

RECONCEIVING CIVIL PROTECTION ORDERS FOR DOMESTIC VIOLENCE: CAN LAW HELP END THE ABUSE WITHOUT ENDING THE RELATIONSHIP?

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* Associate Professor, Rutgers University School of Law—Camden. Copyright 2008 by Sally F. Goldfarb. As part of the research for this article, I interviewed twenty-seven attorneys from fourteen states and the District of Columbia who have worked with domestic violence victims. *See infra* Part V.A. I am grateful to all of them for sharing their insights about domestic violence protection orders. Thanks are also due to Joanna Grossman, Linda McClain, and the participants in the Colloquium on Contemporary Issues in Gender, Law, and Public Policy at Hofstra Law School for their thoughtful comments; to Victoria Chase, Julie Goldscheid, Ruth Anne Robbins, Rayman Solomon, and Beth Stephens for helpful suggestions; and to Katrina Gibson, Jessica Miller, Samantha Skabla, and Christopher Soper for excellent research assistance.

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Sylvia did not see Michael [her abusive partner] as a monster. She saw him as the product of a lousy childhood. She also saw him as a good provider and . . . as the father of their two daughters. Nor did she see herself as defenseless but rather . . . as a self-reliant working woman and as someone who stood her ground. She never wanted Michael locked up; she wanted him to change. She wanted to rehabilitate her family, not to break it up.¹

INTRODUCTION

Throughout most of American history, women who were victims of domestic violence had no effective legal recourse because the law took the view that preserving family relationships was more important than protecting women from abuse.² This attitude was in part a product of the common law rule of coverture, which held that upon marriage, a woman’s legal identity is subsumed into that of her husband.³ It was later reinforced by the doctrine of family privacy, which gained ascendancy in the mid-nineteenth century.⁴ As a result, for hundreds of years, police, prosecutors, legislators, and judges privileged the relationship at the expense of the battered woman’s right to safety and autonomy.

During the past three decades, as a consequence of feminist advocacy, legal remedies for domestic violence have for the first time become widely available. However, most of these remedies extract a price that is, for many women, unacceptably high. The most prevalent remedies for domestic violence—including access to battered women’s shelters, arrest and prosecution of offenders, and civil protection

¹ Deborah Sontag, *Fierce Entanglements*, N.Y. TIMES, Nov. 17, 2002, § 6 (Magazine), at 52.

² Throughout this Article, the terms “domestic violence,” “abuse,” and “battering” are used interchangeably and are intended, unless otherwise specified, to include all forms of abuse between current and former spouses and other intimate partners, including physical, psychological, sexual, and economic abuse. This Article refers to perpetrators of domestic violence as male and victims as female since that pattern is present in the overwhelming majority of domestic violence cases. See *infra* Part I. In the absence of any term that is fully adequate to describe women who have been abused, this article relies on the familiar terms “victim” and “battered woman.”

³ See *infra* Part II.

⁴ See *infra* Part II.

orders—usually require that the victim separate from the batterer.⁵ Yet many women in abusive relationships do not want to separate. Like Sylvia,⁶ they want the relationship to continue but the violence to stop.⁷ Current domestic violence law does not sufficiently meet the needs of these women. On the contrary, remedies for domestic violence too often protect a woman's right to safety only if she is willing to leave her partner, thereby sacrificing her right of autonomy as expressed through her decision to stay in an intimate relationship. The law has moved from placing too much emphasis on relationships to placing too little emphasis on them.

The fact that many women do not want to leave their abusive partners is not surprising. Adults commonly find their deepest satisfaction and fullest self-realization in intimate relationships, and women are more likely than men to regard the formation and preservation of relationships as a paramount value.⁸ In addition, leaving the batterer can actually increase the risks to a battered woman.⁹ Despite the common assumption that domestic violence will continue unless the victim leaves, empirical research shows that violent relationships can become non-violent and that legal intervention can assist in bringing about that change.¹⁰ Until domestic violence law recognizes and accommodates the desire of many battered women to remain in their relationships, it cannot be considered truly successful.

The legal system must confront the tension between legal rules that assume that the only solution to domestic violence is to dissolve the relationship and the wishes of many battered women to maintain the relationship in a non-abusive form. In resolving this tension, the law should respect both women's desire to remain in relationships and women's right to safety within those relationships. Furthermore, the law's response to domestic violence should support, rather than undermine, women's role as autonomous decision-makers.

In this effort to reconceive domestic violence law, it is fitting to focus on civil protection orders, since they are the single most commonly used legal remedy for domestic violence.¹¹ To members of the general public, as well as many lawyers, judges, and scholars, protection orders are synonymous with "stay-away" orders, which are designed to protect the victim by ending her relationship with the abuser.¹² Indeed, the overwhelming majority of civil protection orders

⁵ See *infra* Part II.

⁶ See *supra* text accompanying note 1.

⁷ See *infra* Part III.

⁸ See *infra* Part III.

⁹ See *infra* Part IV.B.

¹⁰ See *infra* Part V.B.2.

¹¹ See *infra* Part IV.

¹² See *infra* Part IV.

for domestic violence take this form.¹³ However, there is another type of civil protection order for domestic violence, one that is currently prohibited in some jurisdictions, underutilized in others, and largely ignored in discussions of domestic violence law.¹⁴ Unlike a stay-away order, these orders prohibit future abuse but permit ongoing contact between the parties. Protection orders permitting ongoing contact are a valuable option for many women who are unwilling to leave their relationships and therefore would not seek a stay-away order. By customizing each order to express the victim's preferences for how much and what kinds of contact should be allowed, these orders can put the force of law behind the individual woman's choices. Through the use of careful screening mechanisms and other safeguards, this system can also protect women's safety. While not all battered women would be suitable candidates for orders permitting continuing contact, many would benefit from the availability of a legally enforceable order that requires an end to the violence without requiring an end to the relationship.

This Article argues that the dual goal of advancing women's safety and women's autonomy can be achieved by bringing protection orders that allow ongoing contact between the parties from the margin to the center of domestic violence law. Although these types of orders are currently available in some courts and under some circumstances, they should be consistently and prominently offered in all jurisdictions—not as a replacement for stay-away orders, but as an additional component of the legal response to domestic violence.

Part I of this Article provides an overview of domestic violence, its effects, and its role in maintaining women's inequality. Part II traces the evolution of the legal response to domestic violence, from the position that husbands have the right to use physical punishment against their wives, to the view that the law should not interfere in the family, to the assumption that battered women should leave their relationships. Part III discusses the importance of intimate relationships to women. It also describes the damaging impact on women's autonomy of rules that require a victim to leave her abuser in order to receive a civil protection order. Part IV examines the strengths and weaknesses of civil protection orders, with particular attention to the limitations of stay-away orders. Part V presents the results of interviews with domestic violence attorneys about their experiences with and opinions of protection orders that permit ongoing contact between the parties. It then proposes a system for providing battered women with the option to obtain a protection order that authorizes a continuing relationship

¹³ See *infra* Parts IV, V.

¹⁴ See *infra* Parts IV, V.

between the parties but forbids the abusive partner to engage in further abuse. This proposal bridges the dichotomy between the law's traditional assumption that all abusive relationships should be preserved and the modern assumption that none of them should be. Unlike both the traditional and modern views, the proposed approach defers to women's own choices about whether and under what circumstances an intimate relationship should continue.

I. DOMESTIC VIOLENCE AND ITS IMPACT ON WOMEN

Domestic violence is a familiar and destructive presence in the lives of American women. By a conservative estimate, nearly two million women are physically assaulted, stalked, and/or raped by their partners every year.¹⁵ Three-quarters of all women who have been raped or physically assaulted during adulthood were attacked by a current or former husband or non-marital partner.¹⁶ The vast majority of domestic violence is committed by male perpetrators against female victims.¹⁷ One quarter of all American women have been victims of domestic violence.¹⁸

¹⁵ 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 10 (2000) [hereinafter TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES]. Statistics on domestic violence from different sources vary. Some sources report a higher number of victims. See, e.g., *United States v. Morrison*, 529 U.S. 598, 631 n.8 (2000) (Souter, J., dissenting) (quoting a congressional report estimating that four million American women are battered each year).

¹⁶ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 8 (1998). A high percentage of female homicides are attributable to current or former partners. See CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001, at 2 (2003) (reporting that thirty-three percent of female murder victims were killed by a present or former spouse or other intimate partner); SUSAN A. WILT ET AL., N.Y. CITY DEP'T OF HEALTH, FEMALE HOMICIDE VICTIMS IN NEW YORK CITY 1990-1994, at 1, 12 (1998) (reporting that forty-nine percent of female homicide victims whose killers were known were killed by a present or former spouse or other intimate partner).

¹⁷ See Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71 (1992). According to federal government statistics, women are eighty-five percent of domestic violence victims. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (2005); RENNISON, *supra* note 16, at 1. In cases of severe violence, the percentage of female victims is even higher. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 27 (2000) [hereinafter TJADEN & THOENNES, FULL REPORT]. However, most domestic violence is not severe. See *infra* text accompanying notes 301-02 (discussing use of physical force in domestic violence).

¹⁸ TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES, *supra* note 15, at 9. Some sources provide a higher estimate of the prevalence of domestic violence. See Martha R.

Domestic violence is the single largest cause of injury to women in the United States.¹⁹ Assaults inflicted on women by their partners range from hitting and pushing to kicking, burning, choking, and the use of weapons.²⁰ Abuse often starts or intensifies during pregnancy, resulting in an increased chance of miscarriage and other risks to fetal and maternal health.²¹ Women are also subjected to psychological abuse, such as threats, humiliation, destruction of property and pets, harassment, and forced confinement in the home, which can be even more hurtful than physical attacks.²² Domestic violence leaves women with psychological as well as physical scars.²³

In addition to the physical and psychological harm that it causes, domestic violence injures women in innumerable other ways. Abusive partners prevent women from obtaining education, employment, and economic independence.²⁴ Violence in the home is responsible for forcing many women and children into homelessness.²⁵ A large number of women in prison were compelled to commit crimes by abusive partners.²⁶ Being a victim of domestic violence can cause women to lose custody of their children.²⁷ Perhaps the most profound effect of

Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 10-11 (1991) (summarizing sources estimating that fifty percent or more of all women are victims of domestic violence).

¹⁹ See *Morrison*, 529 U.S. at 631 n.8 (2000) (Souter, J., dissenting).

²⁰ TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES, *supra* note 15, at 11; Susan Schechter & Lisa T. Gary, *A Framework for Understanding and Empowering Battered Women*, in ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN 240, 241 (Martha B. Straus ed., 1988).

²¹ Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 670-73 (2006).

²² See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 891, 893 (1992); JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM 139-40 (1999); Schechter & Gary, *supra* note 20, at 241-42.

²³ See MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN 51-75 (1992) (describing the psychological effects of abuse); EVAN STARK, COERCIVE CONTROL 122 (2007) (reporting that battered women exhibit elevated levels of attempted suicide, alcohol and drug abuse, depression, and psychosis); Faith E. Lutze & Megan L. Symons, *The Evolution of Domestic Violence Policy Through Masculine Institutions: From Discipline to Protection to Collaborative Empowerment*, 2 CRIMINOLOGY & PUB. POL'Y 319, 321 (2003) (listing effects of domestic violence including "fear, depression, distrust, uncertainty, and post-traumatic stress syndrome"). However, most battered women remain psychologically capable of helping themselves and seeking help from others. See STARK, *supra*, at 123-24; see also *infra* notes 93-95 and accompanying text (discussing battered women's exercise of agency).

²⁴ See, e.g., Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 367 (2003).

²⁵ See *United States v. Morrison*, 529 U.S. 598, 631 n.8 (2000) (Souter, J., dissenting); Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421 (1991).

²⁶ BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BLACK WOMEN (1996); Raphael, *supra* note 24, at 372-73.

²⁷ CARRIE CUTHBERT ET AL., BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS

domestic violence is that it deprives women of the opportunity for equality within relationships and in society.²⁸

Scholars have posited a variety of psychological, social, political, biological, and situational explanations for why men batter women.²⁹ A recurring theme in otherwise divergent explanations is that abuse is a method of gaining and exercising power and control over a partner.³⁰ Empirical data support the view that violence against women by intimate partners “is often part of a systematic pattern of dominance and control.”³¹

In heterosexual relationships,³² domestic violence takes place against a backdrop of gender inequality and sex stereotypes. Abuse can be an expression of a man’s superior power in a relationship or a reaction to his perceived loss of power.³³ Common sex stereotypes include the expectation that men are strong, independent, reasonable, and aggressive, while women are weak, dependent, emotional, and passive; these stereotypes can be used to rationalize male violence against women.³⁴ According to many feminist theorists, domestic violence is both a cause and effect of women’s subordination to men.³⁵

(2002); ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 157-77 (2000); Mahoney, *supra* note 18, at 43-49.

²⁸ See LEE H. BOWKER, BEATING WIFE-BEATING 7-9 (1983); STARK, *supra* note 23; Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 12-16 (2000).

²⁹ See, e.g., LUNDY BANCROFT, WHY DOES HE DO THAT? (2002); Carolyn Puzella, *Domestic Violence: Social Scientists’ Perspectives on the Causes of Spousal Abuse*, 11 J. CONTEMP. LEGAL ISSUES 37 (2000).

³⁰ See Alafair S. Burke, *Domestic Violence As a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 569-71 (2007). The importance of power and control is a major theme in feminist analysis of domestic violence. See, e.g., ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER 1-15 (1993) (presenting and explaining the Power and Control Wheel, which depicts the use of domestic violence to establish power and control over the victim); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE 219-24 (1982); Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 59 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

³¹ TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES, *supra* note 15, at iv.

³² Violent relationships are not limited to heterosexual couples. The ways in which elder abuse, child abuse, and abuse in gay and lesbian relationships are similar to and different from heterosexual domestic violence is a complex issue that is beyond the scope of this article. See SCHNEIDER, *supra* note 27, at 67-72. The focus of this article is on heterosexual couples, who constitute the large majority of domestic violence cases.

³³ Burke, *supra* note 30, at 569-70; Mahoney, *supra* note 18, at 56-57; see also STARK, *supra* note 23, at 192-200 (suggesting that abusive men’s attempts to establish coercive control are a reaction to women’s growing independence and formal equality).

³⁴ Lutze & Symons, *supra* note 23, at 320.

³⁵ See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 40-41 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 127 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE]; SCHNEIDER, *supra* note 27, at 5-6, 22-23. Feminist analysis of domestic violence is not monolithic. See Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against*

In order to counteract the harm of domestic violence, the law's response should focus on shifting power and control back to the victim.³⁶

II. THE LEGAL SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE: FROM MARITAL UNITY TO FAMILY PRIVACY TO "WHY DOESN'T SHE LEAVE?"

The American legal system has traditionally been unresponsive to the needs of battered women. Although a law forbidding wife abuse was enacted in the Massachusetts Bay Colony as early as 1641, civil and criminal penalties for domestic violence remained rare throughout most of the nation's history.³⁷ Police customarily refused to arrest batterers.³⁸ Instead, they either let violent incidents take their course or employed ineffective methods like informal mediation or ordering the offender to "walk around the block and cool off."³⁹ If an arrest did occur, prosecutors typically declined to pursue criminal charges.⁴⁰ When cases came to court, judges routinely denied relief, viewing domestic violence as a family matter to be worked out by the parties themselves.⁴¹ These traditional patterns endured into the 1970s, and in some cases beyond.

This policy of non-intervention had different justifications at

Women: Some Reflections on Theory and Practice, 11 AM. U. J. GENDER SOC. POL'Y & L. 251, 251 n.2 (2003) (discussing differing feminist views of violence against women). Many feminists have pointed out that factors other than gender, including race, class, and age, can play a role in domestic violence. See, e.g., SCHNEIDER, *supra* note 27, at 67-68; Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1, 11-12 (1999); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

³⁶ See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

³⁷ See KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW* 490 (4th ed. 2006). To the extent that laws against domestic violence were enforced at all, they were often implemented selectively against members of disfavored racial, ethnic, and class groups. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2134-41 (1996). For further discussion of the history of domestic violence law in the United States, see LINDA GORDON, *HEROES OF THEIR OWN LIVES* (1988); ELIZABETH H. PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (1987).

³⁸ See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (denying defendant's motion to dismiss in case alleging police department's discriminatory failure to respond to domestic violence); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992).

³⁹ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 14 (1999); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996).

⁴⁰ Epstein, *supra* note 39, at 15.

⁴¹ See Goldfarb, *supra* note 28, at 47 (describing judicial attitudes toward domestic violence); Siegel, *supra* note 37 (analyzing the evolution of judicial reactions to domestic violence cases).

different times. Initially, it was a natural outgrowth of the common law rule of coverture. As explicated by Blackstone, the doctrine of coverture is premised on the theory of marital unity.⁴² Under this doctrine, when a woman marries, her legal identity is incorporated into that of her husband and she ceases to have a separate legal existence.⁴³ Since “the husband and wife are one person in law,” a legal action by one against the other is a logical impossibility.⁴⁴ Coverture thus lent support to interspousal tort immunity, which forbids civil suits by one spouse against the other, and the marital rape exemption, which ordains that a man’s rape of his wife is not a crime.⁴⁵ Furthermore, because marital unity made the husband legally responsible for his wife’s actions, coverture conferred on him the power of “domestic chastisement”—that is, the right to use physical force to punish his wife and control her behavior.⁴⁶ In this way, the doctrine of coverture did not merely condone domestic violence; it affirmatively permitted it.

During the middle of the nineteenth century, with the emergence of the ideal of affectionate companionship in marriage, the common law rule permitting husbands to inflict corporal punishment on their wives came to seem both antiquated and indefensible.⁴⁷ Judges consequently became less willing to rely on the right of chastisement.⁴⁸ However, a new rationale for the law’s laissez-faire approach to domestic violence arose to take the place of marital unity: the concept of family privacy. According to the family privacy ideology, legal intervention in the family is inevitably destructive, and family members must be left free to resolve their differences without the damage that would be inflicted on their relationship if the law were to invade the private domestic sphere.⁴⁹ Privacy soon became a guiding principle for domestic violence law, with police, prosecutors, and judges adopting the view that the importance of protecting families from interference outweighed

⁴² 1 WILLIAM BLACKSTONE, COMMENTARIES *430-33.

⁴³ *Id.* at *430.

⁴⁴ *Id.* at *430-31.

⁴⁵ See generally Goldfarb, *supra* note 28, at 22-23 (discussing interspousal tort immunity and the marital rape exemption).

⁴⁶ 1 BLACKSTONE, *supra* note 42, at *432. The husband’s power of chastisement was limited to the exercise of reasonable force to discipline the wife. *Id.* Blackstone wrote in his *Commentaries* that the legitimacy of the right of chastisement had already begun to be doubted. *Id.* at *433. Nevertheless, the husband’s prerogative to administer chastisement continued to appear in American case law many years later. See, e.g., *State v. Buckley*, 2 Del. (2 Harr.) 552 (1838); *Bradley v. State*, 1 Miss. (1 Walker) 156 (1824); *State v. Black*, 60 N.C. (Win.) 162 (1864).

⁴⁷ Siegel, *supra* note 37, at 2142-50.

⁴⁸ *Id.* at 2129-30.

⁴⁹ *Id.* at 2150-70. The vision of a self-contained, private family isolated from the larger, public world is highly unrealistic. Goldfarb, *supra* note 28, at 25-26. In fact, legal intervention in the family is inevitable; the law must either provide redress to battered women, or else refuse to do so and thereby condone domestic violence. *Id.* at 27.

the importance of protecting women from abuse.⁵⁰

Adherence to the notion of family privacy has not entirely disappeared from the legal landscape. Some police, prosecutors, and judges remain reluctant to interfere in cases of violence within the family.⁵¹ However, these are vestiges of an earlier era and have been largely displaced by a new, increasingly dominant trend toward vigorous legal intervention in cases of domestic violence—specifically, legal intervention with the aim of extricating women from relationships with abusive men. This trend began to appear in the 1970s and has accelerated in recent years. Several forces contributed to this dramatic change in direction.

Feminist activism played a significant role in transforming attitudes toward domestic violence. Women's rights advocates campaigned against domestic violence beginning in the nineteenth century, but it was not until the second wave of the feminist movement gave rise to the battered women's movement of the 1970s that their efforts brought about what one scholar has called "the domestic violence revolution."⁵² Feminists organized to break the silence on domestic violence, provide services and support to its victims, and define battering within a larger framework of gender subordination.⁵³ Battered women's shelters were founded, initially as a grass-roots initiative and later with substantial government and professional support.⁵⁴ Through a process of mutually reinforcing social, political, and legal analysis and advocacy, the battered women's movement pressured the legal system to take domestic violence seriously.⁵⁵

Media attention to the problem of domestic violence lent urgency to calls for government action.⁵⁶ Meanwhile, scholars turned their

⁵⁰ See SCHNEIDER, *supra* note 27, at 87-97.

⁵¹ See, e.g., PTACEK, *supra* note 22, at 55 (quoting a Massachusetts judge in a domestic violence case who refused to evict the batterer from the home and stated, "I don't like to break up families"); Epstein, *supra* note 39, at 6-7 (quoting a District of Columbia judge who refused to issue a protection order and told the victim to "go home and try to work things out in private"); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1520-21, 1539 (1998) (stating that privacy concerns continue to shape decisions affecting prosecution, sentencing, and other issues in domestic violence cases). In addition to privacy concerns, inertia and other forms of resistance have also hampered the implementation of aggressive policies toward domestic violence. See, e.g., Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1697-99 (describing the failure of some police, prosecutors, and judges to adhere to mandatory domestic violence enforcement policies).

⁵² STARK, *supra* note 23, at 6-8 (stating that "[s]ociety's response to male violence against women has been revolutionized in the past three decades" but pointing out that the revolution has stalled). On the history of the anti-domestic violence movement, see GORDON, *supra* note 37; PLECK, *supra* note 37; SCHECHTER, *supra* note 30; SCHNEIDER, *supra* note 27, at 11-56.

⁵³ SCHNEIDER, *supra* note 27, at 20-23.

⁵⁴ SCHECHTER, *supra* note 30.

⁵⁵ See SCHNEIDER, *supra* note 27, at 29-49.

⁵⁶ See, e.g., CLAIRE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE

attention to the domestic violence issue.⁵⁷ The work of psychologist Lenore Walker was particularly influential. Walker described domestic violence as a cycle, consisting of a tension-building phase, followed by an acute battering incident, and a honeymoon phase, during which the abuser is kind, loving, and contrite.⁵⁸ Walker also drew on the research of experimental psychologist Martin Seligman, who showed that dogs subjected to random electrical shocks would eventually stop trying to escape;⁵⁹ she concluded that battered women, like the dogs in Seligman's experiment, suffer from "learned helplessness" that renders them incapable of acting in their own self-interest.⁶⁰ Walker's theories have been extensively critiqued.⁶¹ Nevertheless, they gained rapid acceptance, especially among judges, juries, and others who were seeking an explanation for battered women's seemingly inexplicable behavior, including their failure to leave the abuser.⁶²

As public opinion shifted away from tolerance of domestic violence, support grew for aggressive legal interventions in place of the legal system's customary inaction. New approaches adopted in many jurisdictions include mandatory arrest policies, which require police to arrest anyone who they have probable cause to believe has committed domestic violence, and "no-drop" prosecution policies, which prevent prosecutors from complying with a victim's request to drop charges

LAW 1 (2001) (stating that media coverage of the O.J. Simpson case, "with its subtext of battering, held public attention for several years"); PTACEK, *supra* note 22, at 57-60 (describing an influential series of articles about domestic violence in the *Boston Globe*); Mahoney, *supra* note 18, at 2, 35 (stating that the book and movie *The Burning Bed* shone a "spotlight" on domestic violence and strongly affected public consciousness of battered women).

⁵⁷ See, e.g., R. Emerson Dobash & Russell P. Dobash, *Research as Social Action: The Struggle for Battered Women*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 51 (Kersti Yllö & Michele Bograd eds., 1988).

⁵⁸ LENORE E. WALKER, THE BATTERED WOMAN 55-70 (1979).

⁵⁹ Seligman's experiments, conducted in the late 1960s, "would raise the ire of today's animal rights activists." EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS 13 (1988).

⁶⁰ WALKER, *supra* note 58, at 45-51.

⁶¹ Critics have pointed out that the cyclical pattern described by Walker does not occur in all abusive relationships. See, e.g., DUTTON, *supra* note 23, at 28-29. Similarly, no single psychological profile describes all battered women. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1194-1201 (1993) [hereinafter Dutton, *Understanding Women's Responses*]. Contrary to the learned helplessness theory, there is ample evidence that battered women are resourceful and energetic in their efforts to stop the violence and obtain outside assistance. See, e.g., GONDOLF & FISHER, *supra* note 59, at 11-25 (rejecting learned helplessness theory and offering in its place the observation that battered women actively seek help from people and institutions that are helpless to provide it). Learned helplessness theory has also been criticized on the grounds that it pathologizes battered women and, when used in court, it can backfire to hurt them. See, e.g., SCHNEIDER, *supra* note 27, at 79-83; Mahoney, *supra* note 18, at 36-43.

⁶² See STARK, *supra* note 23, at 137-40. Walker's theories were especially influential as the basis of the battered woman syndrome defense in cases of battered women who killed in self-defense. See, e.g., Mahoney, *supra* note 18, at 36-37, 79-82.

against the abuser.⁶³ Civil protection orders became available in every state; in most cases, they forbid the abuser to live with, contact, or approach the victim.⁶⁴ The movement toward stricter enforcement of domestic violence laws gained an important federal imprimatur in 1994 with the enactment of the Violence Against Women Act, which included federal funding to support policies that mandate or encourage arrest for domestic violence offenses, as well as measures designed to improve the availability and impact of protection orders.⁶⁵

The cumulative effect of these reforms was a transformation of legal policy from the assumption that battered woman should stay to the assumption that they should leave.⁶⁶ Consistent with Lenore Walker's theory of "learned helplessness," actors in the legal system—including judges, legislators, prosecutors, and police—increasingly see their role as assisting a battered women to separate from her abuser, against her will if necessary.⁶⁷ Police, prosecutors, and judges become impatient and frustrated with a victim who stays with or returns to her abuser.⁶⁸ They may even refuse to help her, on the grounds that she either must

⁶³ See Epstein, *supra* note 39, at 14-16; Hanna, *supra* note 39. Feminists are divided on the question of whether compulsory criminal interventions in domestic violence are desirable. While many have welcomed a more vigorous legal response to domestic violence, others express concern that these policies deprive women of autonomy, have a disproportionate impact on communities of color, endanger women by triggering retaliatory violence by the batterer, and increase the likelihood that battered women themselves will be arrested and prosecuted. See, e.g., SCHNEIDER, *supra* note 27, at 184-88 (describing the controversy over mandatory arrest and no-drop prosecution policies); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001) (analyzing the dangers that aggressive criminal responses to domestic violence pose to women); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 265-67 (2005) (describing domestic violence advocates' ambivalence about the adoption of mandatory criminal interventions); Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 504-06 (1996) (expressing concern about the impact of mandatory arrest policies on women of color).

⁶⁴ See *infra* Part IV.

⁶⁵ Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of titles 8, 16, 18, 20, 28, and 42 of the United States Code). The Violence Against Women Act was subsequently reauthorized and expanded. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491.

⁶⁶ See, e.g., Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1019 (2000) ("The application of specialized legal remedies for battered women almost always presupposes separation."); Leigh Goodmark, *Law Is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8 (2004) (stating that almost all available legal interventions for battered women are designed to end the relationship).

⁶⁷ An extreme example of enforcing separation against the will of the victim is the practice of jailing a victim who refuses to testify against the abuser. See Hanna, *supra* note 39, at 1865-66, 1891-92; Sack, *supra* note 51, at 1681-82.

⁶⁸ Epstein, *supra* note 39, at 39-40.

not really be abused or does not deserve assistance.⁶⁹

Under this new paradigm, every victim should leave her abuser, and if she turns to the legal system at all, she should cooperate with its efforts to remove her from the relationship. In contrast to earlier eras, the law now offers meaningful remedies for domestic violence, but it largely conditions their availability on the woman's willingness to separate from her partner. In essence, the law, like many members of the general public, focuses its attention on the question "Why doesn't she leave?"⁷⁰ Missing from this picture is a recognition that battered women should have the choice to remain in a relationship and obtain the legal system's assistance to end the violence.

III. WOMEN, RELATIONSHIPS, AND AUTONOMY

Contrary to popular belief, many domestic violence victims do leave their abusers.⁷¹ However, many others do not, and still others leave but then return.⁷² Women have many reasons for staying with or returning to violent partners, including financial dependency, fear of retaliation, social isolation, community pressure, and concern about losing custody of children.⁷³ A common reason for not leaving is that the woman has a deep emotional bond with her partner and wants to preserve and improve the relationship.⁷⁴

⁶⁹ Miccio, *supra* note 63, at 307-08; Angela Moe Wan, *Battered Women in the Restraining Order Process: Observations on a Court Advocacy Program*, 6 VIOLENCE AGAINST WOMEN 606, 610, 622 (2000); *see also* Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 ORE. L. REV. 945, 1000 (2004) (reporting that the Harris County District Attorney's Office in Houston will not assist an abuse victim in obtaining a restraining order unless she has left the batterer); Mahoney, *supra* note 30, at 78 ("Failure to exit [the relationship] is often treated, in law and elsewhere in society, as evidence against the woman's account of the facts, her competence, even her honesty.").

⁷⁰ As many commentators have pointed out, "Why doesn't she leave?" is a misguided question for several reasons, including its implication that battered women don't leave, its assumption that leaving would guarantee safety, and its focus on the victim's actions rather than the perpetrator's. More appropriate questions would be "Why does he abuse her?" or "Why doesn't he let her leave?" *See* ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 129-32 (2000); SCHNEIDER, *supra* note 27, at 77-78; Mahoney, *supra* note 18, at 5-6, 61-63, 83 n.372.

⁷¹ *See, e.g.*, Mahoney, *supra* note 18, at 61-68.

⁷² DUTTON, *supra* note 23, at 95 (reporting that battered women often make "numerous attempts to separate, followed by periods of reconciliation," before finally deciding to end the relationship); Jacquelyn C. Campbell et al., *Relationship Status of Battered Women Over Time*, 9 J. FAM. VIOLENCE 99, 101 (1994) (reporting that battered women leave and return to an abusive relationship an average of five times before leaving permanently).

⁷³ *See* SCHNEIDER, *supra* note 27, at 77; Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999); Mahoney, *supra* note 18; *see also infra* Part IV.B (discussing the risks of leaving an abusive relationship).

⁷⁴ JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN 38-39 (1998); STARK,

As a group, women place a high level of importance on establishing and maintaining interpersonal relationships, including relationships with a spouse or other intimate partner.⁷⁵ There is no consensus among feminists on whether the origins of this phenomenon are social,⁷⁶ biological,⁷⁷ or psychological.⁷⁸ Some feminist theorists have stressed the harm to women that results from this emphasis on relationships.⁷⁹ Certainly domestic violence epitomizes the risk that interpersonal attachments pose for women.⁸⁰ However, abusive relationships are often multidimensional, with episodes of abuse occurring in a context that also includes positive attributes like mutual emotional commitment, companionship, intimacy, and sharing.⁸¹ Battered women's feelings about their relationships frequently include hope for the future and a willingness to forgive, traits that are generally considered admirable human qualities and that can be a source of personal strength.⁸² For a substantial number of women who find themselves in such relationships, the ideal outcome would be to

supra note 23, at 154; Phyllis L. Baker, *And I Went Back: Battered Women's Negotiation of Choice*, 26 J. CONTEMP. ETHNOGRAPHY 55 (1997); Dutton, *Understanding Women's Responses*, *supra* note 61, at 1234-35; Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 43-47.

⁷⁵ See, e.g., MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 99, 136 (2003) (stating that women place a higher value on personal relationships than men do); ALYCE D. LAVIOLETTE & OLA W. BARNETT, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 17 (2d ed. 2000).

⁷⁶ See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004); MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 35, at 32-45.

⁷⁷ See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

⁷⁸ See, e.g., NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

⁷⁹ See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 35, at 39 ("Women think in relational terms because our existence is defined in relation to men."); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1293 (1991) (stating that the adage "a woman's place is in the home" is both a stereotype and a reality that is imposed on women); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 140-41 (1987) (arguing that women's dependency on relationships leaves them vulnerable to suffering); see also LINDA C. MCCLAIN, *THE PLACE OF FAMILIES* 26-27 (2006) (presenting feminist arguments that women's focus on families and relationships can be limiting and oppressive).

⁸⁰ See DUTTON, *supra* note 23, at 97-98 (describing the view of some battered women that it is better to have an abusive relationship than no relationship at all).

⁸¹ See VERA E. MOURADIAN, WELLESLEY CTRS. FOR WOMEN, *WOMEN'S STAY-LEAVE DECISIONS IN RELATIONSHIPS INVOLVING INTIMATE PARTNER VIOLENCE* 4-6 (2004); Mahoney, *supra* note 18, at 16-17.

⁸² See DAVIES ET AL., *supra* note 74, at 76 (describing hope as a coping strategy and stating that hope that the partner will change is a major reason women stay in abusive relationships); MOURADIAN, *supra* note 81, at 6 (describing hope, and the loss of hope, as key determinants of battered women's decisions to stay or leave); Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921 (2003) (discussing the role of forgiveness in domestic violence); Dutton, *Understanding Women's Responses*, *supra* note 61, at 1235-36 ("Hope and optimism in the face of hardship are often considered psychological strengths.").

eliminate the abuse while keeping the relationship.⁸³ This aspiration should not be dismissed as naïve or misguided. Many women have succeeded in remaining in their relationships and putting an end to violence,⁸⁴ and with the assistance of the legal system, many more might be able to do so.⁸⁵

If orders permitting ongoing contact are not available (and for many women today, they are not⁸⁶), the result is that the law of civil protection orders gives a battered woman only two choices. If she obtains a protection order, her partner will be prohibited from seeing or contacting her.⁸⁷ If she does not obtain a protection order, the law will do nothing to help redress the imbalance of power between herself and her partner. This all-or-nothing approach excludes the middle ground that many women would prefer: an order that would help restructure the relationship without ending it. When the law denies women this option, it undermines women's autonomy in two ways.

First, by compelling some women to abandon relationships that they want to preserve, a system that offers only stay-away orders prevents women from realizing their autonomy through relationships. Although autonomy is often associated with atomistic individualism, an alternative view that has been advanced by some feminist scholars emphasizes that an important component of autonomy is the ability to express and constitute oneself through relationships with others.⁸⁸ According to this view, the formation of an autonomous self requires interactions and interdependency with other people.⁸⁹ Forcing women to separate in order to receive a protection order deprives them of the

⁸³ Battered women often say that they want the relationship to continue but the violence to stop. See, e.g., JONES, *supra* note 70, at 203; LAVIOLETTE & BARNETT, *supra* note 75, at 145; NAT'L DOMESTIC VIOLENCE HOTLINE, DECADE FOR CHANGE REPORT 8, 15 (2007); SCHNEIDER, *supra* note 27, at 77-78; David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1161 n.42 (1995).

⁸⁴ See *infra* Part V.B.2.

⁸⁵ See generally *infra* Part V.

⁸⁶ See *infra* Parts IV, V (discussing the availability of orders permitting ongoing contact).

⁸⁷ See *infra* Part IV (discussing stay-away orders).

⁸⁸ See, e.g., FRIEDMAN, *supra* note 75, at 81-112; MCCLAIN, *supra* note 79, at 18 (referring to "relational autonomy"). Some feminists use the term "agency" rather than autonomy to underscore their departure from the traditional liberal view of autonomy. See Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 806 (1999). As some scholars have pointed out, the value of interpersonal connection is not entirely ignored in traditional liberal sources. See FRIEDMAN, *supra* note 75, at 87-91; Linda McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171 (1992).

⁸⁹ See FRIEDMAN, *supra* note 75; Carlos A. Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345 (2005); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989) ("If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships . . .").

chance to develop and exercise their autonomy within intimate relationships. While abusive relationships can be so damaging that they actually interfere with, rather than promote, women's autonomy,⁹⁰ it is far from clear that the best solution is to force women to separate from their partners. If the power of the law could be directed at improving relationships rather than ending them, women's opportunities for autonomy within relationships would be enhanced.

A second way in which making separation a prerequisite for a protection order jeopardizes women's autonomy is by depriving them of self-determination.⁹¹ The law should permit a woman to choose whether she wants to leave her abuser instead of making that decision for her. Feminist theorists who have grappled with the question of whether battered women are agents or victims have concluded that this is a false dichotomy; battered women are both.⁹² While abuse limits a woman's capacity for independent action, battered women often demonstrate a remarkable degree of assertiveness, creativity, and resilience in responding to and coping with their experiences.⁹³ Battered women's acts of resistance can take many forms, including protecting their children, seeking help from formal and informal sources, carving out opportunities for safety, and ending the relationship temporarily or permanently.⁹⁴ Because of the prevalence of "separation assault"—that is, violence triggered by a battered woman's attempt to end a relationship—a decision to continue the relationship may itself be a carefully calculated strategy of resistance to violence.⁹⁵ Thus, a woman's unwillingness to leave, which is often seen as a symptom of weakness and psychological impairment, may actually be a sign of strength and rationality.

An understanding that battered women exercise agency under conditions of oppression leads to the conclusion that a victim is entitled to make vital choices about her own situation (including whether or not to continue a relationship), while at the same time receiving support to

⁹⁰ FRIEDMAN, *supra* note 75, at 19, 95, 141-43; Ball, *supra* note 89, at 359.

⁹¹ See MCCLAIN, *supra* note 79, at 17-18 (referring to "deliberative autonomy").

⁹² See, e.g., SCHNEIDER, *supra* note 27, at 74-86; STARK, *supra* note 23, at 216 (stating that "[a]gency and victimhood live one within the other in abuse"); Mahoney, *supra* note 30. The question of how to reconcile battered women's agency and victimhood has featured prominently in discussions of mandatory criminal justice interventions against batterers and the use of battered woman syndrome to defend women who kill their abusers. See, e.g., Hanna, *supra* note 39, at 1882-85; Mahoney, *supra* note 18, at 35-43.

⁹³ See, e.g., GONDOLF & FISHER, *supra* note 59; SCHNEIDER, *supra* note 27, at 84-85; Abrams, *supra* note 88, at 834-35.

⁹⁴ STARK, *supra* note 23, at 216-18 (describing battered women's creation of real or symbolic "safety zones"); Mahoney, *supra* note 30, at 73, 76; Mahoney, *supra* note 18, at 19-24, 61-63, 75.

⁹⁵ Mahoney, *supra* note 30, at 73; Mahoney, *supra* note 18, at 61-68. For further discussion of separation assault, see *infra* Part IV.B.

overcome the constraints under which she lives.⁹⁶ Indeed, empowerment through decision-making is an important step in women's psychological recovery from the effects of domestic violence.⁹⁷ The power to decide whether to stay or leave is particularly central to establishing a battered woman's autonomy.⁹⁸ If the law denies women the power to make that decision, it replicates the domination exercised by the abuser.⁹⁹

With its roots in the methodology of consciousness-raising, feminist theory has consistently advocated that the law should be grounded in women's experiences.¹⁰⁰ In keeping with this approach, the law of domestic violence protection orders should support women's autonomy by recognizing and responding to the wishes of many battered women to remain in their relationships. Although forcing every victim to make a clean break with her abuser might seem neater, safer, or easier, the complex realities of women's lives demand a more nuanced response.

IV. CIVIL PROTECTION ORDERS FOR DOMESTIC VIOLENCE: STRENGTHS AND LIMITATIONS

Since they were introduced in Pennsylvania in 1976, civil protection orders¹⁰¹ have been authorized by statute in all fifty states and the District of Columbia.¹⁰² Civil protection orders have emerged as the most frequently used¹⁰³ and, in the view of many experts, the

⁹⁶ Ruth Jones has argued that some battered women are so incapacitated by the abuser's coercive control that they are legally incompetent and should be subject to court-ordered guardianship. Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605 (2000). The premise behind this argument is that placing a battered woman under guardianship is not injurious to her autonomy because "a coercively controlled woman is not an autonomous individual." *Id.* at 646-47. Unlike the guardianship approach, an approach that is based on recognizing and reinforcing the victim's right to make decisions can directly enhance her ability to exercise her autonomy. See *infra* Part V.B.4 (discussing woman-defined advocacy).

⁹⁷ DUTTON, *supra* note 23, at 4, 93, 95.

⁹⁸ See *id.* at 115.

⁹⁹ See Mills, *supra* note 36.

¹⁰⁰ See, e.g., MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 35, at 83-105; SCHNEIDER, *supra* note 27, at 35-36, 59-60; Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

¹⁰¹ Protection orders are also known by other names, including restraining orders, orders of protection, and injunctions. The term "protection order" is generally used throughout this article for the sake of consistency.

¹⁰² EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 234 (3d ed. 2003).

¹⁰³ See TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES, *supra* note 15, at 53-54. Although more battered women contact the police than apply for civil protection orders, most of the police contacts do not result in any legal action such as arrest or prosecution. *Id.*

most effective legal remedy against domestic violence.¹⁰⁴

A prominent battered women's advocate has suggested that in the context of domestic violence, any intervention should be evaluated in light of six major goals: safety for battered women, preventing violence, holding perpetrators accountable, challenging batterers' sense of entitlement to dominate their partners, restoring women's lost resources and opportunities, and enhancing women's agency and control over their lives.¹⁰⁵ Civil protection orders are well positioned to advance all of these goals,¹⁰⁶ but as the following discussion demonstrates, that potential has not yet been fully realized.

At the outset, it is important to note that protection orders can be divided into two types: those that require the parties to separate and those that do not. However, the latter have been almost entirely overshadowed by the former. The prevailing view of civil protection orders is that their fundamental purpose is to prevent future harm by separating the parties.¹⁰⁷ Among the most common features of protection orders are provisions requiring that the abuser end his relationship with the victim.¹⁰⁸ These provisions can take several forms, including ordering the offender to refrain from contacting the victim, to remain a specified distance away from her and places that she frequents, and to vacate a home shared with the victim.¹⁰⁹ Such provisions are considered the norm throughout the country. In some jurisdictions, they are mandatory by law¹¹⁰ or judicial custom.¹¹¹ The National Council of

¹⁰⁴ See JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 24 (1996) (describing civil protection orders as "the primary source of legal sanction and protection for battered women"); Victoria L. Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AM. J. PREVENTIVE MED. 16, 21 (2003) (concluding that civil protection orders are one of the few available interventions for domestic violence that has demonstrated effectiveness); Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 367 (2002) ("Although civil restraining orders are not the only remedies available to battered women, they are probably the most attractive.").

¹⁰⁵ Barbara J. Hart, *Arrest: What's the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207, 207-09 (1997).

¹⁰⁶ See, e.g., *infra* Part IV.A.1, 4.

¹⁰⁷ *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1510 (1993) (citing Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L. Q. 43, 44 (1989)).

¹⁰⁸ See SUSAN L. KELITZ ET AL., NAT'L CTR. FOR STATE COURTS, *CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE* 49-50 (1997); 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, 918, 925 (1993). The order may also require the abuser to stay away from the children and other vulnerable third parties, such as the victim's relatives. Klein & Orloff, *supra*, at 919-20.

¹⁰⁹ These types of provisions are sometimes called, respectively, no-contact provisions, stay-away provisions, and vacate, eviction or exclusive possession provisions. For the sake of brevity, this article uses the term "stay-away orders" to refer to orders that contain any of these types of provisions.

¹¹⁰ See N.J. STAT. ANN. § 2C:25-28.1 (West 2007) (forbidding issuance of temporary or final

Juvenile and Family Court Judges has issued a blanket recommendation that “civil protection orders should remove the offender from the home,”¹¹² and has stated that the relief granted in a protection order should be “designed to deny the respondent access to the victim.”¹¹³ Indeed, the term “stay-away order” is sometimes used as a synonym for protection order.¹¹⁴

The widespread assumption that all protection orders require the termination of the parties’ relationship masks a more complicated reality. An alternative, in the form of orders forbidding abuse but permitting ongoing contact between the parties, exists in some places and under some circumstances.¹¹⁵ The exact extent of their availability is impossible to determine, because judicial practices often differ from county to county and even from judge to judge.¹¹⁶ The result is that a battered woman who wants to obtain a protection order designed to end the violence but not the relationship may be unable to do so.¹¹⁷

restraining orders permitting the defendant to occupy the same premises as the victim).

¹¹¹ See, e.g., Wan, *supra* note 69, at 622 (describing a court commissioner who refused to grant orders permitting contact between the parties and often denied orders to women who expressed an interest in maintaining contact, despite the fact that the jurisdiction permitted the issuance of orders allowing contact between the parties); see also *infra* Part V.A (presenting attorneys’ reports of judges who refuse to issue orders permitting ongoing contact between the parties).

¹¹² See Stephen B. Herrell & Meredith Hofford, Nat’l Council of Juvenile & Family Court Judges, *Family Violence: Improving Court Practice*, 41 JUV. & FAM. CT. J. 10, 18 (1990).

¹¹³ See NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: A MODEL STATE CODE 28 (1994). But see AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES 36 (2007) (recognizing that some petitioners for protection orders “may want to have contact with the respondent . . . and want the order simply to prohibit the respondent from assaulting or harassing them or from being violent or threatening towards them”).

¹¹⁴ One group of researchers has described protection orders as a victim’s “contract with the court to leave the relationship for a specific period in exchange for legal protection.” Anne L. Horton et al., *Legal Remedies for Spousal Abuse: Victim Characteristics, Expectations, and Satisfaction*, 2 J. FAM. VIOLENCE 265, 266 (1987).

¹¹⁵ As noted earlier, the standard components of a full stay-away order include provisions evicting the abuser from the victim’s home, forbidding him to contact her, and requiring him to stay a specified distance away from the victim and places that she frequents. See *supra* note 109 and accompanying text (discussing stay-away orders). An order that lacks one or more of these components is sometimes known as an in-house order, no-abuse order, peaceful contact order, or no violent contact order. Such orders are referred to in this article as limited orders or orders permitting ongoing contact.

¹¹⁶ See *infra* Part V.A.

¹¹⁷ Ironically, while some victims who want orders permitting ongoing contact are unable to get them, some other victims receive such orders against their wishes. Several studies have shown that judges issuing protection orders sometimes fail to grant stay-away, eviction, and/or no-contact provisions that are desired by victims. See ADELE HARRELL ET AL., THE URBAN INST., COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS 32-33, 78 (1993); Edward W. Gondolf et al., *Court Response to Petitions for Civil Protection Orders*, 9 J. INTERPERSONAL VIOLENCE 503, 510-11 (1994); Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the*

This Part begins by surveying the characteristics of civil protection orders in general, including levels of victim satisfaction and batterer compliance, the role of protection orders in empowering battered women, criticisms of the protection order process, and enforcement of protection orders. It then presents an analysis of the advantages and disadvantages of stay-away orders, with particular emphasis on the problems that stay-away orders pose for battered women who do not want to separate from their partners.

A. *An Overview of Civil Protection Orders*

A protection order is a court order that imposes legally binding restrictions on an offender's future conduct.¹¹⁸ Temporary protection orders are typically available on an ex parte, expedited basis, after which a final order may be granted following notice to the respondent and a hearing.¹¹⁹ Civil protection orders may be obtained through self-contained legal proceedings, instead of or in addition to a divorce action or criminal prosecution.¹²⁰ Proceedings to obtain protection orders are usually designed to be straightforward in order to permit victims to proceed without an attorney,¹²¹ nevertheless, being represented by a lawyer improves a victim's chances of achieving a favorable outcome.¹²² In addition to legal representation, non-lawyer advocates

Impact of the Reform Statutes, 2 TEX. J. WOMEN & L. 163, 194-98 (1993); Douglas L. Yearwood, *Judicial Dispositions of Ex-Parte and Domestic Violence Protection Order Hearings: A Comparative Analysis of Victim Requests and Court Authorized Relief*, 20 J. FAM. VIOLENCE 161, 164-67 (2005); see also *infra* Part V.A.

¹¹⁸ PETER FINN & SARAH COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT, at v (1990).

¹¹⁹ For general descriptions of protection orders, see FINN & COLSON, *supra* note 118; Helen Eigenberg et al., *Protective Order Legislation: Trends in State Statutes*, 31 J. CRIM. JUST. 411 (2003); Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 1, 5-27 (1992); Klein & Orloff, *supra* note 108, at 811-1142.

¹²⁰ FINN & COLSON, *supra* note 118, at 1.

¹²¹ The majority of petitioners in protection order proceedings appear pro se. Klein & Orloff, *supra* note 108, at 1048.

¹²² See FINN & COLSON, *supra* note 118, at 19, 22 (describing the need for attorney representation when seeking protection orders); 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, 511-12 (2003) (reporting that among a sample of battered women in Baltimore, those represented by an attorney were more than twice as likely to obtain protection orders as those without an attorney); Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 63, 67 (2000) (reporting results of a study in Washington, D.C. showing that representation by an attorney was the most significant factor in predicting whether a woman who received a temporary protection order would return to court for a final order); see also Kinports & Fischer, *supra* note 117, at 174-77 (reporting that lawyers were indispensable to obtaining favorable results in protection order proceedings in some places, but that not every woman seeking a protection order was satisfied

trained to assist battered women can be very helpful to victims involved in the protection order process.¹²³

While civil protection orders are available in all American jurisdictions, procedural and substantive rules vary from jurisdiction to jurisdiction. These rules include who is eligible to apply for an order, what evidence is required for an order to be granted (including the types of acts that have occurred and the relationship between the parties), and the duration of a temporary or final order.¹²⁴ The types of relief that may be awarded in a protection order also vary. In addition to requirements that the abuser stay away from and not contact the victim,¹²⁵ the relief granted may include such measures as a prohibition on further abuse, child custody and visitation, spousal support and child support, monetary compensation, a ban on possession of firearms and other weapons, mandatory counseling for the batterer, and other relief deemed appropriate by the court.¹²⁶ These differences among jurisdictions directly affect the accessibility and usefulness of protection orders. Laws that provide for broad coverage and comprehensive relief offer the most benefits to domestic violence victims.

Civil protection orders are intended to be tailored to the needs of each victim. Typically, the process of entering a protection order starts with a form or checklist that can be filled in with specific types of relief designed to suit the individual case.¹²⁷ Unfortunately, some judges do not take advantage of the opportunity to customize the order by spelling out the relief granted in detail, and instead rely on the general provisions in the standard form.¹²⁸ This lack of individualization and specificity impairs the order's effectiveness.¹²⁹

The subject of the present discussion is civil protection orders.

with her attorney's performance).

¹²³ FINN & COLSON, *supra* note 118, at 26 (stating that "a combination of legal representation and lay advocacy" provides the best results); PTACEK, *supra* note 22, at 177-78 (stating that women who obtained protection orders rated advocates as the most helpful aspect of the process); Herrell & Hofford, *supra* note 112, at vii, 35-36 (stating that advocates can "serve as the bridge between the victim and the justice system"); *see also* Wan, *supra* note 69 (describing interactions between battered women's advocates and women seeking protection orders).

¹²⁴ For comparative analysis of state laws regarding orders of protection, see FINN & COLSON, *supra* note 118; Eigenberg et al., *supra* note 119; Hart, *supra* note 119; Klein & Orloff, *supra* note 108.

¹²⁵ *See supra* note 109 and accompanying text (discussing no-contact, stay-away, and vacate provisions).

¹²⁶ *See* FINN & COLSON, *supra* note 118; Eigenberg et al., *supra* note 119; Hart, *supra* note 119; Klein & Orloff, *supra* note 108.

¹²⁷ *See, e.g.,* FINN & COLSON, *supra* note 118, at 33-37.

¹²⁸ *Id.* at 33-35; HARRELL ET AL., *supra* note 117, at 32-33, 78.

¹²⁹ *See* FINN & COLSON, *supra* note 118, at 2, 33 (stating that an order that describes the elements of relief in detail makes the offender aware of the specific behavior that is prohibited and makes it easier for police and judges to determine whether there has been a violation).

Protection orders are also granted in criminal proceedings.¹³⁰ Criminal protection orders pose intrinsic difficulties for victims because the prosecutor controls the criminal process with the goal of advancing the interests of the general public.¹³¹ Civil protection orders offer battered women a greater opportunity to exercise their autonomy because civil proceedings are initiated and directed by the victim for her own benefit.

In many respects, a civil protection order may be more advantageous to the victim than criminal prosecution of the abuser. Many women do not want to have their partners arrested and sent to jail; they view the types of relief offered in a protection order as more likely to benefit themselves and their children.¹³² Women of color may be especially hesitant to expose their partners to the criminal justice system, which has historically discriminated against members of minority groups.¹³³ For immigrants, an additional disincentive for becoming involved with the criminal justice system is the fact that a criminal conviction can lead to deportation.¹³⁴

Depending on the applicable state statutes, a protection order can be issued on the basis of acts that are not crimes.¹³⁵ In addition,

¹³⁰ See, e.g., Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006); Christopher R. Frank, Comment, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats With Snakes*, 50 U. MIAMI L. REV. 919 (1996).

¹³¹ See generally Suk, *supra* note 130; Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937 (1999). See also Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 820-21 (2000) (critiquing criminal law for granting power primarily to the state and to the public at large, not to women).

¹³² Gondolf et al., *supra* note 117, at 504 (stating that a protection order is "designed to meet [the victim's] particular safety needs" and avoids losing the abuser's earning power by sending him to jail or antagonizing him with criminal charges); Hanna, *supra* note 39, at 1884-85 (listing reasons why battered women do not seek criminal punishment, including their need for the abuser's financial support and fear of reprisal); Ko, *supra* note 104, at 367 (stating that protection orders are issued to control future behavior and therefore are less likely to trigger retaliation than a criminal punishment for past misconduct).

¹³³ See Crenshaw, *supra* note 35; Jenny Rivera, *Domestic Violence Against Latinas By Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 243-51 (1994); Beth Richie, *Battered Black Women: A Challenge for the Black Community*, BLACK SCHOLAR, Mar.-Apr. 1985, at 40.

¹³⁴ See Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT'L & COMP. L.J. 27 (2002).

¹³⁵ FINN & COLSON, *supra* note 118, at 3 (stating that a protection order may provide a remedy for conduct that is not criminal and giving the example of harassment); Hart, *supra* note 119, at 6-7 (reporting that state statutes establishing grounds for issuing a protection order vary in the extent to which they rely on criminal law, and stating that some protection order statutes create their own definitions of conduct justifying issuance of an order, which may include a broad range of behavior such as imposition of emotional distress); Klein & Orloff, *supra* note 108, at 848-76 (describing statutes and cases regarding conduct sufficient to support issuance of a protection order, including harassing and emotionally abusive conduct that might not otherwise be criminal). See also AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE (June 2007), available at

protection orders are available for minor crimes that are unlikely to result in meaningful criminal penalties, and crimes for which it would be difficult to obtain a conviction because of evidentiary problems.¹³⁶ Furthermore, protection orders can forbid the abuser to engage in future activity that would otherwise not be illegal.¹³⁷ Thus, civil protection orders cast a far wider net over abusive behavior than criminal law does. However, civil protection orders are not entirely separate from the criminal justice system; if the order is violated, criminal enforcement proceedings may result.¹³⁸ Civil protection orders are a unique hybrid: “a victim-initiated intervention with the power of enforcement by the criminal justice system.”¹³⁹

A major advantage of civil protection orders is that they bring the domestic violence victim into contact with the legal system, which in turn opens the door to other community resources, such as social services agencies and battered women’s support groups.¹⁴⁰ Seeking a civil protection order is often a battered woman’s first step toward obtaining legal assistance to stop the violence.¹⁴¹ Civil protection orders thus serve as a gateway through which the victim gains access to various types of resources and support. Moreover, civil protection orders make it easier for victims to avail themselves of the criminal justice system later if they choose to do so, since police are often more willing to arrest a batterer for abuse if a protection order is in place.¹⁴²

<http://www.abanet.org/domviol/docs/DVCPOChart+June07.pdf> (listing grounds for issuance of protection orders by state).

¹³⁶ FINN & COLSON, *supra* note 118, at 3. The standard of proof to obtain a civil protection order is lower than the “beyond a reasonable doubt” standard that prevails in criminal cases. Most state statutes that address the issue apply a preponderance of the evidence standard to civil protection order proceedings. Eigenberg et al., *supra* note 119, at 416.

¹³⁷ For descriptions of types of relief available in protection orders, see FINN & COLSON, *supra* note 118, at 33-47; Eigenberg et al., *supra* note 119, at 416-17; Hart, *supra* note 119, at 14-18, Klein & Orloff, *supra* note 108, at 910-1006, 1031-34; see also *infra* notes 265-68 and accompanying text (discussing prohibitions on psychological abuse).

¹³⁸ See *infra* Part IV.A.6 (discussing enforcement).

¹³⁹ Waul, *supra* note 122, at 53.

¹⁴⁰ See PTACEK, *supra* note 22, at 100 (describing judges who viewed protection order proceedings as “an opportunity to counter battered women’s isolation” and referred applicants to other resources, including the criminal justice system, battered women’s advocates, and local shelters); *id.* at 166 (quoting a battered woman who stated that applying for an order “puts you in touch with services you might not know about”); Waul, *supra* note 122, at 57 (describing the protection order application process as a “prime opportunity” for providing victims with “support and connection to other services”).

¹⁴¹ See Eve Buzawa et al., *The Response to Domestic Violence in a Model Court: Some Initial Findings and Implications*, 16 BEHAV. SCI. & L. 185, 194 (1998) (reporting that more domestic violence cases enter the courts through the civil protection order process than through criminal charges); Zlotnick, *supra* note 83, at 1192 (stating that obtaining an order brings the victim into the domestic violence system).

¹⁴² See FINN & COLSON, *supra* note 118, at 2; PTACEK, *supra* note 22, at 163; Zlotnick, *supra* note 83, at 1197, 1204.

1. Rates of Victim Satisfaction

At their best, civil protection orders can help accomplish many goals, including stopping the violence, protecting the abused woman as well as children and other family members, holding the offender accountable, providing financial support for the victim and her children, and conveying to the offender and the general public that domestic violence will not be tolerated.¹⁴³ Empirical studies have consistently shown a high level of satisfaction among women who have obtained protection orders. For example, in a study conducted in three jurisdictions by the National Center for State Courts, over eighty-five percent of women who had obtained protection orders six months earlier felt their lives had improved since getting the order, and over eighty percent felt safer.¹⁴⁴ Similarly, a Wisconsin study found a victim satisfaction rate of eight-six percent, with half of the women reporting that they were very satisfied; ninety-four percent felt that their decision to obtain a protection order was a good one.¹⁴⁵ A study conducted in Colorado reported that one year after receiving a protection order, eighty-four percent of women felt somewhat safe or very safe from physical harm and seventy-two percent felt somewhat safe or very safe from harassment.¹⁴⁶ In a study based on interviews with clients of family violence agencies in four states, seventy-two percent of the women who obtained protection orders rated them as “somewhat effective” or “very effective” in preventing further abuse and violence.¹⁴⁷

Satisfaction with protection orders is not evenly distributed among all groups of women. Significantly, in the Wisconsin study, satisfaction rates were higher among women who wanted to end the relationship than among those who wanted to continue it or were ambivalent.¹⁴⁸ This indicates that the protection orders examined in that study, which were apparently all stay-away orders,¹⁴⁹ did not meet the needs of

¹⁴³ See generally, e.g., Hart, *supra* note 119, at 23 (enumerating benefits of protection orders).

¹⁴⁴ KEILITZ ET AL., *supra* note 108, at ix.

¹⁴⁵ Horton et al., *supra* note 114, at 274; see also Murphy, *supra* note 122, at 509-16 (describing results of a study in Baltimore in which sixty-eight percent of battered women who filed for a protection order indicated that doing so was helpful, quite helpful, or extremely helpful).

¹⁴⁶ HARRELL ET AL., *supra* note 117, at 60. Despite their increased feelings of safety, many of the women in the study continued to take precautions against abuse. *Id.* at 60-61.

¹⁴⁷ Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, in CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 13, 22 (Claudine SchWeber & Clarice Feinman eds., 1985).

¹⁴⁸ See Horton et al., *supra* note 114, at 274-76.

¹⁴⁹ See *id.* at 266-67, 274-76.

women who wanted to maintain their relationships. Indeed, many women who are not ready to end a relationship do not seek a protection order at all or fail to complete the process of obtaining one; they thus opt out of the protection order system before their satisfaction can be measured.¹⁵⁰

2. Rates of Compliance by Batterers

The results of studies measuring continuation of abuse and violations of protection orders are more mixed than those examining victim satisfaction. Some studies report significantly reduced rates of violence and/or relatively high rates of compliance following issuance of a protection order. A study based on interviews with battered women in Seattle found a decrease of seventy percent in the occurrence of physical violence in a nine-month period among women who received protection orders in comparison to those who did not receive them.¹⁵¹ In addition to the reduction in physical violence, this study also showed that women with orders were less likely than those without orders to experience all other forms of abuse except unwanted calls.¹⁵² Similarly, a Texas study showed that women who applied for protection orders reported a significant reduction in average levels of violence during the year following their application, and those who actually received the order reported less violence than qualified applicants who did not receive an order.¹⁵³ The National Center for State Courts study found that after three months, seventy-two percent of women who had received protection orders reported having “no problems” with the

¹⁵⁰ See, e.g., Karla Fischer & Mary Rose, *When “Enough Is Enough”: Battered Women’s Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQUENCY 414, 418 (1995) (reporting that women were reluctant to obtain temporary protection orders because they did not want to end the relationship); Ann Malecha et al., *Applying For and Dropping a Protection Order: A Study With 150 Women*, 14 CRIM. JUST. POL’Y REV. 486, 496 (2003) (stating that over forty percent of women who dropped protection orders said that they did so because they had returned to the relationship); Murphy, *supra* note 122, at 512 (stating that many women’s desire to continue the relationship or at least remain in contact with the abuser prevents them from obtaining a final protection order); Lori A. Zoellner et al., *Factors Associated With Completion of the Restraining Order Process in Female Victims of Partner Violence*, 15 J. INTERPERSONAL VIOLENCE 1081, 1089, 1093 (2000) (reporting that women who remained emotionally attached to their abusers were less likely to complete the restraining order process).

¹⁵¹ Holt et al., *supra* note 104, at 20; see also Victoria L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS’N. 589, 593 (2002) [hereinafter Holt et al., *Civil Protection Orders and Risk*] (reporting that abused women who obtained final protection orders were eighty percent less likely to report physical violence to police during a one-year period than abused women who did not obtain an order).

¹⁵² Holt et al., *supra* note 104, at 20.

¹⁵³ Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 AM. J. FAM. L. 59, 67-68 (2001).

abuser, and after six months, sixty-five percent had no problems.¹⁵⁴

However, in other studies, the reported rates of re-abuse and non-compliance were higher. For example, in the Colorado study, sixty percent of women who obtained orders reported abuse by the man named in the order during the following year; by far the most frequently reported type of abuse was psychological abuse.¹⁵⁵ A Massachusetts study found that forty-nine percent of offenders re-abused their victims within two years of issuance of a protection order.¹⁵⁶ In the study of family violence agency clients in four states, twenty-four percent of the women who had obtained protection orders experienced physical violence within four months after obtaining the order and fifty-six percent experienced non-physical abuse.¹⁵⁷

According to the Wisconsin study, women were at higher risk for non-compliance with the protection order if they did not want to end the relationship or were ambivalent about it.¹⁵⁸ Much of the non-compliance took the form of violations of prohibitions on contact.¹⁵⁹ Thus, it appears that protection orders purporting to terminate contact between the parties are more likely to be violated if the victim is not sure that she wants to sever ties with her partner.

3. Characteristics Affecting Compliance With Protection Orders

Empirical research indicates that characteristics of the batterer and the relationship can affect rates of compliance. Batterers are not all the

¹⁵⁴ KEILITZ ET AL., *supra* note 108, at 37-40; *see also* Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience With Male Violence and the Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 227, 237 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (announcing findings from a Connecticut study that sixty-three percent of orders were not violated in the first two months); T.K. Logan et al., *Protective Orders in Rural and Urban Areas*, 11 VIOLENCE AGAINST WOMEN 876, 897 (2005) (reporting results of a Kentucky study showing that over seventy percent of women who obtained protection orders reported that the order was not violated in the forty days after it was issued).

¹⁵⁵ HARRELL ET AL., *supra* note 117, at 47-50.

¹⁵⁶ Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 192, 199 (Eve S. Buzawa & Carl G. Buzawa eds., 1996); *see also* TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES, *supra* note 15, at 52 (estimating that among physically abused women who obtained protection orders nationally, approximately fifty percent of the orders were violated); Valli Kalei Kanuha & Martha L. Ross, *The Use of Temporary Restraining Orders (TROs) as a Strategy to Address Intimate Partner Violence*, 19 VIOLENCE & VICTIMS 343 (2004) (reporting results of a study in Hawaii showing that fifty percent of victims made police reports against their abusers during the two-year period following issuance of a protection order).

¹⁵⁷ Grau et al., *supra* note 147, at 21-25. These rates were not significantly different from the rates for the agency clients who had not obtained protection orders. *Id.*

¹⁵⁸ Horton et al., *supra* note 114, at 275-76.

¹⁵⁹ *Id.* at 274. The study does not indicate whether some or all of these contacts occurred with the victim's consent.

same; some of them are more likely than others to violate an order. According to the Massachusetts study, abusers with records of criminal activity re-abused their victims more than those without criminal records; the probability of re-abuse increased for those with more recent and more extensive criminal records.¹⁶⁰ Other studies reached comparable results.¹⁶¹ These findings are consistent with the theory that obedience to the law is reduced among members of society who have the least to lose from the social consequences of criminal sanctions.¹⁶² A similar pattern emerged in studies of the effects of arresting batterers, which found that arrest had a stronger deterrent effect among men who were married and employed than among those who were unmarried, unemployed and lived in poor, high-crime neighborhoods.¹⁶³ Currently, a high percentage of batterers who are the subjects of protection orders have prior criminal records and other characteristics indicating a heightened risk of recidivism.¹⁶⁴ A protection order alone is relatively unlikely to deter these offenders from further abuse.¹⁶⁵ Paradoxically, the abusers who are most likely to be deterred by protection orders—namely, “middle- or upper-class abusers who do not have prior [criminal] records”—are apparently underrepresented in protection order proceedings.¹⁶⁶

¹⁶⁰ Klein, *supra* note 156, at 202. This study also found that younger men, most of whom were unmarried, were more likely to re-abuse their victims than older men, most of whom were married. *Id.* at 200, 203.

¹⁶¹ See KEILITZ ET AL., *supra* note 108, at 43 (finding that protection orders were less successful in deterring further violence and other problems among abusers with a criminal history, especially those who had a high number of arrests and/or a record of violent crime other than domestic violence); Chaudhuri & Daly, *supra* note 154, at 239-40 (finding that protection order violations were more common among men with prior criminal convictions, men who were unemployed or working at part-time jobs, and men who abused alcohol or drugs); Grau et al., *supra* note 147, at 23-24 (reporting that re-abuse was more common among men who had a history of violence against strangers).

¹⁶² See FAGAN, *supra* note 104, at 13-15, 25-27 (stating that legal sanctions are strongest when reinforced by informal social controls and weakest when those informal controls are absent); Ko, *supra* note 104, at 388-89 (discussing the theory that offenders with lower “stakes in conformity” are less likely to be deterred from violence).

¹⁶³ See Jannell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence, in DO ARRESTS AND RESTRAINING ORDERS WORK?*, *supra* note 156, at 43; see also CHRISTOPHER D. MAXWELL ET AL., U.S. DEP’T OF JUSTICE, *THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 2*, 7-9 (2001) (reporting that arrest had a deterrent effect on all batterers, but that the likelihood of subsequent abuse was more strongly correlated with the batterers’ prior criminal record than with whether or not they were arrested for a given act of domestic violence).

¹⁶⁴ See KEILITZ ET AL., *supra* note 108, at 26-27 (reporting that sixty-five percent of respondents had prior criminal histories, many of them for violent crime and drug- or alcohol-related crime); Klein, *supra* note 156, at 195 (stating that almost eighty percent of men who were subjects of protection orders had prior criminal histories, many of them involving alcohol or drug crime and crimes against persons).

¹⁶⁵ See KEILITZ ET AL., *supra* note 108, at 43.

¹⁶⁶ Klein, *supra* note 156, at 202-04 (hypothesizing that victims of such abusers may use “alternative vehicles” instead of protection orders to address the abuse).

Another factor that is associated with violations of protection orders is the history of abuse in the relationship. The Colorado study found that the recurrence of abuse in the year following the granting of a protection order was significantly related to the type and severity of abuse that occurred in the year before the order was issued.¹⁶⁷ In addition, the abuser's level of resistance to the protection order at the time of the hearing was a strong predictor of post-order abuse.¹⁶⁸ These criteria may provide valuable assistance in predicting which cases are most likely to result in non-compliance with the order and therefore most in need of additional safeguards.¹⁶⁹

4. Reconciling the Disparity Between Rates of Victim Satisfaction and Batterer Compliance: The Importance of Empowering Battered Women

What can explain the fact that according to these empirical studies,¹⁷⁰ the number of women satisfied with their protection orders exceeds the number whose orders have not been violated? One possible explanation is that even though an order has been violated, the amount and severity of abuse is lower than before the order was issued.¹⁷¹ Thus, the women's level of satisfaction reflects the fact that while the abuse has not been eliminated, it has been reduced.¹⁷²

Another explanation is that rates of compliance and re-abuse are not the only valid ways to measure the success of protection orders.¹⁷³ Although ensuring women's safety from violence is one crucial function of protection orders, enabling battered women to exercise their

¹⁶⁷ HARRELL ET AL., *supra* note 117, at 57-58; *see also* Grau et al., *supra* note 147, at 23-24 (finding that orders were more effective in preventing further abuse for victims with less severe prior injuries). According to the Colorado study, the recurrence of abuse was not related to either the duration of abuse in the relationship or the severity of the incident that precipitated the protection order. HARRELL ET AL., *supra* note 117, at 57-58; *see also* Klein, *supra* note 156, at 200 (stating that the nature of the incident that led to the order made no difference in predicting re-abuse).

¹⁶⁸ HARRELL ET AL., *supra* note 117, at 58.

¹⁶⁹ *See id.* at 61, 79; KEILITZ ET AL., *supra* note 108, at 43; Klein, *supra* note 156, at 207.

¹⁷⁰ Some of the protection order studies are marred by methodological weaknesses. *See* Ko, *supra* note 104 (summarizing and critiquing studies of effectiveness of protection orders). There are also inconsistencies among the study designs, making it difficult to compare findings from different studies. *See* Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 TRAUMA, VIOLENCE & ABUSE 141 (2005).

¹⁷¹ *See* PTACEK, *supra* note 22, at 163-64 (reporting results of a study in which sixty-two percent of the protection orders were violated but eighty-six percent of the women said that the order had either stopped or reduced the abuse; eighty-eight percent of the women said they made the right decision in obtaining a protection order).

¹⁷² *See id.* at 167.

¹⁷³ *See* DALTON & SCHNEIDER, *supra* note 56, at 557-59.

autonomy is another. For many women, obtaining a protection order is deeply empowering because it entails asserting one's own needs, standing up to the abuser, and enlisting a potent institutional ally.¹⁷⁴ This empowerment can be a major step in the process of ending the abuse. One woman who obtained an order said, "After so long of just taking it and taking it[,] I needed to be able to show myself as much as show him that I was tired of being a victim. . . . [T]hat feeling, of fighting back and speaking out, will never leave me."¹⁷⁵

By breaking the silence about the abuse and creating a public record of what has been hidden in private, battered women can regain a sense of control, which in turn enables them to take further steps toward improving their lives.¹⁷⁶ In addition to giving the woman a chance to speak out, the protection order operates as an amplifier for her voice; it unequivocally communicates to the batterer that his behavior is unacceptable and that society condemns domestic violence.¹⁷⁷ In light of these considerable benefits, it is not surprising that many battered women find that the process of obtaining a protection order is "its own reward."¹⁷⁸

5. Criticisms of the Protection Order Process

Despite the high levels of overall satisfaction with protection orders, some women have reported that the process of obtaining an order is difficult, confusing, and time-consuming.¹⁷⁹ These problems can be ameliorated through improved court procedures.¹⁸⁰ In addition, some women find the experience of appearing in court upsetting, intimidating, or embarrassing.¹⁸¹ When judges, lawyers, advocates,

¹⁷⁴ See PTACEK, *supra* note 22, at 163-67; Fischer & Rose, *supra* note 150.

¹⁷⁵ Fischer & Rose, *supra* note 150, at 424.

¹⁷⁶ *Id.* at 422-25.

¹⁷⁷ *Id.* at 420-21, 423-25; see also HARRELL ET AL., *supra* note 117, at 34 (stating that seventy-nine percent of women reported that the protection order was helpful in sending the batterer the message that his actions were wrong, and eighty-six percent said that it was helpful in documenting that the abuse occurred); Murphy, *supra* note 122, at 513 (quoting battered women who said that getting a temporary protection order gave the abuser a "wake up call" and "sent [a] message to him"); see also *infra* Part V.B.2 (discussing the expressive power of protection orders).

¹⁷⁸ See PTACEK, *supra* note 22, at 167; Chaudhuri & Daly, *supra* note 154, at 246.

¹⁷⁹ HARRELL ET AL., *supra* note 117, at 32; Wan, *supra* note 69, at 609.

¹⁸⁰ See KEILITZ ET AL., *supra* note 108, at 41 (finding that women who obtained protection orders in courts that provided a more centralized process and direct assistance to petitioners reported a higher level of well-being after receiving the order). For discussion of procedures for obtaining protection orders and recommendations for improvement, see FINN & COLSON, *supra* note 118, at 19-31; HARRELL ET AL., *supra* note 117, at 16-18, 32, 77-78; Hart, *supra* note 119, at 7-8, 24-25; Kinports & Fischer, *supra* note 117; Klein & Orloff, *supra* note 108, at 1048-67.

¹⁸¹ Chaudhuri & Daly, *supra* note 154, at 246; Fischer & Rose, *supra* note 150, at 418-20;

court clerks, and other actors in the legal system are helpful and supportive, they can dramatically improve the quality of the victim's experience.¹⁸²

6. Enforcement: The "Achilles' Heel" of Protection Orders¹⁸³

Even though obtaining a protection order may be valuable in and of itself, the fact remains that to achieve their full potential, orders must be properly enforced.¹⁸⁴ Depending on the facts and the law of the jurisdiction, a violation of a protection order may be a misdemeanor or felony, civil or criminal contempt of court, or both.¹⁸⁵ A violation may subject the offender to mandatory arrest.¹⁸⁶ In order to ensure adequate enforcement, effective policies governing protection order violations must be adopted and followed by police, prosecutors, and judges.¹⁸⁷

Currently, enforcement of protection orders is inconsistent. Even where laws requiring strict enforcement have been enacted, they are too often ignored.¹⁸⁸ In fact, poor enforcement may be largely responsible for the results of studies showing high rates of non-compliance with protection orders.¹⁸⁹

In *Town of Castle Rock v. Gonzalez*,¹⁹⁰ which was recently decided by the United States Supreme Court, the plaintiff alleged that she repeatedly notified her local police department that her estranged husband had violated a protection order by abducting their three daughters. The police took no action, despite a state statute that instructed police to arrest or seek a warrant for the arrest of an offender who has violated a protection order.¹⁹¹ The man later killed all three of the children.¹⁹² This tragic case, like many others, underscores the need

Wan, *supra* note 69, at 609.

¹⁸² See PTACEK, *supra* note 22, at 151-61 (describing various types of judicial demeanor and their effect on victims); Chaudhuri & Daly, *supra* note 154, at 246 (describing victims' dependence on the attitudes and behavior of judges, attorneys, advocates, court clerks, and sheriffs); Wan, *supra* note 69 (describing the effect of advocates' demeanor on victims).

¹⁸³ See FINN & COLSON, *supra* note 118, at 49 (stating that "[e]nforcement is the Achilles' heel of the civil protection order process").

¹⁸⁴ See *id.* at 2, 49 (stating that consistent enforcement enhances the effectiveness of protection orders by deterring violations and increasing the protection offered to victims).

¹⁸⁵ Suk, *supra* note 130, at 15-16; Zlotnick, *supra* note 83, at 1195-96.

¹⁸⁶ Eigenberg et al., *supra* note 119, at 417-18; Suk, *supra* note 130, at 16.

¹⁸⁷ FINN & COLSON, *supra* note 118, at 49.

¹⁸⁸ Kinports & Fischer, *supra* note 117, at 220-33.

¹⁸⁹ See Grau et al., *supra* note 147, at 25-27; Klein, *supra* note 156, at 208-09, 211; Ko, *supra* note 104, at 378-81.

¹⁹⁰ 545 U.S. 748 (2005) (holding that police did not violate plaintiff's procedural due process rights).

¹⁹¹ *Id.* at 753-54, 758-59.

¹⁹² *Id.* at 754.

for better implementation of enforcement policies. Proper training of law enforcement officers, prosecutors, and judges, although not a panacea, can help improve enforcement practices.¹⁹³

Although a full discussion of enforcement methods is beyond the scope of this Article,¹⁹⁴ there are a number of innovative structural approaches that seem to hold promise as ways to improve the enforcement of protection orders. Legal interventions for domestic violence are most successful when they are integrated with each other and with non-legal resources.¹⁹⁵ Accordingly, a coordinated community response to domestic violence, which consists of an ongoing collaboration among entities such as the judiciary, police, prosecutors, probation, advocacy groups, and social service agencies, can be “a particularly effective way of improving enforcement procedures.”¹⁹⁶

Specialized domestic violence courts have also shown favorable results. The most ambitious specialized courts offer “one-stop shopping” by combining diverse components of the legal system (such as criminal and civil proceedings) as well as access to non-legal services, such as domestic violence advocacy organizations.¹⁹⁷ Similarly, specialized police units and prosecutor departments have the potential to increase efficiency, develop expertise, minimize the burdens on victims, and improve case outcomes.¹⁹⁸

In light of the difficulty of employing legal mechanisms to stop domestic violence, several commentators have recommended

¹⁹³ FINN & COLSON, *supra* note 118, at 62-63; KEILITZ ET AL., *supra* note 108, at 75-78 (listing domestic violence training curricula); Kinports & Fischer, *supra* note 117, at 237-39.

¹⁹⁴ For recommendations of enforcement procedures, see, for example, FINN & COLSON, *supra* note 118, at 49-63; Hart, *supra* note 119, at 27; Kinports & Fischer, *supra* note 117, at 233-46; Klein & Orloff, *supra* note 108, at 1095-1142.

¹⁹⁵ FINN & COLSON, *supra* note 118, at 63; Hart, *supra* note 105, at 207 (calling for “coordinated, comprehensive, and specialized intervention by all components of the legal and human services systems”); Zlotnick, *supra* note 83, at 1177-78.

¹⁹⁶ Kinports & Fischer, *supra* note 117, at 239-42. See generally COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND (Melanie F. Shepard & Ellen L. Pence eds., 1999) (describing the structure and operation of coordinated community responses to domestic violence).

¹⁹⁷ For discussion of different models of specialized domestic violence courts and their effectiveness, see, for example, EMILY SACK, FAMILY VIOLENCE PREVENTION FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES (2002); ROBERT V. WOLF ET AL., CTR. FOR COURT INNOVATION, PLANNING A DOMESTIC VIOLENCE COURT: THE NEW YORK STATE EXPERIENCE (2004); Epstein, *supra* note 39; Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM L. REV.* 1285 (2000). Specialized domestic violence courts also have potential disadvantages, including a heavy psychological toll on judges and the risk of exposing domestic violence victims to punitive child protection proceedings. See, e.g., WOLF ET AL., *supra*; Epstein, *supra* note 39; Tsai, *supra*, at 1309-16.

¹⁹⁸ See Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL RESPONSE, *supra* note 154, at 161, 171; Barbara Hart, *Battered Women and the Criminal Justice System*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 156, at 98, 108.

alternatives to the legal system for domestic violence cases, including therapeutic or restorative justice approaches.¹⁹⁹ These models, which include victim-offender mediation, sentencing circles, group conferences and other variations, typically aim to provide a non-adversarial approach that draws on extended family and community members to assist in resolving the dispute between the parties.²⁰⁰ Although these alternatives reflect a well-intentioned attempt to avoid the deficiencies and excesses of the criminal justice system, they have not been demonstrated to be effective and run the risk of deemphasizing the wrongfulness of domestic violence.²⁰¹ Therefore, they should not be considered a valid substitute for legal sanctions in response to protection order violations.

As the preceding discussion shows, civil protection orders are a promising but imperfect remedy. No single legal intervention, or even law in general, can be sufficient in itself to solve a problem as complex and deep-rooted as domestic violence.²⁰² Nevertheless, protection orders are in many ways ideally suited to advancing the interests of battered women. The relative ease and speed with which they can be acquired, the fact that civil actions are initiated and controlled by the victim, and the possibility of obtaining individualized and broad-ranging relief, together with the demonstrably high level of satisfaction among women who have obtained orders, all indicate that protection orders are a uniquely valuable asset in the effort to combat domestic violence. Therefore, it is worthwhile to explore how protection orders could be improved so that they have even greater positive impact. Some of their shortcomings, and suggestions for how to overcome them, have been discussed above. In addition, it is important to question more fully the dominance of stay-away provisions in protection orders and to consider whether orders permitting the continuation of a relationship between the parties could be a desirable alternative for some battered women.

¹⁹⁹ See, e.g., LINDA G. MILLS, *INSULT TO INJURY* (2003) (promoting the use of “Intimate Abuse Circles”); Christine Fiore & Kristen O’Shea, *Women in Violent Relationships—Experiences With the Legal and Medical Systems*, in *INTIMATE PARTNER VIOLENCE* 18-1, 18-14 to 18-15 (Kathleen A. Kendall-Tackett & Sarah M. Giacomoni eds., 2007) (surveying proposals for alternative approaches); Coker, *supra* note 35 (examining the Navajo peacemaking model and concluding that it has both benefits and shortcomings); C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 *ST. LOUIS U. PUB. L. REV.* 289 (2003) (addressing feminist arguments for and against restorative justice methods).

²⁰⁰ See *supra* note 199 (citing sources).

²⁰¹ See Fiore & O’Shea, *supra* note 199, at 18-14 to 18-15; Judith Lewis Herman, *Justice From the Victim’s Perspective*, 11 *VIOLENCE AGAINST WOMEN* 571 (2005).

²⁰² See FAGAN, *supra* note 104, at 39-40; Coker, *supra* note 35; Goodmark, *supra* note 66.

B. *Advantages and Disadvantages of Stay-Away Orders*

As presently conceived, the paradigmatic civil protection order for domestic violence is a stay-away order.²⁰³ Orders requiring a batterer to sever contact with a victim are a beneficial resource for women who have already separated from the abuser or want to do so. In the past, when a battered woman asked to have the batterer evicted from a shared home, judges often refused, particularly if the home was owned or rented solely in the batterer's name.²⁰⁴ This left victims with little recourse other than fleeing to a battered women's shelter. Now that the standard in many places has changed to an expectation that protection orders will include stay-away provisions, it has become substantially easier to persuade judges to grant such relief.²⁰⁵ If they are adhered to, physical distance requirements create a margin of safety around the victim, prohibitions on contact reduce the abuser's opportunities to harass her, and evicting the abuser from the residence makes the victim's home a safe haven.²⁰⁶ Furthermore, it may be relatively easy to enforce an order requiring an offender to leave the home, cease all contact with the victim, and remain a specified number of feet away from her and from designated locations, because any violations will be clear and unambiguous.²⁰⁷ All of these characteristics make stay-away orders a worthwhile option for battered women.

Nevertheless, stay-away orders have a number of disadvantages. These disadvantages suggest that forcing women to choose between getting a stay-away order and getting no protection order at all, as some courts now do, does a disservice to domestic violence victims.

First, the effectiveness of stay-away provisions is routinely undercut by the fact that in most cases where the victim and abuser have children in common, the court permits ongoing contact between the abuser and the children.²⁰⁸ Batterers often use their access to the children to perpetrate further violence against the mother—for example, when exchanging the children for visitation periods.²⁰⁹ Thus, a batterer

²⁰³ See *supra* notes 107-17 and accompanying text.

²⁰⁴ See FINN & COLSON, *supra* note 118, at 33, 41.

²⁰⁵ Although stay-away relief has become far more routine than in the past, it is still not granted automatically in all cases. See Erika A. Sussman, Center for Survivor Agency and Justice, *The Civil Protection Order As a Tool for Economic Justice*, ADVOC. Q. 1, 2 (2006) (listing state statutes limiting the availability of vacate provisions in protection orders); see also *supra* note 117 (indicating that judges do not always grant stay-away, no-contact, and vacate provisions desired by victims).

²⁰⁶ See Suk, *supra* note 130, at 14.

²⁰⁷ See *id.* at 18-22 (stating that provisions prohibiting contact with the victim and presence in the victim's home make it easy for prosecutors to obtain evidence of violations).

²⁰⁸ See, e.g., HARRELL ET AL., *supra* note 117, at 25; KEILITZ ET AL., *supra* note 108, at 51; Klein, *supra* note 156, at 207.

²⁰⁹ See, e.g., HARRELL ET AL., *supra* note 117, at 45-47; KEILITZ ET AL., *supra* note 108, at 39

who is in principle barred from continuing his relationship with the adult victim in fact has many opportunities to harass and abuse her.²¹⁰ For this reason, women with children are at greater risk than other women for experiencing violence after receiving a protection order.²¹¹

In addition, battered women face the danger of separation assault,²¹² which has been defined as “the attack on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return.”²¹³ Women are most at risk after ending, or while trying to end, an abusive relationship.²¹⁴ A protection order that purports to terminate contact between the parties may be the trigger for an intensification of abuse. The result is that the relationship is over but the violence continues—the exact opposite of what many women seek. In fact, the Massachusetts protection order study discussed earlier showed that offenders who were subject to protection orders containing no-contact provisions were actually more likely to commit further abuse than offenders whose protection orders permitted contact with the victim.²¹⁵ The Colorado study reported that

n.3.

²¹⁰ The practice of granting child custody or visitation to abusive men also endangers children. Men who abuse their adult partners have high rates of committing child abuse. Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE*, *supra* note 57, at 158, 158-66; Hart, *supra* note 119, at 33; Klein & Orloff, *supra* note 119, at 954-55; *see also* Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. FAM. PSYCHOL. 578 (1998) (summarizing and comparing studies). Moreover, even if the child is not directly abused, witnessing the abuse of a parent is emotionally traumatic; children can be accidentally injured when they are caught in the middle of a fight or intervene to protect the victim; and exposure to domestic violence may teach children that abusive relationships are normal and acceptable. *See* Hart, *supra* note 119, at 33-34; Klein & Orloff, *supra* note 108, at 955-56; Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1115-17 (1996).

²¹¹ HARRELL ET AL., *supra* note 117, at 58-59; KEILITZ ET AL., *supra* note 108, at 39 n.3; Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 217-18 (1999).

²¹² *See generally* 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 1363 (2000); Mahoney, *supra* note 18.

²¹³ Mahoney, *supra* note 18, at 65.

²¹⁴ *See* Mahoney, *supra* note 18; CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, *FEMALE VICTIMS OF VIOLENT CRIME 5* (1991) (reporting that separated or divorced women are fourteen times more likely to experience domestic violence than women who are still living with their spouse); N.Y. STATE COMM’N ON DOMESTIC VIOLENCE FATALITIES, *REPORT TO THE GOVERNOR 8* (1997) (stating that of fifty-seven domestic homicides committed in New York State between 1990 and 1997, seventy-five percent of the victims had ended the relationship or indicated an intention to end it at the time of their death).

²¹⁵ Klein, *supra* note 156, at 202 (reporting that the rate of re-abuse was 35.7 percent for no-contact orders and 27.3 percent for orders permitting contact, and stating that when the abusers’ prior criminal history was controlled for, batterers with no prior criminal record showed the greatest disparity between the re-abuse rates for orders forbidding and permitting contact). One possible interpretation of this statistic is that denying abusers access to their partners causes them to escalate their violence. It is also possible that judges order no contact in cases where the abuse

women who lived with the abuser at the time of the incident that led to the protection order were significantly less likely to experience any type of abuse after the order; the study concluded that this finding is “consistent with reports that the period following separation is particularly dangerous for abused women.”²¹⁶ In a similar finding from a study of battered women who had gone through criminal proceedings arising from abuse that occurred one year earlier, women who were no longer in a relationship with the abuser nor in social contact with him were more than twice as likely to be revictimized by him as those who remained in contact with him.²¹⁷ Thus, stay-away provisions do not necessarily keep a victim safe and may instead expose her to greater harm than a legal intervention that permits ongoing contact between the parties.

Aside from the danger of additional abuse, a stay-away order can impose other types of harm on the victim. These include loss of access to the abuser’s income and resulting impoverishment, loss of his child care assistance leading to the victim’s inability to keep a job, and loss of support from extended family and community.²¹⁸ Separation also inflicts the emotional loss attendant on ending an intimate relationship and breaking up a family.²¹⁹

Further problems arise if the woman wants to reconcile or even just communicate with her partner. Voluntary contact between the victim and offender following issuance of a protection order is common.²²⁰ If the abuser has been prohibited from having contact with the victim, any future communication between the parties—even if the victim initiated it—can lead to a finding that he has violated the order and subject him to criminal penalties. As noted earlier, many women are reluctant to

is most severe, which would help to explain the greater likelihood of further abuse in such cases. The study does not clarify this point. See DALTON & SCHNEIDER, *supra* note 56, at 562.

²¹⁶ Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 156, at 214, 233.

²¹⁷ EVE BUZAWA ET AL., RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING: FINAL REPORT 147 (1999). *But see* David A. Ford & Mary Jean Regoli, *The Preventive Impacts of Policies for Prosecuting Wife Batterers*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, *supra* note 154, at 181, 200-03 (finding that women who cohabited with the abuser during the six months following prosecution were at heightened risk for additional violence).

²¹⁸ See DAVIES ET AL., *supra* note 74, at 50-52 (comparing the risks of staying and risks of leaving and showing that the former do not necessarily outweigh the latter); Coker, *supra* note 66, at 1017-20 (2000) (discussing the deleterious effects of separation on battered women, especially those who are poor).

²¹⁹ LAVIOLETTE & BARNETT, *supra* note 75, at 145; Mahoney, *supra* note 18, at 20-21; *see also supra* Part III (discussing the importance of intimate relationships to women).

²²⁰ See HARRELL ET AL., *supra* note 117, at 44 (differentiating between wanted and unwanted contacts and reporting that three months after issuance of a protection order, thirteen percent of women had chosen to reconcile with the abuser and fifteen percent had chosen to allow him to move back in); *see also* Baker, *supra* note 74, at 63-66 (describing battered women who chose to have contact with their partners in spite of protection orders).

impose criminal prosecution on their partners for a variety of financial, practical, and emotional reasons.²²¹ Indeed, for many women, one of the advantages of protection orders is that they are a civil remedy. However, once the order has been violated, criminal proceedings may come into play.²²² When a stay-away order is in place, criminal action against the abuser may be unleashed by contacts that the victim herself desires.

Although protection orders are intended to restrict the behavior of the abuser, some courts have penalized victims for engaging in conduct that violates the terms of the order. A Kentucky judge fined two women for contacting men who had been ordered to stay away from them.²²³ The Iowa Supreme Court has twice upheld contempt of court convictions against victims in cases involving similar facts.²²⁴ Thus, an order that was designed as a shield to protect the victim can end up being used as a sword to punish her.

Voluntary contact between the victim and abuser can also give rise to problems of underenforcement. A potential advantage of stay-away orders is that they create a “buffer zone” around the victim; the batterer can be arrested as soon as he approaches or contacts the victim, instead of having to wait until he actually abuses her. However, when the victim has precipitated the violation by reconciling or initiating contact with an abuser who is subject to a stay-away order, police, prosecutors, and judges may be unsympathetic to her and unwilling to take action, even if actual abuse has occurred.²²⁵

Most importantly, the prevalence of stay-away provisions deters many women from applying for civil protection orders and prevents many women who have gotten temporary orders from completing the process of receiving a final order.²²⁶ For women who are not ready to separate from an abusive partner, not getting a protection order may seem preferable to getting an order that prohibits ongoing contact. Currently, the majority of women who are eligible for protection orders

²²¹ See *supra* notes 132-34 and accompanying text.

²²² See *supra* Part IV.A.6 (discussing enforcement of protection orders).

²²³ Francis X. Clines, *Judge's Domestic Violence Ruling Creates an Outcry in Kentucky*, N.Y. TIMES, Jan. 8, 2002, at A14.

²²⁴ *Henley v. Iowa Dist. Court*, 533 N.W.2d 199 (Iowa 1995); *Hutcheson v. Iowa Dist. Court*, 480 N.W.2d 260 (Iowa 1992). But see *Supreme Court of Ohio v. Lucas*, 795 N.E.2d 642 (Ohio 2003) (holding that an individual who is protected by a protection order may not be prosecuted for aiding and abetting the respondent in violating the order).

²²⁵ See FINN & COLSON, *supra* note 118, at 53; Chaudhuri & Daly, *supra* note 154, at 249 n.15; Kinports & Fischer, *supra* note 117, at 225-26; cf. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 113, at 30 (recommending that states adopt the principle that only a judge may modify a court order and that the victim's invitation does not waive or nullify a stay-away order).

²²⁶ See *supra* note 150 and accompanying text.

do not obtain them.²²⁷ Those who do obtain them often wait until the violence has persisted for a long time and progressed to a severe level.²²⁸ Since a civil protection order is often the point of entry for a victim to gain access to a range of legal and non-legal assistance,²²⁹ this deterrent effect threatens to deprive women not only of protection orders but also of other valuable services and resources. Consistently allowing victims to choose whether or not a protection order will include stay-away provisions could encourage more women to come into contact with the legal system, and to do so sooner.

Giving victims the option of obtaining a protection order with or without stay-away provisions could have an additional pragmatic benefit. When battered women feel that the legal system has listened and responded to their preferences, they are more likely to turn to the law again, including for the purpose of reporting subsequent abuse.²³⁰ Thus, allowing the victim to select the type of order she prefers could increase her willingness to seek help through the legal process in the future.

V. OUT OF THE SHADOWS AND INTO THE SPOTLIGHT: EXPANDING THE ROLE OF CIVIL PROTECTION ORDERS PERMITTING ONGOING CONTACT

For a battered woman who does not want to separate from the abuser, a stay-away order may create more problems than it solves. The option of obtaining a protection order that authorizes an ongoing relationship between the parties but sets limits on the abuser's behavior provides a valuable alternative. However, this type of order is not consistently available in all jurisdictions. Not only do state statutes vary, but even in states whose statutes permit such orders, they are often denied on the basis of criteria that vary according to the county or the

²²⁷ TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES, *supra* note 15, at 52 (reporting that only seventeen percent of women who were physically assaulted by an intimate obtained a restraining order against the assailant after the most recent victimization).

²²⁸ HARRELL ET AL., *supra* note 117, at 54-57; KEILITZ ET AL., *supra* note 108, at 23; Fischer & Rose, *supra* note 150, at 416. For many women, a protection order is a last resort. Fischer & Rose, *supra* note 150, at 416; Horton et al., *supra* note 114, at 275.

²²⁹ See *supra* notes 140-42 and accompanying text (describing protection orders as a gateway to the legal system).

²³⁰ See Lauren Bennett Cattaneo & Lisa A. Goodman, *New Directions in Risk Assessment – An Empowerment Approach to Risk Management*, in INTIMATE PARTNER VIOLENCE, *supra* note 199, at 1-2, 1-7; Buzawa et al., *supra* note 217, at 152-53; Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1891-92 (2002); 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, 92 (2007).

individual judge.²³¹ Furthermore, protection orders permitting ongoing contact have attracted little public attention and almost no examination by scholars.²³² Given their potential to enhance battered women's safety and autonomy, limited protection orders deserve to be brought from the background to the forefront of domestic violence law.

This Part addresses both where the law is now and where it should be with respect to limited protection orders. First, it summarizes the results of a series of interviews with domestic violence attorneys about their experiences with and opinions of protection orders permitting ongoing contact between the parties. It then presents a proposal to make limited orders consistently available as an option for battered women, and addresses potential concerns such as risks to victims, enforcement, privacy, and resources.

A. *Attorneys' Views of Protection Orders Permitting Ongoing Contact*

In order to examine lawyers' current practices and attitudes concerning protection orders that permit an ongoing relationship between the parties, interviews were conducted with twenty-seven attorneys from fourteen states and the District of Columbia who have worked with domestic violence victims.²³³ The attorneys were asked about their experiences with protection orders that do not require the abuser to vacate the victim's residence, refrain from contacting the

²³¹ See *infra* Part V.A (discussing availability of orders permitting ongoing contact).

²³² In the voluminous legal literature on domestic violence, the use of orders permitting ongoing contact in order to benefit victims has garnered only a few sentences in a handful of publications. See, e.g., Coker, *supra* note 66, at 1019 (pointing out that judges are reluctant to grant protection orders without stay-away provisions because they view them as counterproductive); Klein & Orloff, *supra* note 108, at 1081-82, 1116-17 (recommending that when parties reconcile, protection orders should be able to be modified to remove stay-away provisions, and noting that protection orders that permit the parties to continue their relationship can be helpful to victims). See also Goodmark, *supra* note 66, at 21 (asserting that orders prohibiting further abuse while the parties live together merely duplicate existing criminal law); but see *supra* notes 135-37 and accompanying text (explaining that protection orders can prohibit acts that would not otherwise be illegal).

²³³ The author conducted the interviews in person, by e-mail and/or by telephone in 2005, 2006, and 2007. The interviews were informal, and the findings presented here are not intended to be comprehensive, generalizable, or statistically significant. Nevertheless, the attorneys' comments provide valuable anecdotal information about protection orders as seen through the eyes of those working on the front lines of domestic violence law. The attorneys were identified through the American Bar Association Commission on Domestic Violence Law Listserv and other professional contacts. They represent a range of geographical areas and practice settings, with the majority working in a legal aid program, battered women's advocacy organization, or law school clinic. In order to encourage the attorneys to speak frankly about their experiences with clients, judges, and others, this Article does not identify their names and locations. All interviews are on file with the author.

victim, and/or stay away from her.

The attorneys' descriptions of the availability of limited orders fell into three categories. Some attorneys indicated that such orders do not exist in their jurisdiction, either as the result of a statutory prohibition²³⁴ or because judges do not permit them. For example, one attorney reported that in her county, "We have strict no contact. An injunction gets entered or it doesn't." A second group of attorneys stated that protection orders allowing ongoing contact are issued in their jurisdiction, but only rarely. Some of these lawyers reported that judges grant limited orders solely or primarily under specific circumstances, such as when both parties consent to entry of the order, the parties work together, the ongoing contact is limited to communication regarding the couple's children, or the victim asks the court to vacate a previously issued stay-away order. Finally, a third group of attorneys said that limited orders are readily available in their jurisdiction.²³⁵

The attorneys' responses indicated that in some states, the availability of limited orders differs from county to county or from judge to judge, despite the fact that all courts within the state are governed by the same statutes. Many judges were described as having a negative attitude toward orders permitting ongoing contact. Some judges consider them ineffective and difficult to enforce. Other judges take the view that if the victim is willing to have ongoing contact with the abuser, she must not be afraid of him and therefore does not deserve a protection order.²³⁶ This perspective fails to recognize the complexity of domestic violence, the depth of women's commitment to their relationships, and the risk of separation assault.

Many of the lawyers said that orders permitting ongoing contact are helpful for cases where a domestic violence victim is not ready to end the relationship with her partner and therefore is unwilling to pursue a stay-away order. One attorney in a jurisdiction that generally permits limited orders reported, "When a client is very reluctant about getting an order, she is sometimes more willing if we can tailor it to fit her need for contact with the abuser. We can then enter an order allowing contact but preventing abuse. They can even live in the same house together." Another lawyer stated, "We have many clients who just want the abuse to stop, but can't or don't want to stop all communication or interaction with the batterer. . . . [These] clients like having the order

²³⁴ See N.J. STAT. ANN. § 2C:25-28.1 (West 2007).

²³⁵ Because the attorneys who were interviewed were not a statistically representative sample, it is not possible to determine the proportion of each of these three types of jurisdictions nationally. Further empirical research is needed to answer this and other questions about the current status of limited protection orders.

²³⁶ See Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733 (2003) (critiquing the widespread requirement that the victim must express fear of the abuser in order to receive a protection order).

without the no contact provision.” Attorneys told a number of “success stories” about obtaining limited orders that were apparently never violated.²³⁷ Meanwhile, some attorneys in jurisdictions that do not consistently permit limited orders expressed frustration at being unable to obtain such orders even when they would meet the client’s needs.

Other situations in which attorneys said that limited orders could be helpful include cases involving an elderly or disabled victim who requires daily care from the abuser, as well as cases of a victimized caregiver who wants to continue providing care for an abusive dependent.²³⁸ Abuse of the elderly and disabled by family members and others is a widespread and serious problem.²³⁹ In some cases, the victim is dependent on the abuser; in others, the situation is the opposite.²⁴⁰ In either event, the victim is typically unwilling to leave the abuser.²⁴¹ Thus, the victim’s situation resembles that of battered women who want to maintain an intimate relationship.

The lawyers pointed out many advantages of having access to orders permitting ongoing contact. One advantage they identified is the chance to empower the client by providing her with choices. This is particularly important, several attorneys said, because of the large number of clients who are not ready to end the relationship with the abuser and therefore do not want a full stay-away order. An order permitting ongoing contact “tells the victim that we are not just in the business of dissolving relationships,” one lawyer said. Several attorneys referred to their desire to offer their clients “flexibility” and “control.” One lawyer spoke of her commitment to “woman-defined advocacy,”²⁴² and several stressed the importance of promoting women’s autonomy. An attorney in a jurisdiction that is liberal in allowing orders that permit ongoing contact said that she views such

²³⁷ The attorneys concluded that the orders were not violated because they were not aware of any enforcement proceedings and were not recontacted by the victim. Additional empirical research would be helpful to determine the rate of compliance with limited orders and to compare that rate with the analogous statistic for stay-away orders. See *supra* note 215 and accompanying text (describing Massachusetts study’s finding of higher violation rates for no-contact orders than orders permitting contact).

²³⁸ Depending on the facts of the case and the applicable law, elderly or disabled victims may obtain protection orders under a state statute applicable to domestic violence and/or under one or more other statutes. See Bonnie Brandl & Tess Meur, *Domestic Abuse in Later Life*, 8 ELDER L. J. 297, 316, 323-35 (2000).

²³⁹ See, e.g., AM. ASSOC. OF RETIRED PERSONS, ABUSED ELDERS OR OLDER BATTERED WOMEN? (1993); Linda Vinton, *Violence Against Older Women*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 179 (Claire M. Renzetti et al. eds., 2001).

²⁴⁰ Lisae C. Jordan, *Elder Abuse and Domestic Violence: Overlapping Issues and Legal Remedies*, 15 AM. J. FAM. L. 147, 149 (2001).

²⁴¹ Silvia M. Straka & Lyse Montminy, *Responding to the Needs of Older Women Experiencing Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 251, 253, 258 (2006).

²⁴² For discussion of the methodology and goals of woman-defined advocacy, see *infra* Part V.B.4.

orders as one tool in her tool kit. “We should offer a full range of tools,” she said, “to meet the client where she is and help her move to the next step. If the only option I could offer was all or nothing, I would be ashamed.”

Some attorneys who had experience with orders permitting ongoing contact reported that the orders can help change the batterer’s behavior.²⁴³ One lawyer reported that “having to appear in court can result in a behavior adjustment for minor offenders.”²⁴⁴ According to another attorney, “it gives a little bit of the power back to her” and “says that [domestic violence] is not acceptable.” Another said that “it is a way to hold the batterer accountable for his actions. . . . [H]e is on notice that the next time he ‘loses control’ he will be arrested.” These comments are consistent with studies showing that battered women feel that protection orders are effective because they place the power of the law on the victim’s side and convey the message that abuse is unacceptable.²⁴⁵

In addition to the intrinsic benefits of orders permitting ongoing contact, a common theme among the lawyers interviewed was that such orders are better than nothing. For instance, when there is insufficient evidence to win a full stay-away order, an order permitting ongoing contact is a useful fallback measure. Similarly, if a victim has a stay-away order that she no longer wants to maintain, dropping the stay-away provisions and keeping the remainder of the order in effect offers more protection than vacating the order in its entirety.²⁴⁶ One lawyer pointed out that dropping the stay-away provisions instead of the whole order is less likely to leave the batterer feeling that he has “won” and is free to resume his abusive behavior. The remaining provisions of the order are still subject to enforcement.²⁴⁷ And for victims who would be unwilling to enter the legal system if stay-away orders were the only option, an order permitting ongoing contact—even if less than ideal—provides a crucial alternative. Otherwise, “she would never come to our door,” said a lawyer with a domestic violence clinic. “It helps to have

²⁴³ One lawyer who has obtained orders permitting ongoing contact said that such orders are “no more and no less effective than orders in general.”

²⁴⁴ Another attorney said, “She is making it public. She has the process, her lawyer, and the judge on her side. [That can lead him to] make changes in his conscious choice of behaviors.”

²⁴⁵ See *supra* Part IV.A.4 (discussing victim empowerment).

²⁴⁶ See FINN & COLSON, *supra* note 118, at 53 (stating that if a victim who has a stay-away order wants to resume living with her abuser, she should bring a modification action, and the judge should inform her that “the no-abuse provision can remain in force even though the eviction order is vacated”).

²⁴⁷ See *id.* (stating that if a victim modifies an order by dropping the eviction provision in order to permit cohabitation, police are willing to enforce the remaining no-abuse provision; they are less willing to enforce if the parties are living together in violation of an eviction order “because they feel [the victim] is abusing or violating the order”). For further discussion of enforcement, see *supra* Part IV.A.6; see also *infra* Part V.B.5.

her sit in our office for an hour and establish a relationship.”

A number of attorneys expressed the view that a protection order permitting ongoing contact is a “foot in the door,” not only with respect to putting the victim in touch with a lawyer and other resources, but also with respect to creating a limited sphere of protection that can later be expanded through the process of modification. In jurisdictions that grant orders allowing ongoing contact, lawyers reported that modifying the order to add stay-away provisions is permissible and is typically easier than obtaining an order in the first instance. Thus, the initial limited order gives the victim time to evaluate the situation and decide whether she wants more protection; if she does, it is generally not difficult to obtain additional court-ordered restrictions on the abuser’s conduct, including strict stay-away requirements.

However, attorneys who were interviewed also expressed concerns about orders permitting ongoing contact. Primary among these was the possibility that the order would give the victim a “false sense of security” and expose her to the risk of re-abuse. One attorney who has obtained limited orders said that “there are not too many cases where an order [permitting ongoing contact] is going to solve the problem.” A lawyer in a jurisdiction that does not permit such orders said that she has “grave concerns” about their effectiveness. Several lawyers described cases of a victim who had obtained a limited order, found that it did not stop the abuse, and modified the order to add stay-away provisions. Many lawyers said that they would discourage clients from obtaining a limited order if the abuse is severe. One attorney told of a client who got a protection order permitting her extremely violent partner to stay in the home because she thought it would placate him and be better for their child. He later beat her again, destroyed much of their household property, and kidnapped the child. The client then modified the order to add strict stay-away provisions.

At the same time, many of the attorneys—including some of the same ones who pointed out that limited orders may not offer sufficient protection—acknowledged that a large number of women are not willing to obtain full stay-away orders and that an order permitting ongoing contact can be a step in the right direction. One lawyer said that she used to think that orders permitting ongoing contact were “useless,” but she has recently reconsidered and concluded that they can be beneficial for women who do not want to leave their relationships, a group of victims for whom (in this lawyer’s words) “we do almost nothing.”

With regard to enforcement, attorneys reported both advantages and disadvantages of orders permitting ongoing contact in comparison to stay-away orders. Many attorneys said that when an order does not completely prohibit an abuser from contacting the victim or being in a

specified location, it is difficult to get the police to take action in the event of a violation, particularly if there is no physical injury, property damage, or other concrete evidence of abuse. On the other hand, an attorney in a jurisdiction that frequently grants limited orders reported that she knows of cases where abusers have successfully been held in contempt for violating them. Furthermore, several attorneys pointed out that an order permitting ongoing contact avoids the problems that face a victim seeking enforcement of a stay-away order after she has initiated or welcomed contact with the abuser.²⁴⁸ Attorneys gave many examples of ways in which women can be penalized for contacting an abuser who is subject to a stay-away order. Examples included women who were charged as accessories for “enticing” the abuser to violate the order; the possibility that voluntary contact by the victim during the pendency of a temporary stay-away order could hurt her credibility at the hearing on the final order; and the prospect that such contact could be considered as a mitigating factor when sentencing the abuser on a criminal charge. One attorney reported that in her jurisdiction, when a victim contacts an abuser who is on probation and subject to a stay-away order, the probation officer sometimes advises the abuser to seek a protection order against the victim on the grounds that she is stalking or harassing him.

One attorney said that victims themselves are reluctant to enforce orders permitting ongoing contact, while another took the opposite view that a victim who has been granted a limited order at her request will feel empowered and therefore be more likely to pursue enforcement proceedings than one forced to accept a stay-away order that does not reflect her wishes.²⁴⁹ The latter attorney also said that women with stay-away orders who have consensual contact with the abuser tend to blame themselves for any subsequent abuse and therefore are reluctant to take action in response to violations; this problem does not arise if the order permits ongoing contact.²⁵⁰

Some of the lawyers’ comments recognized that enforcement of any protection order can be a challenge. For example, one lawyer said, “I have heard from law enforcement that [orders permitting ongoing contact] are difficult to enforce, but they say that about everything.” Another said that “in general, protective orders are only as good as the police officers who are willing to enforce them.” Several lawyers

²⁴⁸ See *supra* note 225 and accompanying text (discussing enforcement of stay-away orders).

²⁴⁹ See *supra* note 230 and accompanying text (stating that battered women who feel that the legal system has met their needs are more likely to turn to the legal system again in the event of subsequent abuse).

²⁵⁰ See Chaudhuri & Daly, *supra* note 154, at 237 (reporting that women thought they were no longer entitled to have a stay-away order enforced if they voluntarily allowed the abuser back into their home).

observed that if domestic violence occurs, it is easier to hold the abuser legally accountable if there is an order permitting ongoing contact than if there is no order at all; these lawyers pointed out that police are more likely to arrest if there is an order in effect, and that the violation of the order can be added to other criminal charges against the defendant. In addition, contempt of court remedies are available only if there is a protection order.

An additional concern was that judges overuse orders permitting ongoing contact and deny restrictive provisions requested by the victim. For example, some judges were said to be reluctant to evict batterers from the home out of concern for their property rights. The concern about judicial overuse of limited orders is the mirror image of the frustration expressed by some lawyers that limited orders were not available to clients who would benefit from them. In both situations, judges are failing to provide women with orders that meet their needs. One of the most common situations where lawyers said that judges were permitting more contact than the victim desired was in provisions allowing the parties to communicate regarding their children. Several attorneys reported that such provisions are often vague and pave the way for continued harassment on the telephone and in person.²⁵¹ They recommended that at a victim's request, judges should place specific limitations on the form and content of contact about the children in order to reduce opportunities for abuse.²⁵²

In summary, few of the attorneys who were interviewed made comments about limited orders that were purely positive or purely negative. Most were cognizant that such orders have both risks and benefits. No lawyer said that orders permitting ongoing contact are appropriate for every case, but almost all of them said that they can be useful in some cases. These attitudes were fairly consistent among lawyers in all three types of jurisdictions.²⁵³ Because of the hazards presented by ongoing contact between a victim and abuser,²⁵⁴ several lawyers stressed the importance of providing clients with a full array of protections, including access to a battered women's advocate, risk assessment, safety planning, and effective responses from police and other agencies. These additional protections can help ensure that the potential advantages of limited orders are achieved while their dangers are minimized. Finally, several lawyers said that the issue of limited

²⁵¹ As two attorneys pointed out, harassment in connection with visitation is widespread even when a stay-away order is in place. See *supra* notes 208-11 and accompanying text.

²⁵² In general, specificity is essential to the effectiveness of protection orders. See *supra* notes 127-29 and accompanying text (discussing the need to individualize protection orders).

²⁵³ See *supra* notes 234-35 and accompanying text (describing three categories of jurisdictions).

²⁵⁴ Of course, terminating contact between a victim and abuser also presents hazards. See *supra* notes 212-17 and accompanying text (discussing separation assault).

protection orders deserves more attention than it has received. One said that it is time to “break the taboo” on the subject.

B. *A Proposal to Increase Battered Women’s Options By Consistently Offering Civil Protection Orders That Do Not Terminate the Parties’ Relationship*

Currently, a battered woman may be forced to choose between continuing a relationship and obtaining a civil protection order.²⁵⁵ This situation undermines the woman’s autonomy by disregarding the fact that she may prefer to maintain the relationship and enlist the law’s help to end the violence.²⁵⁶ It also undermines her safety, because given a choice between a stay-away order and no protection order at all, many battered women will choose the latter and forego the many benefits that an order provides.²⁵⁷ Conversely, the victim may obtain a stay-away order that she does not really want and be left worse off than before.²⁵⁸ For the advancement of women’s autonomy and safety, limited civil protection orders should be available in all jurisdictions as a mechanism for prohibiting abuse in an ongoing relationship.²⁵⁹ Such orders should be offered in addition to, not instead of, conventional stay-away orders.

Protection orders permitting ongoing contact, like stay-away orders, are not appropriate for all cases. The goal of making limited orders more consistently available than they are today is to give battered women more options from which to choose. Because limited orders are currently granted in a relatively small number of cases and empirical research on them is scarce, this proposal is necessarily preliminary. As limited orders become more widely attainable and are used more frequently, further research will be needed to assess their strengths and weaknesses, identify the conditions under which they are most effective, and determine whether further refinements are necessary.

²⁵⁵ See *supra* notes 203-54 and accompanying text (discussing stay-away orders and attorneys’ comments on limited orders).

²⁵⁶ See *supra* Part III.

²⁵⁷ See *supra* notes 101-78 and accompanying text (describing the advantages of protection orders).

²⁵⁸ See *supra* notes 208-25 and accompanying text (discussing the disadvantages of stay-away orders).

²⁵⁹ For purposes of the present discussion, it is assumed that the battered woman has met the prerequisites to be eligible for a protection order under the relevant law. The focus of this discussion is on the relief provided in the order—specifically, whether a battered woman should be able to receive a protection order that lacks full stay-away provisions.

1. Creating Effective Limited Protection Orders

To operate effectively, an order permitting ongoing contact must specify the restrictions on the abuser's future conduct. Each order should be custom-tailored to express the victim's preferences regarding the parties' future interactions. Protection orders are designed to permit just this type of customization.²⁶⁰

Even though a limited protection order does not include the full range of restrictions characteristic of a typical stay-away order, the victim should, if she chooses, be able to place limits on the amount and type of contact that will be permitted. For example, a limited order might indicate that the abuser may approach the victim in public but not at home, or that he may contact her by telephone but not in person. Alternatively, the order could prohibit future abusive conduct,²⁶¹ but place no limitations whatsoever on contact. Thus, a limited protection order may set broad or narrow constraints on the abuser's actions,²⁶² as well as awarding other relief such as child custody, financial support, and restrictions on weapon possession. Whatever its exact terms, the distinguishing characteristic of a limited protection order is that, unlike a full stay-away order, it does not completely sever the relationship between the parties. As the batterer's behavior or the victim's needs change, the victim should have the opportunity to modify the order by adding, deleting, or altering provisions restricting contact between the parties, or even by converting the limited order into a full stay-away order if the victim wishes.²⁶³

The order must also list the types of abusive behavior that are forbidden. In many instances, when batterers stop physically assaulting their partners, their reliance on non-physical abuse begins or increases.²⁶⁴ Therefore, in addition to prohibiting physical assault, it is essential that protection orders also prohibit stalking, harassment,

²⁶⁰ See *supra* note 127 and accompanying text.

²⁶¹ For further discussion of prohibitions on abusive conduct, see *infra* notes 264-68 and accompanying text.

²⁶² To the extent that a limited order can include some restrictions on contact, limited orders and stay-away orders can be seen as points along a continuum rather than entirely distinct phenomena.

²⁶³ See *supra* Part V.A (discussing attorneys' comments regarding modification of limited orders); see also FINN & COLSON, *supra* note 118, at 53 (recommending adoption of simplified modification procedures). In order to be most fully informed, the decision to modify a limited order, like the decision to obtain one, should be accompanied by risk assessment, safety planning, and client counseling. See *infra* Part V.B.3, 4.

²⁶⁴ Several studies show that after a protection order is issued, psychological abuse is more common than physical abuse. HARRELL ET AL., *supra* note 117, at 50; KEILITZ ET AL., *supra* note 108, at 38-39; PTACEK, *supra* note 22, at 163-64; Grau et al., *supra* note 147, at 22-23; Holt et al., *Civil Protection Orders and Risk*, *supra* note 151, at 593.

threats, damage to property and pets, and other forms of psychological abuse.²⁶⁵ Some states, but not all, already permit protection orders to include provisions forbidding psychologically harmful conduct, either under a specific statute or through the exercise of the court's power to order any necessary relief.²⁶⁶ For example, Delaware's statute permits a protective order to enjoin the respondent from "engaging in a course of alarming or distressing conduct in a manner which is likely to cause fear or emotional distress."²⁶⁷ All jurisdictions should make provisions prohibiting psychological abuse available in protection orders. Orders prohibiting non-physical abuse have been upheld against constitutional challenges.²⁶⁸

In keeping with the goal of promoting women's autonomy, limited protection orders should be granted only at the victim's request. Many jurisdictions have statutes or case law giving judges broad discretion to craft the relief granted in protection orders.²⁶⁹ When exercising their discretion, judges should consider the importance of both the victim's safety and her autonomy. Currently, some judges who are sympathetic to battered women are reluctant to issue limited protection orders because they fear that such orders do not offer sufficient protection against future abuse.²⁷⁰ Yet depending on the circumstances, an order permitting ongoing contact may be the safest option. A judge who is concerned that a woman's decision to seek a limited order might be ill-advised can request additional facts or refer the victim to other resources, such as a lay advocate or pro bono counsel, to ensure that she

²⁶⁵ See generally Klein & Orloff, *supra* note 108, at 914-18 (giving examples of numerous types of abuse that can be prohibited in protection orders).

²⁶⁶ See *id.* at 910-18 (citing statutes and cases); Joy M. Bingham, Note, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 N.D. L. REV. 837, 838-40 (2005) (citing statutes).

²⁶⁷ DEL. CODE ANN. tit. 10, § 1041 (2007); see also, e.g., 750 ILL. COMP. STAT. 60/103, 60/214 (2007) (permitting an order of protection to prohibit harassment and interference with personal liberty; defining "harassment" as conduct that is not necessary to accomplish a reasonable purpose, that would cause a reasonable person emotional distress, and that does cause emotional distress to the petitioner; and defining "interference with personal liberty" as "committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage"); N.J. STAT. ANN. §§ 2C:25-19(a), 2C:25-29(b)(1), 2C:33-4 (West 2007) (permitting restraining orders to prohibit harassment and defining "harassment" to include "any . . . course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy" another person).

²⁶⁸ Klein & Orloff, *supra* note 108, at 906-08, 917-18 (citing cases); see also Laurie S. Kohn, *Why Doesn't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1 (2001) (arguing that certain restrictions on speech imposed in protection orders should be found constitutional).

²⁶⁹ Klein & Orloff, *supra* note 108, at 910-14.

²⁷⁰ See Coker, *supra* note 66, at 1019; see also Kuennen, *supra* note 230, at 75-76 (stating that judicial decision-making in protection order proceedings is often skewed toward providing more, rather than less, protection in order to avoid the risk of negative publicity).

has engaged in a careful decision-making process.²⁷¹ Denying battered women the opportunity to exercise their autonomy not only is harmful to the individual victims involved but also deters other women from entering the legal system.²⁷² Just as judges should not routinely deny requests for limited orders, they also should not impose limited orders on victims who ask for and qualify for a full stay-away order. Unfortunately, both of these practices occur in courtrooms today.²⁷³

To encourage women who do not want to separate from their partners to consider seeking a protection order, it will be necessary to publicize the availability of orders permitting ongoing contact. At present, even in jurisdictions where limited orders are available, many battered women do not know that they exist.²⁷⁴ A battered woman who is unwilling to end her relationship may hear about other victims who have obtained full stay-away orders and assume that such orders are the only option.²⁷⁵ Police in many jurisdictions are required to inform battered women of the availability of protection orders.²⁷⁶ In order to counteract the popular view that protection orders are synonymous with stay-away orders, police should specifically inform victims that their jurisdiction allows orders permitting ongoing contact.

2. The Potential Benefits of Limited Protection Orders

Limited protection orders can be a powerful weapon in the fight against domestic violence. By giving battered women an alternative to stay-away orders, they are likely to encourage more women to enter the legal system sooner, providing access to both legal and non-legal assistance. Furthermore, even without full stay-away provisions, protection orders can be a catalyst for significant changes on the part of

²⁷¹ For discussion of case evaluation and client counseling issues, including risk assessment and safety planning, see *infra* Part V.B.3, 4.

²⁷² See *supra* notes 226-29 and accompanying text (describing the deterrent effect of a system that offers only stay-away orders). See also generally Kuennen, *supra* note 230 (recommending that judges defer to battered women's requests to vacate protection orders, in part because failing to do so deters other women from obtaining orders).

²⁷³ See *supra* note 117.

²⁷⁴ Two attorneys interviewed for this article said that clients are poorly informed about the availability of orders permitting differing levels of contact between the parties. See also Logan et al., *supra* note 154, at 902 (stating that women may not be aware that their jurisdiction permits "no violent contact orders" as well as "no contact orders" and that this lack of information operates as a barrier to seeking a protection order).

²⁷⁵ Information about the legal system's response to domestic violence often travels along a community "grapevine" among battered women; such information is frequently incomplete. See Epstein, *supra* note 39, at 36 (stating that stories about encounters with the legal system spread informally among battered women).

²⁷⁶ FINN & COLSON, *supra* note 118, at 60; Lisa G. Lerman, *Statute, A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 125-26 (1984).

the abuser, the victim, and society as a whole.

Protection orders operate on several levels. Their expressive power should not be underestimated. Many women report that one of the main benefits of protection orders is the message they communicate that the abuser's behavior is illegal and unacceptable.²⁷⁷ This message can have a major impact on both the victim and the abuser.²⁷⁸ Battered women frequently feel shame and guilt for their abuse; a protection order explicitly shifts the blame to the abuser.²⁷⁹ Unlike a statute prohibiting domestic violence, a protection order consists of a judge directly ordering a specific individual not to engage in certain conduct.²⁸⁰ This direct confrontation with a powerful authority figure can have a potent effect,²⁸¹ especially if the judge's words and attitude at the hearing reinforce the order's message that domestic violence will not be tolerated.²⁸² Evidence that protection orders can cause abusers to change their behavior is provided by empirical studies showing that a substantial number of orders are not violated²⁸³ and that many women never return to court for a final protection order because the temporary order brought an end to the abuse.²⁸⁴

In addition to their effect on victims and perpetrators, protection orders can also have an impact on society as a whole. Law has enormous capacity to change social norms.²⁸⁵ Public acceptance of domestic violence has declined dramatically in recent years, due in part to the enactment of laws prohibiting behavior that was once widely

²⁷⁷ See *supra* Part IV.A.4.

²⁷⁸ See PTACEK, *supra* note 22, at 165 (quoting a battered woman who said that by obtaining a protection order, "I proved something to him and proved something to myself"); SCHECHTER, *supra* note 30, at 317 ("[Protection orders] tell women that their pain is taken seriously and they tell men their behavior is wrong, that violence must cease, and that women are the aggrieved party, not the criminals.").

²⁷⁹ See Herman, *supra* note 201 (describing the psychological benefits of using legal proceedings to shift blame to the offender, hold him publicly accountable, relieve the victim of shame, and reintegrate her with the community).

²⁸⁰ The conduct that is prohibited in a protection order can include acts that go beyond the prohibitions of criminal law, such as psychological abuse. See *supra* note 137 and accompanying text (comparing protection orders to criminal prosecution); see also *supra* notes 265-68 and accompanying text (discussing inclusion of psychological abuse in protection orders).

²⁸¹ Carlson et al., *supra* note 211, at 206; Lerman, *supra* note 276, at 96.

²⁸² FINN & COLSON, *supra* note 118, at 52-53; PTACEK, *supra* note 22, at 92-111, 150-61, 172-76.

²⁸³ See *supra* Part IV.A.2 (discussing empirical studies of batterer compliance).

²⁸⁴ See HARRELL ET AL., *supra* note 117, at 31; KEILITZ ET AL., *supra* note 108, at 47; Murphy, *supra* note 122, at 513. Abusers are not all equally amenable to altering their behavior to conform to a protection order; therefore, risk assessment and safety planning are important components of the process of obtaining an order. See *infra* Part V.B.3.

²⁸⁵ See, e.g., SCHNEIDER, *supra* note 27, at 38 ("Law affects public consciousness in many ways. It reflects the process of social change in society, as litigants, lawyers, advocates, judges, and jurors respond to new social currents within the larger society, but it also shapes those currents."); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

viewed as normal and acceptable.²⁸⁶ Stay-away orders convey the message that women have a right to leave violent relationships, but they do not convey the related but distinct message that women have a right to remain in relationships and demand that they become non-violent.²⁸⁷ Making limited protection orders widely available would make a powerful statement to that effect, with the potential to change public attitudes.

Contrary to the usual expectation that battering will inevitably escalate in severity and frequency over time, it is possible for a battered woman to stay in a relationship and for the abuse to stop.²⁸⁸ A study of women in violent relationships showed that approximately twenty-five percent of the women were in the same relationship two years later but reported that they were no longer being beaten or otherwise abused.²⁸⁹ In another study, a researcher examined one thousand cases of battered women who successfully put an end to domestic violence, many of whom remained with their partners.²⁹⁰ He found that seeking legal intervention was among the factors that women identified most frequently as helping to stop the abuse.²⁹¹ The legal intervention was effective in large part because it carried the threat of future negative consequences for the batterer.²⁹² Thirty percent of the women who were interviewed for this study said that the batterer stopped the abuse because he was afraid of divorce; twenty percent said that he stopped because he did not want to be arrested or charged with a crime.²⁹³ Thus, limited protection orders, which carry the threat of arrest and

²⁸⁶ See Katherine Triantafyllou, *Massachusetts: New Legislation to Help Battered Women*, 27 JUDGES' J. 20, 22 (1988) (describing the enactment of protection order laws as a form of public education).

²⁸⁷ See SUSAN SCHECHTER, EXPANDING SOLUTIONS FOR DOMESTIC VIOLENCE AND POVERTY: WHAT BATTERED WOMEN WITH ABUSED CHILDREN NEED FROM THEIR ADVOCATES 7 (2000) ("Advocates have always said that women have the right to be in safe and respectful relationships. The domestic violence movement's historic goal has been to end violence and coercion, not to have women leave their relationships."), quoted in Goodmark, *supra* note 66, at 20; Littleton, *supra* note 74, at 52 ("What would legal doctrine and practice look like if it took seriously a mandate to make women safer in relationships, instead of offering separation as the only remedy for violence against women?") (emphasis deleted).

²⁸⁸ See Campbell et al., *supra* note 72, at 107-08.

²⁸⁹ *Id.* at 105, 108; see also DUTTON, *supra* note 23, at 44 (reporting results of studies showing rates of recurrence of violence after battered women returned to their partners following a stay at a shelter; according to the study with the longest follow-up period, over forty percent of women experienced no violence within six months); Etiony Aldorando, *Cessation and Persistence of Wife Assault: A Longitudinal Analysis*, 66 AM. J. ORTHOPSYCHIATRY 141 (1996) (reporting results of a three-year study showing that over one-third of men who were physically violent to their partners during the first year ceased the violence for the next two years and also showed significant reductions in their use of psychological aggression).

²⁹⁰ LEE H. BOWKER, ENDING THE VIOLENCE (1986). One hundred forty-six of the women in the study were interviewed; the remainder filled out written questionnaires. *Id.* at iii.

²⁹¹ *Id.* at 51-53, 61-64. See also BOWKER, *supra* note 28, at 66-67, 103, 123-24.

²⁹² BOWKER, *supra* note 28, at 64-67.

²⁹³ *Id.* at 123-24.

prosecution for a violation and the possibility of modification to add stay-away provisions ending the relationship, can play a constructive role in the process of ending violence without ending the relationship. In short, not all batterers are intractable, and legal intervention can help bring an end to abuse.

As noted earlier, domestic violence is both a cause and effect of unequal power distribution between the partners.²⁹⁴ By placing the strength of the law on the side of the victim, a protection order provides her with a “bargaining chip” that bolsters her relative power in the relationship.²⁹⁵ A study of domestic violence prosecution policies showed that when the victim is granted the right to determine whether the abuser is subjected to legal sanctions, she gains bargaining leverage that she can use to extract concessions from the abuser, with a resulting improvement in her level of safety.²⁹⁶ Likewise, if a victim were to obtain a limited protection order, she would be the prime mover in obtaining the order and dictating its terms, reporting any violations, and modifying the order to add or remove stay-away provisions. This could confer on her a significant measure of control over her partner, thereby shifting the balance of power in her favor.

These studies suggest that obtaining a protection order can add to a woman’s power in the relationship and help her bring an end to abuse. However, it is also possible that some batterers may react to this perceived loss of power by escalating the violence.²⁹⁷ Thus, the same action—obtaining a protection order—might increase one woman’s safety and increase another woman’s danger.²⁹⁸ The difference will

²⁹⁴ See *supra* notes 30-36 and accompanying text. See also BOWKER, *supra* note 28, at 8-9 (describing research showing that men who use violence gain power over their wives); David A. Ford, *Prosecution As a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOC’Y REV. 313, 317-18 (1991) (stating that violence is a “power resource” that abusers employ to dominate their partners).

²⁹⁵ See, e.g., BOWKER, *supra* note 290, at 98; PTACEK, *supra* note 22, at 164-66, 171.

²⁹⁶ See David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT 127, 142, 156-57 (N. Zoe Hilton ed., 1993) (finding that women who have the choice of whether to drop criminal charges against the abuser, and do not do so, are least likely to be revictimized, in part because their control over the prosecution gives them bargaining leverage over the abuser); see also FAGAN, *supra* note 104, at 17-18 (describing the “Sword of Damocles” effect created by giving the victim the power to hold the threat of legal sanctions over the abuser’s head). Some commentators have emphasized the risks, rather than the benefits, of giving victims control over legal sanctions. See, e.g., Hanna, *supra* note 39 (arguing that when battered women control the decision whether to prosecute, batterers may use violence and intimidation to compel victims to drop charges).

²⁹⁷ See *supra* note 33 and accompanying text; see also Mahoney, *supra* note 30, at 79 (describing separation assault as a reaction to the batterer’s perception that his control is eroding); Mahoney, *supra* note 18, at 56-57 (stating that “factors that increase the woman’s independence and autonomy might make additional control moves [by the batterer], including violence, more likely”).

²⁹⁸ Cf. Mahoney, *supra* note 18, at 58 (“The same behavior—threatening to leave the

depend on the man with whom each woman is involved and on the totality of each woman's circumstances.²⁹⁹ For that reason, case evaluation, risk assessment, and safety planning are all important components of the process of seeking a limited protection order.

3. Minimizing Risks of Re-Abuse: The Need for Case Evaluation, Risk Assessment, and Safety Planning

As noted earlier, limited protection orders are not appropriate for all cases. By definition, limited orders allow a continuation of interactions between the parties. With these interactions come risks. Physical proximity presents opportunities for physical violence, while other forms of contact can be exploited for purposes of intimidation, coercion, and psychological mistreatment. Thus, in comparison to a full stay-away order that is obeyed by the batterer, a limited order leaves the victim more exposed to possible future victimization. This concern must be balanced against the reality that for many women, the alternative to a limited order is not a full stay-away order with perfect compliance. Rather, as previously discussed, the alternative may be no protection order, or a stay-away order that triggers retaliatory separation assault or other negative consequences, or a stay-away order that the victim herself disregards at her peril.³⁰⁰ Taking these alternatives into account, a limited order may in fact be the safest course of action for some women. By offering limited protection orders as well as stay-away orders, the legal system can enable individual women to obtain the type of order that is most likely to help them.

The risks of re-abuse can be minimized by using limited orders in cases where they are most likely to be effective. Violent relationships are not all the same. Although domestic violence is always wrong,³⁰¹ it is not always severe. Most physical assaults by intimate partners consist of hitting, pushing, slapping and other relatively minor uses of force, and more than half do not result in physical injury.³⁰² The

relationship—might prove extremely effective or tremendously dangerous for women.”).

²⁹⁹ See *id.*

³⁰⁰ See *supra* notes 208-29 and accompanying text (discussing disadvantages of stay-away orders).

³⁰¹ Acts committed in self-defense are, of course, an exception to the rule that domestic violence is always wrong. See, e.g., ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

³⁰² TJADEN & THOENNES, FULL REPORT, *supra* note 17, at 27-28; TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES, *supra* note 15, at 10-11, 46. One scholar has argued that the majority of domestic violence is “situational couple violence,” which is rooted in a specific conflict and is relatively minor and sporadic, and a minority is “intimate terrorism,” which is committed in the service of total control and is more likely to be frequent and brutal.

meaning of these statistics is not that minor violence is unimportant; on the contrary, pushing or hitting can cause serious injuries,³⁰³ and seemingly insignificant acts of abuse can contribute to an abuser's coercive control over the victim.³⁰⁴ The salient point is that a battered woman is not necessarily at risk for severe physical violence if she remains in her relationship with the abuser.³⁰⁵ Indeed, depending on the circumstances, leaving may be far more dangerous.³⁰⁶

A careful process of case evaluation can assist in determining whether a limited order is a suitable choice for a particular battered woman. A useful starting point is provided by research that has begun to identify characteristics of batterers who are most likely to violate protection orders. As described above, unmarried young men, men with records of crime and substance abuse, and unemployed men all appear to have an elevated probability of violating an order.³⁰⁷ Non-compliance has also been shown to be more common among abusers who strongly resist the issuance of the order.³⁰⁸ Additionally, the type and severity of abuse in the year preceding the order has been found to predict the type and severity of abuse in the year after the order was issued.³⁰⁹ These findings can provide helpful guidance to battered women and those who work with them as they consider whether to obtain a limited protection order.

One implication of these findings is that even in the absence of effective enforcement practices, married, employed men without criminal records are comparatively likely to obey a protection order, including (and perhaps especially) one that lacks stay-away provisions.³¹⁰ However, the partners of these men rarely obtain protection orders against them.³¹¹ For women in this group who do not want to end their relationships, an order permitting ongoing contact could be a worthwhile choice.

Aside from data on compliance with protection orders, researchers

Michael P. Johnson, *Domestic Violence: It's Not About Gender—Or Is It?*, 67 J. MARRIAGE & FAM. 1126 (2005); Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283 (1995).

³⁰³ TJADEN & THOENNES, FULL REPORT, *supra* note 17, at 27.

³⁰⁴ STARK, *supra* note 23, at 56-57, 94-95.

³⁰⁵ Physical injury is not the only important parameter in judging the severity of domestic violence or assessing future risk. See generally STARK, *supra* note 23 (emphasizing coercive control); *infra* notes 312-19 and accompanying text (discussing risk assessment).

³⁰⁶ See *supra* notes 212-17 and accompanying text (discussing separation assault).

³⁰⁷ See *supra* notes 160-66 and accompanying text.

³⁰⁸ See *supra* note 168 and accompanying text.

³⁰⁹ See *supra* note 167 and accompanying text.

³¹⁰ See Klein, *supra* note 156, at 202; see also *supra* note 215 and accompanying text (discussing finding that orders prohibiting contact were more likely to be violated than orders permitting contact, particularly among batterers with no prior criminal record).

³¹¹ See Klein, *supra* note 156, at 202-04.

have developed other methods of assessing the risk that a batterer will engage in a repetition or escalation of domestic violence. Criteria that have been identified as risk factors for future severe violence include access to weapons, threats of homicide or suicide, previous severity of domestic violence, incidents of forced sex, level of jealousy and domination, and drug or alcohol abuse.³¹² In addition, some experts have identified “protective factors” that tend to diminish the likelihood of future violent behavior, including the batterer’s community reputation, steady employment, stability of relationships and living situation, personal honor, and support systems of family and friends.³¹³ Researchers have compiled these criteria into several different standardized instruments, typically taking the form of a checklist or questionnaire to be filled out with information provided by the victim, for the purpose of assessing the batterer’s potential to commit homicide or other violence.³¹⁴ One of the most commonly used risk assessment instruments is the Danger Assessment Scale,³¹⁵ which consists of a question about the frequency and severity of domestic violence committed during the past year, followed by a list of twenty yes-or-no questions about the batterer, the victim, and the abusive relationship.³¹⁶ The Danger Assessment Scale has performed well on tests for reliability, validity, and predictive value.³¹⁷ Risk assessment instruments are already in use in some courts in connection with criminal sentencing and other legal proceedings.³¹⁸ Although further research is needed to test and improve these risk assessment instruments,³¹⁹ they provide a practical tool for helping to determine which cases present the greatest risk of future violence.

³¹² Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in *ASSESSING DANGEROUSNESS* 96, 111 (Jacquelyn C. Campbell ed., 1995).

³¹³ See Jan Roehl & Kristin Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, 21 *JUST. SYS. J.* 171, 175 (2000).

³¹⁴ See Lisa A. Goodman et al., *Predicting Repeat Abuse Among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System*, 15 *J. INTERPERSONAL VIOLENCE* 63, 65 (2000); Roehl & Guertin, *supra* note 313, at 178-83 (listing and describing risk assessment instruments).

³¹⁵ See Goodman et al., *supra* note 314, at 65.

³¹⁶ Jacquelyn C. Campbell, *Danger Assessment*, <http://www.dangerassessment.org> (last visited Mar. 8, 2008).

³¹⁷ See Goodman et al., *supra* note 314; *Psychometric Data: Danger Assessment*, <http://www.dangerassessment.org> (2005). Although the Danger Assessment Scale was originally developed to assess the risk of homicide by batterers, it may also be useful in predicting the risk of future domestic violence generally. Goodman et al., *supra* note 314, at 65.

³¹⁸ Roehl & Guertin, *supra* note 313, at 176-78, 186-89. Compare Hanna, *supra* note 51, at 1573 (recommending the development of a reliable risk assessment instrument to assist in screening of criminal cases), with Epstein, *supra* note 230, at 1896 (objecting to the use of risk assessment instruments in criminal proceedings and stating that they should be used only to help victims predict whether violence will recur and plan for their safety).

³¹⁹ See generally Cattaneo & Goodman, *supra* note 230, at 1-8 to 1-9; Roehl & Guertin, *supra* note 313.

Battered women's lawyers and other advocates can and should combine the use of these standardized instruments with attention to the individual woman's specific situation, including risks generated by her batterer and by other aspects of her life such as poverty and discrimination.³²⁰ Researchers have concluded that the most accurate results can be obtained by combining knowledge gained from formal risk-assessment instruments with the victim's own insights into the risks she faces.³²¹ Although battered women sometimes deny or understate the violence they have experienced,³²² empirical research shows that women are actually very accurate in predicting future violence.³²³ One advantage of formal risk assessment instruments is that if the results indicate a high likelihood of future severe violence, they can be discussed with the victim to counteract any tendency on her part to underestimate the danger posed by the batterer.³²⁴

A high probability that the order will be violated or that future violence will occur does not necessarily mean that the victim should not obtain a limited order, nor does a low probability mean that she should. Decisions of this kind can only be made based on the totality of the circumstances. However, these factors are important to consider when deciding what legal intervention to seek (if any), as well as what other steps the victim will take to protect her safety.³²⁵

There is no guarantee that violence will not recur after the issuance of a protection order. Therefore, a protection order alone, whether or not it contains stay-away provisions, should not be considered sufficient to ensure the victim's safety. Experts recommend that battered women incorporate their protection order into a comprehensive safety plan.³²⁶ Many battered women begin to engage in safety planning even before they become involved with the legal system.³²⁷ A safety plan³²⁸

³²⁰ See DAVIES ET AL., *supra* note 74, at 21-72.

³²¹ See Arlene N. Weisz et al., *Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions*, 15 J. INTERPERSONAL VIOLENCE 75, 86-87 (2000).

³²² See, e.g., Buel, *supra* note 69, at 999-1000; Weisz et al., *supra* note 321, at 76, 87.

³²³ Cattaneo & Goodman, *supra* note 230, at 1-11 to 1-12; Weisz et al., *supra* note 321, at 81-82; see also Barbara Hart, *Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 57, at 234, 240 (stating that "battered women are usually the best evaluators of the potential for lethal violence because they generally have more information about the batterer than anyone other than the batterer himself"); Mahoney, *supra* note 18, at 58-59 (explaining that the victim is the "closest observer" and "best judge" of the batterer's actions).

³²⁴ See Cattaneo & Goodman, *supra* note 230, at 1-10; Weisz et al., *supra* note 321, at 87.

³²⁵ See Cattaneo & Goodman, *supra* note 230 (describing risk assessment as part of a process of empowering the battered woman to manage risk); Goodman et al., *supra* note 314, at 71 (discussing the use of formal risk assessment as a tool in safety planning).

³²⁶ HARRELL ET AL., *supra* note 117, at 58; KEILITZ ET AL., *supra* note 108, at 44.

³²⁷ DAVIES ET AL., *supra* note 74, at 73.

³²⁸ The National Council of Juvenile and Family Court Judges has defined a safety plan as "a written or oral outline of actions to be taken by a victim of domestic or family violence to secure

requires the victim to identify the options and resources that are available to her and make concrete plans for how she will protect herself and her children in a variety of settings and under a variety of circumstances.³²⁹ A safety plan may include measures such as keeping a bag packed in case it is necessary to flee, keeping extra copies of important documents in a safe place, and planning an escape route.³³⁰ Safety plans are necessary for women who stay in an abusive relationship as well as for those who leave.³³¹ While no amount of planning can eliminate the possibility of future violence, a well-crafted safety plan can reduce the chances that a woman will be re-abused, as well as helping her to evaluate her entire situation more clearly.³³²

4. Client Counseling and Women's Autonomy

Ultimately, the decision of whether to seek a limited protection order must rest with the battered woman herself. For lawyers who represent battered women, placing the client at the center of this decision is consistent with the goal of advancing battered women's autonomy. It is also consistent with the lawyer's professional responsibility.³³³ The role of a lawyer representing a battered woman in connection with a civil protection order is fundamentally different from the role of a prosecutor.³³⁴ Some feminists have taken a position in favor of arresting and prosecuting a batterer over the victim's objections, based in part on the argument that the obligation of the criminal justice system to protect the public trumps the autonomy of the individual victim.³³⁵ That rationale is inapplicable to civil cases, where the victim's right to exercise her autonomy takes precedence over the interests of the general public.³³⁶

A helpful model for legal representation of battered women is

protection and support after making an assessment of the dangerousness of the situation." NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 113, at 2.

³²⁹ See generally DAVIES ET AL., *supra* note 74.

³³⁰ See MARGARET B. DREW ET AL., AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE 40-47 (2d ed. 2004) (providing guidelines and a checklist for safety planning).

³³¹ DAVIES ET AL., *supra* note 74, at 73-92, 104, 118.

³³² DUTTON, *supra* note 23, at 107-10.

³³³ See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2004) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation"); see also AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, *supra* note 113, at 25-26 (recommending that the lawyer in a civil protection order matter "should advise the client about legal options and consequences, but must ultimately defer to the client regarding legal decisions").

³³⁴ See *supra* note 131 and accompanying text.

³³⁵ See, e.g., FRIEDMAN, *supra* note 75, at 150; SCHNEIDER, *supra* note 27, at 185; Hanna, *supra* note 39.

³³⁶ See generally Kuennen, *supra* note 230, at 82-88.

provided by the “woman-defined advocacy” approach. Woman-defined advocacy

means advocacy that starts from the woman’s perspective, integrates the advocate’s knowledge and resources into the woman’s framework, and ultimately values . . . [the victim as] the decision maker, the one who knows best, the one with the power. . . . [I]t seeks to craft the alternatives that will enhance women’s safety, given the realities facing each battered woman.³³⁷

Other commentators on legal representation for battered women, although they have not taken the identical approach, have emphasized similar themes such as collaboration, respect, empathy, and attentiveness to battered women’s psychological as well as legal needs.³³⁸ Contrary to the prevailing emphasis of domestic violence law today,³³⁹ advocacy that values the victim’s perspective does not assume that her decision to remain in a relationship is irrational. “It is not the goal of woman-defined advocacy that women should stay in violent relationships, but when staying provides the best possible alternative, woman-defined advocacy supports a woman’s decision and works with her to keep her and her children as safe as possible.”³⁴⁰

Battered women are often ambivalent about whether to take legal action.³⁴¹ Furthermore, their decision-making may be affected by intimidation and fear of reprisal by the batterer. Therefore, effective legal representation of battered women requires more than simply deferring to their expressed wishes. Woman-defined advocacy is a partnership in which the lawyer plays an active role by sharing perspectives, information, and knowledge.³⁴² The lawyer must strike a

³³⁷ DAVIES ET AL., *supra* note 74, at 3-4. This approach defines “advocates” to include “anyone who responds directly to help battered women in an organizational context,” including lawyers. *Id.* at 2.

³³⁸ See Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997) (reviewing the literature on legal representation of battered women); see also Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL’Y & L. 567, 624-50 (2003) (advocating that lawyers and the legal system adopt a stance of “compassionate witnessing” toward domestic violence cases).

³³⁹ See Mahoney, *supra* note 30, at 76.

³⁴⁰ DAVIES ET AL., *supra* note 74, at 4; see also AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, *supra* note 113, at 18 (“The lawyer should remain nonjudgmental toward clients who reunite with their perpetrators, and should assure clients that should they decide to leave in the future, resources will be available to help them.”).

³⁴¹ See, e.g., Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1343-47 (1993).

³⁴² DAVIES ET AL., *supra* note 74, at 93; see also MODEL RULES OF PROF’L CONDUCT R. 2.1 (2004) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the

delicate balance between providing a different perspective and substituting her judgment for that of the client.³⁴³

Although all battered women should be presumed to have the capacity to make decisions for themselves, the woman-defined advocacy model acknowledges that some battered women may have mental health issues that preclude them from accurately judging and responding to their situation.³⁴⁴ In those circumstances, referral to a mental health professional may be necessary.³⁴⁵ In addition, the model recommends the provision of more intensive advocacy services, including referrals to other agencies, if there is a potential for lethal violence or if children are being abused or neglected.³⁴⁶ However, the overall emphasis of the approach is on restoring to the woman the decision-making power that has been taken away from her by the batterer.³⁴⁷

5. Violations and Enforcement

While every effort should be made to ensure that protection orders are structured so that they are not violated, further abuse by the batterer is always a possibility. The fact that an order is violated does not necessarily mean that it is worthless or that obtaining it was a mistake. The process of obtaining a protection order can be a valuable experience and prepare the woman to take additional actions on her own behalf.³⁴⁸

If the protection order is violated, this may paradoxically be helpful to the victim by providing her with a fuller understanding of her situation. It may even lead her to change her mind about remaining in the relationship. For many battered women, deciding to separate from an abuser is an incremental process.³⁴⁹ Many women cling to the hope that the partner will stop being abusive; only when that dream dies,

client's situation.”).

³⁴³ See DAVIES ET AL., *supra* note 74, at 6, 105; see also AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, *supra* note 113, at 26 (“The lawyer must ensure that the client is educated and informed about legal options and choices, and the likely consequences of those choices. Once this information has been conveyed, the lawyer must respect the client's autonomy.”).

³⁴⁴ DAVIES ET AL., *supra* note 74, at 108-10. See also MODEL RULES OF PROF'L CONDUCT R. 1.14 (describing a lawyer's duties to a client with diminished capacity).

³⁴⁵ DAVIES ET AL., *supra* note 74, at 110.

³⁴⁶ *Id.* at 100-03, 110-11, 120-21.

³⁴⁷ *Id.* at 3.

³⁴⁸ See *supra* notes 173-78 and accompanying text.

³⁴⁹ See DAVIES ET AL., *supra* note 74, at 79-80 (citing statistics showing that women leave five times and take eight years before finally ending a relationship); Campbell et al., *supra* note 72, at 101 (describing the victim's process of testing her internal and external resources before leaving); Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 485 (2003) (describing stages of change that battered women go through).

usually as the result of some turning point or significant incident, is the woman finally able to decide to leave.³⁵⁰ By getting a protection order before she feels ready to separate from her partner, and then seeing that he is unwilling or unable to comply with a direct judicial mandate to stop the abuse, the victim might reach the point of deciding to end the relationship sooner than she otherwise would.³⁵¹

If a limited protection order is violated, effective enforcement procedures should be available, just as for any other order.³⁵² As a legal matter, the abuser would be subject to criminal prosecution and/or contempt proceedings for violating the order, in addition to the legal consequences, if any, that would otherwise attach to his misconduct.³⁵³ As a practical matter, a number of factors make enforcement of limited protection orders particularly challenging. If a woman is reluctant to jeopardize her relationship or if she is intimidated by the batterer, she may be unwilling to report that the order has been violated. On the other hand, the fact that a limited order was crafted to reflect her preferences may increase her commitment to seeing it enforced.³⁵⁴ Furthermore, a limited order avoids the enforcement problems that result when a stay-away order is violated after the victim voluntarily contacts the abuser. If abuse does occur, the prospects for holding the abuser accountable are better if the victim has a limited order than if there is no order in place.³⁵⁵

Proactive enforcement methods can relieve the pressure that is placed on the victim when she is solely responsible for reporting violations. Some jurisdictions actively monitor an offender's compliance with a protection order—for example, by having court staff or an independent agency check police records for incidents involving the abuser and communicate with the victim to inquire about violations and inform her about her options.³⁵⁶ Battered women's advocacy organizations can play a valuable role in this process by maintaining

³⁵⁰ HARRELL ET AL., *supra* note 117, at 57-58; NEIL S. JACOBSON & JOHN M. GOTTMAN, *WHEN MEN BATTER WOMEN* 132-40, 165, 173, 277 (1998); ELAINE WEISS, *SURVIVING DOMESTIC VIOLENCE* 9, 25, 139-40, 191 (2004); Lynn M. Short et al., *Survivors' Identification of Protective Factors and Early Warning Signs for Intimate Partner Violence*, 6 *VIOLENCE AGAINST WOMEN* 272, 276-77 (2000).

³⁵¹ See Fischer & Rose, *supra* note 150, at 427-28 (describing protection orders as part of a learning process by which the battered woman discovers whether the batterer will stop his abuse).

³⁵² Procedures that can strengthen protective order enforcement include a coordinated community response to domestic violence, specialized domestic violence courts, and specialized police and prosecutor units. See *supra* Part IV.A.6.

³⁵³ See *supra* notes 185-86 and accompanying text (discussing enforcement).

³⁵⁴ See *supra* note 230 and accompanying text (explaining that battered women are more likely to report subsequent abuse if they feel that their preferences have been respected in previous legal proceedings).

³⁵⁵ See *supra* Part V.A (reporting attorneys' comments).

³⁵⁶ See FINN & COLSON, *supra* note 118, at 53, 57; Ford & Regoli, *supra* note 296, at 140; *Developments in the Law: Legal Responses to Domestic Violence*, *supra* note 107, at 1512, 1517.

contact with victims who have obtained protection orders and offering them support and assistance if they want to report violations and pursue enforcement remedies.³⁵⁷ Proactive enforcement can be problematic if it usurps the victim's decision-making power, such as when the underlying order is a criminal stay-away order that was imposed on the victim against her wishes.³⁵⁸ Civil protection orders, which are entered at the request of the victim rather than a prosecutor, are more likely than criminal orders to express the victim's own choices.

If a violation is reported, effective enforcement requires that police, prosecutors, and judges respond vigorously. In comparison to a batterer who violates a stay-away order by contacting the victim or coming to her home, a violation of an order permitting ongoing contact may seem less clear-cut.³⁵⁹ Nevertheless, it should not be assumed that evidence of violation of an order lacking stay-away provisions is impossible to obtain. Depending on the circumstances, the evidence might include physical injuries, property damage, and testimony by the victim and other witnesses. For violations that involve threats, harassment, or other types of psychological abuse, orders that describe the prohibited acts with specificity can facilitate enforcement. Some states already recognize psychological abuse in their criminal law and/or among the grounds for issuing a protection order; in those jurisdictions, police, prosecutors, and judges are especially likely to be familiar with psychological abuse.³⁶⁰

The lack of uniformity among limited protection orders, although an advantage from the point of view of honoring women's choices, could be a disadvantage for enforcement purposes, since police officers will have to read each order to determine whether the batterer has violated it. This problem is not a new one, however. Stay-away orders differ from each other, and victims are advised to carry their order with them at all times so that they can obtain police assistance if the order is

³⁵⁷ See FINN & COLSON, *supra* note 118, at 57.

³⁵⁸ See Suk, *supra* note 130, at 48-50 (describing New York City criminal court's practice of entering a criminal protection order prohibiting contact between the parties regardless of the victim's wishes; police then make routine unannounced visits to homes with a history of domestic violence and arrest the defendant if he is present there, even if he was invited by the victim); see also Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 219 (2003) (describing random visits by Dallas Police Department detectives to the homes of women who were placed under criminal protective orders).

³⁵⁹ See Suk, *supra* note 130, at 19 (stating that evidence of an abuser's presence in a location where he is forbidden to be is an easy way of proving a violation).

³⁶⁰ See, e.g., N.J. STAT. ANN. § 2C:25-19 (West 2007) (referring to the state criminal harassment statute as both a ground for issuing a protection order and an act that would violate an order). Even in a state that does not recognize psychological abuse in its domestic violence statutes, judges may be familiar with the phenomenon simply from their exposure to domestic violence cases. See Bingham, *supra* note 266, at 856 n.124 (quoting a judge's statement that judges know emotional abuse when they see it).

violated.³⁶¹

Perhaps the biggest obstacle to enforcement will be the attitude that if a victim is not willing to separate from her partner, she must not really be in danger, so a violation of the protection order is trivial, particularly if it does not involve physical violence. This attitude reflects the widespread but erroneous belief that the only rational response to domestic violence is separation, as well as the tendency to underestimate the significance of psychological abuse. With adequate training and increased experience, police, prosecutors, and judges may gain a better understanding of the dynamics of domestic violence and learn to treat violations of limited orders seriously. By way of analogy, many police officers have learned to take seriously violations of protection order provisions prohibiting the offender's presence in the victim's home, even in the absence of actual violence.³⁶² Until recently, police tended to regard this type of protection order violation as a mere technicality and undeserving of arrest;³⁶³ in the past few years, the criminal justice system has increasingly come to think of the abuser's presence in the victim's home in violation of a protection order as a valid proxy for domestic violence itself.³⁶⁴ Similarly, police, prosecutors, and judges who are not already familiar with psychological abuse will need to learn that such abuse is deeply damaging, that it plays a central role in coercive control of the victim by the batterer, and that it may be a precursor to physical violence.³⁶⁵

One way to sidestep problems with police and prosecutors is by allowing battered women to bring their own criminal contempt actions for protection order violations, as some states now do.³⁶⁶ Criminal contempt proceedings have a number of advantages over prosecuting a protection order violation as a separate crime, including the fact that they are faster and that judges are inclined to look unfavorably on people who violate a court order.³⁶⁷ However, pursuing a criminal contempt remedy pro se can be difficult, especially when the defendant is represented by counsel.³⁶⁸ Providing appointed counsel to battered women in contempt proceedings would mitigate these difficulties.³⁶⁹

Another step that the victim can take without the assistance of police or prosecutors is to request modification of the order. After a

³⁶¹ DREW ET AL., *supra* note 330, at 42, 44.

³⁶² See Suk, *supra* note 130.

³⁶³ See FINN & COLSON, *supra* note 118, at 49.

³⁶⁴ Suk, *supra* note 130, at 17-22, 52-53.

³⁶⁵ See STARK, *supra* note 23; Klein & Orloff, *supra* note 108, at 871-72.

³⁶⁶ See Zlotnick, *supra* note 83.

³⁶⁷ *Id.*

³⁶⁸ Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348-56 (1995); Kinports & Fischer, *supra* note 117, at 230-31.

³⁶⁹ Barry, *supra* note 368, at 360-61.

limited order has been violated, the victim should be able to return to court to add stay-away provisions if she wishes.³⁷⁰

Inevitably, establishing effective enforcement methods for limited orders will be a painstaking and at times frustrating process, as it has proven to be for protection orders in general. As limited protection orders become more widespread, there will be more opportunities to study what enforcement practices do and do not work. The effort to improve enforcement will need to be a focus of continuing attention.

6. Privacy and Legal Intervention in Ongoing Relationships

A possible objection to this proposal is that people should not be expected to conduct their intimate relationships under the watchful eye of the legal system.³⁷¹ This objection echoes the familiar argument that the law should not intrude on the privacy of the family, an argument that long served as an excuse for allowing domestic violence to continue unchecked.³⁷² Of course, the law already sets limits on conduct in intimate relationships, not only by criminalizing domestic violence but in many other ways—for example, by prohibiting adultery.³⁷³ A protection order forbidding acts of abuse is significantly less disruptive to a relationship than a conventional stay-away order, which terminates the relationship entirely.³⁷⁴ Under the system proposed here, the extent to which a couple's privacy would be compromised is under the control of the individual victim rather than dictated by the state.

At first glance, intervening in an ongoing relationship may appear to be a less appropriate role for the legal system than ordering a couple to break up and then prohibiting contact between them. However, the function of a judge in issuing and enforcing a limited protection order is to regulate the abuse, not the other aspects of the couple's relationship. Judges in family matters are accustomed to dealing with specific legal issues that arise within the flux of human relationships, such as when determining the best interests of the child in a custody dispute or

³⁷⁰ See *supra* Parts V.A, V.B.1 (discussing modification).

³⁷¹ See, e.g., *Wright v. Wright*, No. CN90-7815, 1990 WL 255821, at *2 (Del. Fam. Ct. Nov. 29, 1990) (denying wife's request for spousal support during marriage and stating that when spouses live together, it is not the function of the Court to allocate funds between them, just as the Court should not "be involved in deciding when and where they should eat, sleep or engage in sexual relations"); *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953) (refusing to interfere in the domestic arrangements of a married couple).

³⁷² See *supra* Part II.

³⁷³ See Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 837 (2006) (stating that twenty-three states continue to criminalize adultery).

³⁷⁴ See, e.g., Suk, *supra* note 130, at 8 (describing the routine issuance of stay-away orders in criminal cases as "state-imposed de facto divorce").

monitoring a parent's compliance with a visitation order.

In addressing these difficult issues, the legal system need not operate in isolation. In many jurisdictions, protection orders can mandate participation in alcohol and drug treatment, batterer intervention programs, and other types of counseling.³⁷⁵ Through a coordinated community response approach, courts can collaborate directly with agencies that provide such services.³⁷⁶ However, the use of counseling and treatment programs must be approached with caution. Some of them may be ineffective or even harmful. For example, although well-designed batterer intervention programs seem to help some men change their patterns of abusive beliefs and behavior,³⁷⁷ the empirical research conducted to date has failed to demonstrate their effectiveness at preventing recidivism.³⁷⁸ Similarly, anger management programs and couples counseling are often counterproductive because they tend to minimize the batterer's responsibility for his actions.³⁷⁹ Battered women's advocacy programs can be helpful allies to the legal system by identifying and monitoring suitable programs to supplement the courts' efforts to end violence in an ongoing relationship.

7. Resources

In order for limited protection orders to achieve the best possible results, battered women should have access to supportive resources including representation by attorneys, consultation with lay advocates, and assistance with risk assessment and safety planning.³⁸⁰ Various resources should also be available to the legal system to enhance its ability to administer limited protection orders, such as a coordinated community response to domestic violence, specialized domestic violence courts, and appropriate training programs for police, prosecutors, and judges.³⁸¹

³⁷⁵ See KEILITZ ET AL., *supra* note 108, at 49-50; Eigenberg et al., *supra* note 119, at 417; Klein & Orloff, *supra* note 108, at 944-47.

³⁷⁶ See Fernando Mederos, *Batterer Intervention Programs: The Past, and Future Prospects*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND, *supra* note 196, at 127.

³⁷⁷ See, e.g., BANCROFT, *supra* note 29; David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 57, at 176.

³⁷⁸ See, e.g., SHELLY JACKSON ET AL., U.S. DEP'T OF JUSTICE, BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE? (2003); Lynette Feder & David B. Wilson, *A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behavior?*, 1 J. EXPERIMENTAL CRIMINOLOGY 239 (2005).

³⁷⁹ See AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, *supra* note 113, at 36; Joan Zorza, *What Is Wrong With Mediation?*, in 3 VIOLENCE AGAINST WOMEN 945 (Joan Zorza ed., 2006).

³⁸⁰ See *supra* Part V.B.3-4.

³⁸¹ See *supra* Part IV.A.6.

The need for these resources is not unique to protection orders permitting ongoing contact between the parties. The same items are important to the effectiveness of stay-away orders and indeed of all legal interventions for domestic violence.³⁸² Some of these resources are currently in place in many jurisdictions, but they are not yet universally available.³⁸³ Even in the absence of a full complement of resources, the current system of civil protection orders has proven to be remarkably helpful to large numbers of domestic violence victims.³⁸⁴ So too, making limited protection orders more widely available would be a favorable development even without an additional infusion of resources.

Ideally, if our society is serious about addressing the pervasive and devastating problem of domestic violence, significantly increased funding should be provided to assist battered women. Nevertheless, expanding the system of civil protection orders to provide a larger role for orders permitting ongoing contact does not need to await the accomplishment of that goal.

CONCLUSION

The history of the law's response to domestic violence can best be described as a transition from one extreme to its opposite. Traditionally, the law refused to intervene in intimate relationships and therefore denied victims' requests for a legal remedy. More recently, the law has offered victims legal relief, but the relief generally requires ending the relationship. Thus, the law has moved from leaving abusive relationships alone to dissolving them. Neither of these approaches meets the needs of battered women who seek to end the violence without ending the relationship, and neither of them attempts to harness the law's power to affect relationships in constructive ways.

Offering limited protection orders as well as stay-away orders has the advantage of giving battered women more options to meet their diverse needs. While some battered women want to separate from the abuser, others—like Sylvia, whose story began this article—want to maintain the relationship and work to improve it.³⁸⁵ In the words of a

³⁸² For example, safety planning should precede and accompany any legal intervention for domestic violence, including criminal proceedings, divorce actions, and tort litigation. *See, e.g.*, Buel, *supra* note 69, at 957, 1029.

³⁸³ For example, despite bar association pro bono programs and federal funding for civil legal assistance to battered women, many domestic violence victims continue to lack access to attorneys. *See* Klein & Orloff, *supra* note 108, at 1058-64; Murphy, *supra* note 122, at 502-03, 511.

³⁸⁴ *See supra* Part IV.A.1.

³⁸⁵ *See supra* text accompanying note 1. Sylvia remained with her partner Michael despite

research study on separation assault, “Ultimately, the survivors themselves are in the best position to determine whether staying or ending the relationship is the best decision for their lives. We as a community need to ensure that women have the resources and support they need to make that decision.”³⁸⁶

By permitting the use of protection orders in ongoing relationships, the law can help alter the balance of power between an abuser and victim, shape the attitudes and behavior of both parties, and create a new social norm that women have a right to remain in a relationship and be free of violence. In conjunction with risk assessment and safety planning procedures, enforcement measures, and other safeguards, protection orders that do not require separation can advance both women’s safety and women’s autonomy. As protection orders permitting ongoing contact between the parties become more widely used and more openly discussed, additional data will become available to assist in determining how they can best be employed to serve the interests of battered women. In the meantime, this option should be prominently and consistently featured in the array of legal remedies for domestic violence.

many years of abuse. *See* Sontag, *supra* note 1. She never sought a protection order, presumably because she was unwilling to end the relationship. *See id.*

³⁸⁶ Fleury et al., *supra* note 212, at 1381.