legal protections for abuse victims more accessible while being more likely to actually notify respondents of domestic violence cases. First, states should abrogate laws that require pre-TRO notice and rescind laws that prevent access to a hearing on the merits of a petition, such as those requiring the dismissal of domestic violence cases for lack of service. Second, given VAWA's mandate that law enforcement effectuate service for domestic violence cases, sheriffs and police should make diligent efforts at service, and failure to achieve personal service by the second hearing date should provide prima facie reason for permitting alternative service, including by electronic means to reflect modern life. Due to the safety and logistical difficulties in accomplishing personal service in many domestic violence cases, this Article recommends that all states adopt provisions automatically permitting alternative service after two hearing dates at which personal service is not achieved. Finally, the Article recommends that court rules enable petitioners to request alternative means, such as electronic service, from the outset upon filing domestic violence cases in situations in which the respondent's home and employment addresses and whereabouts are unknown.

The procedural reforms detailed in Part V would protect all rights at stake—both the respondent's and petitioner's procedural rights—and strike a reasonable balance in doing so. The handful of jurisdictions that permit alternative service have often been motivated to do so following tragic events,[58] but states need not wait for tragedy before making the protection order remedy more accessible.

58. *See, e.g.*, Rebecca Jane Griego Act, 2008 Wash. Sess. Laws 1536, 1536–38 ("This act shall be known as the Rebecca Jane Griego act."); *Rebecca Griego Bill Passes Senate Unanimously*, *supra* note 16.

I. DOMESTIC VIOLENCE DANGERS AND THE NEED FOR PROTECTION ORDERS

To provide context for the need for procedural access to legal remedies to protect victimized individuals and their children from domestic abuse, Section I.A identifies the harms of domestic violence and Section I.B focuses on the prevalence of "separation assault," or the heightened risk of abuse and of lethality at the point of separation. Section I.C examines the efficacy of domestic violence protection orders, including data showing that civil protection orders provide the greatest safety outcomes of any legal relief available, which counsels in favor of making the remedy accessible.

A. Domestic Violence Harms

Domestic violence can be defined as the use of physical, sexual, emotional, economic, or psychological actions or threats of actions in intimate relationships to exert power and control over the other person.[59] The abusive partner may exploit immigration or health status in perpetrating abuse and engage in severe isolation tactics, such as restricting movements and associations.[60] Racial, ethnic, and gender identities and poverty often make it more difficult to escape abuse, as survivors contend with multiple oppressions.[61] In sum, domestic violence includes a range of behaviors that frighten, intimidate, terrorize, manipulate, injure, or humiliate the abused individual.

Significantly, more than one-third of women who have experienced intimate partner violence have also experienced birth-control sabotage or

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59. STARK, *supra* note 9, at 85–87.

60. *See generally* Camille Carey & Robert Solomon, *Impossible Choices: Balancing Safety and Security in Domestic Violence Representation*, 21 CLINICAL L. REV. 201 (2014); Tori Cooke, *Understanding Women's Decision Making: The Intolerable Choice of Living in a Violent House or Escaping to the Uncertainty of Homelessness and Poverty*, 4 PARITY 21 (2015); Jane K. Stoever, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157 (2009) [hereinafter Stoever, *Stories Absent*] (explaining that domestic violence responses must comprehensively respond to the multiple intersections survivors face, such as resource deprivation and language); Jane K. Stoever, Opinion, *More Abuse for Victims of Violence: Those Who Suffer Shouldn't Have to Choose Between Deportation and Medical Care*, L.A. TIMES (July 17, 2017, 4:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-stoever-mandatory-reporting-domestic-violence-20170717-story.html [https://perma.cc/5KWQ-VRZB].

61. *See generally* Kimberlé Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (explaining that women's experiences of violence are often shaped by multiple dimensions of their identities, including race and class).

reproductive coercion.[62] Pregnancy is a time of heightened abuse and onset of serious physical violence, and intimate partner violence occurs with greater frequency when there are children in the home.[63] Three-quarters of women who experience physical intimate partner violence have minor children who live with them,[64] and the abusive partner often uses children in the abuse, such as threatening to kidnap the children.[65] Abuse is also more likely to recur following separation when the parties have children in common,[66] which naturally creates lifelong connections and opportunities for contact beyond the romantic relationship.

Intimate partner abuse is rarely confined to a single, isolated event; instead, the abusive partner more commonly engages in an ongoing process of violence and control.[67] Due to the repetitive, escalating nature of domestic violence, domestic violence survivors are more likely than victims of stranger violence to be re-assaulted, to experience more severe violence, and to sustain worse injuries, including weapons-inflicted injuries.[68] As violence escalates, the risk that the abusive partner will kill

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62. Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, 81 CONTRACEPTION 316, 322 (2010). Birth control sabotage refers to an intimate partner destroying, manipulating, or tampering with contraceptive devices to induce pregnancy. *Id.* Reproductive coercion includes "attempts to impregnate a partner against her will, control outcomes of a pregnancy, coerce a partner to have unprotected sex, and interfere with contraceptive methods." AM. COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION: REPRODUCTIVE AND SEXUAL COERCION 1 (2013), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co554.pdf?dmc=1&ts=20181105T1612568052 [https://perma.cc/CZ3F-K355].

63. Rebecca L. Burch & Gordon G. Gallup Jr., *Pregnancy as a Stimulus for Domestic Violence*, 19 J. FAM. VIOLENCE 243, 243, 245 (2004).

64. CAL. P'SHIP TO END DOMESTIC VIOLENCE, CALIFORNIA DOMESTIC VIOLENCE FACT SHEET 1 (2011) ("The CWHS also revealed statistically significant higher rates of intimate partner violence among women who had been pregnant in the last five years (12%). Of those experiencing physical intimate partner violence, 75% of victims had children under the age of 18 years at home." (footnote omitted)); H. LIEN BRAGG, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE 9 (2003) ("An estimated 3.3 to 10 million children a year are at risk for witnessing or being exposed to domestic violence . . . .").

65. *See* Jane K. Stoever, *Parental Abduction and the State Intervention Paradox*, 92 WASH. L. REV. 861, 862 (2017).

66. Adele Harrell & Barbara Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 214, 218 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

67. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN iii–iv (2000), https://www.ncjrs.gov/pdffiles1/nij/183781.pdf [https://perma.cc/KP2F-6G96].

68. DIV. OF VIOLENCE PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 90 (2011), https://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf [https://perma.cc/X3LU-

the victimized individual dramatically increases because of the heightened likelihood that the perpetrator will use a weapon against the survivor.[69]

At its most dangerous, domestic violence is lethal. The majority of female homicide victims are killed through intimate partner violence.[70] In 2010, there were 157 domestic violence homicides in California alone.[71] The California Department of Justice, Criminal Justice Statistics Center reports that between 2009 and 2010, while all other homicide types decreased, intimate partner homicides increased by 20%.[72] Nationwide, 50% of individuals incarcerated in state prisons for spousal abuse had killed their victims[73]—a statistic that both highlights the lethal nature of abuse and the rarity of jail sentences for domestic violence.[74]

B. Separation Assault

Many abuse survivors seek safety through the courts, but separating from an abusive partner and initiating legal action against an abuser in

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8SQC] (identifying that sexual abuse, intimate partner violence, and stalking "are often repetitive and can recur over long time periods"); MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, VIOLENCE-RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS 5–8 (1997), https://pdfs.semanticscholar.org/4ddb/310658e83a29d5686200d8292db882734ea8.pdf [https://perma.cc/TG5N-MY75] (reporting that among women treated for intimate partner violence in emergency rooms, 25% are treated for serious stabs, cuts, and internal injuries); Amy Sisley et al., *Violence in America: A Public Health Crisis—Domestic Violence*, 46 J. TRAUMA 1105, 1105–12 (1999) (finding that 52% of domestic violence survivors receive injuries when being physically assaulted, as compared to 20% of victims of stranger assault, and measuring reassault over a six-month period).

69. *See* Mary Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 156 (2014) ("[N]early half of all incidents of firearms-related homicide take place in the home . . . . [A] substantial proportion of high-risk actors who go on to commit homicide-suicides have a history of assaults and domestic disturbances but have never been in court."); Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination*, 79 FLA. B.J., Sept. 2005, at 79 ("Family and intimate assaults involving firearms are 12 times more likely to end in fatality than those not associated with firearms.").

70. Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 741–46 (2017).

71. CAL. P'SHIP TO END DOMESTIC VIOLENCE, *supra* note 64; KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, HOMICIDE IN CALIFORNIA, at 31 tbl.24 (2015).

72. CAL. P'SHIP TO END DOMESTIC VIOLENCE, *supra* note 64; HARRIS, *supra* note 71 (showing an increase in domestic violence associated homicides in California from 130 to 157 between 2009 and 2010).

73. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 3 (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf [https://perma.cc/F6A7-YE5F].

74. *See generally* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE (2018) (addressing the lack of efficacy of criminal responses to abuse); Jane K. Stoever, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 308 (2011) (noting that abuse survivors frequently do not desire a criminal response).

which the survivor names and details the abuse puts survivors at risk for heightened danger. Femicide attempts typically occur as abused women attempt to leave relationships,[75] and abuse survivors face the greatest risk of acute violence and lethality when separating from an abusive partner and during the period that follows.[76] The survivor's efforts to leave signal to the abusive partner an impending loss of control, and he or she frequently responds by escalating control tactics, punishing the survivor through threats and violence, retaliating for the separation, or attempting to intimidate the survivor into returning.[77] Rather than ensuring the survivor's safety, separation from an abusive partner instead often escalates and intensifies the abuser's violence. Martha Mahoney describes the common phenomenon of "separation assault" as efforts and attacks that "are aimed at preventing or punishing the woman's autonomy. They are major—often deadly—power moves."[78]

Quantitative and qualitative research confirms that abusive partners often commit high-level violence when the survivor exits the

75. Jacquelyn C. Campbell et al., *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 TRAUMA VIOLENCE & ABUSE 246, 254 (2007) (finding the first three months after separation to be the time of most risk, the combination of physical and legal separation presented the greatest risk for homicide by an intimate partner, and most murders occurred within the first year after separation); Christina Nicolaidis et al., *Could We Have Known? A Qualitative Analysis of Data from Women Who Survived an Attempted Homicide by an Intimate Partner*, 18 J. GEN. INTERNAL MED. 788, 791 (2003).

76. Campbell et al., *supra* note 11, at 1091 ("When the worst incident of abuse was triggered by the victim's having left the abuser for another partner or by the abuser's jealousy, there was a nearly 5-fold increase in femicide risk . . . . When the incident was triggered by the victim's having left the abuser for any other reason, femicide risks were also significantly increased."); Barbara Hart, *Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 234, 240 (Kersti Yllö & Michele Bograd eds., 1988) ("The decision by a battered woman to leave is often met with escalated violence by the batterer."); 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, 815–16 (1993) ("Violence is often triggered by the anger aroused by threatened loss and excessive feelings of dependency—making the period during and after separation an extremely dangerous time."); Maribeth L. Rezey, *Separated Women's Risk for Intimate Partner Violence: A Multiyear Analysis Using the National Crime Victimization Survey*, J. INTERPERSONAL VIOLENCE, Feb. 21, 2017, at 13 ("On average, separated women were significantly more likely than divorced ($t = 4.03$) and never married women ($t = 3.91$) to be victims of [intimate partner violence].").

77. MEYER, *supra* note 19, at 1; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–7, 65 (1991) (exploring abusers' violent and coercive acts when the survivor decides to separate or begins to prepare to leave the abusive partner).

78. Mahoney, *supra* note 77, at 5–6, 65.

relationship,[79] and approximately two-thirds of all women who separate from their abusive partners are re-victimized by them.[80] Studies have shown that an abuse survivor's risk increases by 75% upon leaving, and heightened danger continues for two years.[81] Researchers have consistently found that at least 75% of reported domestic violence incidents involved women who were separating from or already separated from their batterers.[82] In addition to the immediate threat of separation assault, continued abuse can happen over lengthier periods of time.[83]

Abuse survivors undertake many efforts to protect themselves and their children from further violence. Rather than passively experiencing abuse, many abused individuals are actively surviving the abuse by constantly strategizing, planning, and attempting to achieve freedom from violence.[84]

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79. Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1315, 1376 (2000).

80. Jane Koziol-McLain et al., *Predictive Validity of a Screen for Partner Violence Against Women*, 21 AM. J. PREVENTIVE MED. 93, 97–99 (2001) (finding that two-thirds of separated abused women were re-victimized during the four-month period of the study, and stating that "even though abused women separate from their partners, they do not automatically become safe"); *see also* Campbell et al., *supra* note 11, at 1095 (identifying "estrangement" as a risk factor for intimate partner femicide, and concluding "extremely controlling abusers are particularly dangerous under conditions of estrangement"); Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 VIOLENCE AGAINST WOMEN 1367, 1380 (2005) ("The majority of women said that after they left their expartners and went to family court, the batterers continued to subject them and their children to some form of abuse or mistreatment. More than a third said that their expartners stalked them postseparation, and nearly a quarter said that their expartners threatened to kill them.").

81. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., SUBSTANCE ABUSE TREATMENT AND DOMESTIC VIOLENCE 10–11 (2012) ("When a battered woman leaves her abuser, her chances of being killed increase significantly.").

82. RONET BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4 (1995), https://www.bjs.gov/content/pub/pdf/FEMVIED.PDF [https://perma.cc/JU47-HA94] (finding that among domestic violence victims, "the victimization rate of women separated from their husbands was about 3 times higher than that of divorced women and about 25 times higher than that of married women"); CAROLYN REBECCA BLOCK, RISK FACTORS FOR DEATH OR LIFE-THREATENING INJURY FOR ABUSED WOMEN IN CHICAGO 6 (2004), https://www.ncjrs.gov/pdffiles1/nij/199732.pdf [https://perma.cc/L67Y-BNEL] ("Most clinic/hospital women in this study (85 percent) who had experienced severe violence in the previous year had left or tried to end the relationship in the previous year, and most women homicide victims (75 percent) had left or tried to end the relationship in the previous year."); Douglas A. Brownridge et al., *Violence Against Separated, Divorced, and Married Women in Canada, 2004*, 49 J. DIVORCE & REMARRIAGE 308, 309 (2004) ("Separated women reported 7 times the prevalence of violence and divorced women reported twice the prevalence of violence than married women in the year prior to the study.").

83. Andrew R. Klein, Practical Implications of Current Domestic Violence Research, Part I: Law Enforcement 29–30 (Apr. 2008) (unpublished research report), https://www.ncjrs.gov/pdffiles1/nij/grants/222319.pdf [http://perma.cc/V9J-4EYQ] (while at least one-third of abusers re-abuse in a short timeframe, more re-abuse in longer periods).

84. *See generally* Stoever, *supra* note 74.

For example, Rebecca Griego had moved multiple times, changed her phone number, and received accommodations to work from home for a month so that her abuser could not attack her at work.[85] She also sought a protection order, but was unable to secure full legal protection due to her inability to personally serve her ex-boyfriend.[86]

C. Efficacy of Protection Orders

This Article focuses on increasing access to domestic violence civil protection orders because protection orders (1) are the legal remedy most utilized by abuse survivors, even more so than criminal justice responses,[87] and (2) are the most effective legal remedy available to decrease or eliminate domestic violence.[88] In fact, researchers have concluded that protection orders "appear to be one of the few widely available interventions for victims of [intimate partner violence] that has demonstrated effectiveness."[89]

The domestic violence protection order remedy is a civil action that potentially has criminal consequences for violation.[90] Civil protection orders provide injunctive relief to prevent and remedy abuse,[91] including orders prohibiting the abusive party from continued abuse, threats, stalking, harassment, or possession of a firearm upon a finding of domestic violence.[92] Orders may also prohibit or limit the respondent's

85. Seattle Times Staff, *supra* note 6.

86. Brunner & Perry, *supra* note 4.

87. 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 domestic violence victims are more likely to seek relief from violence solely in the civil system through protection orders, as compared to using the criminal justice system); Stoever, *supra* note 74, at 308 (discussing why civil protection orders are the most common legal remedy used for domestic violence); *see also* Goldfarb, *supra* note 10, at 1489 (identifying civil protection orders as the "most commonly used legal remedy for domestic violence").

88. *Infra* notes 101–116 and accompanying text.

89. Victoria Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AM. J. PREVENTIVE MED. 16, 21 (2003).

90. *In re* Marriage of Holtorf, 922 N.E.2d 1173 (Ill. App. Ct. 2010); Rankin v. Criswell, 277 S.W.3d 621 (Ky. Ct. App. 2008); E.C.O. v. Compton, 984 N.E.2d 787 (Mass. 2013); J.D. v. M.D.F., 25 A.3d 1045 (N.J. 2011).

91. Wolt v. Wolt, 2010 ND 33, 778 N.W.2d 802; State *ex rel.* Cockerham v. Cockerham, 218 S.W.3d 298 (Tex. App. 2007).

92. *See, e.g.*, D.C. CODE § 16-1005 (West 2019) (describing the different forms of relief a court can award).

contact with protected parties, including the petitioner, petitioner's children, and household members; order the respondent to participate in batterer intervention treatment, parenting skills classes, a psychological evaluation, or drug or alcohol treatment; award custody, visitation, child support, spousal support, or payment for medical bills or property damage; and award possession of pets and property, among other relief necessary to the effective resolution of the matter.[93]

Domestic violence protection order proceedings are intended to "quickly and effectively" intervene in abusive situations and prevent the tragic escalation of violence.[94] Protection orders are "remedial in nature," and courts agree that domestic violence law is to be "broadly construed to 'effectuate its humanitarian and preventive purposes.'"[95] Numerous courts identify that the proceedings are intended to be "summary in nature"[96] and "expeditious."[97] States also consistently indicate that the civil protection order relief shall be "immediate"[98] and "easily accessible."[99] Appellate courts in Texas, for example, explain that the statute authorizing the domestic violence remedy is intended to "provide an expedited procedure for victims of domestic violence; the purpose is not to correct past wrongs or establish liability but to give immediate protection to the applicant."[100]

Multiple studies have shown that protection orders are effective at eliminating or markedly decreasing abuse[101] and at helping survivors feel

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93. *See, e.g.*, CAL. FAM. CODE § 6200 (West 2018) (describing various forms of relief available upon a finding of domestic abuse).

94. Hanneman v. Nygaard, 2010 ND 113, 784 N.W.2d 117, 123; *see also* Lear v. Jamrogowicz, 2013 MT 147, ¶26, 370 Mont. 320, 303 P.3d 790 ("The object of a [proceeding for a temporary order of protection] is the swift and efficient protection of one who is being harassed and intimidated by another.").

95. Roper v. Jolliffe, 493 S.W.3d 624, 634 (Tex. App. 2015) (citing Boyd v. Palmore, 425 S.W.3d 425, 430 (Tex. App. 2011)).

96. *Hanneman*, 784 N.W.2d at 123.

97. Putman v. Kennedy, 932 A.2d 439, 442–43 (Conn. App. Ct. 2007) ("The legislature promulgated § 46b–15 to provide an expeditious means of relief for abuse victims.").

98. N.Y. FAMILY LAW § 812(2)(b) (McKinney 2018); *In re* Rollerson v. New, 901 N.Y.S.2d 515 (Fam. Ct. 2010) (identifying that the purpose of New York's civil domestic violence remedies is to provide immediate redress from abuse or from specified criminal acts committed by an intimate partner or household member without requiring an arrest or criminal prosecution).

99. LA. STAT. ANN. § 46:2131 (West 2018) (regarding the Domestic Abuse Assistance Act, "It is the intent of the legislature to provide a civil remedy for domestic violence which will afford the victim immediate and easily accessible protection."); Dvilansky v. Correu, 204 So.3d 686, 689 (La. Ct. App. 2016).

100. *Roper*, 493 S.W.3d at 634.

101. *See generally* Matthew Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205 (1999) (concluding that abuse survivors experience a "significant decline in the probability of abuse" following the entry of a civil protection order); *see*

safer and more empowered.[102] A study of nearly 2,700 women who had reported domestic violence to the police found that those who obtained civil protection orders experienced an 80% decrease in subsequent police-reported physical violence.[103] Overall, these women experienced significantly decreased likelihoods of physical and non-physical intimate partner violence, including decreased risk of contact by the abusive partner, weapon threats, injuries, and abuse-related medical treatment.[104] Many abused individuals never make police reports, so police data only reveal a portion of domestic violence incidents,[105] but qualitative studies

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also Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA 589, 590–92 (2002) (conducting a population-based study and reviewing police records to examine the effectiveness of protection orders, and finding that having a permanent protection order was associated with a significantly decreased risk of new episodes of violence); Catherine L. Kothari et al., *Protection Orders Protect Against Assault and Injury: A Longitudinal Study of Police-Involved Women Victims of Intimate Partner Violence*, 27 J. INTERPERSONAL VIOLENCE 2845, 2859 (2012) (confirming the "protective effect of [protection orders], which are associated with reduced police incidents and emergency department visits both during and after the order, and reduced police incidents compared to a matched comparison group"); Judith McFarlane et al., *Intimate Partner Violence Against Immigrant Women: Measuring the Effectiveness of Protection Orders*, 16 AM. J. FAM. L. 244, 248 (2002) (finding that immigrant women who sought protection orders experienced a significant decrease in violence and stalking throughout the duration of the study, comparable to reduced violence experienced by women born in the United States who receive protection orders, and concluding, "[c]learly, contact with the justice system and application for a protection order is a powerful deterrent to further abuse and can be deemed highly effective in terms of subsequent intimate partner violence against immigrant women"); 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 significant reductions in physical assaults, stalking, threats to do bodily harm, and worksite harassment among women who sought and qualified for protection orders); *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 (recognizing that abuse survivors use multiple legal and non-legal strategies to prevent violence; that obtaining only an emergency TPO achieves some women's goals; and that significant institutional barriers and the lack of representation make it difficult for many litigants to complete the protection order process).

102. TK Logan et al., *Factors Associated with Separation and Ongoing Violence Among Women with Civil Protective Orders*, 23 J. FAM. VIOLENCE 377, 382 (2008) (In a study of 700 women who received protection orders, 78% reported that they felt safe as a result of the order and that the orders were effective.).

103. Holt et al., *supra* note 101, at 591–92.

104. *Id.*

105. *See* Michelle Fugate et al., *Barriers to Domestic Violence Help Seeking*, 11 VIOLENCE AGAINST WOMEN 290, 295 (2005) (In a study of nearly 500 abused women who were receiving medical care in a public health clinic or hospital, 62% of the women had not called the police for help.); *see also* TK LOGAN & ROB VALENTE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 2 (2015), http://www.thehotline.org/wp-content/uploads/sites/3/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf [https://perma.cc/6WXD-2CTV] (reporting results of a 2015 survey conducted by the National Domestic Violence Hotline, which found that one-quarter of abuse survivors who had

with abuse survivors show dramatic decreases in rates of physical and non-physical abuse following the entry of a civil protection order. In one study, 86% of the women who received a protection order stated that the abuse either stopped or was greatly reduced.[106] Another interview-based study found a 70% decrease in physical abuse among women who maintained their protection orders.[107]

Courts can issue temporary protection orders (TPO) on an ex parte basis to provide immediate safety protection against imminent harm, but such orders are typically only in effect for five days to three weeks at a time.[108] Permanent or long-term protection orders produce more substantial safety outcomes.[109] Multiple studies have found a correlation between the duration of the protection order and the survivor's safety, which researchers describe as a "dose-response relationship according to the duration of the [civil protection order]."[110] Having long-term orders, rather than merely a TPO, therefore, can be key to significantly decreasing future violence and sustaining an end to abuse.[111]

Significantly, abuse survivors perceive the orders as valuable, effective, and crucial to their safety.[112] In a study of women who had

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previously called the police to report abuse would not call police again to report intimate violence; 80% of these respondents worried that a future call to the police would result in the police doing nothing or not believing them, and a majority feared that calling the police again would make the violence worse).

106. JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE 164 (1999); *see also* Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 AM. J. FAM. L. 59, 60 (2001) (discussing James Ptacek's research on the effectiveness of protection orders).

107. Holt et al., *supra* note 89, at 20.

108. D.C. CODE § 16–1004 (West 2019); CAL. FAM. CODE § 6256 (West 2019).

109. Carlson et al., *supra* note 101, at 214 (showing a 66% overall decline in women reporting violence before and after protection orders during a two-year follow-up period, with a 68% decline in those with permanent orders, compared to a 52% reduction in violence for those with temporary orders); Holt et al., *supra* note 89, at 20 (finding significant decreases in risk among women who kept their protection orders in effect over time).

110. Holt et al., *supra* note 89, at 21.

111. Factors in addition to protection order duration can contribute to the effectiveness of protection orders. For example, orders that contain more comprehensive and specified relief are more likely to provide protection to survivors. TK Logan et al., *Protective Orders in Rural and Urban Areas*, 11 VIOLENCE AGAINST WOMEN 876, 906 (2005). Differences in communities' implementation and enforcement of orders and in the availability of confidential shelters and other safety resources in a geographic region can also affect the efficacy of orders. *Id.* at 899.

112. TK Logan & Robert Walker, *Civil Protection Order Outcomes: Violations and Perceptions of Effectiveness*, 24 J. INTERPERSONAL VIOLENCE 675, 677–78, 682–83 (2009) (reporting on a study of 700 women with protection orders and finding that 51% believed the orders were "extremely effective" and 27% found their orders to be "fairly effective," while 14% did not find the orders effective and 7% were unsure).

recently obtained TPOs, 98% of women felt more in control of their lives, 91% felt that obtaining the order was a good decision, and 89% felt more in control of their relationship due to the court order.[113] A majority of women also report feeling safer after obtaining permanent protection orders. In a study of nearly 700 women who had received permanent protection orders, 43% felt "extremely safe" and 34% felt "fairly safe," while 10% did not feel safe and 12% were unsure about how they felt.[114]

Although protection order recipients generally experience an overall decrease in violence, approximately one-half of protective orders are violated by abusive partners.[115] The rate of violation increases to more than two-thirds when the respondent has previously raped or stalked the abuse survivor.[116] Despite the high rates of violations, the orders are associated with a reduction in the severity and frequency of violence and the fear of harm for the majority of abuse survivors.[117] The overall decrease in violence demonstrates the value and potential of protection orders, while the re-abuse rates show the need for continued court protection and improved abuse prevention efforts and community responses to abuse.

While abuse survivors most commonly choose civil protection orders among criminal and civil legal options, this legal remedy is not the solution for every abused individual. The courtroom environment and public nature of these adversarial proceedings have adverse psychological effects on some survivors. Psychiatrist Judith Herman observes, "If one set out by design to devise a system for provoking intrusive post-traumatic

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113. Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Orders of Protection*, 41 CRIME & DELINQUENCY 414, 417 (1995).

114. Logan & Walker, *supra* note 112, at 683 (finding that women who experienced very severe violence or stalking felt less safe than protection order recipients who had not had such experiences).

115. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 52 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf [https://perma.cc/KP2F-6G96] (noting that the National Violence Against Women survey found 69.7% of those stalked, 67.6% of those sexually assaulted, and 50.6% of those physically assaulted by a partner reported a violation of the order); Logan & Walker, *supra* note 112, at 682–83 (studying 700 women with protection orders using self-reports of specific violent behaviors, arrest records for protection order violations, and perceptions of violations, and finding that three-fifths of women experienced a violation of the order and there was no difference in violation rates between urban and rural jurisdictions).

116. TJADEN & THOENNES, *supra* note 115, at 52.

117. Jaime Kay Dahlstedt, *Notification and Risk Management for Victims of Domestic Violence*, 28 WIS. J.L. GENDER & SOC'Y 1, 8 (2013).

symptoms, one could not be better than a court of law."[118] State intervention—whether civil or criminal—can prompt numerous unexpected consequences for abuse survivors.[119] In some jurisdictions, the report of children being present during intimate partner violence triggers a Child Protective Services investigation and a "failure to protect" case to be filed against the abuse survivor under the theory that the victim should have protected the children from being exposed to violence.[120] A majority of states allow public access to civil protection order filings,[121] and survivors may have privacy concerns given the potential for discrimination in housing, employment, professional licensure, and welfare benefits contexts[122] and health, life, and home owner's insurance,[123] along with potential immigration consequences.[124] This Article recognizes that not every abuse survivor may wish to pursue a protection order, but when a survivor seeks this court-ordered protection, the civil protection order remedy should be available.

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118. JUDITH HERMAN, TRAUMA AND RECOVERY 72 (1992); *see also* Stoever, *Stories Absent*, *supra* note 60, at 1189–90 (discussing the public nature of domestic violence proceedings and survivors' concerns about revealing personal information about the petitioner or respondent in open court).

119. *See generally* Jane K. Stoever, *Mirandizing Family Justice*, 39 HARV. J.L. & GENDER 189 (2016).

120. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 76 (2002) ("In some states it is considered neglect to permit a child to witness adults fight in the home. When a mother calls the police to report she has been beaten, she may be confessing to child neglect."); *see also* Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1244 (1999) (identifying that poor women of color are disproportionately targeted by the child welfare system); Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 601–02 (2004); Ijeoma Nwabuzor Ogbonnaya et al., *Domestic Violence and Immigration Status Among Latina Mothers in the Child Welfare System: Findings from the National Survey of Child and Adolescent Well-Being II (NSCAW II)*, 39 CHILD ABUSE & NEGLECT 197 (2015).

121. Joann Sahl, *Can We Forgive Those Who Batter?*, 100 MARQ. L. REV. 527, 530 (2016).

122. Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 159–60, 181 (2003) (recommending that lawyers and advocates counsel abuse survivors about the potential negative consequences of civil protection orders).

123. Emily C. Wilson, *Stop Re-Victimizing the Victims: A Call for Stronger State Laws Prohibiting Insurance Discrimination Against Victims of Domestic Violence*, 23 AM. U. J. GENDER, SOC. POL'Y & L. 413, 416, 430 (2015) (detailing insurance classifications based on domestic violence and the need for heightened legal protection); *see also* Michael J. Sudekum, *Homeowner's Policies and Missouri Law Make Recovery for the Domestic Violence Victim/Co-Insured an Olympic Challenge*, 69 UMKC L. REV. 363, 363 (2000).

124. *See* Natalie Nanasi, *A Fraught Pairing: Immigrant Survivors of Intimate Partner Violence and Law Enforcement*, *in* THE POLITICIZATION OF SAFETY (Jane K. Stoever ed., forthcoming 2019); Angelica S. Reina et al., *"He Said They'd Deport Me": Factors Influencing Domestic Violence Help-Seeking Practices Among Latina Immigrants*, 29 J. INTERPERSONAL VIOLENCE 593 (2013); Jane K. Stoever, *How New U.S. Immigration Policy Is Hurting Domestic Violence Victims*, SAN DIEGO UNION-TRIBUNE (July 26, 2018, 4:45 PM), http://www.sandiegouniontribune.com/opinion/commentary/sd-oe-immigration-deportation-domestic-abuse-20180726-story.html [https://perma.cc/UZD6-2Q3M].

II. SURVIVORS SEEKING SAFETY: SERVICE CHALLENGES AND RISKS

Service requirements create access to justice issues, particularly for unrepresented individuals with limited means. Access to justice—as a movement or as a principle—has many meanings.[125] At its core, the "access to justice" movement has been about remedying the inability of most Americans—including low-income and middle-income individuals—to afford counsel for civil legal problems, and the resulting "pro se crisis" that overwhelms many civil courts.[126] The movement has broadened to encompass an expansive range of strategies to meet the legal needs of individuals who cannot afford counsel.[127] Dimensions of accessing justice include: access to information necessary to navigate legal proceedings and understand the law,[128] fair treatment by judicial officers and court staff,[129] and access to a personal sense of fairness and justice in the proceedings and outcomes of legal matters.[130] Achieving procedural access by making court processes and rules accessible to the majority of individuals who use the courts and remedies—in this case, domestic violence courts and litigants—is essential to accessing justice.[131]

The petitioner must properly serve the opposing party under the law before a judge may enter a legal remedy, but current notice and personal service requirements in domestic violence cases are unduly burdensome and dangerous for many petitioners. This Part details the current legal

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125. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) (raising access to justice concerns about the "retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth").

126. Aviel, *supra* note 38, at 2292; Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1228 (2014) ("Over four-fifths of the poor's legal needs and two- to three-fifths of the legal needs of middle-income Americans remain unmet.").

127. Aviel, *supra* note 38, at 2292; Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 914 (2009) (critiquing the traditional narrow framing of "access to justice").

128. *See generally* PAUL T. JAEGER ET AL., LIBRARIES, HUMAN RIGHTS, AND SOCIAL JUSTICE (2015) (identifying access to information as a component of access to justice).

129. *See* Paris Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 661–62 (2006).

130. Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 870–83 (2004).

131. *See* Aviel, *supra* note 38, at 2292; Steinberg, *supra* note 38, at 746; Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 847–50; *cf.* Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 498, 503 (2015) (cautioning against "informalism" and "delegalization" in family law cases and structuring systems in ways that treat litigants as child-like and "in need of state supervision").

landscape in four areas. Section II.A identifies that some jurisdictions require petitioners to notify respondents prior to seeking an ex parte TPO and before receiving any court-ordered protection. Section II.B provides data from a fifty-state survey showing that all jurisdictions require personal service for civil protection orders, and a minority of states make alternative service available upon a showing of "diligent efforts" at personal service. Section II.C discusses VAWA's mandate that law enforcement serve domestic violence cases for free. Section II.D explores how jurisdictions dismiss domestic violence cases for lack of service despite the mandate for law enforcement to effectuate service, and some jurisdictions' court rules require judges to do so.

A. Notice of Ex Parte Temporary Protection Order Requests

Although the point at which an abused individual attempts to separate from an abusive partner is the time of greatest danger, problematically, current laws in some states require a domestic violence victim to provide advanced notice to the abusive partner before filing for a temporary civil protection order. For example, Sierra County, California, requires that the petitioner notify the respondent by 10:00 a.m. the day prior to filing for a TPO,[132] and Orange County, California, requires that the petitioner give four-hour notice to the respondent before the court will consider an ex parte petition for a temporary domestic violence protection order.[133] This is typically accomplished by the petitioner or petitioner's counsel telephoning the respondent to alert him or her to the planned request for a temporary order and to the date, time, and location at which the respondent can appear to object to the request for a TPO.[134] Not only does providing notice at this stage make it easier for the respondent to then evade personal service, it can also endanger abuse survivors by enraging respondents before court protection is ordered.

Such advanced notice alerts an abusive partner to the exact location of a victim at a time when the risk of an abusive partner inflicting severe or lethal violence is highest and before a court has ordered temporary legal protection. An abuse survivor who has escaped to a confidential location can now be followed back to a shelter or other undisclosed location. Beyond the immediate risk of physical violence against the victim, advanced notice may facilitate parental abduction, with the respondent

132. SIERRA CTY. SUP. CT. R. 6.14(a) (providing an exception for "exceptional circumstances").

133. ORANGE CTY. SUP. CT. R. 704(A)(1).

134. *Id.*; *Declaration Re: Notice of Ex Parte Application (Family Law)*, ORANGE COUNTY CTS., https://www.occourts.org/forms/local/l1124.pdf [https://perma.cc/3W2E-QQHQ].

taking children from daycare or school before a court order is in place.[135] Increasingly, advance notice can also result in immigration consequences, with the respondent alerting U.S. Immigration and Customs Enforcement (ICE) officers to the location of an undocumented abuse survivor, and ICE officers making arrests at domestic violence and human trafficking court.[136]

Judicial officers and abuse victims recognize the inherent danger. As the Orange County Court Executive Officer noted, "On the initial request of a temporary [civil protection] order, I don't see how having an alleged batterer meet an alleged victim at the courthouse doors is a good idea."[137] One courthouse advocate recounted overhearing a petitioner provide notice and the respondent scream in the background, "We're all gonna die . . . ."[138] Tragically, petitioner Paula Manuel's estranged husband Brian Manuel killed their four-year-old son after she provided the mandated notice.[139] She stated, "Absolutely, it gave him a heads-up . . . when I called him, it just made him more angry."[140] After she gave the four-hour notice, he called her incessantly and left threatening messages that warned: "If we don't reconcile, life as we all know it will change." Brian then picked up their child from daycare, as there was no order in place to prevent him from doing so, before shooting Paula and killing their son.[141]

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135. Stoever, *Parental Abduction*, *supra* note 65, at 876, 883 (identifying that most abducted children are taken by a parent and describing child abductions by domestically abusive parents as the ultimate abuse).

136. Steve Coll, *When a Day in Court Is a Trap for Immigrants*, NEW YORKER (Nov. 8, 2017), https://www.newyorker.com/news/daily-comment/when-a-day-in-court-is-a-trap-for-immigrants [https://perma.cc/6Q7V-PU3E]; Beth Fertig, *Outcry After Immigration Agents Seen at Queens Human Trafficking Court*, WNYC NEWS (June 16, 2017), https://www.wnyc.org/story/outcry-after-immigration-agents-come-trafficking-victim-queens-courthouse [https://perma.cc/E7DE-X53D]; Katie Mettler, *ICE Detains Woman Seeking Domestic Abuse Protection at Texas Courthouse*, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/?utm_term=.526f1cd99905 [https://perma.cc/6TQR-XVAG]; James Queally, *ICE Agents Make Arrests at Courthouses, Sparking Backlash from Attorneys and State Supreme Court*, LA TIMES (Mar. 16, 2017), https://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html [https://perma.cc/39EH-H48K].

137. Rhor, *supra* note 18 (quoting Alan Slater, Orange County Court Executive Officer).

138. *Id.* (quoting advocate Giovanna Businaro's experience observing petitioners' anxiety and fear and how some abuse survivors decide to forego seeking court protection when they learn of the notice requirements).

139. *Id.*

140. *Id.*

141. *Id.*

In contrast to these court rules, courts in many other jurisdictions are able to issue TPOs on an ex parte basis for limited periods to provide immediate protection from violence.[142] Jurisdictions including Alabama,[143] the District of Columbia, and Minnesota require a showing of past domestic violence and an imminent threat of harm[144] or "immediate and present danger of domestic abuse"[145] for an ex parte TPO. Depending on the state, a hearing for a "permanent" protection order must be set within one to three weeks,[146] so the ex parte TPO is of limited duration. While the temporary order provides immediate safety remedies, determinations of possession of property, financial awards, longer-term custody, and therapeutic treatment remedies are typically reserved for the noticed hearing.[147]

Multiple states have determined that issuing TPOs without providing notice to the respondent does not violate due process.[148] For example, in the Minnesota case, *Baker v. Baker*,[149] the respondent challenged the ex parte temporary order that awarded temporary child custody to his estranged wife and required him to vacate their residence. The Minnesota Supreme Court determined that requiring pre-deprivation notice to an

142. *See, e.g.*, HAW. REV. STAT. § 586-3 (2018); IDAHO CODE ANN. § 39-6304 (West 2018); IND. CODE § 34-26-5-2 (2018); MASS. GEN. LAWS ch. 209A, § 3 (2018); MICH. COMP. LAWS § 600.2950 (2018); MONT. CODE ANN. § 40-15-102 (2017); NEB. REV. STAT. § 42-924 (2018); NEV. REV. STAT. § 33.020 (2017) (all of the foregoing permitting a temporary order to be granted with or without notice to the respondent, and not specifying danger of immediate harm); N.H. REV. STAT. § 173-B:3 (2018); R.I. GEN. LAWS § 8–8.1-3 (2018); UTAH CODE ANN. § 78B-7-103 (West 2018); VT. STAT. ANN. tit. 15, § 1104 (2018) (all of the foregoing permitting temporary orders to be issued ex parte, without notice to the respondent, upon motion or findings that the respondent has abused the petitioner or petitioner's children, or both); D.C. CODE § 16-1004(b) (2019); WASH. REV. CODE § 26.50.020 (2018); WIS. STAT. § 813.12(3)(b) (2017) (all of the foregoing not requiring notice be given to the respondent before a temporary restraining order is entered against the respondent named in the petition).

143. United States v. Hamm, 134 Fed. App'x 328, 330 (11th Cir. 2005) (Alabama's Protection from Abuse Act allows for the issuance of an ex parte protection order as "necessary to protect the plaintiff or minor children from abuse, or the immediate and present danger of abuse to the plaintiff or minor children, upon good cause shown in an ex parte proceeding").

144. D.C. CODE § 16-1004(b)(1) (requiring a showing that "the safety or welfare of the petitioner or a household member is immediately endangered by the respondent").

145. MINN. STAT. § 518B.01(7)(a) (2018).

146. *Hamm*, 134 Fed. App'x at 330; *see, e.g.*, ALASKA STAT. § 18.66.110(a) (2018) (permitting TPOs to last for twenty days); D.C. CODE § 16–1004(b)(2) (stating that an initial TPO is issued for two weeks).

147. CAL. FAM. CODE § 6340-46 (West 2018).

148. Baker v. Baker, 494 N.W.2d 282, 286 (Minn. 1992); Ferris v. Ferris, 12th Dist. Clermont No. CA2005–05–043, 2006-Ohio-878 (finding good cause for issuing an ex parte TPO); State v. Karas, 108 Wash. App. 692, 698, 32 P.3d 1016, 1019 (2001) (determining that courts have the authority to issue ex parte TPOs pending hearing).

149. 494 N.W.2d 282.

alleged abusive partner would endanger the victim, thereby defeating the Domestic Abuse Act's[150] purpose of providing immediate protection to domestic violence victims.[151] Because the Act offers relief to persons at risk of ongoing domestic violence, the court reasoned that ex parte protection is "central to the substantive relief provided for under the Act," and that requiring pre-deprivation notice was not only inappropriate, it could actually precipitate increased violence.[152]

B. Personal Service for Domestic Violence Remedies

Across the United States, personal service is expected in domestic violence protection order cases and fulfills notice requirements.[153] Some state family law codes go even further and provide heightened procedural requirements for domestic violence remedies, explicitly exempting these remedies from alternate pathways to service.[154] For example, when Petitioner Paula Manuel sought a domestic violence protection order in California against her estranged husband, she was unable to achieve personal service.[155] When she told the judge about her fears for her safety, based in part on his work as a security guard and ownership of multiple guns, and that she believed her husband was deliberately evading service, the judge responded that there was nothing he could do under the law until her husband was personally served.[156]

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150. MINN. STAT. § 518B.01.

151. *Baker*, 494 N.W.2d at 286.

152. *Id.*

153. ALA. R. CIV. P. 4(c)(1); ALASKA R. CIV. P. 4(d); ARIZ. R. CIV. P. 4.1; ARK. R. CIV. P. 4(d); CAL. FAM. CODE § 243 (West 2018); COLO. R. CIV. P. 4(e)(1); CONN. GEN. STAT. § 52-57(a) (2019); DEL. FAM. CT. R. CIV. P. 4(d)(1); D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(A)(i); FLA. STAT. ANN. § 48.031 (2018); GA. CODE ANN. § 9-11-4(e)(7) (2018); HAW. R. FAM. CT. 4(d)(1); IDAHO R. CIV. P. (4)(d)(1); 735 ILL. COMP. STAT. 5/2-203 (2018); IND. R. CIV. P. 4.1; IOWA. R. CIV. P. 1.305(1); KAN. STAT. ANN. § 60-303(d)(1)(A) (2018); KY. R. CIV. P. 4.04(2); LA. CODE CIV. PROC. ANN. art. 1232–34; ME. R. CIV. P. 4(d); MD. R. CIV. P. 3-124(b); MASS. R. CIV. P. 4(d); MICH. CT. R. 2.105(A); MINN. R. CIV. P. 4.03(a); MISS. R. CIV. P. 4(d); MO. ANN. STAT. § 506.150 (West 2018); MONT. R. CIV. P. 4(e); NEB. REV. STAT. § 25-508.01 (2018); NEV. R. CIV. P. 4(d); N.H. REV. STAT. § 510:2 (2018); N.J. R. CIV. P. 4:4-4; N.M. R. CIV. P. 1-004(F); N.Y. C.P.L.R. § 308 (McKinney 2018); N.C. R. CIV. P. 4(j)(1)(a); N.D. R. CIV. P. 4(d)(1); OHIO R. CIV. P. 4.1(B); 12 OKLA. STAT. ANN. § 2004 (West 2018); OR. R. CIV. P. 7(D)(2)(a), (3)(A)(1); PA. R. CIV. P. NO. 402; R.I. R. CIV. P. 4(d)(1); S.C. R. CIV. P. 4(d)(1); S.D. CODIFIED LAWS § 15-6-4(d)(8) (2018); TENN. R. CIV. P. 4.04(1); TEX. R. CIV. P. 106(a)(1); UTAH R. CIV. P. (4)(d)(1)(A); VT. R. CIV. P. 4(d)(1); VA. CODE ANN. § 8.02-296(1) (2018); WASH. R. CIV. P. 4(d)(2); W. VA. R. CIV. P. 4(d)(1); WIS. STAT. § 8.01.11(1) (2018); WYO. R. CIV. P. 4(e).

154. CAL. FAM. CODE § 243.

155. Rhor, *supra* note 18.

156. *Id.*

Less than one-third of states explicitly make available alternative forms of service in domestic violence cases when personal service had been unsuccessful. These states include Alabama,[157] Alaska,[158] California,[159] Illinois,[160] Michigan,[161] Minnesota,[162] Nevada,[163] New Jersey,[164] New York,[165] Rhode Island,[166] Washington,[167] West Virginia,[168] Wisconsin,[169] and the District of Columbia.[170]

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157. ALA. CODE § 30-5-7 (2018); ALA. R. CIV. P. 4.3(d)(1), (e)(1). Service may be completed through personal delivery by a process server or by certified mail. A court may, on motion, order service to be made by publication when a defendant avoids service or for failure of service due to unknown present location. *Id.*

158. ALASKA R. CIV. P. 4(e).

159. CAL. FAM. CODE § 6340(a)(2) (West 2018) (amended in 2018 to permit alternative service).

160. 735 ILL. COMP. STAT. 5/2-206(a) (2018); 750 ILL. COMP. STAT. 60/103 (2018). Service on a member of respondent's household or by publication shall be adequate if petitioner has made all reasonable efforts to accomplish actual service personally on respondent and respondent cannot be found and petitioner files an affidavit or sworn testimony as to those efforts. *Id.*

161. MICH. COMP. LAWS ANN. § 600.2950(18) (West 2018) (requiring personal service or service by registered or certified mail, return receipt requested).

162. MINN. STAT. § 518B.01 (2018). Personal service attempts may be followed by service through a one-week published notice when the petitioner files an affidavit concerning the unsuccessful personal service attempts and stating that a copy has been mailed to the last known residence. *Id.*

163. NEV. REV. STAT. § 33.030 (2017). The appropriate law enforcement agency shall personally serve the respondent. When a current address is unknown or the agency has made at least two unsuccessful attempts at the current place of employment, service may be completed by delivery to the respondent's current place of employment and by mailing a copy to the current place of employment. *Id.*

164. N.J. STAT. ANN. § 2C:25–28 (West 2018) (initially requiring personal service, but permitting courts to order "other appropriate substituted service" if personal service cannot be effected).

165. N.Y. FAM. CT. ACT § 153(b) (McKinney 2019) (requiring police officers to attempt personal service); *id.* § 826 (permitting courts to make an order for substituted service).

166. R.I. GEN. LAWS § 8–8.1–3 (2018). The order shall be personally served by a deputy sheriff or certified constable. If either have been unable to personally serve the respondent after diligent efforts, the court may order an alternative method of service, including, but not limited to, certified and regular mail at the last known address or place of employment, leaving copies at the dwelling with a person of suitable age, or by publication in a newspaper for two consecutive weeks. *Id.*

167. WASH. REV. CODE § 26.50.050 (2018).

> Except as provided in RCW 26.50.085 and 26.50.123, personal service shall be made upon the respondent not less than five court days prior to the hearing. If timely personal service cannot be made, the court shall set a new hearing date and shall either require an additional attempt at obtaining personal service or permit service by publication as provided in RCW 26.50.085 or service by mail as provided in RCW 26.50.123. The court shall not require more than two attempts at obtaining personal service and shall permit service by publication or by mail unless the petitioner requests additional time to attempt personal service. If the court permits service by publication or by mail, the court shall set the hearing date not later than twenty-four days from the date of the order.

Id.

168. W. VA. CODE § 48-27-501 (2018). Unsuccessful attempts at personal service may be followed by service through a published notice and simultaneous first class mail of the court order to the last known address. *Id.*

The majority of states that permit alternative service do so only when a petitioner files a motion or affidavit requesting alternative service and following a judicial determination that the petitioner made diligent efforts to attempt personal service and judicial approval of an alternate method best suited to accomplish actual notice.[171] Many petitioners do not know that requesting alternative service is possible, and the process presents logistical hurdles.[172]

C. VAWA's Promise of Service

Since 2000, VAWA has required law enforcement agencies to serve protection order petitions and court orders on respondents without charging fees to petitioners.[173] Significantly, police and sheriff departments that charge for service of protection orders jeopardize their federal grant funding and may be noncompliant with their own state laws and policies.[174] The broad mandate for accomplishing service does not suggest the number of attempts at personal service law enforcement should make, that law enforcement must make reasonable efforts, or standards for communicating with petitioners; this important advancement remains an imperfect solution due to its drafting and execution.

While the requirement that law enforcement attempt service for free is an extremely important mechanism for achieving service in some cases, "[g]iven sheer volume, over-worked law enforcement personnel may have

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169. WIS. STAT. ANN. § 813.125(2)(a) (West 2018) (permitting petitioners to file affidavits with the court about private process servers and law enforcement being unable to achieve personal service, and then permitting judges to authorize alternative service methods).

170. D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(A)(i), (D)(i)–(iv). A respondent shall be personally served. If the court determines that, after diligent effort, service has been unsuccessful, it may permit alternative service through delivery to respondent's employer, registered or certified mail with return receipt requested, or such other manner as the court, in its discretion, may deem just and reasonable, including electronic service. *Id.*

171. *See, e.g.*, ALA. R. CIV. P. 4.3(d)(1) ("reasonable diligence"); ALASKA R. CIV. P. 4(e)(1) ("diligent inquiry"); ARIZ. R. CIV. P. 4.1(k), (*l*)(1)(A)(i) ("reasonably diligent efforts"); COLO. R. CIV. P. 4(f) ("due diligence"); FLA. STAT. ANN. § 49.041(1) (West 2018) ("diligent search and inquiry"); VA. CODE ANN. § 8.01-316(A)(1)(b) (2018) ("diligence").

172. *Supra* note 157 and 160; s*ee also* ALA. R. CIV. P. 4.3(d)(1) (requiring that the petitioner file an affidavit to seek service by publication); *infra* Section IV.C.

173. *Supra* note 14 and accompanying text.

174. HENRY & PLAYER, *supra* note 14.

little incentive to doggedly locate and personally serve a batterer."[175] The brief timeframe for service in domestic violence cases often means that law enforcement officers do not make multiple service attempts.[176] Many counties still utilize rudimentary methods for transferring protection order paperwork to police departments,[177] such as using mail, couriers, or pick-up boxes from which deputies retrieve service packets, as opposed to instantaneous email or electronic delivery. Officers typically fail to communicate with petitioners about their efforts at achieving service.[178] A police sergeant overseeing a two-detective team charged with serving domestic violence petitions and orders in a major metropolitan area identifies challenges: "There are people who can't be found, don't want to be found, they're hiding in the bathroom, moved to Minnesota . . . . Police cannot knock down a door to serve an order . . . there is a limit."[179]

Through pragmatic measures, law enforcement can better fulfill the federal requirement for law enforcement to effectuate service in domestic violence cases. Law enforcement and courts can improve processes so that officers timely receive pleadings and summons for service, immediately begin efforts at service, make multiple service attempts, and communicate with petitioners about service.

In contrast to pro se litigants' reliance on law enforcement for service, higher-resourced individuals and their attorneys often utilize detectives or private process servers to accomplish personal service. Whereas police and sheriffs attempting service will generally only make one service attempt, private services can be employed to conduct stakeouts and attempt service at multiple locations multiple times. These private agents appear in plainclothes, rather than in uniform, and do not drive police cars, making it more likely that the respondent will answer the door.[180] Resources and counsel do not guarantee service, however, especially

175. Mary Schouvieller, *Leaping Without Looking: Chapter 142's Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota*, 14 LAW & INEQ. 593, 630 (1996).

176. *Id.*

177. Rhor, *supra* note 18.

178. In my experience litigating domestic violence cases in six states over nearly two decades, law enforcement rarely communicates with petitioners about service. Instead, law enforcement commonly instructs petitioners and counsel to check with the court about whether a proof of service has been filed.

179. Singer, *supra* note 16.

180. These observations are based on my experience litigating domestic violence cases in six jurisdictions over nearly two decades.

when respondents successfully evade service.[181] One example of a highly visible individual with resources whose case was dismissed for lack of service is former Miss USA and Real Housewives of Atlanta reality television star Kenya Moore, whose case against her ex-boyfriend was dismissed even as he persisted in harassing her.[182]

D. Court Rules Mandating Case Dismissal for Lack of Service

Currently, if a petitioner is unable to personally serve the respondent, judges may reissue the TPO; however, some counties' local rules require that petitions be dismissed after one, two, or three hearing dates by which service has not been achieved, even though the survivor still needs protection.[183] Even in counties where no such local rule exists, judges commonly dismiss civil protection order cases after only two TPO reissuances if the respondent has not been personally served,[184] leaving petitioners without remedy and instructing petitioners to re-file and restart the entire process if the respondent reappears.

Dismissing domestic violence cases for lack of service and leaving abuse survivors without protection is problematic and dangerous because many abuse perpetrators intentionally evade service or are difficult or impossible to find, yet continue stalking, threatening, and abusing petitioners and present ongoing danger to the parties' children. Even when a domestic violence order has not yet been personally served on the respondent, it provides important safety protections that schools, workplaces, and others observe—thereby preventing respondents from abducting children from daycares and schools and from coming into protected locations, such as the petitioner's workplace.

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181. See *infra* notes 191–196 and accompanying text, detailing two client examples for which my Domestic Violence Clinic spent over $4,000 in one case and over $2,000 in another case on private investigators and process servers to attempt to locate and serve respondents.

182. LIEBER & GALPERIN LLP, *supra* note 15.

183. Under California local court rules, in San Francisco and Alameda Counties, the court will dismiss the case after three attempts at service; in Butte County, the case is dismissed after only one attempt, and other counties, including San Mateo County, permit two attempts at personal service before the court dismisses the case. *See, e.g.*, BUTTE COUNTY R. 16.4 ("If a responding party fails to appear at a hearing, the moving party must submit proof of timely service to the Court; otherwise, the matter will be taken off calendar."); SAN MATEO COUNTY R. 5.7(E) (presuming that the court shall dismiss a case after two hearing dates without service).

184. Minute Orders of case examples are on file with the Author.

E. Case Studies Illustrating Danger of Current Procedural Rules

Current notice and personal service requirements create additional impediments in an already challenging legal process for domestic violence victims seeking legal protection, including increased safety risks, traumatic emotional and mental triggers, financial and time-related constraints, and the inability to receive necessary court-ordered protection. This Section explores the logistical, financial, and safety-related challenges of the procedural rules just discussed.

The service process itself often creates danger for victims and their family members and friends who attempt to assist with service. Rebecca Griego's sister, Rachel Griego, recounted the difficulty of trying to locate a man who was able to evade law enforcement's service efforts while continually threatening and stalking her sister. Jonathan had no place of employment, had stolen from his roommates, was on the run, and used pay-as-you-go phones so he could not be tracked.[185] Given these factors, the police were unable to locate and serve Jonathan.

Rachel Griego recalled, "In short, we were left to find him ourselves in order to serve him, which, in and of itself, put our very lives in danger."[186] The Domestic Violence Unit judge suggested that the sisters post information on Craigslist to help with their search, and told them, "Good luck."[187] The judge expressed that because of the requirement for personal service, there was nothing more the judge could do to protect Rebecca from abuse.[188] Jonathan murdered Rebecca the day before the next scheduled court date on her protection order request.[189]

The personal service requirement often creates extreme delays in those domestic violence cases that are not dismissed, all the while jeopardizing safety.[190] In one of my domestic violence clinic's cases, we hired a private process server to attempt service on a respondent in coordination with the police.[191] His roommate said he was not home, and the respondent fled with the parties' baby. The respondent, who had threatened to take their baby and change her name, texted our client: "Lose this number."[192] He

185. Perry, *supra* note 7.

186. *Id.*

187. *Id.*

188. *Id.*

189. H.R. Rep. 60-6357, Reg. Sess., at 3 (Wash. 2008); S.B. Rep. 60-6357, Reg. Sess., at 1 (Wash. 2008).

190. Schouvieller, *supra* note 175, at 630.

191. Court pleadings, referenced exhibits, and invoices totaling over $4,000 for private process servers and private investigators are on file with the Author.

192. Exhibits are on file with the Author.

spent the next seven months on the run with the infant, evading service and police detection.[193] Our clinic and client spent the entirety of that time searching for our client's baby, attempting to track the respondent through welfare and food stamp payments and the baby's medical records, and returning to court every three weeks to seek an extension of the TPO.[194] Finally, the respondent and child were found after I went on local news with our client, and the mother and child were reunited.[195]

Nearly twenty months after our client first filed for a civil protection order, after further court delays, the hearing occurred and she was awarded her permanent order. Our clinic was determined to recover her baby and spent more than $4,000 on private process servers and private investigators alone, in addition to the hardships to our client of missed work, transportation expense, and emotional trauma; the attorney and student intern time; and the judicial and clerical resources.

The following example further illustrates entwined difficulties attendant to mandating pre-TPO notice and personal service in domestic violence cases, and how pre-TPO notice endangers survivors and their children and makes achieving personal service more difficult by alerting respondents to evade service.

We represented Karen, who had three young children with her ex-boyfriend, in her civil protection order and child support cases. Jason viciously abused Karen during their seven-year relationship, including beating her so severely that she had a miscarriage. When Karen first sought representation, we learned that she had been unable to receive a protective order in the past because she could not serve Jason. The judge had dismissed her two prior filings and TPOs after two continuances, each for lack of personal service,[196] yet Jason kept threatening and abusing her, and Karen feared he would take their children from school.

We felt compelled to help Karen and her children, aware that service would be an issue. When we filed a new petition, the judge required us to provide four-hour notice to Jason for the new TPO pursuant to Orange County court rules, refusing to find "good cause" for waiving notice despite Jason's threat of child abduction; history of violence; criminal record that included drug, gang, and weapon-related offenses; and prior success evading service. Jason responded to our notice by texting that he

193. Pleadings and court orders are on file with the Author.

194. Court filings and orders are on file with the Author.

195. *Authorities Believe Baby Girl Allegedly Abducted in 2013 Is Still in San Bernardino County*, CBS L.A. (Oct. 3, 2014, 11:04 PM), https://losangeles.cbslocal.com/2014/10/03/authorities-believe-baby-girl-allegedly-abducted-in-2013-is-still-in-san-bernardino-county/ [https://perma.cc/W3L4-LAMA].

196. The court's Minute Order is on file with the clinic.

was not coming to court. The pre-TPO notice alerted Jason that we would be searching for him for service.

Jason did not have stable housing or employment, so my students undertook extensive efforts to locate him through social media, and we were eventually able to have a private investigator serve Jason at a bar after midnight. Following a default hearing at which Jason failed to appear, the judge noted how brave Karen was for pursuing relief and said, "I want you to know, you have the respect of the Court." The protection order then had to be personally served, which proved impossible for many months.

The pre-TPO notice rule and personal service requirements together cause abuse survivors anxiety and fear. Repeated court dates also paradoxically provide opportunities to stalk petitioners, as abuse survivors must keep returning to court at set dates and times. Across jurisdictions, abuse survivors who are most vulnerable to high-level abuse are left to navigate court processes and service attempts on their own and report feeling fearful and at a loss.[197]

Part III will explain the legal basis for permitting alternative service for domestic violence cases, and Part IV will address the problematic historic reasons for the differential treatment of domestic violence cases before Part V recommends remedies.

III. DOMESTIC VIOLENCE EXCEPTIONALISM AND DUE PROCESS

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects a respondent's right to notice, which is ensured through service of process.[198] Significantly, a petitioner also has a constitutionally protected interest in having a hearing on the merits of his or her claim "at a meaningful time and in a meaningful manner."[199] The petitioner's due process right of access to courts has received scant attention in scholarship.[200] Section III.A addresses the petitioner's right while noting that the respondent does not have a constitutionally protected interest in avoiding claims or evading service of process. Section III.B details the respondent's rights and the evolving notice-giving standards articulated by the Supreme Court.

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197. *See* Perry, *supra* note 7; Rhor, *supra* note 18.

198. Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999).

199. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982).

200. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

A. The Petitioner's Right to a Hearing

The Due Process Clause applies both to "defendants hoping to protect their property" and to "plaintiffs attempting to redress grievances."[201] Despite this dual application, Judith Herman noted the longstanding lack of attention to petitioners' rights, writing, "The legal system is designed to protect men from the superior power of the state but not to protect women or children from the superior power of men. It therefore provides strong guarantees for the rights of the accused but essentially no guarantees for the rights of the victim."[202]

The Due Process Clause requires that court rules allow access to a hearing at a "meaningful time and in a meaningful manner."[203] As the Court in *Mullane* explained, once the state creates a remedy, it cannot deprive the petitioner of a hearing on that claim without due process of law.[204] If procedural rules are so stringent as to prevent petitioners from achieving service and having their cases heard, as commonly occurs in domestic violence protection order cases, petitioners are denied the right of access to the courts.

The Court in *Logan v. Zimmerman Brush Co.*[205] stated that rules must not create an "unjustifiably high risk that meritorious claims will be terminated,"[206] but this is precisely what happens when domestic violence petitions are dismissed for failure to personally serve the respondent. The jurisdictions with rules that automatically terminate domestic violence petitions for lack of service contravene the Due Process Clause, which prevents rules from terminating a claim when the petitioner's failure to comply with the rules is "due to inability, and not to willfulness, bad faith, or any fault" of the petitioner.[207]

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201. *Logan*, 455 U.S. at 429.

202. HERMAN, *supra* note 118, at 72.

203. *Logan*, 445 U.S. at 437; Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

204. *Mullane*, 339 U.S. at 314–15; *see also Logan*, 455 U.S. at 429 ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (holding that, under the Due Process Clause, states cannot limit the rights to adjudicatory procedures when doing so is "the equivalent of denying them an opportunity to be heard upon their claimed right").

205. 455 U.S. 422 (1982).

206. *Id.* at 434.

207. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958).

Significantly, respondents do not have a due process interest in avoiding claims against them or evading service of process. Procedural rules must instead protect all rights at stake, including both the respondent's and petitioner's rights, and strike a reasonable balance in doing so.

B. The Respondent's Notice Rights

A court must have both personal jurisdiction and proper service of process to have power to rule on a dispute.[208] Due process demands that the respondent is given proper notice and the opportunity to be heard before the court exercises jurisdiction.[209] If the respondent does not receive proper notice, the court's power to adjudicate the matter is imperfect, and its judgments are vulnerable to collateral attack.[210]

In many areas of the law, standards for notice-giving have developed and evolved to ensure defendants have opportunities to participate in proceedings, particularly as the "constitutionally permissible bases for exercising jurisdiction over the defendant's person or property have expanded."[211] Namely, given technological advances and how people live and interact, service of process via electronic means is often the most expedient method of actually providing notice and ensuring justice.[212] Service of process in domestic violence cases, however, has not evolved with technology and with due process doctrine more generally.

1. Evolving Notice-Giving Standards

Regarding the historical evolution of service of process, in *Pennoyer v. Neff*[213] in 1877, the U.S. Supreme Court considered whether the federal Constitution requires particular methods of service and found personal service to be the most preferable means, but permitted constructive service in limited settings, such as permitting service by publication for unreachable in-state defendants.[214] During the past century, due process

208. U.S. CONST. amends. V, XIV; *Mullane*, 339 U.S. at 314.

209. *Mullane*, 339 U.S. at 314.

210. Smith v. United States, 403 F.2d 448 (7th Cir. 1968); *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 173–74 (5th ed. 2015).

211. FRIEDENTHAL ET AL., *supra* note 210, at 174; *cf.* Chaplin v. Superior Court, 253 P. 954 (Cal. Ct. App. 1927) (finding notice not satisfied even when the defendant had knowledge of the lawsuit, evaded service, and had the lawsuit brought to his attention through media publicity and personal correspondence).

212. *Infra* notes 387–389 and accompanying text.

213. 95 U.S. 714, 729 (1877).

214. *Id.* at 729, 733–34.

doctrine has evolved from requiring actual notice to permitting methods that instead provide a likelihood that service will give notice. For example, forty years after *Pennoyer*, the Court in *McDonald v. Mabee*[215] explicitly authorized other service methods, such as leaving notice with the defendant's co-resident at their home.[216]

The current general standard for notice, declared by the Court in *Mullane v. Central Hanover Bank & Trust Co.*, is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[217] The Court expanded methods of service consistent with the "reasonably calculated" standard articulated in *Mullane*[218] and has since affirmed that the Constitution requires service methods that are likely to achieve actual notice, regardless of whether they in fact provide notice.[219] The Court took into account practical difficulties when it declared: "A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified. Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment."[220]

Courts encourage flexibility concerning the mandate of reasonableness under the circumstances of the case,[221] recognizing that the notice and opportunity for hearing should be "appropriate to the nature of the case."[222] The U.S. Supreme Court has also maintained that due process

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215. 243 U.S. 90, 92 (1917).

216. *Id.* ("To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.").

217. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950) (permitting service by mail in the case in question concerning common-trust fund proceedings).

218. *Id.* at 315.

219. *See, e.g.*, Dusenbery v. United States, 534 U.S. 161, 168 (2002) (affirming the *Mullane* standard for the sufficiency of notice); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705, (1988) (identifying personal service or substituted service as acceptable means of serving a foreign party); Polansky v. Richardson, 351 F. Supp. 1066, 1069 (E.D.N.Y. 1972) (explaining that actual receipt of process is not the test for due process, instead it is whether "reasonable steps had been taken to give [the adverse party] notice" (alteration in original)). Note also that parties can knowingly and voluntarily waive notice, such as through waiver by contract (in the absence of substantially unequal bargaining power between the parties or a contract of adhesion). *See, e.g.*, D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) (finding that due process is not violated by the inclusion of a cognovits clause in a promissory note); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) (permitting service of process upon a party's designated agent).

220. *Mullane*, 339 U.S. at 313–14.

221. *See id.* at 314–15.

222. *In re* Jesusa V., 85 P.3d 2, 9 (Cal. 2004).

requirements must be flexible and particular to the situation.[223] Although personal service guarantees actual notice of the pendency of a legal action, "less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history."[224] Furthermore, outside of domestic violence contexts, when the defendant has actual knowledge of the case even though formal notice has not been perfected, many courts accept this knowledge as sufficient.[225]

2. Alternative Service Options Across Other Areas of Law

The U.S. Supreme Court and lower courts have acknowledged the prevalence of alternate methods of service. Beyond traditional personal service, generally applicable state and federal civil procedure statutes commonly provide for "substituted" or "constructive" service, such as by mailing notice to the defendant, leaving notice at the defendant's home, electronic delivery, posting notice, or publishing notice in a newspaper in the manner prescribed by statute. In federal court matters, for example, Federal Rules of Civil Procedure 4(e)(2)(B) authorizes leaving process at the defendant's usual place of abode.[226] Federal Rules of Civil Procedure Rule 4(d) authorizes first-class mail as a substitute for personal service and even encourages its use to save the expense of personal service.[227]

Procedural rules and courts permit various methods of service of process across multiple contexts.[228] For example, service by certified mail

223. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (internal quotations omitted)).

224. Greene v. Lindsey, 456 U.S. 444, 449 (1982).

225. Nowell v. Nowell, 384 F.2d 951 (5th Cir. 1967); Clemones v. Ala. Power Co., 250 F. Supp. 433 (N.D. Ga. 1966); *cf.* Md. State Firemen's Ass'n v. Chaves, 166 F.R.D. 353 (D. Md. 1996); Chilcote v. Shertzer, 372 F. Supp. 86 (E.D. Wis. 1974); Espindola v. Nunez, 245 Cal. Rptr. 596 (Ct. App. 1988) (In a civil suit for negligence, breach of contract, fraud, and conspiracy, service was proper where the process server attempted three times to serve the defendant personally at his home and then, on the fourth try, left copies with the defendant's wife, a codefendant in the action. The court focuses on legislative intent, which provides for a liberal reading of the due diligence requirement.).

226. FED. R. CIV. P. 4(e)(2)(B); *see, e.g.*, Karlsson v. Rabinowitz, 318 F.2d 666 (4th Cir. 1963) (determining that service delivered to the defendant's wife in Maryland was proper even though the husband-defendant had moved to Arizona with no intent to return to Maryland).

227. FED. R. CIV. P. 4(d).

228. *See, e.g.*, Lewis v. Madej, No. 15cv2676, 2015 WL 6442255 (S.D.N.Y. Oct. 23, 2015) (trademark infringement case permitting substituted service); Bein v. Brechtel-Jochim Grp, Inc., 8 Cal. Rptr. 2d 351 (Ct. App. 1992) (in a corporate breach of contract action, permitting service to the gate guard for defendants who lived in a gated community).

is sufficient for license revocation[229] and mechanic's liens,[230] to designated licensing agencies,[231] and in general civil suits.[232] Service by posting a summons and complaint on the residence in dispute is acceptable in unlawful detainer cases for a landlord to have "a summary, expeditious way of getting back his property when a tenant fails to pay the rent or refuses to vacate the premises at the end of his tenancy."[233] Service by publication suffices for personal injury cases[234] and to terminate parental rights.[235] In general, federal requirements for service on businesses are broad and allow for multiple employees to receive documents to satisfy the service requirement[236] or for the Secretary of State to receive service.[237] Service abroad on a foreign business entity can be accomplished in every method under Federal Rule of Civil Procedure 4(h) other than personal delivery.[238]

Each jurisdiction imposes its own statutory requirements for service of process that extend beyond the minimum requirement of due process. Some state statutes include catch-all provisions for alternate service

229. *See, e.g.*, McIntee v. State Dep't of Pub. Safety, 279 N.W.2d 817, 820 (Minn. 1979) (holding that delivery of a license revocation notice via certified mail to a respondent's postbox of five years was sufficient to constitute "constructive delivery" of notice despite respondent's failure to pick up his mail).

230. *See, e.g.*, Har-Ned Lumber Co. v. Amagineers, Inc., 436 N.W.2d 811, 814–15 (Minn. Ct. App. 1989) (concluding that service of a mechanic's lien statement via certified mail was timely despite recipient's failure to respond to the notice).

231. CAL. BUS. & PROF. CODE § 10151.5 (West 2018) (authorizing nonresident real estate licensees to be served through the Bureau of Real Estate).

232. D.C. R. CIV. P. 4(c)(3)–(4) (permitting service by registered or certified mail in civil cases); *see also* Ellard v. Conway, 114 Cal. Rptr. 2d 399 (Ct. App. 2001) (providing an example of a fraud action permitting service by mail).

233. Bd. of Trustees of the Leland Stanford Junior Univ. v. Ham, 156 Cal. Rptr. 3d 839, 899 (Ct. App. 2013) (stating that the expeditious recovery of real property "is not served by a protracted inquiry into all sources of information regarding the tenant's location before posting and mailing at the one address of which the landlord is certain"); Nork v. Pac. Coast Med. Enters., Inc., 140 Cal. Rptr. 734 (Ct. App. 1977).

234. *See, e.g.*, Elliott v. Franklin, No. CX-92-1968, 1993 WL 129633, at *2 (Minn. Ct. App. Apr. 27, 1993) (finding service by publication in a personal injury case adequate when a respondent purposely avoided service pursuant to MINN. R. CIV. P. 4.04).

235. CAL. WELF. & INST. CODE § 366.26 (West 2018).

236. An employee capable of receiving service need only have the authority and responsibility to render it likely he or she will know what to do with the papers received to be deemed a "managing or general agent" for the purposes of Rule 4(h)(1)(B). Baade v. Price, 175 F.R.D. 403, 405 (D.D.C. 1997) (holding that the person served must have *some measure of discretion* in operating some phase of defendant's business or in management of a given office); Montclair Elecs., Inc. v. Electra/Midland Corp., 326 F. Supp. 839, 842 (S.D.N.Y. 1971).

237. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 17.026 (West 2018); TEX. R. CIV. P. 103.

238. Freedom Watch, Inc. v. OPEC, 766 F.3d 74 (D.C. Cir. 2014) (antitrust case).

through electronic service[239] and other means that are increasingly relevant based on advances in technology and the evolving ways in which people live and communicate. For example, during the past two decades, electronic service has been permitted in trademark infringement,[240] bankruptcy,[241] class action securities fraud,[242] international business affairs,[243] and general domestic business cases.[244] An emerging trend in New York, the District of Columbia, and some other jurisdictions permits email and Facebook service in civil cases, including family law cases, when traditional service proves impracticable and the party also attempts service by mail upon the last known address.[245] Reported cases involving this method of service include divorce[246] and international child custody matters.[247]

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239. *See, e.g.*, CAL. R. OF CT. 2.251(a) ("When a document may be served by mail, express mail, overnight delivery, or fax transmission, the document may be served electronically under Code of Civil Procedure section 1010.6 and the rules in this chapter.").

240. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002).

241. *In re* Int'l Telemedia Assocs., 245 B.R. 713 (Bankr. N.D. Ga. 2000); *In re* Xacur, 216 B.R. 187 (Bankr. S. D. Tex. 1997) (permitting service via email and posting the text of the complaint on a web page).

242. Greebel v. FTP Software, 939 F. Supp. 57 (D. Mass. 1996).

243. AngioDynamics, Inc. v. Biolitec AG, 780 F.3d 420, 428–29 (1st Cir. 2015) (approving service on "elusive international" defendant's counsel); *Rio Props.*, 284 F.3d at 1013, 1016 (determining email service to be sufficient with both the Constitution and Rule 4(f)(3) of the Federal Rules of Civil Procedure where the defendant had structured its business so that it could only be reached by email); *In re Int'l Telemedia Assocs.*, 245 B.R. at 715–18 (where an international defendant-debtor had refused to provide a permanent address, but did provide a permanent facsimile number and email address, the court ordered service to be effected by facsimile, email, and regular mail to the defendant's last known address).

244. Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442, 443–44 (Civ. Ct. 2008) (finding service by email appropriate when conventional service was impracticable).

245. *Supra* notes 30–31; *see, e.g.*, D.C. SUPER. CT. DOM. VIO. R. 5(a)(3) (permitting judges to allow multiple forms of alternative service).

246. Hollow v. Hollow, 747 N.Y.S.2d 704, 706–08 (Sup. Ct. 2002) (relying on *Rio Props.*, 284 F.3d 1007 and *In re Int'l Telemedia Assocs.*, 245 B.R. 713, and finding that email service of process satisfies the requirement set forth in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). In *Hollow*, the first case to authorize e-service under rule 308(5) of the New York Civil Practice Law and Rules, email service was acceptable in a divorce case when sent to a defendant that had been living in Saudi Arabia for two years and had only communicated with the plaintiff through email, and other methods of service were impracticable. The court allowed e-service, in combination with service through international registered and standard mail. *Hollow*, 747 N.Y.S.2d at 706–08.

247. Ferrarese v. Shaw, 164 F. Supp. 3d 361, 364, 367–68 (E.D.N.Y. 2016) (in international custody and child abduction case, allowing service by email and Facebook, provided petitioner also effected service by certified mail, on defendant's last known address, and on defendant's sister).

C. Due Process for Domestic Violence

Because protection orders place restrictions on the respondent's actions—such as prohibiting the respondent from communicating with or being near the petitioner and parties' children,[248] ordering the respondent to vacate a shared residence,[249] and awarding temporary child custody and financial support[250]—questions arise about whether alternative service sufficiently protects respondents' due process rights.

Although jurisdictions generally require personal service for domestic violence cases, due process does not demand personal service. Section 1 examines how service of process methods already prescribed in codes of civil procedure, which are designed to give reasonable notice of an action to the respondent, fulfill due process requirements in the domestic violence context. Section III.C.1 applies the *Mathews v. Eldridge*[251] factors,[252] which require consideration of the domestic violence context, balance of harms, and the governmental interest in providing protection from abuse. Notably, respondents can challenge domestic violence protection orders by motioning the court to modify or vacate orders, so a respondent who feels unfairly or unduly burdened by an order issued following alternative service can still petition the court. Finally, Section III.C.2 addresses questions of enforcement and procedural justice.

1. Mathews v. Eldridge *Analysis*

Due process requirements strive to ensure the respondent has actual notice of the domestic violence protection order hearing and the opportunity to appear in court. Even though personal service is preferable, the due process adequacy of other forms of notice for domestic violence protection order cases is a separate inquiry and can be evaluated under the *Mathews* factors.[253]

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248. *See, e.g.*, D.C. CODE § 16-1005 (2019) (listing forms of relief); WASH. REV. CODE § 26.50.060 (2018) (same).

249. *See* Margaret E. Johnson, *A Home with Dignity: Domestic Violence and Property Rights*, 2014 BYU L. REV. 1 (2014).

250. Stoever, *supra* note 74, at 364–65 (2011) (identifying that some protection order statutes lack financial relief, and discussing judicial reluctance to address financial remedies, even when statutorily enumerated, in protection order cases).

251. 424 U.S. 319 (1976).

252. *Id.* at 321.

253. *Id.*

In *Mathews v. Eldridge*, the U.S. Supreme Court considered whether individuals have a statutorily granted property right in Social Security benefits.[254] The Court held that terminating such benefits implicates due process but does not require a pre-termination hearing.[255] In determining the amount of process due, the Court set forth three factors to be weighed: (1) the private interests affected; (2) the procedural safeguards provided, specifically considering the risk of erroneous deprivation resulting from the procedures and the probable value of additional safeguards; and (3) the government's interest.[256]

Across jurisdictions, the entry of a protection order following alternative service occurs only when the respondent has been unable to be located for personal service.[257] Thus, if a respondent actively seeks custody or visitation of a child, one would expect to be able to locate the respondent. Similarly, concern about a respondent being ordered to vacate his or her residence without receiving notice is also misplaced, as the petitioner would effectuate personal service on a respondent residing in a known residence who is not evading service. A respondent's significant interest in having custody of his or her child, in remaining in the shared residence, or in not having a civil protection order issued against him or her is therefore unlikely to be infringed upon; even if it were however, this interest does not outweigh the value of the safeguards provided and the government's interest.

Multiple procedural safeguards minimize the risk of erroneous deprivation. First, orders are issued only upon a petitioner's sworn and factually specific affidavit and/or testimony and only after a judicial officer determines that domestic abuse has occurred under the statutory definition.[258] Before a judge can issue a TPO or Civil Protection Order, a judge must make statutory findings that the legal standards are satisfied.[259] Second, petitioners must generally make diligent efforts at personal service before alternative service is permitted, with actual notice being the

254. *Id.*

255. *Id.*

256. *Id.*

257. See *supra* Part II, detailing how personal service is required before alternative methods may be utilized in domestic violence cases.

258. *See, e.g.*, CAL. FAM. CODE § 6200–6460 (West 2018) (requiring courts to find "an act or acts of abuse" before issuing a protective order); D.C. CODE § 16-1005(c) (2019) (requiring courts to find good cause to believe a respondent committed or threatened to commit a criminal offense against the petitioner before entering relief).

259. *See, e.g.*, D.C. CODE § 16-1004(b)(1) (2019) (requiring courts to determine that the safety or welfare of the petitioner or petitioner's household member are immediately endangered before issuing a TPO).

goal.[260] Third, the respondent can make a motion to modify or vacate the order[261]; the "permanent" order is not truly permanent, as aggrieved respondents can petition the court to be heard and receive relief. Finally, courts must tailor the injunctive relief in civil protection orders to the case.[262]

The federal government and each state have expressed strong interests in protecting survivors of domestic violence and in acting promptly to remedy the immediate and present dangers of such abuse. Indeed, the government "has an extraordinary interest in a society free from violence, especially where vulnerable persons are at risk."[263] States enacted domestic violence protection order laws to "prevent violence"[264] and further their "strong policy against domestic violence."[265] Moreover, legislative history expresses the strong legislative intent that these protective laws be "broadly construed" to reduce violence.[266] Courts have also noted the "vulnerability of the targeted population (largely unrepresented women and their minor children)."[267] Given the safety issues at stake and the procedural safeguards the law affords, issuing a civil protection order following alternative service would sufficiently protect an alleged abusive partner's right to due process.

To safeguard both petitioners' and respondents' right to due process in the domestic violence realm, orders have been overturned when judges issued mutual protection orders without underlying allegations of abuse.[268] During the 1990s and 2000s, many judges wrongfully issued protection orders against both the petitioner and respondent even though

260. *Supra* note 171 and accompanying text.

261. MINN. STAT. § 518B.01(11)(a) (2018) ("Upon application, notice to all parties, and hearing, the court may modify the terms of an existing order for protection."); *see also Mathews*, 424 U.S. 319 (discussing post-deprivation procedures to rectify an erroneous deprivation).

262. *See generally* Stoever, *supra* note 45 (discussing the limited duration of civil protection orders).

263. Baker v. Baker, 494 N.W.2d 282, 288 (Minn. 1992) ("[I]nasmuch as the statute requires an allegation of an 'immediate and present danger of domestic abuse,' there can be no argument that a special need for prompt action is shown." (quoting MINN. STAT. § 518B.01(7)(a)) (internal citations omitted)).

264. Holeman v. White, 292 P.3d 65, 68 (Okla. Civ. App. 2012) ("The Protection from Domestic Abuse Act serves a vital purpose, to prevent violence.").

265. Cesare v. Cesare, 713 A.2d 390, 393 (N.J. 1998).

266. *In re* Marriage of Nadkarni, 93 Cal. Rptr. 3d 723, 734 (Ct. App. 2009) (identifying that "the Legislature intended that the DVPA [Domestic Violence Prevention Act] be broadly construed in order to accomplish the purpose of the DVPA" of reducing domestic violence).

267. *Id.* at 735 (citing Gonzalez v. Munoz, 67 Cal. Rptr. 3d 317, 324 (Ct. App. 2007)).

268. Isidora M. v. Silvino M., 190 Cal. Rptr. 3d 502 (Ct. App. 2015) (reversing the issuance of a mutual civil protection order when only one party had sought an order against the other and allegations had not been filed to provide notice).

no allegations of abuse had been filed and the judges had not made findings of abuse committed by the petitioner.[269] The judges reasoned that by prohibiting contact by either party, the parties would fully separate and the judicial orders would more effectively prevent future contact and violence. Without notice of allegations and findings of facts amounting to abuse under the domestic violence statutes, much less any claim of domestic violence, such orders violated due process. These appellate cases demonstrate that findings of facts and substantiated claims of abuse are necessary for protection orders to stand, relieving concern that frivolous or deceitful protection orders would exist if service were less of a barrier.

2. Enforcement and Procedural Justice

Regarding enforcement, personal service more readily guarantees enforcement of a domestic violence order because it ensures that the respondent has actual notice of the allegations and court proceeding and has been given the opportunity to appear in court to be heard. Naturally, orders are more easily enforced when notice is not of concern; without actual knowledge of protection order provisions, respondents can collaterally attack alleged violations on grounds that they did not know that their conduct was prohibited by the order.

However, petitioners would often be able to prove actual notice through evidence other than proof of personal service, such as text messages, social media postings, or voicemails from the respondent that reference the protection order. Furthermore, enabling courts to issue protection orders that can later be personally served when the respondent reappears is preferable to leaving an abuse survivor without protection. Even if the respondent is not actually aware of the order, schools, workplaces, and others can still enforce protection orders to prevent violence and child abduction.

From a procedural justice perspective, ensuring actual notice is preferable so that the respondent may present his or her case in court and feel heard, which increases compliance with court orders.[270] Scholars have also noted that "[m]aking an abuser face a judge reinforces the idea that

269. Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TX. J. WOMEN & L. 163, 218 (1992).

270. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1868–69, 1876–79 & nn.113–17 (2002).

domestic abuse is unacceptable."[271] Furthermore, "[i]f early and critical opportunities to deter and inform alleged abusers are not utilized, a batterer will be more likely to consider the protection order against him a worthless piece of paper or a violation of his right to due process."[272]

Rather than defaulting to the broader state civil procedure codes, civil protection order remedies often have more stringent procedural rules imposed through family code provisions[273] or procedural rules governing domestic violence courts.[274] But in the domestic violence context, given the adequacy of alternative methods of service, the survivor's need for safety-related legal protection, and the respondent's ability to petition the court to vacate a protection order, alternative service protects due process of both parties.

IV. EXPLAINING DIFFERENTIAL TREATMENT OF DOMESTIC VIOLENCE

Denial of legal protection for failure to achieve service contravenes the protective intent of domestic violence legislation, courts' recognition of the "vulnerability of the targeted population (largely unrepresented women and their minor children),"[275] and the readily obtainable option of alternative service in other areas of law. Part IV seeks to understand why jurisdictions impose heightened service requirements for domestic violence remedies. Section IV.A describes how procedural rules replicate and reinforce the state's historic refusal to respond to domestic violence. Section IV.B reveals how subordination and experiences of violence are linked by race, class, and gender; amasses research showing that most abuse survivors seeking court protection are low-income women and are disproportionately women of color; and interrogates how the law works to erect barriers to their protection. Section IV.C explores societal reluctance to believe abuse survivors, which also results in barriers to accessing legal protection.

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271. Schouvieller, *supra* note 175, at 609–10. Minnesota's weighing between interests to focus on protecting abuse survivors is significant because the state ultimately created a one-step, self-finalizing ex parte protection order. *Id.* This does not exist in other states.

272. *Id.* at 610.

273. *See, e.g.*, CAL. FAM. CODE § 243 (West 2018).

274. *See, e.g.*, D.C. SUPER. CT. DOM. VIOL. R. 5(a)(3).

275. *In re* Marriage of Nadkarni, 93 Cal. Rptr. 3d 723, 735 (Ct. App. 2009) (citing Gonzalez v. Munoz, 67 Cal. Rptr. 3d 317, 324 (Ct. App. 2007)).

A. Historic Acceptance of Domestic Violence

The historical acceptance of spousal abuse and the context in which domestic violence laws evolved inform the current differential treatment of civil protection orders. Laws in the United States historically excluded marital relations from state oversight and intervention, with the family deemed a protected "private sphere"[276] that was exempt from legal scrutiny, even when victimized individuals sought help.[277]

At common law, a husband had the "right of chastisement" over his wife[278] and the duty to "make the wife behave herself" through any means necessary, including through thrashing her.[279] He could not be subject to prosecution unless he inflicted permanent damage on his wife.[280] A wife's identity was subsumed in her husband's, thus preventing her from suing him.[281] Marriage was considered sacred and permanent, regardless of the violence one spouse inflicted upon the other, with courts applying theories of family privacy to shield abusive spouses from prosecution.[282] For

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276. Morgan L. Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269, 272, 275 (2007) ("The problem is that law enforcement and the courts withhold protection when it is most critically needed out of respect for family privacy."); *see* State v. Edens, 95 N.C. 693 (1886) (deeming the family private and exempt from legal scrutiny); State v. Rhodes, 61 N.C. 453, 455 (1868) (holding that the law recognizes family government as complete in itself, and will not "invade the domestic forum, or go behind the curtain" in the absence of permanent injury).

277. *See Edens*, 95 N.C. at 697 ("We are not disposed . . . to break in needlessly upon that oneness of husband and wife, which is the fundamental and cherished maxim of the common law . . . .").

278. Blackstone stated that the husband has the right to restrain the wife "by domestic chastisement, in the same moderation that a man is allowed to correct his apprentice or children." 1 WILLIAM BLACKSTONE, COMMENTARIES *444.

279. State v. Black, 60 N.C. 267 (1864) (holding that "[a] husband is responsible for the acts of his wife" thus permitting the husband to thrash her, if necessary to that end).

280. *See Edens*, 95 N.C. at 695–96 (holding that a man could "assault and batter[]" his wife if he inflicted no permanent injury upon her, and also that a husband could "wanton[ly] and malicious[ly]" slander the good name of his wife with impunity); *Rhodes*, 61 N.C. at 455–56 (holding that the law recognizes family government "as complete in itself," and will not "invade the domestic forum, or go behind the curtain" in the absence of permanent injury); State v. Hussey, 44 N.C. 123, 126 (1852) (finding that a wife is not a competent witness against her husband to prove battery that does not inflict permanent damage); Siegel, *supra* note 45, at 2118 ("The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or 'chastisement' so long as he did not inflict permanent injury upon her." (citation omitted)).

281. *See, e.g.*, *Edens*, 95 N.C. at 697 (noting that a woman cannot maintain an action against her husband due to her legal status upon marriage and describing the oneness of husband and wife as the "fundamental and cherished maxim of the common law").

282. *Id.* (noting that the law regards marriage as permanent and sacred and "leaves temporary differences and wrongs which one may do to the other to the corrective hands of time and reflection").

example, in the 1868 case of *State v. Rhodes*,[283] the North Carolina Supreme Court refused to prosecute a husband for repeatedly whipping his wife, stating, "[w]e will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."[284] Even after women were legally permitted to sue in their own names, the law granted interspousal immunity from tort claims to preserve the "tranquility of family relations."[285]

Professor Reva Siegel coined the phrase "preservation through transformation" to refer to legal change that gives the appearance of correcting a wrong while, in fact, perpetuating the status quo.[286] The term aptly applies to domestic violence. After the law formally changed to repudiate domestic assault, courts granted immunity from prosecution to avoid disrupting family harmony and to protect the private sanctuary of the home.[287] Likewise, the law traditionally provided immunity from marital rape charges and still provides differential protection and application.[288] Violent crimes committed by strangers garner significantly more resources and attention than crimes committed against intimates,[289] and stranger violence is more likely to lead to arrests and convictions than identical crimes perpetrated against intimate partners or family members.[290]

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283. 61 N.C. 453 (1868).

284. *Rhodes*, 61 N.C. at 458–59 (observing that prosecution in middle-class families would be "harassing to them, or injurious to society," and that judicial reach into upper-class households would bring "disgrace" and "ruin").

285. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611, 617–18 (1910) (considering the District of Columbia's Married Women's Property Act, invoking marital privacy rationale for interspousal tort immunity, and noting that such suits would "open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel"); Perkins v. Perkins, 62 Barb. 531, 535 (N.Y. Sup. Ct. 1872) (finding that allowing a cause of action between spouses would "overwhelm" the courts and allow "the parties to a marriage contract to sue each other for every fireside controversy").

286. Siegel, *supra* note 45, at 2119, 2166, 2169–70.

287. *Id.* at 2120 (noting that immunities were granted by economic status to the benefit of middle- and upper-class men).

288. Lisa R. Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 682 (1996) (noting that at least thirteen states continue to "offer preferential or disparate treatment to perpetrators of spousal sexual assault"); Jaye Sitton, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261, 277 (1993) ("The marital rape exemption went largely unchallenged from the time of Matthew Hale until the late 1970s.").

289. Carissa Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 344–45 (2007).

290. *Id.* at 345–46, 352–53.

B. Preservation Through Transformation

In the early 1900s, as laws and legal systems developed, states created family and juvenile courts to address criminal acts committed against spouses and children outside of criminal courts.[291] These family courts prioritized family unity, encouraged reconciliation, and kept family violence private, even when victimized individuals sought criminal recourse.[292] Law enforcement manuals instructed officers to delay responding to domestic violence calls, have the abuse perpetrator walk around the block, and otherwise mediate situations.[293] Arrest and prosecution for domestic violence remained exceedingly rare.[294] As the legal treatment of domestic violence shifted from marital duty and prerogative to marital privacy, change was merely in structure and rationale, and domestic violence largely remained socially and legally condoned.[295]

Before the 1970s, the only civil remedy available for domestic violence was a protection order issued through a divorce.[296] Prior to the no-fault divorce revolution that began in the 1970s, divorce required fault-based grounds, fees, and extensive proceedings necessitating attorneys.[297] Emergency ex parte orders in divorce required proof beyond a reasonable doubt, and violations were only penalized as civil contempt, which

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291. ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 126 (1987).

292. *Id.* at 137–38. *See* Camille Carey, *Correcting Myopia in Domestic Violence Advocacy: Moving Forward in Lawyering and Law School Clinics*, 21 COLUM. J. GENDER & L. 220, 226–27 (2011) (identifying how early family courts prevented domestic abuse from being recognized as a public issue); Siegel, *supra* note 45, at 2118 (describing the treatment of wife battering in the Anglo-American common law).

293. Lisa Goodman & Deborah Epstein, *Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence*, 20 J. INTERPERSONAL VIOLENCE 479, 480 (2005) [hereinafter Goodman & Epstein, *Refocusing on Women*].

294. *See* Fajardo v. County of Los Angeles, 179 F.3d 698 (9th Cir. 1999) (regarding an equal protection claim against the sheriff and county under 42 U.S.C. § 1983 because the county had a policy or custom that discriminated against domestic violence victims by giving lower priority to their 9-1-1 calls than to 9-1-1 non-domestic violence calls); Thurman v. Torrington, 595 F. Supp. 1521 (D. Conn. 1984) (finding that the Fourteenth Amendment's Equal Protection Clause was violated by a police department that routinely provided less protection to domestic violence victims than to victims of stranger violence).

295. *See* Siegel, *supra* note 45, at 2169–70 ("The regulation of marital violence was thus translated into the language of companionate marriage prevailing during the industrial era.").

296. *See* Tarr, *supra* note 122, at 161 ("In order to get an injunction [preventing domestic violence], the woman had to bring a lawsuit, which, in most cases, meant a divorce proceeding.").

297. *See* Laurence M. Friedman, *Divorce: The "Silent Revolution"*, *in* FAMILY IN TRANSITION 203 (15th ed., Arlene S. Skolnick & Jerome H. Skolnick eds., 2009).

generally meant a verbal reprimand.[298] Permitting protection orders only via divorce proved to be sorely inadequate given the lengthy nature of divorce proceedings, the assumption that married petitioners wished to divorce, the exclusion of unmarried victims from court protection, and the lack of enforcement. A new legal remedy was needed.

During the 1960s and 1970s, battered-women's activists and scholars sought to transform domestic violence from a private matter into a public one by creating legal mechanisms to enhance abuse survivors' safety and independence.[299] The first domestic violence protection order legislation was passed in 1970,[300] with advocates intending for this autonomy-enhancing injunctive relief to "radically alter the balance of power between abusers and their victims"[301] and enable survivors to invoke protections of the criminal justice system.[302] By 1993, all fifty states and the District of Columbia had enacted protection order statutes.[303]

As with many legal issues related to family formation and dissolution, state law largely governs protection orders and thus varies by state.[304] As states enacted domestic violence protection order statutes to protect domestic violence survivors and their children from further danger, each state determined how to define domestic violence and the types of relationships covered, relief available, duration of orders, and rules governing domestic violence remedies.[305]

In light of the deeply entrenched societal and legal acceptance of domestic violence, protection order laws provided significant remedies that were previously unavailable. Heightened standards for domestic

298. Tarr, *supra* note 122, at 161.

299. Goodman & Epstein, *Refocusing on Women*, *supra* note 293, at 480.

300. Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 48 (2007).

301. David M. Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1451 (2010); *see also* Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 3, 23 (1992).

302. *See* Tarr, *supra* note 122, at 159.

303. LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN 33 (2008).

304. The U.S. Supreme Court has frequently proclaimed that family law is a matter of state law. *See, e.g.*, Simms v. Simms, 175 U.S. 162, 167 (1899) ("[T]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States."). *But see* 18 U.S.C. § 228 (2018) (federal law regarding failure to pay child support obligations); Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584 (2015) (legalizing same-sex marriage across the United States); Loving v. Virginia, 388 U.S. 1 (1967) (striking down all state laws banning interracial marriage).

305. Each state has its own statutorily based civil and criminal remedies for domestic violence. For forms of relief, see *supra* notes 92–93 and accompanying text.

violence relief, however, prevent survivors from accessing such relief and preserve existing gender hierarchies.[306] As another example of differential protection concerning domestic violence, short-term statutory injunctions against domestic violence problematically give the appearance of ostensibly remedying domestic abuse, but only temporarily address the often-ongoing danger. Although injunctions regarding trademarks, business matters, and financial interests are often permanent, civil protection orders, which are a form of injunctive relief, are most commonly only one year in duration.[307]

By imposing more stringent service requirements, the procedural barriers to accessing legal protection shape and perpetuate intimate partner violence, in contrast to the ready access that litigants in other areas of the law have to the courts and legal remedies. Despite progress in the creation of laws against violence, the legal system continues to perpetuate status differences by giving diminished protection to domestic violence survivors, most of whom are female.

C. Race, Class, and Gender Identities of Domestic Violence Petitioners

Aspects of identity are relevant to understanding the persistent differential treatment of domestic violence remedies, including heightened procedural requirements. Most petitioners in domestic violence court are low-income women, with high percentages of petitioners identifying as women of color,[308] and states' procedural rules hold these litigants to rigid requirements that impede access to protection. The heightened procedural requirements for protection from domestic violence thus impose racial, gender, and class-based disadvantages on communities the law has historically oppressed.

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306. *See* Siegel, *supra* note 45, at 2119 (noting that the legal system plays an important role in perpetuating status differences between husbands and wives).

307. Stoever, *Enjoining Abuse*, *supra* note 45, at 1015.

308. *See* Tricia B. Bent-Goodley, *Culture and Domestic Violence*, 20 J. INTERPERSONAL VIOLENCE 195, 196 (2005) (discussing the differential impact of domestic violence within groups of color); Lisa Langenderfer-Magruder et al., *Experiences of Intimate Partner Violence and Subsequent Police Reporting Among Lesbian, Gay, Bisexual, Transgender, and Queer Adults in Colorado*, 31 J. INTERPERSONAL VIOLENCE 855 (2016) (noting that LGBTQ individuals are at equal or higher risk of intimate partner violence victimization as compared to heterosexual individuals, and transgender individuals experience significantly higher rates of abuse than their cisgender peers); Beth Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 SIGNS 1133, 1136 (2000) (noting that poor women of color are "most likely to be in both dangerous intimate relationships and dangerous social positions"); Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender*, 11 VIOLENCE AGAINST WOMEN 38 (2005) (discussing the need to give voice to battered women from diverse backgrounds while focusing on remedying structural inequalities).

Most protection order petitioners are women seeking protection from abusive male partners, with demographic data from multiple jurisdictions revealing that women are petitioners in approximately 85% to 92% of civil protection order cases.[309] These rates are consistent with significant research showing that approximately 85% of domestic violence survivors identify as female and 90% of abuse perpetrators identify as male.[310] Research further shows that abuse endured by women is typically more severe than abuse men experience,[311] and that petitioners seek court protection only after lengthy histories of abuse.[312] Domestic violence is understood to be about power and control dynamics and coercive control, not solely gender, and experiences of abuse perpetuated by women against men should not be discounted.[313] Additionally, although lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals experience intimate partner violence at the same or higher rates than individuals in heterosexual relationships, legal protection and community-based

309. *See* Alesha Durfee, *Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders*, 4 FEMINIST CRIMINOLOGY 1, 16 (2009) (finding that 85% of petitioners are female in a random sample of protection order petitions in an urban county); Susan B. Sorenson & Haikang Shen, *Restraining Orders in California: A Look at Statewide Data*, 11 VIOLENCE AGAINST WOMEN 912, 920 (2005) (examining over 200,000 domestic violence civil restraining order cases in California, and finding that a man was to be restrained in 83.6% of cases); Katherine A. Vittes & Susan B. Sorenson, *Are Temporary Restraining Orders More Likely to Be Issued When Applications Mention Firearms?*, 30 EVALUATION REV. 266, 271 (2006) (analyzing Los Angeles County filings and finding that 92.2% of petitioners were female, while 7.8% of petitioners were male).

310. Studies by the Department of Justice and the American Medical Association have shown that 80% of abuse is male to female, 10% is male to male, 6% is female to female, and 4% is female to male. U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 14 (2003) [hereinafter COSTS OF INTIMATE PARTNER VIOLENCE]; *see also* TJADEN & THOENNES, *supra* note 67, at 5 (discussing rates at which women are abused).

311. *See* Lois Schwaeber, *Recognizing Domestic Violence: How to Know It When You See It and How to Provide Appropriate Representation*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 2–12 (Mo T. Hannah & Barry Goldstein eds., 2010) (identifying that women experience higher levels of violence in intimate relationships in comparison to men, including serious physical assault or being choked, drowned, or threatened with a gun); COSTS OF INTIMATE PARTNER VIOLENCE, *supra* note 310, at 14 (discussing rates of physical violence).

312. Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 522 (2013) (describing the process abuse survivors undertake when seeking to leave an abusive relationship or to end the violence in an ongoing relationship).

313. *See* Jamie R. Abrams, *The Feminist Case for Acknowledging Women's Acts of Violence*, 27 YALE J.L. & FEMINISM 101 (2016).

services have typically had a hetero-normative approach and have not been accessible to LGBTQ abuse survivors.[314]

Domestic violence petitioners are more commonly women of color than represented in a region's population. For example, in the District of Columbia, over 85% of petitioners and respondents in civil protection order cases in 2012 were African American, while 50% of the population is African American.[315] As an additional example, in a recent review of Los Angeles County cases, 72% of petitioners identified as Latino, 20% as African American, 4.5% as Caucasian, and 3.7% as Asian/Pacific Islander; compared with the county's ethnic composition, Latinos and African Americans were significantly overrepresented as petitioners in domestic violence cases.[316] Other aspects of identity or health status can further compound challenges to receiving court-ordered protection. For example, women who are HIV-positive or at risk for HIV "face a fifty percent chance of being a victim of domestic violence,"[317] and individuals experiencing domestic violence are at increased risk for HIV exposure. [318]

Demographic statistics are striking in the context of historic lack of outreach to and accessibility of services to racially and ethnically diverse populations.[319] Additional studies of protection order petitioners confirm these demographic patterns over time,[320] although these trends are shifting

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314. *See, e.g.*, Victoria Cruz, *Domestic Violence Advocate/Counselor, Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence, Panel Discussion*, *in* 29 FORDHAM URB. L.J. 121, 147 (2001) (describing the inability of many gay, lesbian, and transgender victims to access domestic violence shelters).

315. SURVIVORS & ADVOCATES FOR EMPOWERMENT (DC SAFE), INC., *supra* note 17, at 7.

316. Vittes & Sorenson, *supra* note 309, at 271.

317. D.C. ACCESS TO JUSTICE COMM'N, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA'S LOW-INCOME COMMUNITY 61 (2008), http://www.dcaccesstojustice.org/files/CivilLegalNeedsReport.pdf [https://perma.cc/TM33-NZG8]; D.C METRO. POLICE DEP'T, DOMESTIC VIOLENCE AND HIV, https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/DV_HIV.pdf [https://perma.cc/75UL-UZUD].

318. D.C. METRO. POLICE DEP'T, *supra* note 317.

319. Sherry Lipsky et al., *The Role of Intimate Partner Violence, Race, and Ethnicity in Help-Seeking Behaviors*, 11 J. ETHNICITY & HEALTH 81 (2006); Lisa M. Martinson, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN'S L.J. 259, 269–70 (2001) (describing exclusionary and discriminatory practices in domestic violence shelters and services).

320. *See* OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES (2005), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/nyselfrepresentedlitigants.authcheckdam.pdf [https://perma.cc/H5Q6-A8XR] (surveying over 3,300 self-represented litigants in New York City Family Court and New York City Housing Court in 2003, and finding that 83% of unrepresented litigants in these courts identified as African American, Asian, or Latino, with the proportions of African American and Latino pro se litigants far outstripping their representation in the general population); Sorenson & Shen, *supra* note 309, at 914, 922.

during the Trump era.[321] Following President Trump's election and expanded immigration enforcement efforts, dramatically fewer abuse survivors with unsecure immigration status are seeking help from domestic violence agencies or the civil or criminal justice systems.[322]

Axes of identity and oppression intersect, as poor Americans are disproportionately women of color,[323] and increased poverty correlates with greater levels of domestic violence.[324] Protection order petitioners generally have scarce financial resources and struggle financially while seeking protection from abuse.[325] Nationwide, domestic violence is the leading cause of homelessness for women and children,[326] and over half of women who attempt to leave abusive relationships fall below the poverty line.[327] Recent studies found that protection order petitioners in Kentucky[328] and battered immigrants[329] generally have incomes of less than $15,000. Poverty limits options, creates stressors and conditions that promote abuse, and makes it more difficult to escape abuse. Unsurprisingly, most domestic violence petitioners are unable to afford counsel as they navigate the court system seeking protection.

Studies across areas of the law show that petitioners in domestic violence protection order cases are the least likely to be represented by

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321. James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. TIMES (Oct. 9, 2017), http://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html [https://perma.cc/AUQ9-4J2G].

322. *Id.*

323. JOHN ICELAND, POVERTY IN AMERICA 81, 88 (2d ed. 2006).

324. 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); SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES 16 (2007), https://www.bjs.gov/content/pub/pdf/ipvus.pdf [https://perma.cc/V2MK-HNAN] (examining nonfatal intimate partner victimization and finding that "females living in households with lower annual incomes experienced the highest average annual rates").

325. *See* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1019 (1999).

326. Sokoloff & Dupont, *supra* note 308, at 44.

327. Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 617–18 (2001).

328. Lisa Shannon et al., *Intimate Partner Violence, Relationship Status, and Protective Orders: Does "Living in Sin" Entail a Different Experience?*, 22 J. INTERPERSONAL VIOLENCE 1114, 1119 (2007) (58% of study participants had annual incomes of less than $15,000).

329. Nawal H. Ammar et al., *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37 CRIM. JUST. REV. 337, 338 (2012) (finding that 67% of battered immigrant women have yearly incomes of less than $15,000).

counsel.[330] For example, a recent study of the District of Columbia courts found that approximately 98% of both petitioners and respondents in the Domestic Violence Unit proceed pro se.[331] Pro se litigation in complex civil litigation, such as tort claims and commercial disputes, is extremely rare, as is pro se litigant involvement in property rights claims.[332] Data from Washington State reveal pro se litigation in only 2-3% of complex civil cases and in 19-20% of property rights cases.[333] In stark contrast, litigants are self-represented in 95% of domestic violence cases in Washington State.[334]

Access-to-justice scholars have examined the correlation between poverty and self-representation as they study court systems.[335] Pro se litigants typically report that they cannot afford an attorney, do not consult with an attorney, have limited formal education, and are at a disadvantage in pursuing legal claims.[336] They often struggle to understand procedural rules, become frustrated with the seeming impossibility of the legal system, or are overwhelmed by the economic, logistical, and social toll of cases.[337] Much scholarship has focused on how pro se litigants are disadvantaged in courtroom situations, how self-representation barriers diminish pro se litigants' confidence in the judicial system, what the challenges are to judicial officers, and what additional resources courts and litigants need.[338]

The experience of domestic violence amplifies the significant challenges inherent in self-representation. Abuse survivors struggle with the physical and psychological effects of violence and the trauma provoked by coming to court, anticipating that they will recount histories

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330. Anne D. Janku & Joseph A. Vradenburg, *Self-Represented Litigants and Civil Case Dispositions in Missouri: An Impact Analysis*, 51 CT. REV. 74, 76 (2015); *see also* Steinberg, *supra* note 38, at 749–51 (discussing increasing rates of pro se litigants in domestic violence cases).

331. D.C. ACCESS TO JUSTICE COMM'N, *supra* note 317, at 83.

332. JUDICIAL SERVS. DIV., ADMIN. OFFICE OF THE COURTS, AN ANALYSIS OF PRO SE LITIGANTS IN WASHINGTON STATE 1995–2000, at 2 (2001), https://www.courts.wa.gov/subsite/wsccr/docs/Final%20Report_Pro_Se_11_01.pdf [https://perma.cc/649Q-P6YR].

333. *Id.* (examining Judicial Information System data and finding pro se litigant involvement in 20% of property rights issues in Washington State from 1995 to 2000).

334. *Id.* at 3 tbl.1.

335. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1788–90 (2001); Steinberg, *supra* note 38, at 752–54.

336. OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE, *supra* note 320 (surveying over 3,300 self-represented litigants in New York City Family Court and New York City Housing Court in 2003).

337. *Id.*; *see generally* CONFERENCE OF STATE COURT ADMINS., POSITION PAPER ON SELF-REPRESENTED LITIGATION (2000), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/positionpaper.authcheckdam.pdf [https://perma.cc/4C6R-TG2W].

338. CONFERENCE OF STATE COURT ADMINS., *supra* note 337, at 1–4.

of abuse and possibly encounter and be cross-examined by the abusive partner.[339] Pro se litigants are held to the same standards as those who are represented by counsel, yet they commonly have difficulty properly serving the opposing party and lack the resources and ability to do so.[340] Not only do the procedural rules presume counsel who serves a vital role in achieving service of process,[341] they ignore domestic violence dynamics and barriers to personally serving an abusive partner.

Petitioners who are unable to personally serve respondents struggle to decide whether they can repeatedly return to court to seek continuances, which often entails missing work, foregoing income, and having to make daycare and transportation arrangements, in addition to being emotionally taxing. Even with states increasingly enacting laws that prohibit employers from firing domestic violence petitioners for missing work due to court hearings,[342] revealing personal information to utilize such laws and losing wages present real hardships.

Access to safety and questions of procedural justice should be evaluated in the context of the historic lack of protection against domestic violence, the state's historic oppression of women, and the racialized, gendered, and class-based implications of imposing heightened notice requirements. An interrelated part of the state's differential legal treatment of domestic violence survivors is its common distrust and disbelief of abuse allegations, as explored in the next Section.

D. Distrust of Domestic Violence Claims and Claimants

Jurisdictions enacted heightened procedural requirements for domestic violence remedies in the context of historic "judicial and societal distrust

339. Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 101 (2005).

340. DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 21–23 (2011), https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf [https://perma.cc/Q32T-N3WV]; Dan Gustafson et al., *Pro Se Litigation and the Costs of Access to Justice*, 39 WM. MITCHELL L. REV. 32, 37 (2012).

341. Kleeman v. Rheingold, 81 N.Y.2d 270, 275 (Ct. App. 1993) (identifying counsel as being of "central importance" to achieving service of process).

342. *See* Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 700 (2008); *see, e.g.*, Cal. Labor Code § 230(c) (2019) (prohibiting employers from discharging or discriminating or retaliating against employees who take time off from work to seek domestic violence legal remedies and to attend court hearings).

of female complainants,"[343] which persists to this day.[344] Research shows that fact finders disbelieve women solely because of their gender, typically viewing women to be less credible than men and prone to exaggerate claims, especially as related to gender-based violence and their children.[345] Professors Deborah Epstein and Lisa Goodman write about how female abuse survivors routinely "face a Gaslight-style gauntlet of doubt, disbelief, and outright dismissal of their stories."[346] A recent study of gender stereotypes and credibility determinations found that both male and female study participants viewed masculine victims as more credible than feminine victims in scenarios with male defendants.[347] Current empirical research of custody cases involving allegations of domestic violence and alienation[348] also statistically confirms gender bias. Professor Joan Meier and Sean Dickson conclude, "Overall, fathers who were accused of abuse and who accused the mother of alienation won their cases 72% of the time; slightly *more* than when they were *not* accused of abuse (67%)."[349] Furthermore, "When mothers alleged domestic violence,

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343. Francine Banner, *Honest Victim Scripting in the Twitterverse*, 22 WM. & MARY J. WOMEN & L. 495, 543 (2016); *cf.* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 828 (2007) (discussing reasons that many abuse victims distrust law enforcement and judges).

344. The nation was divided over Dr. Christine Blasey Ford's allegations that now-Justice Brett Kavanaugh sexually assaulted her, with some critiquing her for not coming forward sooner. *See* Lisa Bonos, *Trump Asks Why Christine Blasey Ford Didn't Report Her Allegation Sooner. Survivors Answer with #WhyIDidntReport*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-withwhyididntreport/?utm_term=.7b785e3ccda8 [https://perma.cc/4VP3-DXAH]; Monica Rhor, *Brett Kavanaugh Supreme Court Confirmation Hearing Shows Divide Between Men, Women*, USA TODAY (Sept. 29, 2018, 2:35 AM), https://www.usatoday.com/story/news/2018/09/28/brett-kavanaugh-christine-blasey-ford-assault-claim-gender-divide/1459557002/ [https://perma.cc/4DAQ-KAPX].

345. WELLESLEY CTRS. FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 3 (2002) (reporting that fathers who seek custody are favored over mothers because "mothers are held to a different and higher standard than fathers"); Dana H. Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 176, 178 (2009).

346. Epstein & Goodman, *Discounting Credibility*, *supra* note 52.

347. Nesa E. Wasarhaley et al., *The Impact of Gender Stereotypes on Legal Perceptions of Lesbian Intimate Partner Violence*, 32 J. INTERPERSONAL VIOLENCE 635 (2017).

348. Parental alienation is a construct created by Richard Gardner, a child psychiatrist, "to describe a 'syndrome' whereby vengeful mothers employed child abuse allegations in litigation as a powerful weapon to punish ex-husbands and ensure custody to themselves." Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311, 316 (2017). The concept lacks "any scientific or empirical foundation, and has today been largely—although by no means completely—rejected by experts and scholars, and to a lesser degree, courts." *Id.* at 317.

349. *Id.* at 328.

fathers won 73% of the time . . . . Child sexual abuse allegations *increased* fathers' likelihood of winning to 81%."[350] This contemporary research echoes the conclusions of multiple states' Gender Bias Task Forces: "Women receive unfavorable substantive outcomes in cases because of their gender, and men do not. Women's complaints are trivialized and their circumstances misconstrued more often than men's, and women more often than men are victims of demeaning and openly hostile behavior in court proceedings."[351]

Domestic violence is trivialized by "all reaches of the justice system, from police through prosecutors and judges,"[352] and a woman's character is often attacked when she makes a complaint of abuse or sexual assault.[353] Scholars and judicial-watch groups have tracked judicial hostility to domestic violence remedies. Professor James Ptacek details judicial responses that reinforce women's entrapment in abusive relationships, including minimizing, denying, and blaming the petitioner; neglecting the survivor's fears; exhibiting patronizing displays of authority, bias against victim/survivors, and racist attitudes toward women of color; and making hostile remarks toward domestic violence petitioners.[354] An example of judges enabling violent respondents includes being unwilling to impose sanctions on respondents.[355]

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350. *Id.* (emphasis in original).

351. 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, 55 (1996). A 2015 survey which yielded over 900 responses reported similar findings about police hostility, blame, and disbelief of abuse victims. ACLU, CUNY SCHOOL OF LAW & UNIV. OF MIAMI SCHOOL OF LAW, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 12 (2015), https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf [https://perma.cc/6DHA-LVX4].

352. Swent, *supra* note 351, at 55.

353. Banner, *supra* note 343, at 495 (describing how on social media sites, "terms such as 'gold digger,' 'slut,' and 'ho' are engaged with regularity to describe those who come forward alleging an assault by a public figure"); Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L. Q. 247, 254–55 n.19 (1993) (identifying that female rape and domestic violence victims must often defend themselves against accusations that they provoked the abusive act or are exaggerating the violence).

354. JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES (1999), http://tcfv.org/pdf/Updated_wheels/Judical_responses%20that%20entrap.pdf [https://perma.cc/B5BR-BET8] (depicting the Power and Control Wheel displaying judicial responses that reinforce women's entrapment).

355. *Id.*

Alongside the countless examples of judicial resistance or refusal to enforce domestic violence laws,[356] the state engages in racialized, gendered, and class-based patterns of intervention in the family. This includes the child welfare system's targeting of African American and Latino families with low incomes[357] and heightened state scrutiny and distrust of low-income women of color in the public benefits context.[358] The state also often renders the rights of women irrelevant and their decision-making capacity suspect regarding their reproductive health.[359] In sum, race, class, gender, and victimization axes of identity make certain individuals particularly vulnerable to state intrusion and control while the state simultaneously fails to provide the help abuse survivors seek.[360]

The recent #MeToo movement is relevant to societal and legal responses to gender-based violence. The movement reveals the persistent societal reluctance to believe abuse survivors and offer real remedies, seeks to create sustained social change, and draws on longstanding feminist practices while also displaying some of the same privileging, silencing, and infighting of the early battered women's movement.[361] The

356. Lynn H. Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1065 (1995) ("The reports of state supreme court task forces on gender bias in the courts are replete with reports of judges who trivialize violence against women." (citations omitted)).

357. Robin Fretwell Wilson, *Removing Violent Parents from the Home: A Test Case for the Public Health Approach*, 12 VA. J. SOC. POL'Y & L. 638, 658 (2005).

358. Wendy Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 319–20 (2014); Khiara M. Bridges, *Towards A Theory of State Visibility: Race, Poverty, and Equal Protection*, 19 COLUM. J. GENDER & L. 965, 968 (2010) (identifying how the administration of public benefits and the information women must cede to the state is "premised on a profound distrust of poor people and poor mothers"); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012).

359. *See* Joanne E. Brosh & Monica K. Miller, *Regulating Pregnancy Behaviors: How the Constitutional Rights of Minority Women Are Disproportionately Compromised*, 16 AM. U. J. GENDER SOC. POL'Y & L. 437, 438–39 (2008); Ruth Colker, *Blaming Mothers: A Disability Perspective*, 95 B.U. L. REV. 1205, 1206 (2015) (identifying the state's distrust of women's decision-making throughout pregnancy and motherhood); Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657 (2008); Dorothy E. Roberts, Privatization and Punishment in the New Age of Reprogenetics, 54 EMORY L.J. 1343, 1346 (2005) (describing the "rush to punish poor, substance-abusing mothers for their reproductive failures"); Ruthann Robson, *Lesbians and Abortion*, 35 N.Y.U. REV. L. & SOC. CHANGE 247, 277 (2011) (identifying that "an interrogation of a woman's 'reason' for having an abortion demonstrates a distrust of women similar to the distrust apparent in other abortion restrictions that treat women [who] have abortions quite differently than ungendered patients providing informed consent for other medical procedures").

360. *See generally* Stoever, *Mirandizing Family Justice*, *supra* note 119 (analyzing state services that replicate control and deny survivors autonomy); Stoever, *Parental Abduction*, *supra* note 65 (identifying the state's hyper-aggressive interventions in some contexts, often against victims' wishes, while failing to criminally or civilly respond to other areas for which survivors seek help).

361. *See* Jane K. Stoever, *Introduction*, *in* THE POLITICIZATION OF SAFETY (Jane K. Stoever ed., forthcoming 2019); Caroline Kitchener, *Larry Nassar and the Impulse to Doubt Female Pain*,

#MeToo movement and news reports initially focused on Hollywood, politicians, and those in the public eye, with multiple complaints against Harvey Weinstein, Matt Lauer, Charlie Rose, Al Franken, Kevin Spacey, Louis CK, Mario Batali, and dozens of other high-profile individuals.[362] It appeared that multiple women publicly had to allege abuse or harassment for any single survivor's allegation to be believed, and all too often, workplaces, schools, churches, and other institutions of trust had longstanding knowledge of pernicious abuse, as was the case with Dr. Larry Nassar's sexual abuse of over 100 girls and women.[363] Similar to the limited focus on the plight of domestic violence litigants, the #MeToo movement initially lacked any focus on less glamorous workplaces and professions. In further developing domestic violence remedies and responses, this Article explores how overly onerous service of process requirements compound the challenges abuse survivors face in legal systems that have not been responsive to their complaints and how such rules create barriers to safety and justice, necessitating reform.

V. LAW REFORM TO INCREASE ACCESS TO SAFETY AND JUSTICE

Efforts to remedy gender-based violence must include making legal remedies accessible. Courts currently dismiss volumes of protection order cases daily for lack of personal service, leaving abuse survivors without needed protection. Jurisdictions should instead reform procedural rules to address historic injustices and provide actual access to domestic violence remedies.

Due to the safety and logistical difficulties in accomplishing personal service in a significant volume of domestic violence cases, this Article recommends that all states adopt provisions automatically permitting alternative service after two hearing dates at which personal service is not achieved. This Article further recommends that court rules enable petitioners to request alternative means, such as electronic service, from

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ATLANTIC (Jan. 23, 2018), https://www.theatlantic.com/health/archive/2018/01/larry-nassar-and-the-impulse-to-doubt-female-pain/551198/ [https://perma.cc/8LLT-KAHY]; *supra* notes 47–53 and accompanying text.

362. *Supra* note 48–49 and accompanying text.

363. *See* Kitchener, *supra* note 361; Dan Barry et al., *Molested as FBI Case Plodded for a Year*, N.Y. TIMES (Feb. 3, 2018), https://www.nytimes.com/2018/02/03/sports/nassar-fbi.html [https://perma.cc/W4BA-YHHQ] (reporting that at least forty girls and women were molested by Dr. Nassar after he was under federal investigation).

the outset upon filing domestic violence cases in situations in which the respondent's home, employment address, and whereabouts are unknown. The challenges regarding service are so common that three states, Minnesota, Nevada, and Washington, have enacted an automatic means of permitting alternative service methods after initial attempts at personal service fail.[364] Additional concrete reforms identified in Sections V.A and V.B are also essential in order to increase access to the protection order remedy.

A. Abrogate Procedural Laws Preventing Access to Protection Orders

Current rules requiring notice before seeking temporary protection from abuse, mandating case dismissal for failure to perfect personal service, and requiring that personal service be accomplished multiple days prior to the hearing date for it to be valid prevent access to safety and justice for abuse survivors.

1. Address Pre-Temporary Protection Order Notice Rules

Some jurisdictions require a domestic violence survivor to notify the abusive partner before the petitioner seeks a temporary emergency protection order. For example, eleven California counties require the petitioner to contact the respondent by phone or in person and provide notice four to twenty-four hours prior to filing for a temporary civil protection order.[365] These rules are highly dangerous and contrary to the national standard, which permits courts to grant TPOs without notice if the respondent poses a present risk of abuse.[366]

Given the heightened rates of abuse and lethal violence at separation, the risk of revealing confidential locations, and the short-term nature of TPOs which can be vacated, jurisdictions should abrogate laws that require that the petitioner give notice prior to seeking emergency temporary protection.

2. Prevent Dismissal for Failure to Serve

Some jurisdictions' court rules require courts to dismiss cases when the petitioner has failed to personally serve the respondent by the first,

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364. MINN. STAT. § 518B.01 (2018); NEV. REV. STAT. § 33.030 (2018).

365. California counties requiring pre-TPO notice include Alameda, Alpine, Amador, Butte, Humboldt, Imperial, Inyo, Kern, Lake, Lassen, and Los Angeles. *See, e.g.*, ORANGE CTY. R. 704(1) (four-hour notice); SIERRA CTY. R. 6.14(a) (notice by 10:00 a.m. the prior day).

366. *See supra* notes 142–145.

second, or third hearing date.[367] Many of these petitioners would be legally entitled to relief if they were able to have an evidentiary hearing on the merits, and rules mandating dismissal directly contravene the petitioner's due process right to a hearing.[368] Mandatory dismissal rules also leave abuse survivors without needed protection that can prevent respondents from coming to their homes, workplaces, and schools; prohibit respondents from taking their children from daycare or school; and provide additional safety-related protection.

When states do not specify the number of times a petitioner may return to court if personal service is not effectuated,[369] some judges as a matter of practice dismiss domestic violence petitions for lack of service after only one or two attempts, informing petitioners that the dismissal is "without prejudice" and they may re-file once the respondent reappears.[370] The routine dismissal of cases for lack of personal service fails to protect individuals being stalked or still abused, but whose intimate partners successfully evade service. Instead, service rules should be reformed to make service of process more effective,[371] and should prevent the dismissal of cases before a hearing on the merits.

Additionally, respondents may not have stable home or work addresses, yet may still be in contact through telephone, text message, and social media and know the petitioner's whereabouts. The nationwide requirement that parties cannot serve process themselves and must instead do so through a third party to ensure validity of service[372] presents further barriers to achieving service. Unfortunately, all too often the petitioner has the unique opportunity to serve the respondent when the respondent unexpectedly appears at the petitioner's home. An exception to the general rule against a litigant personally serving the opposing party should be made for such situations. Personal service requirements are challenging

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367. *See supra* note 183 and accompanying text.

368. *See supra* Section III.A.

369. *Rebecca Griego Bill Passes Senate Unanimously*, *supra* note 16 ("Currently, protection orders must be served on the abuser in person, and there are no clearly defined limits to how many times a victim must return to court if the authorities are not able to locate and serve the abuser.").

370. Minute Orders providing examples are on file with the Author. The Author has also heard this statement from multiple judges.

371. *See infra* Section V.B.

372. *See, e.g.*, CAL. CIV. PROC. CODE § 414.10 (West 2018) ("A summons may be served by any person who is at least 18 years of age and not a party to the action."); TEX. R. CIV. P. 103 ("[N]o person who is a party to or interested in the outcome of a suit may serve any process in that suit.").

for both petitioners and law enforcement,[373] as reflected in the high rates of case continuances and dismissals for lack of service.[374]

3. Nullify Time Limits

Many states require that service occur a set number of days prior to the hearing, with five days being common across states.[375] This means that a litigant could achieve personal service closer to the hearing, but the court would not consider the service valid, the merit hearing could not occur, and the respondent would be alerted to evade service.

Any personal service should be considered effective, particularly considering the compressed timeframe of two to three weeks from the filing date to the hearing date. Instead of imposing a multi-day period prior to the hearing by which service must be effectuated, respondents can be given a continuance to permit time to gather evidence and prepare their cases. Alongside the current five-day notice provision in California, for example, respondents are already guaranteed the right to at least one continuance.[376]

B. Reform Service Rules for Domestic Violence Cases

1. Law Enforcement Service Attempts Pursuant to VAWA Should Provide Prima Facie Proof of Diligent Effort

Under VAWA,[377] as a condition of receiving federal funds, states must certify that petitioners are not charged fees for serving domestic violence protection order or restraining order cases[378] To comply with federal law, all states have adopted laws requiring state and local sheriff and police departments to effect service of process in domestic violence cases.[379] For

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373. Police will not typically serve process at homeless shelters, which is a practice intended to encourage unhoused individuals to find shelter and safety without fearing police encounters. This was my experience as a live-in staff member at a homeless shelter.

374. *Supra* notes 14–18 and accompanying text.

375. CAL. FAM. CODE § 243 (West 2018) (requiring that service be perfected at least five days prior to the hearing); N.D. CENT. CODE § 14-07.1-02(3) (2017) (requiring personal service upon the respondent at least five days prior to the hearing); WASH. REV. CODE § 26.50.050 (2018) (requiring personal service on the respondent at least five days prior to the hearing).

376. CAL. FAM. CODE § 245(a).

377. Pub. L. No. 113-4, 127 Stat. 54 (codified in part in scattered sections of 42 U.S.C.).

378. 42 U.S.C. § 3796hh(c)(1)(D) (2018).

379. *See, e.g.*, FLA. STAT. ANN. § 741.30(2)(a) (West 2018) (specifying a mechanism through which the state court pays law enforcement officers a fee for service in each domestic violence case); 735 ILL. COMP. STAT. ANN. 5/2-202(a) (West 2018) ("Process shall be served by a sheriff.").

example, New Jersey orders court clerks to immediately forward all domestic violence petitions and temporary orders to law enforcement for service and mandates that the documents "shall immediately be served."[380] Given federal and state law, police and sheriff departments should allocate sufficient resources to this important task. If law enforcement is unable to effectuate service by the second court date, this should serve as prima facie proof of "diligent effort" permitting alternative service.

States should enact presumptions that if law enforcement has not been able to accomplish personal service by the second hearing date, the petitioner is automatically permitted to utilize an alternative means most likely to achieve actual notice. In some jurisdictions, alternative service is not available for domestic violence remedies, furthering historic lack of protection from abuse; in other jurisdictions, access to alternative methods of service is prohibitively difficult. For example, to receive permission to utilize alternative service in Pennsylvania, a litigant must show proof of "(1) inquiries of postal authorities including inquiries pursuant to the Freedom of Information Act, (2) inquiries of relatives, neighbors, friends, and employers of the defendant, (3) examinations of local telephone directories, courthouse records, voter registration records, local tax records, and motor vehicle records, and (4) a reasonable internet search."[381] It is also challenging for pro se litigants to separately motion the court for alternative service.

Placing service obligations with law enforcement as mandated by federal law and having a ready structure in place for alternative service ensures the petitioner's right to a hearing on the merits, permits methods of service still likely to notify the respondent of the case, and makes alternative service methods procedurally accessible. This proposition relieves petitioners of the obligations of traditional methods for requesting alternative service that require specialized legal knowledge, motions to the court, and additional court dates and which present access barriers to unrepresented petitioners.

Three states have already adopted laws that automatically permit service alternatives in the domestic violence context, which helpfully provide predictability and save judicial resources. Minnesota allows the

380. N.J. STAT. ANN. § 2C:25-28 (West 2018) (requiring clerks to immediately forward domestic violence complaints and emergency orders to law enforcement for service and mandating that the documents "shall immediately be served").

381. PA. R. CIV. P. 430.

petitioner's failed efforts at personal service to be followed by one week of published notice and requires the petitioner to mail service to the respondent's last known residence.[382] Unlike in most other states, an additional motion or judicial permission is not required.[383] Pursuant to the Rebecca Griego Act,[384] courts in Washington now cannot require more than two attempts at obtaining personal service, and they must then permit service by mail or publication.[385] In Nevada, law enforcement agencies are required to personally serve respondents,[386] but if the respondent's home address is unknown or law enforcement has had at least two failed service attempts to the respondent's place of employment, the law automatically permits service by mail to the workplace.[387] The Nevada solution is limited in that it is only effective when the respondent is employed and the petitioner is aware of such employment. The recommendations in the following section present more expansive options.

2. Electronic Service for Modern Life

Procedural rules concerning service and applied to domestic violence matters should continue to evolve to respond to technological advances and how people function and communicate. Some traditional methods of alternative service, namely service via publication in a newspaper or by posting a summons at a set location in a courthouse, rarely achieve actual notice, which judges and scholars acknowledge.[388] In contrast, service via mail to a known residential or employment address is more likely to communicate notice to the respondent. The most effective way for giving timely notice to an individual would often be electronic service, but it is not currently permitted as a primary service means for domestic violence cases in any jurisdiction. In fact, only three jurisdictions explicitly permit electronic service as an alternative form of service for protection orders.[389]

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382. MINN. STAT. § 518B.01 (2018).

383. *Id.*; *cf., e.g.*, ALA. R. CIV. P. 4.3(d)(1); D.C. DOM. VIOL. R. 5(a)(3)(A)(i); N.J. STAT. ANN. § 2C:25-28; N.Y. FAM. CT. ACT § 826 (McKinney 2015).

384. *See* WASH. REV. CODE § 26.50.050 (2018).

385. *Id.*

386. NEV. REV. STAT. § 33.030 (2018).

387. *Id.*

388. *See* Pennoyer v. Neff, 95 U.S. 714, 727 (1877) (identifying that publishing process "in the great majority of cases, would never be seen by the parties interested"); Melodie M. Dan, *Social Networking Sites: A Reasonably Calculated Method to Effect Service of Process*, 1 CASE W. RES. J.L. TECH. & INTERNET 183, 207 (2010) (noting that service by publication is unlikely to provide actual notice and should be used as a last resort).

389. ALASKA R. CIV. P. 4(e); D.C. DOM. VIOL. R. 5(c); ME. R. CIV. P. 4(g).

Unlike checking the newspaper daily to see if one's name appears regarding a court proceeding, the average person in the United States checks his or her cellular phone eighty-six times per day.[390] Today, individuals across socioeconomic statuses commonly have cellular phones. A 2018 Pew Research Center study found that 95% of Americans have some type of cellular phone, with 100% of people age eighteen to twenty-nine possessing a cellular phone and 98% of Americans age thirty to forty-nine owning phones.[391] The high ownership rates are significant and these age brackets largely match the age demographics of protection order litigants. The 2018 Pew study further found that over three-quarters of Americans have smartphones, and young adults, non-whites, and lower-income Americans particularly rely on smartphones for online access.[392]

Under current personal service requirements, respondents commonly refuse to open the door to accept service or can otherwise evade service or be extremely difficult to locate by a third party. Even if the petitioner or a third party texts, emails, or mails the petition and summons to the respondent, rules that require hand-delivery make actual notice insufficient. The constitutional standard simply requires that service be "reasonably calculated" to deliver notice to the opposing party. If personal service is not readily achievable, a petitioner should be permitted to have someone notify the respondent via text message, email, or social media message functions about the protection order hearing date, choosing an electronic method through which the petitioner and respondent have previously or regularly communicated. The server could, for example, send via text message images of the petition, summons, and any TPO or ask the respondent to check his or her email for the petition, summons, and temporary order. Current technology, such as "read receipts" that alert the sender when his or her message has been read, could be offered to the

390. Lisa Eadicicco, *Americans Check Their Phones Eight Billion Times a Day*, TIME (Dec. 15, 2015), http://time.com/4147614/smartphone-usage-us-2015/ [https://perma.cc/4XSL-4AHK] (reporting on a study finding that individuals ages eighteen to twenty-four view their phones an average of seventy-four times per day, those who are age twenty-five to thirty-four check their phones fifty times per day, and people who are age thirty-five to forty-four look at their phones thirty-five times per day); *see also* Chris Fullwood et al., *My Virtual Friend: A Qualitative Analysis of the Attitudes and Experiences of Smartphone Users: Implications for Smartphone Attachment*, 75 COMPUTERS HUM. BEHAV. 347 (2017) (discussing "habitual" use of mobile phones).

391. PEW RESEARCH CTR., MOBILE FACT SHEET (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/mobile/ [https://perma.cc/D63S-YBJL].

392. *Id.*

court, assuming the cellular phone user has not deactivated this function.[393]

A respondent often continues to contact a petitioner directly through text or social media messages, yet under current rules the petitioner's response to the respondent providing notice of the case and images of the petition and summons is insufficient for notice. Currently, even when the respondent acknowledges the protection order case through text message, email, or social media responses and posts, the respondent's actual notice paradoxically does not satisfy the personal service requirement. Service rules can adapt to realities of life and technology such that a petitioner's text message, email, or social media message notifying the respondent of the case could suffice. In proving notice by a third party or the petitioner, the petitioner can also provide copies of emails or screenshots of text messages or social media communications to the court as proof of service. The petitioner can also show the court proof that the respondent has recently used the phone number, email address, or social media messaging function through their communications history or through read receipts.

Presuming law enforcement attempts at service fulfill "diligent effort" requirements and automatically permitting alternative service methods, including electronic service, will remedy current procedural barriers.

CONCLUSION

Access to safety and justice for abuse survivors can only be achieved when abused individuals are able to access court protection, as legislatures intended. This Article seeks to achieve the legislative purpose of civil protection orders by actually making this valuable legal remedy available to abuse survivors who petition courts for help.

The law has not historically afforded protection to low-income women of color, who disproportionately are the petitioners in protection order cases. Current stringent procedural barriers work to impede access to this legislative remedy to domestic abuse and, troublingly, result in the dismissal of high percentages of cases. Expanding service options to address procedural justice and access to courts will help address historic and contemporary differential treatment of domestic violence remedies while protecting all parties' due process rights.

393. *See* Sarah Silbert, *How to Tell When Someone Reads Your Text Message*, LIFEWIRE (Feb. 2, 2019), https://www.lifewire.com/read-my-text-message-4148206 [https://perma.cc/2JVW-CT9T].