THE JUSTICE SYSTEM AND DOMESTIC VIOLENCE: ENGAGING THE CASE BUT DIVORCING THE VICTIM

LAURIE S. KOHN*

I. INTRODUCTION

Advocates for victims[1] of domestic violence have made significant strides over the last forty years by forcing domestic violence to the forefront of our national consciousness[2] and initiating a major transformation of the justice system's response to family violence. An unofficial policy of nonfeasance has morphed into an official policy of engagement on all levels of the justice system. Today victims may seek civil protection orders from the courts to protect them from family abuse.[3] When batterers violate those orders, courts can enforce the

* Visiting Associate Professor and Co-Director, Domestic Violence Clinic, Georgetown University Law Center. J.D., LL.M., Georgetown University Law Center; A.B., Harvard College. I owe an enormous debt of gratitude to Deborah Epstein for her thoughtful feedback on this article and to my family for their support. I am also indebted to Mollie Farrell, Anne Taylor, Coty Miller, Courtney Ellis, and Arianne Plasencia for their superb research assistance. I dedicate this article to Harry Kohn, Jr. for having given me the love, support, and inspiration to sustain me for a lifetime.

1. Throughout this article, I will interchangeably use victim and survivor to refer to individuals who endure violence in their intimate relationships. During my work on domestic violence, I have found little consensus about which term most accurately and appropriately describes the status of those who have confronted domestic violence. These individuals are three-dimensional figures whose identities are not monolithically dictated by the nature of their relationships. For the ease of the reader, I reduce the phrases "individual who has been battered" or "individual who has survived violence by an intimate partner" to victim and survivor. For an interesting discussion of labels in domestic violence, see Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 529–31 (1992).

2. Popular culture has recognized domestic violence as a social problem—featuring family violence in books, television shows, and movies. *See, e.g.*, STEVEN DONAHUE, AMANDA RIO (2004); RODDY DOYLE, THE WOMAN WHO WALKED IINTO DOORS (1996); FANNIE FLAGG, FRIED GREEN TOMATOES AT THE WHISTLE STOP CAFE (1987); JOHN GRISHAM, THE RAINMAKER (1995); STEPHEN KING, ROSE MADDER (1995); ANNA QUINDLEN, BLACK AND BLUE (1998); ALICE WALKER, THE COLOR PURPLE (1983); *COPS: Tazed and Confused: Special Edition* (FOX television broadcast Nov. 6, 1994); *ER: Going Home* (NBC television broadcast Sept. 29, 1994); ENOUGH (Sony 2002); IF SOMEONE HAD KNOWN (MPI Home Video 1995); SHATTERED DREAMS (Live/Artisan 1990); SLEEPING WITH THE ENEMY (20th Century Fox 1991); SLING BLADE (Miramax 1996); THE BURNING BED (MGM 1984); WHAT'S LOVE GOT TO DO WITH IT? (Touchstone Pictures 1993).

3. ALA. CODE § 30-5-1(b)(6) (2005); ALASKA STAT. § 18.66.100(a) (2006); ARIZ. REV. STAT. ANN. § 13-3602(A) (2006); ARK. CODE ANN. § 9-15-101 (2006); CAL. FAM. CODE § 6300 (Deering 2006); COLO. REV. STAT. § 13-14-102(1.5)(b) (2005); CONN. GEN. STAT. § 46b-15(a) (2006); DEL. CODE ANN. tit. 10, § 1042 (2006); D.C. CODE ANN. § 16-1003(a) (2006); FLA. STAT. § 741.30(1) (2006); GA. CODE ANN. § 19-13-4(a) (2006); HAW. REV. STAT. § 586-3(a) (2006); IDAHO CODE ANN. § 39-6304(1) (2006); 750 ILL. COMP. STAT. 60/102 (2006); IND. CODE § 34-26-5-2(a) (2006);

orders through civil or criminal contempt,[4] and prosecutors' offices have the authority to prosecute violations.[5] Statutes encourage and even require police

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IOWA CODE § 236.3 (2005); KAN. STAT. ANN. § 60-3107(a) (2006); KY. REV. STAT. ANN. § 403.725 (West 2006); LA. REV. STAT. ANN. § 46:2136(A) (2006); ME. REV. STAT. ANN. tit. 19-A, § 4007(1) (2005); MD. CODE ANN., FAM. LAW § 4506 (West 2006); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 2006); MICH. COMP. LAWS ANN. § 600.2950(1) (West 2006); MINN. STAT. ANN. § 518B.01(4) (West 2005); MISS. CODE ANN. § 93-21-7 (West 2006); MO. REV. STAT. § 455.020(1) (2006); MONT. CODE ANN. § 40-15-102(1) (2005); NEB. REV. STAT. § 42-924(1) (2005); NEV. REV. STAT. § 33.020(1) (2006); N.H. REV. STAT. ANN. § 173-B:5(I)(a) (LexisNexis 2006); N.J. STAT. ANN. § 2C:25-28, 29 (West 2006); N.M. STAT. § 40-13-3(A) (2006); N.Y. FAM. CT. ACT § 821(1)(d) (McKinney 2006); N.C. GEN. STAT. ANN. § 50B-2(a) (West 2006); N.D. CENT. CODE § 14-07.1-02(1) (2006); OHIO REV. CODE ANN. § 3113.31(E)(1) (West 2006); OR. REV. STAT. § 107.718(1) (2006); 23 PA. CONS. STAT. § 6108(a) (2005); R.I. GEN. LAWS § 8-8.1-3(a)(1) (2006); S.C. CODE ANN. § 20-4-40 (2005); S.D. CODIFIED LAWS § 25-10-3 (2006); TENN. CODE ANN. § 36-3-606(a) (2005); TEX. FAM. CODE ANN. § 81.001 (Vernon 2005); UTAH CODE ANN. § 30-6-2(1) (2006); VT. STAT. ANN. tit.15, § 1103(c) (2006); VA. CODE ANN. § 16.1-279.1(A) (2006); WASH. REV. CODE § 26.50.030 (2006); W. VA. CODE § 48-27-305 (2006); WIS. STAT. § 813.12(4)(a) (2006); WYO. STAT. ANN. § 35-21-103(a) (2006); *See generally* 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 (1993) (providing an overview of state statutes authorizing domestic violence restraining orders).

4. ALA. CODE § 30-5A-3(b) (2005); ALASKA STAT. § 09.50.010(5) (2006); ARIZ. REV. STAT. ANN. § 13-3602(J) (2006); ARK. CODE ANN. § 9-15-210 (2006); CAL. PENAL § 166(c)(1) (West 2006); COLO. REV. STAT. § 18-6-803.5(7) (2005); CONN. GEN. STAT. § 46b-15(g) (2006); DEL. CODE ANN. tit. 11, § 1271A(a) (2006); D.C. CODE ANN. § 16-1005 (f) (LexisNexis 2006); FLA. STAT. § 741.30(9)(a) (2005); GA. CODE ANN. § 19-13-6 (2006); HAW. REV. STAT. § 710-1077(1)(g) (2006); IDAHO CODE ANN. § 7-601(5) (2006); 750 ILL. COMP. STAT. 60/223(b) (2005); IOWA CODE § 664A.7.1 (2007); KAN. STAT. ANN. § 20-1204(a) (2006); KY. REV. STAT. ANN. § 403.760(1) (West 2006); LA. REV. STAT. ANN. § 46:2137(A) (2006); ME. REV. STAT. ANN. tit. 19-A, § 4011(2) (2005); MD. CODE ANN., FAM. LAW § 4-508(b) (LexisNexis 2006); MICH. COMP. LAWS ANN. § 600.2950(23) (West 2006); MINN. STAT. ANN. § 518B.01(14)(b) (West 2005); MISS. CODE ANN. § 93-21-21 (West 2006); NEV. REV. STAT. § 199.340(4) (2006); N.H. REV. STAT. ANN. § 173-B:9(II) (LexisNexis 2006); N.J. STAT. ANN. § 2C:29-9(b) (West 2006); N.M. STAT. § 40-13-5(B) (2006); N.Y. PENAL LAW § 215.51(b) (McKinney 2006); N.D. CENT. CODE § 14-07.1-06 (2006); OHIO REV. CODE ANN. § 2705.02(A) (LexisNexis 2006); OR. REV. STAT. § 107.720(4) (2006); 23 PA. CONS. STAT. § 6114(a) (2005); R.I. GEN. LAWS § 15-15-3(i)(1) (2006); S.C. CODE ANN. 20-4-60(b) (2005); TENN. CODE ANN. § 36-3-610 (2005); TEX. FAM. CODE ANN. § 6.506 (Vernon 2005); VT. STAT. ANN. tit. 15, § 1108(e) (2006); WASH. REV. CODE § 26.50.110 (2006); § 1-28-107 (2006); State v. Murray, 623 A.2d 60 (Conn. 1993).

5. ALA. CODE § 30-5A-3(c)(1) (2005); ALASKA STAT. § 11.56.740(b) (2006); ARK. CODE ANN. § 9-15-207(b)-(c), (e) (2006); CAL. PENAL § 273.6(a) (Deering 2006); COLO. REV. STAT. § 18-6-803.5(2)(a) (2005); CONN. GEN. STAT. § 53a-107(a), (b) (2006); DEL. CODE ANN. tit. 10, § 1046(i) (2006); D.C. CODE ANN. § 16-1005(g) (2006); FLA. STAT. § 741.31(4)(a) (2006); HAW. REV. STAT. § 586-11(a) (2006); IDAHO CODE ANN. § 39-6312(1) (2006); 750 ILL. COMP. STAT. 60/223(a)(1) (2005); IND. CODE § 35-46-1-15.1(1) (2006); IOWA CODE § 664A7.4 (2007); KAN. STAT. ANN. § 21-3843(c) (2006); KY. REV. STAT. ANN. § 403.763(2) (West 2006); LA. REV. STAT. ANN. § 14:79(B) (2006); ME. REV. STAT. ANN. tit. 19-A, § 4011(1) (2005); MD. CODE ANN., FAM. LAW § 4-508(a) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2006); MICH. COMP. LAWS ANN. § 600.2950(23) (West 2006); MINN. STAT. ANN. § 518B.01(14) (West 2005); MISS. CODE ANN. § 93-21-21 (West 2006); MO. REV. STAT. § 455.085(8) (2006); MONT. CODE ANN. § 45-5-626(3) (2005); NEB. REV. STAT. § 42-924(3) (2005); NEV. REV. STAT. § 33.100 (2006); N.H. REV. STAT. ANN. § 173-B:9(III) (LexisNexis 2006); N.J. STAT. ANN. § 2C:29-9(b) (West 2006); N.M. STAT. § 40-13-6(E) (2006); N.C. GEN. STAT. ANN. § 50B-4.1(a) (2006); N.D. CENT. CODE § 14-07.1-06 (2006); OHIO REV. CODE ANN. § 2919.27(B)(2) (LexisNexis 2006); OKLA. STAT. tit. 22, § 60.6(A)(1) (2005); R.I. GEN. LAWS § 8-8.1-3(j) (2006); S.C. CODE ANN. §

officers to arrest suspects who appear to have committed acts of domestic violence.[6] Batterers can be and are prosecuted for criminal acts of violence against intimate partners.

Engagement with domestic violence over the last forty years has led system actors—including prosecutors, judges, policy makers, and police—to two disparate conclusions: (1) domestic violence is a social ill that should be addressed through the justice system rather than ignored as a private matter,[7] and (2) domestic violence victims are unreliable as partners to system actors who are engaged in combating domestic violence. System actors have reconciled these conflicting conclusions by implementing aggressive intervention policies that exclude victims. Over the many years in which system actors have engaged the issue of domestic violence, they have worked closely with a broad cross section of victims. While some victims unambiguously seek intervention by the justice system to end the violence, most are more conflicted about seeking public interference and ending the violent relationship. Thus, many system actors who expect or even hope for all victims to have the same level of unambiguous commitment to intervention by the justice system are repeatedly disappointed by the population they seek to protect.

Advocates have reinforced this conclusion about victim unreliability by developing theories to explain victim ambivalence. For example, the Power and Control Wheel[8] and Battered Women's Syndrome[9] help judges, police officers, lawyers, and prosecutors understand *why* victims may respond in unexpected ways to the prospect of escaping violence. However, the theories themselves affirm the notion that victims are unreliable.

Over the last twenty years, system actors have responded to the combination of perceived victim unreliability and political pressure to combat domestic violence through policies that allow actors to address domestic violence aggressively with minimal interference by unreliable victims. Those policies permit and encourage actors to protect victims regardless of whether they

16-25-20(E) (2005); S.D. CODIFIED LAWS 25-10-13 (2006); TEX. PENAL CODE ANN. § 25.07(g) (Vernon 2005); UTAH CODE ANN. § 77-36-2.4(2)(a) (2005); VA. CODE ANN. § 16.1-253.2 (2006); WASH. REV. CODE § 26.50.110(1) (2006); W. VA. CODE § 48-27-903 (2006); WIS. STAT. § 813.12(8)(a) (2006); WYO. STAT. ANN. § 6-4-404(a) (2006); P.R. LAWS ANN. tit. 8, § 628 (2004). *See also* Violence Against Women Act, 42 U.S.C. 3796hh(c)(1) (1998) (conditioning receipt of certain VAWA grants on state and local government certification that their laws or official policies "encourage or mandate arrest of domestic violence offenders who violate the terms of a valid and outstanding protection order").

6. *See infra* Part III.A.

7. *See, e.g.*, Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 565, 640 (2000) [hereinafter Symposium, *Women, Children and Domestic Violence*] (remarks of Judge Laura Drager) ("We have overcome the initial resistance to the concept that domestic violence even exists. Victims and advocates convinced legislators and the courts that we needed to address the issue in a way we had not before.").

8. *See infra* Part II.C.1.

9. *See infra* Part II.C.2.

express contrary preferences.[10] Legislation governing police procedures and aggressive prosecution silence the victim. Judges too have recently taken positions they believe will protect victims regardless of victim preferences in civil cases. These official and unofficial policies suppress dissenting victim voices.

This article will examine and analyze the development of an inverse relationship in the legal system between the seriousness accorded domestic violence *cases* and the seriousness accorded domestic violence *victims*. Part II of this article will look to the history of the domestic violence movement, including the challenges of working with and litigating on behalf of domestic violence victims and the psycho-social theories developed to overcome those challenges. In Part III, the article will analyze the development of mandatory policies that suppress victim voices in favor of efficient and aggressive criminal case handling. It will also document how the civil justice system has followed suit in suppressing victim voices by denying petitioners' motions to dissolve existing protection orders. In Part IV, the article will critique the safety and political implications of the justice system's interventions. Part V will argue that these interventions are inadequate because they fail to incorporate victim participation, achieve the central goal of enhancing victim safety, or address the real problems that are raised by victim ambivalence.

Part V will propose both philosophical approaches and concrete mechanisms intended to keep victims engaged in the civil and criminal justice responses by urging system actors to address the forces that make them unreliable witnesses and litigants. Specifically, the article will suggest a paradigm shift in our intervention goals. The article will advocate that the legal system focus on enhancing victim safety rather than ending abusive relationships; this emphasis would encourage system actors to tailor policies to the needs of specific cases and victims. Further, it would increase victim trust in the system. Part V will suggest means by which judges, prosecutors, and law enforcement can address the core issues that fuel victim ambivalence and incorporate victim preferences into interventions. By addressing these key

10. Throughout this article, I refer to individuals who are battered as females and to perpetrators as males. I use this label as shorthand, and do not intend to cast into doubt or denigrate the existence of female on male or same-sex battering. While men are victims of intimate violence and women are batterers, the statistics bear out that in the majority of cases, the reverse is true. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, INTIMATE PARTNER VIOLENCE 1993–2001 1 (2001) (stating that intimate partner crimes "primarily involve female victims. About 588,490 or 85% of victimizations by intimate partners in 2001 were against women"); OFFICE OF JUSTICE PROGRAMS, 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 iv (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf (staing that approximately 1.3 million women as compared with 835,000 men are raped and or/physically assaulted by intimate partners annually); Marta B. Varela, *Protection of Domestic Violence Victims under the New York City Human Rights Law's Provisions Prohibiting Discrimination on the Basis of Disability*, 27 FORDHAM URB. L.J. 1231, 1234 (2000) (estimating that three-quarters of all victims of domestic violence are women).

issues, we can develop a more effective system to confront domestic violence.

II.

HISTORICAL CONTEXT

The historical context of the state's response to domestic violence elucidates the current paradoxical treatment of cases and victims and suggests avenues for reform. Two phenomena provide insight into why system actors treat domestic violence with the utmost seriousness while dismissing domestic violence victims as irrelevant. The first is the evolution of the state's and public's responses to domestic violence, and the second is the natural divergence between the perspectives of system actors and domestic violence victims.

A. From unofficial nonfeasance to official engagement: the justice system's response to domestic violence

American society now acknowledges that something must be done about domestic violence. However, contemporary perceptions of domestic violence can only be understood if placed within the context of the state's historical response to domestic violence. In the early Colonial period, state courts followed British law and permitted men to control their spouses through domestic chastisement.[11] By the mid-nineteenth century, American state courts had begun to place some restrictions on a man's right to use physical force against his wife. Those restrictions, however, merely limited the amount of force permitted. Courts considered the traditional English common law "rule of thumb"[12] to be appropriate spousal discipline. This rule permitted a man to physically discipline his wife as long as he used an instrument "not thicker than his thumb."[13] Another court cautioned that it would intervene only where a man inflicted "permanent injury" simply to "gratify his own bad passions."[14] Still another court held that even if a husband committed an assault upon his wife,

11. *See, e.g.*, State v. Rhodes, 61 N.C. (Phil.) 453, 459 (1868) (holding that the court will not interfere with "family government in trifling cases"); Joyner v. Joyner, 59 N.C. 322 (1862) (holding that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place); Bradley v. State, 1 Miss. 156, 158 (1824) (stating that men may utilize "salutary restraints in every case of [a wife's] misbehavior, without being subjected to vexatious prosecutions resulting in the mutual discredit and shame of all parties concerned").

12. *See* UNITED STATES COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982).

13. *See, e.g.*, State v. McAfee, 12 S.E. 435 (N.C. 1890) (noting the lower court instructed jury that a husband had no right to whip his wife with a stick larger than a man's thumb if the chastisement was inflicted from pure malice); *Rhodes*, 61 N.C. (Phil.) 453 (upholding lower court's acquittal of husband based on husband's right to beat wife with stick no larger than his thumb; although stating reason for acquittal was not right of husband to beat wife, but court's refusal to enter the domestic sphere over "trifling" matters).

14. State v. Black, 60 N.C. (Win) 262, 263 (1864).

"her bad behaviour and misconduct" would mitigate any punishment.[15] Overall public sentiment during this period was that domestic violence was a private matter—one best resolved behind closed doors and far from the public eye.[16] As a North Carolina court held, "[w]e will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."[17] As a result of these attitudes toward interpersonal violence, victims had no legal recourse against their batterers.

In the 1960s, the rise of social activism increased consciousness of the subordination of women in society generally and of domestic violence particularly. The first wave of domestic violence advocacy efforts focused on opening shelters for battered women, but legal recourse remained unavailable.[18]

During the 1970s and 1980s, feminists lobbied the state to recognize that family violence constituted criminal acts that are prohibited when carried out against non-family members.[19] They encouraged criminal justice policies that would reduce the discretion of system actors in deciding whether to pursue a case, so that domestic violence would be zealously prosecuted rather than ignored.[20] In this period, many states began codifying criminal and civil remedies for domestic violence.[21] Statutes established victims' rights to pursue

15. Robbins v. State, 20 Ala. 36, 39 (1852).

16. *See* State v. Pettie, 80 N.C. 367, 368 (1879) ("It is settled law of this state that the courts will not invade the domestic form or interfere with the right of a husband to control or govern his family; and from motives of public policy, even if a husband should chastise his wife, it is regarded as best not to take any cognizance thereof, unless some permanent injury be inflicted or there be an excess of violence, or such a degree of cruelty as shows that the chastisement was inflicted to gratify his own bad passion."); State v. Oliver, 70 N.C. 60, 61–62 (1874) (Unless a permanent injury has been committed, "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."); State v. Rhodes, 61 N.C. (Phil.) 453, 459 (1868). *See also* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996) (discussing the state's typical non-response to domestic violence prior to the 1970s); Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 432 (1990) ("Only in the last twelve years has this problem [of intrafamily violence] become a focus of attention and national concern.").

17. *Rhodes*, 61 N.C. (Phil.) at 459.

18. *See* Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666 (2004) ("The early battered women's advocacy movement was a grassroots effort to provide services and shelter to domestic violence victims . . .").

19. *See* DEBORAH RHODE, JUSTICE AND GENDER 242 (1989) (detailing the efforts of the feminist movement to address domestic violence in the 1970s); Barbara J. Hart, *Arrest: What's the Big Deal?*, 3 WM. & MARY J. OF WOMEN & L. 207, 207 ("For the last twenty years, activists in the battered women's movement have been urging the criminal justice system to take action against domestic violence. They want the system to treat it like a crime . . .").

20. Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 53 (2000) (noting also that victim advocates' success in implementing mandatory interventions had unforeseen results that ultimately may have worked to the victims' detriment).

21. *See generally* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999) (describing the enormous shift in thinking over the course of a generation from denial of the

civil injunctions against batterers to protect them from further violence and establish ground rules for separation.[22] By 1983, forty-three states had enacted protection order legislation under which victims could seek redress against and protection from battering partners.[23] On the criminal front, jurisdictions slowly began to charge domestic violence offenses as crimes.[24]

However, the official codification of these remedies did not guarantee that the justice system embraced them. Despite a mandate to arrest when probable cause existed, police often declined to apprehend domestic violence offenders at the scene of an incident.[25] Court systems failed to establish accessible procedures for filing for protection orders,[26] and in many jurisdictions, prosecutors routinely resisted charging codified domestic offenses.[27]

While the underlying crimes in domestic violence cases were identical to those in stranger-assaults, the victim and perpetrator dynamic complicated the state's response. Advocates urged system actors to understand that when the victim and perpetrator are bound by a web of interdependency, including children, finances, and emotions, appropriate state intervention should include consideration of non-penal issues.[28] They argued that when a victim

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existence of domestic violence to the implementation of programs in the 1960s and '70s to confront it and protect victims).

22. *See* statutes cited *supra* note 3.

23. *See* Lisa Lerman & Franci Livingston, *State Legislation on Domestic Violence*, RESPONSE Sept.–Oct. 1983 at 1 ("Forty-three states and the District of Columbia have enacted legislation that allows battered women to obtain civil protection orders independent of domestic relations proceedings."). *See generally* Leigh Goodmark, *The Legal Response to Domestic Violence: Problems and Possibilities: 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, 10 (2004) ("First appearing in state law in the 1970s, by 1989 all fifty states and the District of Columbia had enacted statutes providing civil remedies for battered women via protection orders, known as the 'grandmother of domestic violence law.'") [hereinafter, Goodmark, *Legal Response*].

24. *See infra* note 27 and accompanying text.

25. *See infra* Part III.A.1, discussing the historic police response to domestic violence.

26. *See generally* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1192–1193 (1995) ("While civil protection orders were initially limited to certain classes of persons and were sometimes difficult to obtain, their availability and flexibility has grown dramatically in recent years."); Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 169–172, 178, 180–81 (1993) (listing complexity of forms, difficulty accessing the courthouse during service hours, and filing fees as problems affecting victim access to protection orders).

27. In Orange County, California, for example, prosecutors brought charges in only four felony domestic assault cases in 1989 while a decade later they filed 2316. Jack Leonard, *Domestic Abuse Arrests in Orange County Skyrocket in Last Decade*, L.A. TIMES, Sept. 5, 1999, at B5.

28. *See, e.g.*, State v. Marks, 2002 WL 970451, *2 (Tenn. Crim. App. May 10, 2002) ("The assistant district attorney recognized the following factors as being in favor of granting pretrial diversion: (1) the defendant has no prior criminal record; (2) the defendant has a good relationship with his first ex-wife, Barbara Marks, and their children; (3) the defendant has been involved with a family business all of his working life and has a good business reputation . . ."). *See also* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY

recommends that a perpetrator not be prosecuted or incarcerated because her children will starve without his income, the state should consider the recommendation.[29]

During the late 1970s and 1980s, advocates and social theorists struggled to explain the dynamics of battering to judges and prosecutors to encourage a more nuanced treatment of these cases. They put forth coercion theories explaining that the batterer's exertion of power and control over his victim is at the root of domestic violence.[30] Under the pervasive control of the batterer, a victim often will act in ways that are contrary to her best interest.[31] She may submit to violence, surrender her connections to society, jeopardize her children's safety, lie to protect the batterer, or use violence against the batterer in self-defense. Advocates offered such social research in order to explain why domestic violence victims behaved and presented in ways that were uncharacteristic of most victims of violence. In recent years, judges and juries have begun to internalize these lessons. Fact-finders often perceive victim behavior to be the result of batterer coercion.[32] Power and control have become the buzz words popular culture associates with domestic violence.[33]

L. REV. 1505, 1556–58 (1998) (discussing the difficulties prosecutors and judges face when balancing the state's interest in jailing domestic violence offenders against the victim's dependence on the abuser).

29. *See* Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence, supra* note 28, at 1557.

30. Lenore Walker's research on battered women and the cycle of violence is the best known example of this type of work. LENORE E. WALKER, THE BATTERED WOMAN xv (1979) ("A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."). *See, also*, Christine N. Carlson, *Invisible Victims: Holding the Educational System Liable for Teen Dating Violence at School*, 26 HARV. WOMEN'S L.J. 351, 363 (2003) ("Dr. Lenore Walker's groundbreaking study on domestic violence, published in 1979, first developed and introduced the idea of the cycle of violence."); Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women To Iraq*, 46 ARIZ. L. REV. 213, 232 n.101 (2004) ("Dr. Lenore Walker, who developed the concept of battered woman syndrome (BWS) in the late 1970s, describes the battered woman's life as involving a cycle of violence."); Leigh Goodmark & Catherine F. Klein, *Deconstructing Teresa O'Brien: A Role Play for Domestic Violence Clinics*, 23 ST. LOUIS U. PUB. L. REV. 253, 258–59 (2004) ("The cycle of violence was conceived by Dr. Lenore Walker as a means of understanding the dynamics of a battering relationship.").

31. *See* discussion of psychosocial theories *infra* Part II.C.

32. *See, e.g.*, Stevenson v. Stevenson, 714 A.2d 986, 993 (N.J. Super. Ct. Ch. Div. 1998) (reasoning that the plaintiff's request to dissolve a protection order "made despite the latest brutal beating she suffered at the hands of a drunken husband who has a past history of wife-beating and an alcohol abuse problem, is consistent with phase three of 'the battered woman's syndrome'"). *See also* Zappaunbulso v. Zappaunbulso, 842 A.2d 300, 306 (N.J Super. Ct. App. Div. 2004) ("Our courts have recognized that those who commit acts of domestic violence have an unhealthy need to control and dominate their partners . . .").

33. *See, e.g., Domestic Violence—It Doesn't Happen in Cornwall, Does It?*, CORNISH GUARDIAN, Mar. 17, 2005, at 46 (describing goal of local domestic violence support organization as "enabling women to understand the context of their abuse and issues around power and control"); Eric Frazier, *On Family: Violence's Tentacles Still Grip Us Hard,* CHARLOTTE OBSERVER, Mar. 15, 2005, at 1E (asserting that, "[f]or the batterer, it's all about power and control"); Kirsten Searer, *Stiffer Domestic Violence Law Urged*, LAS VEGAS SUN, Feb. 16, 2005, at

The most recent wave of domestic violence advocacy focused on mandatory intervention policies. During the 1980s and 1990s, advocates pushed for statutes and policies that reduced system actors' discretion to refuse to pursue domestic violence cases. Police officers, who traditionally had a choice about whether to make an arrest when they found probable cause at the scene of the incident, were statutorily mandated to make arrests upon a finding of probable cause.[34] Prosecutors' offices implemented no-drop prosecution policies, requiring the prosecutor to pursue a charged domestic violence case regardless of the victim's preferences.[35] These policies increased the numbers of domestic violence cases entering and being pursued within the criminal justice system, indicating that advocates were successful in their efforts to convince the justice system to take the issue of domestic violence seriously.[36]

B. Why have system actors concluded that victims are unreliable?

At the same time, criminal and civil justice system actors have concluded that victims are unreliable partners in these system interventions. Increased interactions with victims of domestic violence have conveyed this point clearly and indelibly. In addition, theories put forth by advocates, while well-crafted to encourage the legal system to take violence against women seriously and to protect women who batter in self defense, have provoked a backlash that reinforces the message that victims are unreliable.

B4 (quoting domestic violence lobbyist as stating, "[d]omestic violence is about 'power and control'"); Polly Summar, *Cause for Alarm: The Danger of Domestic Violence*, ALBUQUERQUE JOURNAL, Apr. 6, 2003, at 8 (quoting the founder and chairman of a women's center as stating, "[d]omestic violence is about power and control"); Judi Villa, *Domestic Violence Claiming More Victims on Periphery*, ARIZONA REPUBLIC, Apr. 3, 2005, at A1 (noting that, according to the director of a domestic violence service organization, domestic violence related murders "are about an abuser maintaining power and control").

34. *See infra* Part III.A for an in-depth discussion of mandatory arrest policies.

35. *See infra* Part III.B for a discussion of no-drop prosecution policies.

36. *See* Renée Römkens, *Law as a Trojan Horse: Unintended Consequences of Rights-based Interventions to Support Battered Women*, 13 YALE J. L. & FEMINISM 265, 265 (2001) ("After thirty years of feminist advocacy and politics, a small but historic change has taken place: domestic violence has entered mainstream international and national politics as a matter of legitimate public concern and has become the subject of various legal regulations in the United States, notably the provision of rights to support and protect victims."). Today, every state and the District of Columbia allows victims of domestic violence to obtain injunctions against batterers. *See* statutes cited *supra* note 3. For example, the Superior Court of the District of Columbia houses a Domestic Violence Intake Center where victims can initiate civil protection order cases and meet with safety advocates, criminal justice paralegals, representatives who can assist with the filing of child support cases, and police officers. *See* Epstein, *Effective Intervention*, *supra* note 21, at 29–32. In July 2006, an average month, 336 petitions for protection orders were filed. *See* DOMESTIC VIOLENCE UNIT, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, MONTHLY SUMMARY (July 2006). The prosecutor's office initiated approximately 280 misdemeanor cases in the same month (251 of which were filed/certified and 28 of which were transferred into the court during the month). *Id.*

1. Individual interactions with victims

Interactions with victims of domestic violence reveal the complexity of battering relationships. When policy-makers initially determined that they would intervene in domestic violence cases, they viewed domestic violence survivors as uncomplicated victims in need of protection. However, when actors began to interact with individual victims, they realized the complexity of the battering dynamic.[37] Because often the system actor's goals dramatically diverge from the victim's goals and because victim behavior is inconsistent with typical crime victim behavior, actors may rationally conclude that victims are unreliable partners in domestic violence interventions.

2. Divergent goals and priorities

System actors often approach official intervention from a different perspective than survivors since system actors generally prioritize the legal aspects of the conflict.[38] Most individuals in the justice system hope to protect battered women from further violence by seeking to remove them from abusive relationships. When confronted with a domestic violence offense, the system actor sees a straight-forward scenario: an individual has been beaten by her partner and needs protection. The system actor sees an offender who must be brought to justice to vindicate the public good and protect the victim from further harm. As a dispassionate bystander to the relationship, the prosecutor, police officer, or judge can narrowly view the offense and focus on the solution, untouched by the dynamics of the offending relationship.[39]

Because of the complexity of battering relationships, victims experience a wide range of pressures and emotions in the aftermath of a violent episode. These forces compel most victims to perceive battering relationships in shades of gray that do not exist in the monochrome world of most lawyers, police officers, and judges. While some victims may wholeheartedly and consistently embrace the actor's mission to end the relationship, most victims will, at some point during a criminal or civil case, deviate from the path to a successful termination

37. *See* Römkens, *supra* note 36, at 286 ("The representation of the battered woman, and more generally of the domestic violence victim, regularly shifts from a group category of 'deserving victims' during the stage of lawmaking, to a category of potentially flawed, unreliable, irresponsible, exaggerating, and undeserving individuals in its day-to-day legal implementation of laws that were originally intended to protect and support women.").

38. *See* EVE BUZAWA, GERALD T. HOTALING, ANDREW KLEIN & JAMES BYRNE, RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING: EXECUTIVE SUMMARY 13 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/181428.pdf (reporting that victims in a large scale study generally perceived a gap between their interests and those of the prosecutors).

39. Römkens perceives negative attitudes toward domestic violence victims to be less benign than I suggest above. Römkens, *supra* note 36. She argues that general public policies and public service campaigns present an attitude that is "at best ambiguous," at worst a deep-seated disdain for domestic violence victims as weak and morally inferior. *Id.* at 288.

of the relationship.[40]

Most victims experience some ambivalence in leaving a battering relationship. Commonly cited explanations for failing to leave and for returning to a battering relationship include lack of financial resources,[41] fear of both violent and non-violent retribution,[42] lack of access to information about options for escape,[43] continuing love for the batterer and belief he will change,[44] desire to maintain the two-parent family structure,[45] prior negative interactions with the legal system,[46] community pressure to refrain from seeking and general

40. *See* Römkens, *supra* note 36, at 281–82 (discussing the deviating goals of system actors and domestic violence victims; the latter prioritize "protection and peace of mind for themselves and their children" over punishment of ex-partners).

41. *See* Sarah M. Buel, *A Lawyer's Understanding of Domestic Violence*, 62 TEX. B.J. 936, 938 (1999) (discussing the paucity of funding available to a woman through public assistance; further, citing a state study showing that 85 percent of the women contacting service providers had returned to their batterers at least five times previously with the primary motivation being financial need); Maria L. Imperial, *Self-Sufficiency and Safety: Welfare Reform for Victims of Domestic Violence*, 5 GEO. J. ON FIGHTING POVERTY 3, 4 (1997) (stating that many victims of domestic violence are financially dependent on their batterers whose abuse undermines their efforts to keep their jobs); Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1076 (1995) (citing the financial pressures on both high income and low income women who consider leaving battering relationships).

42. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 61, 144 (1987) (citing the high incidence of further abuse and homicide upon separation); *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 858–59 (2000) ("If she takes [the batterer's] threats seriously, and statistics show that she should, then she may conclude that it is safer for her and her children in the short term to stay in the relationship."); Buel, *supra* note 41, at 937–38 (arguing that one of the many reasons that women stay in battering relationships is their reasonable fear that the batterer will carry out one of his threats to hurt her or the children); 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, 2 (2001) (asserting that some victims stay in battering relationships due to the batterer's threats to divulge personal information about the victim). *See generally* Joyce Klemperer, *Programs for Battered Women—What Works?*, 58 ALB. L. REV. 1171, 1178 (1995) (citing the need for safety as the most critical issue for a woman fleeing an abusive relationship).

43. *See* Buel, *supra* note 41, at 938.

44. *See* Mary Ann Dutton, 21 HOFSTRA L. REV. 1191, 1234–35 (1993) (discussing the emotional attachment of a victim to an abusive partner). *See generally* Nan Seuffert, *Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law*, 23 MELB. U. L. REV. 211 (1999) (exploring the challenges victims' ambivalence creates in legal discourse).

45. *See* Buel, *supra* note 41, at 938 ("We may believe that our children's interest is best served by having both parents raise them . . ."); Dutton, *supra* note 44, at 1234 ("[Concern for children] may lead [women] to remain [in battering relationships], believing that to separate the children from their father may be detrimental to the children."). While many victims understandably feel pressure to remain with an abusive mate so that their children can have access to their fathers, a substantial body of psychological research indicates that merely witnessing violence can have a significantly damaging impact on children. Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1112–14 (1995).

46. *See* Buel, *supra* note 41, at 938 (discussing the effect of poor legal representation or ignorant judges on domestic violence survivors' decisions about leaving abusive relationships).

skepticism about legal intervention,[47] and psychological diagnoses such as depression and post traumatic stress disorder.[48] Social science research asserts that victims attempt to leave abusive relationships multiple times before they succeed.[49] Because such behavior is inconsistent with typical crime victim behavior, system actors may conclude victims are unreliable at best, dishonest at worst, and may prefer to move forward on the cases without them.

Many domestic violence victims are strongly influenced by these extralegal issues in deciding when to seek legal intervention.[50] A victim's goal in initiating an arrest or prosecution may be to send a warning to the offender that she will seek intervention if forced. She may be trying to buy herself time to establish financial stability without the violence or pressure of a violent relationship. Alternatively, she may seek prosecution to gain leverage in the relationship and obtain concessions from her partner.[51]

Further, the insistent demands of supporting a family or caring for children might lead a victim to assign low priority to court proceedings. Seemingly endless continuances, recesses, and procedural delays require significant time investment by the complaining witness, who may be missing work and related income and neglecting child care responsibilities.[52] In the end, the ultimate goal of criminal justice—punishment for past crimes—may not resonate with a victim whose everyday obligations mandate that she focus on the future. Punishment of

47. *See id.* at 939 (discussing the pressure from family and clergy to maintain the relationship); Dutton, *supra* note 44, at 1237 (suggesting that forces of race, ethnicity, and culture might influence a victim's decision about whether to leave an abusive relationship).

48. *See* Kelly Grace Monacella, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 TEMP. L. REV. 699, 704 (1997) (explaining that the stress of the environment in which a battered woman lives make her prone to depression). Recent research revealed that 70 percent of a random sample of women seeking intervention from the legal system or shelters suffered from Post Traumatic Stress Disorder. Lauren Bennett Cattaneo, Margaret E. Bell, Lisa A. Goodman, & Mary Ann Dutton, *Intimate Partner Violence Victims' Accuracy in Assessing their Risk of Re-abuse*, 22 J. FAM. VIOLENCE 429, 438 (2007).

49. LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 198 (1986) ("The average number of previous separations among women who resumed cohabitating with the batterer was 2.42, compared to 5.07 among shelter residents who never resumed cohabitating after they left the shelter."). *See also* Waul, *supra* note 20, at 56 ("Ending an abusive relationship is not typically a single decision, but rather a process that occurs over time.").

50. *See* David A. Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOC'Y REV. 313, 320–21 (1991) (asserting that women use the justice system in strategic ways and often drop charges when they have secured desired outcomes).

51. *Id.* at 321 ("[C]riminal justice is used as part of a strategy for securing outcomes, rather than for catharsis or punishment as an end in itself."). One study found that making non-violent threats, such as the threat to pursue prosecution or to call the police, was the most successful self-help strategy that battered women used to protect themselves. LEE BOWKER, BEATING WIFE-BEATING 66 (1983).

52. Barbara Hart, *Battered Women and the Criminal Justice System*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 102 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996) [hereinafter Hart, *Battered Women*].

batterers is often a low priority for victims of domestic violence.[53] Finally, the victim may resist legal interventions because she harbors a deep distrust of the justice system based on past interactions or collective community perceptions.[54] When system actors confront victims' different goals and priorities, many become frustrated and wish to divorce their actions from the victims' actions.[55]

3. Unreliable and inconsistent victim behavior in the justice system

Judges, prosecutors, and police officers repeatedly witness victim ambivalence or even animosity toward the justice system in the course of a case. Often, after the initial call to the police or even after several weeks or months of cooperating with the prosecution, victims return to their batterers. Sometimes victims who return try to drop a pending protection order case or vacate a previously entered order. They may plead with the prosecutor to drop the criminal case,[56] refuse to testify in that case, or even testify in favor of the defense. Judges hearing criminal cases and lawyers prosecuting them consistently confront victims who take the stand to recant their earlier allegations of abuse.[57] Not infrequently, judges and prosecutors encounter victims who refuse to cooperate with the prosecution in any way, despite their earlier allegations of intimate violence.[58] In these cases, prosecutors may subpoena these victims and sometimes may incarcerate them to compel their testimony.[59]

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53. *See* Römkens, *supra* note 36, at 282 (analyzing a domestic violence program in the Netherlands and concluding that victims' primary need from the legal system is protection and not punishment of offenders).

54. *See infra* note 260 and accompanying text.

55. An analysis of programs intended to support battered women revealed that system actors perceive the domestic violence victim as deserving of compassion when she is a victim of crime; but she dramatically loses empathy when she fails to cooperate in efforts to protect her. *See* Römkens, *supra* note 36, at 286.

56. *But cf.* Hart, *Battered Women*, *supra* note 52, at 102–03 (stating that reconciliation with the batterer typically does not inform the victim's decision to terminate cooperation with the prosecution).

57. Some sources estimate that from 80 to 90 percent of domestic violence victims at some point refuse to cooperate with prosecutors. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367–68 (1996). *See also* People v. Brown, 94 P.3d 574, 576 (Cal. 2004) ("About 80 to 85 percent of victims 'actually recant [the violence they described to the police] at some point in the process.'").

58. *See, e.g.*, People v. Lopez, No. F036914, 2002 Cal. App. LEXIS 2665 at *3 (Cal. Ct. App. Mar. 26, 2002) (reporting that victim did not decide to testify until spending one night in jail under arrest for failure to appear at hearing). Judges in Colorado reported that many victims recant. They also expressed frustration with those victims who do not want defendants to receive sentences. *See* Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 HARV. WOMEN'S L.J. 263, 265 (1997).

59. *See, e.g.*, Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 402–04 (2001) (describing prosecutors' use of fear tactics including subpoenas and threats of arrest or perjury charges to compel victim cooperation); *Battered Women Must Testify*, WASH. POST, Aug. 8, 1983, at A8 (noting the incarceration of one victim as the result of an experimental "no-drop"

A domestic violence survivor can be an unreliable witness or litigant in a civil or criminal proceedings even when she affirmatively *wants* to cooperate. Like other victims of trauma, a domestic violence survivor may have little memory of the incidents that comprise the domestic violence offense. Often she will involuntarily repress traumatic events.[60] Or, a victim may have endured so many and such frequent episodes of battering that she cannot effectively distinguish one from another.[61]

Even victims who do testify may disappoint system actors by presenting themselves on the stand in ways that defy common expectations of victims. One expects a victim of violence to be meek, scared, and sweet. Victims who display anger or lack emotion can pose a challenge for lawyers seeking to hold the offender accountable.[62]

Other victims may frustrate the prosecutor, judge, or police by pressing for greater lenience toward the offender than the system actor seeks. Many domestic violence victims assess their risks differently than dispassionate observers would.[63] A domestic violence victim who resolves to cooperate with

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policy adopted by Anchorage, Alaska municipal prosecutor's office); Mackenzie Carpenter, *Wives Forced to Testify in Spousal Abuse Cases*, PITTSBURGH POST-GAZETTE, Aug. 30, 2002, at B4 (reporting the Pennsylvania Supreme Court ruling that wives must testify in court against their husbands in domestic violence disputes, and noting Allegheny County policy of arresting victims who refuse to honor a subpoena); Colleen O'Connor, *The Law's Double Edge*, DALLAS MORNING NEWS, Mar. 11, 1996, at 1C (noting the growing number of jurisdictions that are willing to compel a victim's testimony); Maureen O'Hagan, *In Baltimore, a Victim Becomes a Criminal*, WASH. POST, Mar. 30, 2001, at A1 (reporting that a domestic violence victim, arrested to compel her testimony, lied to the grand jury out of fear for her life and was sentenced to thirty months in prison for perjury); Alex Roth, *Jailing the Victim; Courts Force Battered Women to Testify*, DAILY NEWS OF L.A., June 8, 1998, at N1 (reporting the increasingly aggressive treatment of uncooperative victims by prosecutors and judges); Jason Wolfe, *Woman Recants Her Story of Abuse*, PORTLAND PRESS HERALD (Maine), Jan. 10, 1996, at 1B (reporting the frustration of prosecutors and police after victim recanted, and noting that she had been arrested before the trial to compel her testimony).

60. *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 179–80 (1992).

61. *See* Waul, *supra* note 20, at 57 (reporting a study's finding that a quarter of domestic violence victims sought protection orders not immediately following a single incident, but after five or more years abuse); *see also* St. Joan, *supra* note 58, at 282 (noting that trauma can impair a victim's ability to construct a comprehensive verbal narrative of the entire offense).

62. *See* Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AMER. U. J. GENDER SOC. POL'Y & L. 733, 734 (2003) (arguing that when witnesses do not present as paradigmatic victims, judges and juries tend to doubt their credibility).

63. *See generally*, Cattaneo, *Intimate Partner Violence, supra* note 48 (discussing victim risk assessment and the factors that affect its accuracy). A victim who assesses that her risk of violence in staying in a battering relationship is lower than a dispassionate advocate would assess that same risk may be entirely reasonable. A victim might compare the risks associated with staying in an abusive relationship to those associated with leaving the relationship and determine that she is safer staying. For a discussion of the feminist character of such a rationale for failing to pursue interventions, see Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 23 U. CHI. LEGAL F. 23, 45 (1989). Research on separation violence indicates that the most dangerous time for a victim of domestic violence is when she attempts to leave the relationship. BROWNE, *supra* note 42, at 61, 144 (citing the high incidence of further abuse and homicide upon separation). Some research estimates that victims

prosecution despite her low assessment of risk may seek a minimal sentence or a weak protection order. This desire might lead a victim—usually contrary to the hopes of the prosecutor or victim advocate—to underplay the violent behavior on the stand or to request reduced protection. For example, she might allocute for probation rather than incarceration at a criminal sentencing or request a minimal protection order rather than one that requires the battering partner to stay away from her.

Inconsistent victim behavior can be especially irksome to law enforcement. Officers arriving on the scene of a domestic violence incident may witness the violence in progress or see the resulting injuries or destruction of property. Often, the victim will fabricate a marginally credible story that absolves her partner and explains her injuries, and she will send the officer away from the scene. These experiences color the officer's reactions when he encounters the ambivalent victim the next time she calls for police intervention.[64]

Civil cases are also an extremely fertile forum for interactions with domestic violence victims who appear unreliable, fickle, and marginally credible from the perspective of a judge. In some jurisdictions, dismissal rates for civil protection orders are in equipoise with pursued petition rates.[65] Dismissing dozens of cases weekly for petitioner's failure to appear, judges cannot help but notice victims'

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are seventy-five percent more likely to be murdered when trying to flee or after leaving than if they remain in the relationship. Buel, *supra* note 41, at 937–38. Interactions with the justice system may be particularly provocative of violence. Research has shown that batterers threaten victims with violence during as many as 50 percent of all prosecutions. Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 33 (2000) (citing ROBERT DAVIS ET AL., NEW YORK VICTIM SERVICES AGENCY, VICTIM-WITNESS INTIMIDATION IN THE BRONX COURTS (1990)). Thirty percent of batterers actually assault victims during the pendency of a prosecution. *Id.* (citing Stephen Goldsmith, *Taking Spouse Abuse Beyond a "Family Affair,"* 17 LAW ENFORCEMENT NEWS 7 (1991)). Further, despite the conventional wisdom that suggested that absent intervention battering increases in severity over time, contemporary research suggests that, in fact, such a victim might be correct in her assessment. Most studies now illustrate that abuse actually decreases over time without intervention. Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence*, 6 TRAUMA, VIOL. & ABUSE 141, 164 (2005) [hereinafter Cattaneo, *Risk Factors*].

64. These interactions may inform some of the negative behaviors that domestic violence survivors identify in law enforcement. In a 2001 study of 890 women who sought services for domestic violence or sexual assault, twenty-four percent of the 867 women who dealt with law enforcement reported that law enforcement acted bored when interacting with the victims. Thirty-one percent reported that officers told the victims that there was nothing law enforcement could do for them. Sixteen percent reported that the officers scolded or blamed the women for not following through with prior incidents. JANINE M. ZWEIG, MARTHA R. BURT & ASHELEY VAN NESS, THE EFFECTS ON VICTIMS OF VICTIM SERVICE PROGRAMS FUNDED BY THE STOP FORMULA GRANTS PROGRAM iv, 84 (URBAN INSTITUTE, 2003).

65. *See* Andrew 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, 195–96 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (noting that almost half of the woman who obtained restraining orders returned to court to vacate them prior to the one-year termination date); SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, DISPOSITION CHARTS, July 2006 (statistics showing that approximately half of the civil protection orders adjudicated were dismissed (177 out of 345)).

tenuous relationships with the system. Even victims who pursue their protection orders often return to court later to vacate those orders.[66]

System actors who consistently witness victim ambivalence about cooperating with the justice system reasonably conclude that victims are unreliable partners in domestic violence interventions.[67]

C. Psychosocial theories about domestic violence

In an attempt to portray domestic violence as a social problem worthy of intervention and to assist victims in court, advocates developed and disseminated psychological and social theories to explain the incongruous behavior of some domestic violence victims. Advocates sought to explain victim behavior that was uncharacteristic of most complaining witnesses in order to convince system actors to treat domestic violence as seriously as other criminal acts.[68] To do so, they used models developed by social theorists and victim advocates: the now well-known Battered Women's Syndrome and the Power and Control Wheel Model. These advocates deserve an enormous debt of gratitude for convincing system actors to handle domestic violence aggressively. However, system actors' contemporary responses to victims reflect some unanticipated and damaging repercussions of the pervasiveness of these theories.[69]

1. Battered Women's Syndrome

Battered Women's Syndrome (BWS), which explains the characteristics of a subset of domestic violence victims by reference to a series of behavioral traits and psychological reactions, has incidentally damaged domestic violence victims' credibility.[70]

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66. Klein, *supra* note 65, at 195–96.

67. Without training, system actors' perceptions of victims as unreliable can become less benign. Training is vitally important to enable actors to continue supporting victims in their efforts to manage their violent relationships.

68. Even victim advocates have observed publicly that victim behavior is often irrational; one remarked that victim thought-processes do not "make any logical sense. But that's the thing about domestic violence it's crazy-making." Summar, *supra* note 33, at 8.

69. *See* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 564–65 (1999) (noting recent acknowledgement that strong state policies such as mandatory intervention ultimately fail women's interests); Schneider, *supra* note 1, at 548 (noting the problematic perception of the battered woman as a victim that resulted from the movement against domestic violence).

70. Ironically, as if the characteristics of the syndrome are not sufficient to provoke a lack of respect for those who suffer it, the syndrome relies on extrapolation from the experiences of dogs. When dogs in a cage receive electric shocks each time they try to escape, they eventually cease to attempt to escape. *See generally* Lyn Y. Abramson, Martin E. P. Seligman, & John D. Teasdale, *Learned Helplessness in Humans: Critique and Reformulation,* 87 J. ABNORMAL PSYCHOL. 49 (1978) (applying findings on learned helplessness to depression in humans); Martin E. P. Seligman, Steven F. Maier & James H. Geer, *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256 (1968) (relating dogs' passive reaction to inescapable shock to maladaptive passive acceptance of aversive events in humans).

Lenore Walker first identified and defined the syndrome in the 1970s.[71] She described it as a form of post traumatic stress disorder characterized by powerlessness, hypervigilence, and fear and amplified by the often repetitive nature of battering.[72] The syndrome explains why women stay in battering relationships by reference to "learned helplessness" which can result from acute violent episodes. "Learned helplessness" describes a condition characterized by an inability to make decisions or even to look out for one's best interest.[73]

Walker's research also popularized the cycle of violence. Under this theory, domestic violence victims are trapped in a cycle of behaviors from which they struggle to extricate themselves. This three-phase cycle includes tension-building, acute battering, and loving contrition.[74] The theory explains that a victim remains in an abusive relationship because she is lulled by the batterer's affection and apologies into the belief that the abuse has ended.[75]

BWS became part of the legal and popular consciousness when attorneys began offering BWS evidence through expert testimony at trial.[76] The Diagnostic and Statistical Manual lists the effects and symptoms of domestic violence as a subset of Post Traumatic Stress Disorder.[77] Because of its rapid acceptance as a psychological and legal theory, one commentator refers to BWS

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71. *See supra* note 30.

72. *See* WALKER, *supra* note 30, at 49.

73. *See id.* at 42–54.

74. *See id.* at 55.

75. *See id.* at 65–70.

76. *See* Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 795 (1996) (stating that all fifty states have permitted some form of BWS evidence to be presented at trial). Several states have codified the admission of BWS evidence through legislation. *See, e.g.*, MASS. ANN. LAWS ch. 233, § 23F (LexisNexis 2005); MD. CODE ANN., EVID. § 10-916 (LexisNexis 2006); MO. ANN. STAT. § 563.033 (West 2006); OHIO REV. CODE ANN. § 2945.392 (West 2006); WYO. STAT. ANN. § 6-1-203 (2005). Stories in the popular press indicate the deep permeation of the theory. *See, e.g.*, *Battered Women: Murderers or Victims?*, ECONOMIST, Jan. 16, 1993, at 30 (reporting the passage of a California law allowing evidence of abuse to be admitted as a defense in murder cases due to the growing recognition of BWS); Anna Gorman, *Wife Who Killed Husband Free After 17 Years; New Law on Battered Women's Syndrome Brings Release After Davis Denied Parole*, L.A. TIMES, Oct. 26, 2002, at 1 (reporting on the first woman freed from prison because evidence of BWS was not permitted during her trial); Dana Littlefield, *Second Trial Set for Woman Charged in Spouse's Death*, SAN DIEGO UNION-TRIB., Jan. 6, 2005, at NC-1 (reporting that judge set aside a woman's murder conviction due to the unavailability during her first trial of expert testimony on BWS); Laura Loh, *For Battered Women Behind Bars, New Hope; Volunteers Work to Free Those Convicted of Killing Abusive Partners Before Syndrome was Recognized in California*, L.A. TIMES, June 21, 2002, at B2 (describing advocates' and lawyers' work to free inmates convicted of killing abusive partners before BWS was officially recognized in California); Katha Pollitt, *Georgie Porgie Is a Bully*, TIME, Fall 1990, Special Issue, at 24 (arguing that despite such advances as BWS legal defenses, violence against women is not being taken seriously enough by men); Robin Topping, *Abuse an Untold Factor in La Pinta's Case*, NEWSDAY, May 10, 2005, at A6 (reporting the reversal of a woman's murder conviction due to the failure of her attorney to raise a BWS defense).

77. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV 465 (4th ed. 2000).

as the syndrome that transformed from "pariah to conqueror in less than twenty years."[78]

BWS has been enormously useful to domestic violence victim advocates. First, BWS evidence is regularly admitted to defend women in domestic violence homicide cases.[79] Syndrome evidence helps victims put forward a self defense argument. Under this theory, a defendant-victim can use such evidence to illustrate that the danger from which she sought to protect herself was subjectively imminent.[80] Additionally, BWS has provided an explanation for seemingly irrational victim behavior.[81] It has lent scientific support to anecdotal explanations of the various reasons why victims seem to act against their best interests.

However, the influence of BWS has not been entirely positive. While it has been a success in the courtroom and in the popular imagination, BWS has damaged domestic violence victims' credibility. The syndrome reinforces images of battered women as helpless, meek, and unreliable agents. In court, syndrome evidence has "focused on the passive, victimized aspects of battered women's experiences."[82] If women are perceived as being unable to take responsibility for their own actions, accurately gauge the imminence of harm, and leave a bad situation, they will not be seen as active partners in domestic violence interventions. A system actor understanding that a victim suffers from this constellation of symptoms might feel that she can reasonably discount the victim's own input about the relationship. As one commentator opined, such theories "have aided in revealing the sources of women's disempowerment at the

78. Raeder, *supra* note 76, at 795.

79. *See, e.g.*, Boykins v. State, 995 P.2d 474, 479 (Nev. 2000) (reversing and remanding because "the trial court failed to properly instruct the jury on Boykins' theory that battered woman syndrome should be considered by the jury not only as to the reasonableness of Boykins' conduct, but as to her state of mind at the time of the shooting"); Bonner v. State, 740 So. 2d 439, 441 (Ala. Crim. App. 1998) (holding that trial court's refusal to allow expert testimony on BWS was reversible error); People v. Humphrey, 921 P.2d 1, 10 (Cal. 1996) (noting that "evidence of battered woman's syndrome is generally *relevant* to the reasonableness, as well as the subjective existence, of defendant's belief in the need to defend"); State v. Kelly, 478 A.2d 364, 368 (N.J. 1984) (holding "that the battered-woman's syndrome is an appropriate subject for expert testimony" and "that the experts' conclusions, despite the relative newness of the field, are sufficiently reliable under New Jersey's standards for scientific testimony").

80. *See, e.g.*, State v. Koss, 551 N.E. 2d 970, 973 (Ohio 1990) ("Expert testimony regarding the battered woman syndrome can be admitted to help the jury not only to understand the battered woman syndrome but also to determine whether the defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense.").

81. *See, e.g.*, Stevenson v. Stevenson, 714 A.2d 986, 993 (N.J. Super. Ct. Ch. Div. 1998) (reasoning that the plaintiff's request to dissolve a protection order "made despite the latest brutal beating she suffered at the hands of a drunken husband who has a past history of wife-beating and an alcohol abuse problem, is consistent with phase three of 'the battered woman's syndrome.'"). *See also* I.J. v. I.S., 744 A.2d 1246, 1249 (NJ Super. Ct. Ch. Div. 1999) (explaining that courts are required to explain the cycle of violence to all those plaintiffs moving to dismiss their protection orders).

82. Schneider, *supra* note 1, at 561.

risk of obscuring their capacities for resistance."[83] Another commentator explained that successful use of BWS evidence "will lead the jury to characterize [the victim] as incompetent rather than as reasonable . . . [She will be labelled] unreasonable, incompetent, suffering from psychological impairment or just plain crazy."[84]

2. *The Power and Control Wheel*

The Power and Control Wheel Model ("the Wheel"), widely recognized as a critical tool in explaining the context of domestic violence,[85] also reinforces the image of domestic violence victims as unable to act in their best interests. The Wheel suggests that they are overwhelmed by the batterer's many controlling behaviors. Developed by the Domestic Abuse Intervention Project of Duluth, Minnesota, the Wheel maps intimate partner behavioral tactics from a central motivation of power and control, featured as the hub. The outer rim of the Wheel displays the concepts of sexual and physical violence. Spokes connect power and control to violence; the spokes represent abusive tools that battering partners employ, short of violence, to coerce and control their mates. These tools include using children; minimizing, denying, and blaming; relying on male privilege; using emotional and economic abuse and intimidation; and threatening.[86]

The Domestic Abuse Intervention Program developed the Wheel through work with domestic violence survivors.[87] The survivors compiled the abuse tactics used against them by their male partners to develop an educational tool for use with male batterers.[88] In presenting different manifestations of abusive behavior, the Wheel can elucidate the connection between seemingly benign patterns of interpersonal behavior and violence and allow abusive men to recognize their own coercive actions.

The Wheel's use immediately became widespread. The Wheel conveyed

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83. RHODE, *supra* note 19, at 242.

84. Littleton, *supra* note 63, at 38.

85. *See* DAVID B. WEXLER, DOMESTIC VIOLENCE 2000: AN INTEGRATED SKILLS PROGRAM FOR MEN 13 (2000) (stating that the Duluth model is the prominent model of batterer behavior); Linda Kelly, *Disabusing the Definition of Domestic Violence: How Women Batter Men and the Role of the Feminist State*, 30 FLA. ST. U. L. REV. 791, 845 (2003) ("[T]he 'power and control' wheel of the Domestic Abuse Intervention Project (DAIP) of Duluth, Minnesota became the most powerful invention in defining domestic violence.").

86. For more detail, see DOMESTIC ABUSE INTERVENTION PROJECT, POWER AND CONTROL WHEEL, http://www.duluth-model.org/documents/PhyVio.pdf.

87. The Power and Control Wheel shares a focus on coercion with the theory that Evan Stark developed in the early 1990s. Stark explained a victim's situation as a form of "entrapment" created by the combination of psychological forces at play in the abusive relationship, rendering her incapable of escaping the abuse. Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 115, 121–22 (Eve S. Buzawa & Carl G. Buzawa eds. 1996).

88. Domestic Abuse Intervention Project, http://www.duluth-model.org/wheels.html (last visited Oct. 24, 2007).

the new and important message that domestic violence occurs not as the result of masochistic women submitting to male partners.[89] Rather, it occurs because battering partners use a myriad of abusive techniques emanating from a need to exert power and control. The Wheel refocused the inquiry from "why doesn't she leave?" to the roots of the abusive behaviors.[90] In addition, when people persisted in asking, "why doesn't she leave?", the Wheel provided a rational explanation. It illustrated that, even when a battering partner is not using violence against the victim, he is controlling her through other abusive and coercive techniques. Further, the Wheel effectively communicated that the abusive partner's behavior stems more from a psychological need to dominate and control than it does from a desire to inflict pain.

At first, advocates were optimistic about the usefulness of the Wheel and other coercion theories in the legal context. As one academic and advocate argued in 1993, the theories effectively refocused attention on the batterer's behavior and away from the pathology of the victim. They also helped explain how women endure and persist in abusive relationships, and provided a tool for reframing reasonableness in self-defense theories.[91]

Soon, experts brought the Wheel into court. In domestic relations cases, the Wheel became a popular tool to help experts instruct the judge and jury about the wide-ranging effects of abuse on the victim. Courts have admitted expert testimony using the Wheel to provide context to abusive behavior that might affect children in a custody battle.[92] They have also admitted it to explain seemingly unreasonable victim behavior in domestic violence prosecutions,[93] including why an individual might not try to escape a battering relationship[94] or might deny that there is a problem.[95] Although advocates developed the Power and Control Wheel as a therapeutic tool for use with batterers, the Wheel has

89. *See, e.g.*, Laura Crites & Donna Coker, *What Therapists See That Judges May Miss*, 27 JUDGES J. 8, 42 (1988) (stating that some psychotherapists label domestic violence victims as having "self-defeating (masochistic) personality disorder").

90. *See* Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1317–18 (1993) (arguing that the new emphasis in 1993 on power and control helped to recast the omnipresent question of "why did she stay?").

91. *See id.* at 1319–20.

92. *See, e.g.*, Borchgrevink v. Borchgrevink, 941 P.2d 132, 139 (Alaska 1997) (finding that expert testimony on the Power and Control Wheel suggested that even non-assaultive behavior can be tantamount to domestic violence, which has implications for custody determinations).

93. *See, e.g.*, Harris v. State, 84 P.3d 731, 747–48 (Okla. Crim. App. 2004) (upholding admission of expert testimony on the Power and Control Wheel to help the jury understand possible causes for unreasonable behavior).

94. *See, e.g.*, State v. Yusuf, 800 A.2d 590, 609 (Conn. App. Ct. 2002) (upholding the lower court's admission of expert testimony on BWS and coercion to assist the jury in understanding why the victim of repeated domestic violence assaults did not make efforts to escape the abuse).

95. People v. Vandersteen, 2003 Cal. App. LEXIS 2252, at * 26–27 (Cal. Ct. App. 2003) (describing expert testimony on the Power and Control Wheel that explains why battered women often engage in denial or manipulation).

supported the individual legal claims of domestic violence survivors by situating incomprehensible victim behavior within a framework in which it is comprehensible to those not suffering abuse.

However, while some victim advocates hoped that the Wheel and coercive battering theories would refocus attention on the conduct of *abusive partners*, the vast majority of the legal uses of the Wheel focus on explaining and even pathologizing the behavior of *victims*.[96] The Wheel has been used hand-in-hand with BWS to help fact finders understand why victims react to battering in ways that seem unthinkable to the average juror.[97] The Wheel conveys to the court that irrational victim behavior should not rebut a victim's claims of abuse.

While the Wheel helps explain seemingly incomprehensible behavior, it does not render that behavior rational.[98] Instead, expert testimony on power and control defines victim behavior as its own pathology associated with impaired judgment. As Evan Stark, a pioneer of coercion theory, stated in defending mandatory interventions, "[t]he . . . process of entrapment may reduce a woman's capacity *as an individual* to make certain decisions about her situation *so long as she remains under the influence of* coercive control."[99] Thus, like BWS, the Wheel reinforces the message that victims are unreliable and direly in need of assistance.

III.

MANDATORY POLICIES AND AGGRESSIVE CASE HANDLING

The justice system has developed mandatory policies that suppress victim voices in favor of efficient and aggressive case handling. Responding to the perceived need to protect victims of domestic violence from further danger regardless of their preferences, jurisdictions around the country have instituted mandatory arrest and "no-drop" prosecution policies. Prosecutors' offices and legislatures have adopted one-size-fits-all policies of sanctioning offenders and limiting their contact with victims. In turn, judges have begun to deny petitioners' uncontested motions to vacate protection orders.

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96. Of the cases surveyed, only one reveals an expert citing the Power and Control Wheel to explain the batterer's behavior. In *Hawai'i v. Maelega*, an expert for the prosecution relied on the Wheel to show that the defendant's behavior suggested that he was a batterer. This classification was necessary to rebut the defense that the defendant was acting under extreme emotional distress. 907 P.2d 758, 766–79 (Haw. 1995).

97. *See, e.g.*, *Harris*, 84 P.3d 731 at 747–48; *Yusuf*, 800 A.2d 590 at 609; *Vandersteen*, 2003 Cal. App. Lexis 2252, at *24–32.

98. State v. Taylor, 642 So. 2d 160, 166 (La. 1994) (explaining that a victim cannot make rational decisions for herself because "[f]ear, self-blame, and other emotional factors often leave a battered spouse unable to make a sound judgment as to whether to testify against an abusive spouse").

99. Stark, *supra* note 87, at 143.

A. Mandatory arrest

In an effort to strengthen the police response to domestic violence calls, many law enforcement agencies have instituted mandatory arrest policies over the last thirty years. Studies assessing the efficacy of these policies reveal varying levels of success and suggest that their effectiveness should be measured from a variety of perspectives.

1. Evolution of policies

Historically, police responses to domestic violence have been problematic. Consistent with the general conception of domestic violence as a private matter, for many years the police refused to intervene in intimate partner abuse as they would in response to other crimes.[100] In 1967, the International Association of Chiefs of Police published a training manual instructing that "in dealing with family disputes, the power of arrest should be exercised as a last resort."[101] Meanwhile, pressure to address the issue in some meaningful way resulted in the institution of official mediation policies within police departments.[102] Police officers were encouraged to help couples mediate their differences and preserve family harmony. This approach to domestic violence was so ingrained in the national consciousness that even the American Bar Association endorsed the "separate and mediate" policy in its 1973 Standards for Urban Police Function, stating that "[t]he authority to arrest ought desirably to be limited to situations in which efforts to resolve the conflict have failed and there is adequate ground to believe that a crime has been committed (a criminal assault, for example) and that an arrest is reasonably necessary to prevent further harm."[103]

Further, police conduct statutes precluded active law enforcement intervention even if an individual officer wished to intercede in a domestic dispute. Prior to the 1980s, the vast majority of American jurisdictions prohibited police from making warrantless arrests unless an officer witnessed violence.[104] Such policies dramatically limited officers' authority to make

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100. *See Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1535 (1993).

101. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY 16: HANDLING DISTURBANCE CALLS (1967), *quoted in* Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 10 (1992).

102. Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 13–15 (1992). *See also* Symposium, *Women, Children and Domestic Violence*, *supra* note 7, at 642 (remarks of Inspector Ed Young) (providing an overview of New York City police procedures governing response to domestic violence calls).

103. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE URBAN POLICE FUNCTION 107 (1973).

104. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 61 (1992); *Developments in the Law: Legal Responses to Domestic Violence*, *supra* note 100, at 1536.

domestic violence arrests, since domestic violence most often occurs in private.[105]

The tide began to turn in the years after 1982, when the Minneapolis Police Department and the Police Foundation completed a study of police response to domestic violence offenses in Minneapolis. The study determined that arrest of the suspect led to a far lower likelihood of repeat violence than mediation or asking the suspect to "cool it."[106] Mediation rarely succeeds in domestic violence cases due to the prevalent power imbalances between the parties. A National Institute of Justice report concluded that "victim coercion during mediation is virtually unavoidable."[107]

In 1984, the U.S. Attorney General issued a policy statement recommending arrest in family violence cases.[108] The study, the Attorney General's recommendation, and the work of advocates resulted in the implementation of policies permitting officers to make arrests in domestic violence cases without a warrant even if the violence occurs in private, provided that the officer finds probable cause to believe a family member has committed violence. Forty-nine states and the District of Columbia now permit officers to make warrantless

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105. *See, e.g.*, Symposium, *Women, Children and Domestic Violence*, *supra* note 7, at 629 (remarks of Dorchen Leidholdt) (citing Bruno v. Codd, 396 N.Y.S.2d 974 (1977)) ("[My husband] grabbed me by the throat and beat me and brandished a razor and threatened me with it and tore my blouse off my body and gouged my face, neck, shoulders, and hands with his nails in full public view . . . [The police advised me that] since this was a family matter, there was nothing they could do and I would have to go to family court.").

106. Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, *in* POLICE FOUND. REP. (Apr. 1984), *available at* http://www.policefoundation.org/pdf/minneapolisdve.pdf. In a survey of police responses to domestic violence abuse calls, researchers studied the differing effects of three different responses used by officers when responding to abuse: (1) arresting the suspect, (2) sending the suspect away from the scene of the assault for eight hours, and (3) providing some type of advice or mediation. The study revealed that the percentage of suspects repeating violence within six months (according to police response records) differed greatly depending on which method was initially used by the police; ten percent of the offenders who were arrested repeated the abuse, whereas nineteen percent of the offenders who were advised or provided with mediation repeated violence, and twenty-four percent of the offenders who were sent away from the scene of the assault committed another violent act. The study also found that victims' perceptions of incidents of re-abuse (according to victim interviews) differed according to which method was employed by the police; nineteen percent of victims reported being re-abused after the suspect was initially arrested, thirty-seven percent of victims reported being re-abused after the suspect was initially advised or provided with mediation, and thirty-three percent of victims reported being re-abused after the suspect was initially sent away from the scene. Finally, researchers found that the victims' perceptions of incidents of re-abuse were also affected by whether or not police officers took the time to listen to the victim; nine percent of victims reported experiencing re-abuse after police arrested and listened to the victim, whereas twenty-six percent of victims reported re-abuse in cases where police arrested but did not listen, and thirty-five percent of victims reported re-abuse where police advised the suspect but did not listen to the victim.

107. GAIL A. GOOLKASIAN, U.S. DEP'T OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES 61 (1986).

108. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE 22–25 (1984).

arrests in domestic violence cases on the basis of probable cause;[109] many even

109. ALA. CODE § 15-10-3(a)(8) (2005) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); ARIZ. REV. STAT. ANN. § 13-3601(B) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); ARK. CODE ANN. § 16-81-106(b)(2)(B) (2006) (allowing discretionary probable cause warrantless arrest for misdemeanor battery where there is evidence of physical harm and continuing danger of violence to the victim); CAL. PENAL CODE § 836(d) (Deering 2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); CONN. GEN. STAT. § 46b-38b(a) (2006) (providing that officer "shall" arrest if he determines upon speedy information that a family violence crime was committed); DEL. CODE ANN. tit. 11, § 1904(a)(4) (2006) (allowing warrantless arrest lawful for misdemeanors involving physical injury or illegal sexual contact or threat thereof, regardless of officer's presence); FLA. STAT. § 901.15(7) (2006) (discretionary probable cause warrantless arrest for domestic violence); GA. LAWS ANN. § 17-4-20(a) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); HAW. REV. STAT. § 709-906(2) (2006) (allowing discretionary "reasonable grounds" to justify warrantless arrest for domestic violence); IDAHO CODE ANN. § 19-603(6) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); 750 ILL. COMP. STAT. 60/304(a)(1) (2005) (instructing an officer to use all reasonable means to prevent further abuse, including warrantless arrest where appropriate); IND. CODE § 35-33-1-1(a)(5)(B) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); KY. REV. STAT. ANN. § 431.005(2)(a) (West 2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); LA. REV. STAT. ANN. § 46:2140(a)(1), (2) (2006) (allowing discretionary probable cause to justify warrantless arrest for misdemeanor domestic violence where there is no "impending danger"); MD. CODE ANN., CRIM. PROC. § 2-204(a) (LexisNexis 2006) (allowing discretionary probable cause to justify warrantless arrest for domestic abuse where physical manifestation of injury exists, where there is risk of flight, destruction of evidence, or continuing abuse, and a report to police was made within forty eight hours of the alleged incident); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 2006) (providing that arrest is the preferred response where probable cause suggests domestic violence); MICH. COMP. LAWS ANN. § 764.15(1)(a) (West 2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); MINN. STAT. ANN. § 629.341(1) (West 2005) (allowing discretionary warrantless arrest where probable cause suggests commission of domestic violence within the preceding twelve hours); MO. REV. STAT. § 455.085(1) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); MONT. CODE ANN. § 46-6-311(2)(a) (2005) (stating that arrest is the preferred response in domestic violence calls, and warrantless arrest for domestic violence is lawful under the exigency exception); NEB. REV. STAT. § 29-404.02(1)(c) (2005) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); N.H. REV. STAT. ANN. § 594:10(I)(b) (2006) (allowing discretionary warrantless arrest where probable cause suggests commission of domestic violence within the preceding twelve hours); N.J. STAT. ANN. § 2C:25-21(b) (West 2006) (allowing discretionary probable cause arrest for domestic violence not resulting in physical injury or involving a weapon); N.M. STAT. § 31-1-7(A) (2006) (allowing warrantless probable cause arrest for domestic violence); N.C. GEN. STAT. ANN. § 15A-401(b)(2)(d) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); N.D. CENT. CODE § 14-07.1-10(1) (2006) (providing presumption in favor of probable cause arrest for domestic violence, regardless of officer's presence); OHIO REV. CODE § 2935.03(B)(1) (West 2006) (allowing discretionary "reasonable ground" to justify arrest for domestic violence); OKLA. STAT. tit. 22, § 60.9 (2005) (allowing discretionary warrantless arrest where probable cause suggests commission of domestic violence within the preceding seventy two hours and where physical manifestation of injury exists); 18 PA. CONS. STAT. § 2711(a) (2005) (allowing discretionary probable cause warrantless arrest for domestic violence, although arrest is prohibited unless observable physical injury or other corroborative evidence exist); TENN. CODE ANN. § 36-3-619(a) (2005) (stating that preferred response to probable cause domestic violence is arrest); TEX. CODE CRIM. PROC. ANN. art. § 14.03(a)(4) (Vernon 2005) (allowing discretionary probable cause warrantless arrest for domestic violence); UTAH CODE ANN. § 30-6-8(2)(f) (2006) (providing that officer must use all reasonable means to prevent further abuse, including warrantless arrest of

encourage or require officers to do so.[110]

Advocates who supported this legislation sought to enhance women's safety by mandating increased attention by police officers. In addition, they strove to convey intolerance for domestic abuse: no longer would police lend their tacit approval to domestic violence by ignoring it.[111] Some advocated for mandatory arrest statutes to shift the focus in domestic violence offenses from the victim to the batterer—treating him as the law would treat any criminal perpetrator.[112]

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abuser); VT. R. CRIM. P. R. 3(c)(8) (2006) (providing for lawful probable cause warrantless arrest for "nonwitnessed" domestic violence); VA. CODE ANN. § 19.2-81.3(A) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); W. VA. CODE § 48-27-1002(a) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence); WYO. STAT. ANN. § 7-20-102(a) (2006) (allowing discretionary probable cause to justify warrantless arrest for domestic violence).

110. ALASKA STAT. § 18.65.530(a)(1) (2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence); ARIZ. REV. STAT. § 13-3601(B) (2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence involving physical injury or deadly weapon, unless officer reasonably believes victim is safe from further injury); COLO. REV. STAT. § 18-6-803.6(1) (2005) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence); D.C. CODE § 16-1031(a)(1) (2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence resulting in physical injury); IOWA CODE § 236.12(2)(b) (2005) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence resulting in physical injury); KAN. STAT. ANN. § 22-2307(b)(1) (2006) (requiring adoption by law enforcement agencies of written domestic violence policies including requiring mandatory finding of probable cause in warrantless arrest for domestic violence); LA. REV. STAT. ANN. § 46:2140(a)(1), (2) (2006) (requiring mandatory finding of probable cause in warrantless arrest for felony domestic violence, regardless of officer's presence); ME. REV. STAT. ANN. tit. 19-A, § 4012(5) (2005) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence); MISS. CODE ANN. § 99-3-7(3)(a) (West 2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence in the last twenty four hours); NEV. REV. STAT. § 171.137(1) (2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence "unless mitigating circumstances exist"); N.J. STAT. ANN. § 2C:25-21(a) (2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence resulting in physical injury or involving a weapon); OR. REV. STAT. § 133.055(2)(a) (2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence); R.I. GEN. LAWS § 12-29-3(b)(1) (2006) (requiring mandatory finding of probable cause warrantless arrest for domestic violence); S.C. CODE ANN. § 16-25-70(B) (2005) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence where physical manifestations of injury exist); S.D. CODIFIED LAWS § 25-10-36 (2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence); WASH. REV. CODE § 10.31.100(2)(c) (2006) (requiring mandatory finding of probable cause in warrantless arrest for domestic violence); WIS. STAT. § 968.075(2)(a) (2006) (requiring mandatory finding of "reasonable grounds" in warrantless arrest for domestic violence).

111. *See, e.g.*, WASH. REV. CODE 10.99.010 (2006) (stating that the statute's purpose is to counteract messages that have been sent by the "differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers.").

112. Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, U. ILL. L. REV. 533, 537 (1996). *See also* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES 207 (1979) (citing Martha H. Field & Henry F. Field, *Marital Violence and the Criminal Process: Neither Justice nor Peace*, 47 SOC. SERV. REV. 221 (1973)) (finding in a study of arrests in Washington, D.C. that, prior to the implementation of its mandatory arrest statute, seventy-five percent of assault cases involving strangers or unrelated people resulted in arrest, but only sixteen percent of domestic assault cases resulted in arrest).

Many supporters, however, sought to implement mandatory arrest policies to eliminate the relevance of an uncooperative victim.[113] One commentator criticized historic domestic violence efforts for their unrelenting focus on victims.[114] He reasoned that mandatory arrest policies, in contrast, recast the issue of domestic violence as a purely criminal issue rather than a family dispute that must be resolved to the satisfaction of the victim.[115] Some jurisdictions considered implementing mandatory arrest policies explicitly to protect victims who often failed to pursue criminal sanctions.[116] As one police commissioner explained, mandatory arrest policies place "the burden of a woman's well-being on a neutral officer, rather than allowing the victim, who might be under the sway of her batterer, to prevent an arrest."[117]

This legislation authorizes more arrests and, in some states where arrest is required, limits officer discretion. These policies, in turn, also limit victim discretion. While the victim's statement at the scene is relevant to the officer's assessment of probable cause, her wishes regarding arrest are irrelevant.[118] A victim may have ambivalent feelings about such an arrest. Although many victims call the police in the heat of a domestic assault, some victims are reluctant to have the abusive partner arrested by the time the police arrive.[119] While a woman may not want to be hit, she may want and need the abusive partner to remain at home to assist with child care. She may also worry that that if the abusive partner misses work during his hold or during any subsequent incarceration, he might lose his job and she lose his financial support. Alternatively, she might have called the police and claimed that her partner had abused her to deter an imminent assault. She simply may want the abusive partner out of her home for the evening until he calms down. She might further believe that an arrest will only expose her to more danger by provoking the batterer.[120]

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113. *See* Stark, *supra* note 87, at 145 (discussing the need to mandate arrest and override the voices of women whose "decisions reflect ignorance of their danger or psychological, material, economic, or racial deprivation").

114. *Id.* at 143–45.

115. *Id.*

116. *See, e.g.*, Steve Rhodes, *Abused Wife's Death Points to System Ills*, CHI. TRIB., July 20, 1994, at 2-1 (explaining that some jurisdictions have adopted mandatory arrest laws to protect women who "typically refuse to press charges" out of fear of retribution).

117. Michael Luo, *Domestic Violence Policy Assailed*, NEWSDAY, Aug. 9, 2000, at A32.

118. *See, e.g.*, METROPOLITAN POLICE DEPARTMENT GENERAL ORDER 304.11 64 (2003) ("When probable cause exists to make an arrest, the member shall arrest the suspect regardless of: . . . (m.) A statement from the victim that the victim does not want the suspect arrested.").

119. *See* JOAN ZORZA & LAURIE WOODS, NATIONAL BATTERED WOMEN'S LAW PROJECT, ANALYSIS AND POLICY IMPLICATIONS OF THE NEW DOMESTIC VIOLENCE POLICE STUDIES 18 (1994) (finding in a 1986 study that, out of 97 cases where the victim called the police for intervention, 60 percent reported that they had not wanted the police to actually make an arrest).

120. *See id.* (finding in a 1986 study that, 65 percent of victims reported that abusive partners blamed them for the arrest and 21 percent reported that the partner threatened them because of the arrest).

2. Study results

In the twenty years since the implementation of mandatory arrest policies, researchers have generally found a significant increase in family violence arrests. For example, in New Jersey, prior to mandatory arrest, there were 10,899 domestic violence-related arrests in one year. Five years after the mandatory arrest policy went into effect, police made 24,115 arrests.[121] Between 1993 and 1999, during which time New York City implemented its mandatory arrest statute, the City found that felony arrests increased 33 percent; misdemeanor arrests rose 114 percent; and violations of protection orders arrests increased 76 percent.[122] California,[123] Connecticut,[124] and Kansas City[125] recorded similarly large increases in felony arrests after the institution of mandatory arrest statutes.

Only a handful of studies found that mandatory arrest policies fail to yield a significant increase in arrests. Those studies cited poor implementation of the policies as the cause for the merely modest increases. For example, a study of the Phoenix Police Department conducted after the adoption of the policy found that arrests were being made in only 43 percent of cases where there was probable cause and in which the offender was present at the scene.[126] A study of the Minneapolis mandatory arrest statute requiring arrest for the violation of protection orders resulted in arrest in only 22 percent of cases where it would have been required by the statute.[127]

Critics of mandatory arrest legislation warned of possible unintended consequences, such as increased victim arrests and reluctance to call the police. Victim advocates worried that officers would react to the elimination of their discretion by arresting both victim and perpetrator at the scene.[128] In turn, they

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121. Wanless, *supra* note 112, at 559 (citing UNIFORM CRIME REPORTING UNIT, STATE OF N.J., DOMESTIC VIOLENCE OFFENSE REP. 3 (1991) and UNIFORM CRIME REPORTING UNIT, STATE OF N.J., DOMESTIC VIOLENCE OFFENSE REP. 3 (1993)).

122. Symposium, *Women, Children and Domestic Violence*, *supra* note 7, at 645 (remarks of Inspector Ed Young) (providing an overview of the New York City police procedures governing response to domestic violence calls).

123. In Orange County, researchers found a 431% increase between 1988 and 1998 in felony domestic violence arrests; in Los Angeles, there was a 38% increase, and San Diego saw a 233% increase. Leonard, *supra* note 27, at B5.

124. In Connecticut, the number of arrests annually for domestic violence incidents increased to 7000 from 2000 before policy went into effect. JOAN ZORZA & LAURIE WOODS, NATIONAL BATTERED WOMEN'S LAW PROJECT, MANDATORY ARREST: PROBLEMS AND POSSIBILITIES 12, (1994) (citing Interview of Anne Menard, then Executive Director of the Connecticut Coalition Against Domestic Violence).

125. In Kansas City, Missouri, the number of arrests for domestic violence increased from twelve to fifteen per day to forty to fifty per day after the implementation of a mandatory arrest policy. *Id.* (citing Interview of Denise Phillips, Esq., Legal Aid of Western Missouri).

126. Sherman, *supra* note 102, at 24.

127. *Id.*

128. *See* Sarah Mausolff Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L. J. 213, 225 (1988) [hereinafter Buel, *Mandatory Arrest*] ("The double arrests reflected the perception of the Washington police that they were losing too much discretion in the handling of

reasoned that victims might be reluctant to call law enforcement to a domestic abuse scene.[129] Indeed, research tracking arrests of domestic violence victims suggests that mandatory arrest policies have increased the likelihood that women will end up in jail. While studies have not illustrated a profound increase in the number of arrests of both parties at the scene, they have suggested that women are more likely to be arrested for domestic assault under a mandatory arrest regime. A Wisconsin study found a relatively small increase in dual arrests (from 5.5 percent before mandatory arrest to 7.7 percent after); however, it found a significant increase in arrests of women generally for domestic violence incidents (from 13 percent before mandatory arrest to 24 percent after).[130] After Prince George's County, Maryland implemented a mandatory arrest policy, the arrest rate of women for domestic assault increased by 27 percent.[131] The increase of female arrests is not surprising. Under a probable cause standard, one would expect some women properly to be arrested at the scene. However, a portion of the increased arrests of women likely results from law enforcement's complicity with male perpetrators who use mandatory arrest statutes to harass victims.[132]

With an increase in arrests of women, one might expect women to be reluctant to seek law enforcement intervention. Only one study has suggested that this is so.[133]

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domestic violence cases"); Wanless, *supra* note 112, at 565 ("Other police officers resent mandatory arrest for undermining their authority and discretion; they attempt to sabotage the laws by arresting both parties.").

129. *See id.* at 226 ("Unjustified dual arrests can make women skeptical about seeking further help from the police"); Arthur L. Rizer III, *Mandatory Arrest: Do We Need To Take A Closer Look?*, 36 UWLA L. REV. 1, 19 (2005) ("Advocates worried that women would be less likely to report domestic violence if they feared that they would be arrested along with their abuser.").

130. ZORZA & WOODS, *supra* note 124, at 17 (citing JAMES E. DOYLE, WIS. DEP'T OF JUSTICE, DOMESTIC ABUSE INCIDENT REPORT 1989-1990 13 (1991); JAMES E. DOYLE, WIS. DEP'T OF JUSTICE, DOMESTIC ABUSE INCIDENT REPORT 1990-1991 11 (1993); and GIGI STAFNE, WIS. COAL. AGAINST DOMESTIC VIOLENCE, THE WISCONSIN MANDATORY ARREST MONITORING PROJECT: FINAL REPORT 5 (1989)).

131. Leef Smith, *Increasingly, Abuse Shows Female Side: More Women Accused of Domestic Violence*, WASH. POST, Nov. 18, 1996, at B1.

132. *See generally* Symposium, *Women, Children and Domestic Violence*, *supra* note 7, at 570 (2000) (remarks of Judge Betty Weinberg Ellerin) (explaining that mandatory arrest policies have been turned against women by men who use the policy to harass women, getting them arrested on false charges).

133. A study conducted in Wisconsin found a large increase in the number of women who stated that they would not call law enforcement again after the mandatory arrest law went into effect (68.4%) compared with those who did not intend to call police before the law went into effect (0% would not, 22.5% were unsure). ZORZA & WOODS, *supra* note 124, at 17 (citing STAFNE, *supra* note 130, at 5). If the mandatory arrest policy was the only material change reported in Wisconsin during that period—and contemporary analysis suggests that this was the case—this is a striking difference. *See id.* at 14.

B. No-drop prosecution

Aggressive state action continues after the arrest. In many states, prosecution policies mandate that the state intervene in domestic violence cases and minimize the impact of victims' preferences. The prime example of this type of mandatory intervention protocol, the no-drop prosecution policy, has dramatically increased the raw number of annual prosecutions.[134]

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134. At arraignment, mandatory state intervention continues. Because the majority of domestic violence offenders are released on bail and may return home to continue the abuse, some states have developed protocols for terms of release. *See* Pamela Blass Bracher, *Mandatory Arrest For Domestic Violence: The City of Cincinnati's Simple Solution to a Complex Problem*, 65 U. CIN. L. REV. 155, 179 n.195 (1996) ("Because domestic violence is a misdemeanor, bails are typically set low, which makes it easier for the offender to be released."); *Charging Battered Mothers with 'Failure to Protect': Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 860 (2000) ("Many batterers are released on bail after the arrest"). Endeavoring to reduce inconsistent terms of release and to increase victim safety, these state legislatures have mandated that offenders on release stay away from their victims. *See, e.g.*, 18 PA. CONS. STAT. § 2711(c)(2) (2005); NEB. REV. STAT. § 42-929 (2005); R.I. GEN. LAWS § 12-29-4(a)(1) (2006) (court must impose a no contact provision as condition of release/bond); S.D. CODIFIED LAWS 25-10-23 (2006) (no contact order must be included in pre-arraignment release); UTAH CODE ANN. § 77-36-2.5(1) (2006) (a court must issue a no contact order or have defendant agree to no contact in writing, but a victim may follow a procedure to waive the protection); WIS. STAT. § 968.075(5)(a), (c) (2006) (a court must issue a no contact order, however a victim may follow a procedure to waive the protection). *See also* ALASKA STAT. § 12.30.027 (2006) (prohibiting a person released to return to the residence of the alleged victim); COLO. REV. STAT. ANN. § 18-1-1001(3)(a)-(b) (West 2006) (permitting imposition of no contact condition of release/bond). In these states, arraignment judges have no discretion about conditions of release. In several additional states, the court can impose a stay away and no contact provision as a condition of pretrial release without consulting the victim. ARIZ. REV. STAT. ANN. § 13-3601(I) (2006) (providing that any order for release shall include pretrial release conditions necessary to provide for the protection of the alleged victim); 725 ILL. COMP. STAT. 5/112A-2(c) (2005); N.J. STAT. ANN. § 2C:25-26(a) (West 2005); N.D. CENT. CODE § 14-07.1-13(1) (2005) (providing that a court authorizing the pre-trial or pre-arraignment release of a person charged with domestic violence "shall consider and may issue . . . an order prohibiting the person from having contact with the victim"); OHIO REV. CODE ANN. § 2919.26(D)(1)-(3) (West 2006); P.R. LAWS ANN. tit. 8, § 637(b)(1) (2004); WASH. REV. CODE § 10.99.040(2)(a) (2006).

Victims do not appear at arraignment hearings, nor do prosecutors allocute regarding victims' wishes. However, victims may have strong feelings about offenders' terms of release. A victim may want the offender held or ordered to stay away from her for her safety or, depending on her needs, connections to the offender, and knowledge of his behavior, she may want him to return freely to her. *See* Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 965 (1999) (citing Schneider, *supra* note 1, at 558) (When considering terms of release, "[w]omen typically consider the needs of their children, their financial prospects for surviving without their partners, whether they can safely separate from violent partners and their need to maintain a relationship with the men they love.").

Rather than permit the judge to assess the propriety of a stay-away order based on any input from the victim, legislatures have determined that the safety of the victim, and the state's presumption that its modes of protection are effective, trump any testimony the victim could provide in favor of permitting the parties to interact. While this intervention may send the message that domestic violence is taken seriously by the state, this mandatory protocol effectively silences the voices of victims.

1. Evolution of policies

Many advocates encouraged prosecutors' offices to aggressively pursue domestic violence cases, thereby relieving victims of the burden of motivating the prosecution.[135] They recognized the ambivalence domestic violence victims have toward the criminal justice system,[136] the gender-biased assumptions that inform a victim preference based dismissal policy for domestic violence,[137] the potential for coercion by defendants,[138] and the historic inaction of prosecutors. In response, a large number of jurisdictions[139] have implemented "no-drop" prosecution policies, which remove prosecutorial discretion after a domestic violence prosecution has begun.

In the absence of mandatory policies, prosecutors have traditionally treated

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135. *See, e.g.*, Lisa G. Lerman, *Criminal Prosecution of Wife Beaters*, 4 RESP. TO VIOL. IN FAM. 1, 19 (1981) ("To reduce case attrition, prosecutors should adopt a policy that once charges have been filed in spouse abuse cases, a victim's request for dismissal will be denied unless there are exceptional circumstances.").

136. Research indicates that at least 50 percent of domestic violence victims will seek to drop charges either by requesting a dismissal or by failing to appear for criminal trials. David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, *in* LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 151 (N. Zoe Hilton, ed. 1993).

137. *See* GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM, *reprinted in* 8 GA ST. U. L. REV. 539, 567 (1992) [hereinafter GENDER AND JUSTICE] ("This response from prosecutors in domestic violence cases primarily stems from the gender-biased belief in society that domestic violence is more a private family matter than a crime and that it should be the victim's decision whether to prosecute."). See *supra* notes 40–55 and accompanying text for a discussion of why women choose not to pursue legal intervention in domestic violence cases.

138. *See* Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 130 (1991) (discussing the motivations for victims to request that criminal charges be dropped). Some victims ask that cases be dismissed based on their own concerns about the criminal system or the case itself while others seek dismissal of the charges at the defendant's demand.

139. *See* Cheryl Hanna, *The Paradox of Hope*, *supra* note 28, at 1520 n.52 ("Jurisdictions with aggressive, vertical, or no-drop policies include Alexandria, Virginia; Baltimore, Maryland; Quincy, Massachusetts; Brooklyn, New York; Denver, Colorado; Duluth, Minnesota; King County, Washington; Los Angeles, California; and San Diego, California); Mills, *Killing Her Softly*, *supra* note 69, at 561 n.54 ("[C]urrently, the federal government encourages state interventions, including mandatory arrest and prosecution, by providing federal funds to jurisdictions that adopt stringent domestic violence policies."); Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of The Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 318 (2004) ("Four states (Florida, Minnesota, Utah, and Wisconsin) have statutes that encouraging rather than require mandatory prosecution policies."); FLA. STAT. ANN. § 741.2901(2) (West 1997); MINN. STAT. ANN. § 611A.0311(2)(4) (West 2003); UTAH CODE ANN. § 77-36- 2.7(1)(e) (Supp. 1999); WIS. STAT. ANN. § 968.075(7)(a)(2) (West Supp. 1998); Mark Hansen, *New Strategy in Battering Cases: About a Third of Jurisdictions Prosecute Even Without Victim's Testimony*, 81 A.B.A.J. 14 (1995) (asserting that 30 to 40 percent of all jurisdictions had implemented no-drop prosecution policies as of 1995). *See also* 42 U.S.C. § 3796hh (1994) (authorizing federal funding for the implementation of pro-arrest programs and policies in police departments).

domestic violence cases differently than other kinds of cases. A prosecutor has complete discretion to dismiss a case for any reason but, in most criminal cases, does not give much weight to the wishes of complaining witnesses.[140] In domestic violence cases, however, prosecutors traditionally utilized this discretion to dismiss cases at a victim's request.[141]

Under a "hard" no-drop policy, prosecutors pursue domestic violence prosecutions regardless of the victims' stated wishes, as long as they have adequate proof.[142] They encourage victims to participate in the process but retain sole discretion over decisions about the viability of the case. Because they must pursue many cases without the cooperation of the victim,[143] prosecutors' offices with no-drop policies have become accustomed to presenting their cases by relying on photographs,[144] 911 recordings,[145] and "excited utterance" testimony.[146] They also coerce victim involvement by issuing—and sometimes

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140. *See* GENDER AND JUSTICE, *supra* note 137, at 567 ("In many other nondomestic cases involving violent injury, the State ususallly does not shift the burden of deciding whether to prosecute to the victim.").

141. *See id.* at 566 (finding that if a victim asked to dismiss a case or showed any hesitancy in prosecution, prosecutors dismissed the case immediately); Rhea Mandulo, *Programs Aim at Keeping Abuse Cases Alive*, N.Y.L.J., Jan. 6, 1993, at 2 ("A major obstacle in prosecuting domestic violence cases, according to lawyers and judges, is that claimants too often drop their complaints.").

142. *See, e.g.*, Hansen, *supra* note 139 ("Our policy here is to go forward with any case we can prove, with or without the participation of the victim.").

143. According to one prosecutor, in 1998 the majority of domestic abuse cases were handled without victim cooperation in Duluth, Minnesota, which had a long standing no-drop policy. Margaret Zack, *Trying 'Victimless Prosecutions'*, STAR TRIB., Dec. 28, 1998, at 1A. Another study showed that thirty-three percent of jurisdictions surveyed reported that more than half of cases involved uncooperative victims. Donald J. Rebovich, *Prosecution Response to Domestic Violence, Results of a Survey of Large Jurisdictions, in* DO ARRESTS AND RESTRAINING ORDERS WORK? 185 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996).

144. Eighty-two percent of jurisdictions reported that they used as evidence photographs of injuries to uncooperative victims, according to a study published in 1994. Rebovich, *supra* note 143, at 186.

145. A study conducted in the late 1990s revealed that fifty-one percent of prosecutors' offices use neighbor/family witnesses or 911 tapes as one method of proof when they cannot rely on a victim to testify in a domestic violence case. *Id.* at 186. However, since the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the state's ability to prosecute based solely on 911 tape testimony has become extremely limited. *See generally* Donna D. Bloom, *"Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive* Crawford v. Washington, 36 ST. MARY'S L. J. 717 (2005); Geetanjli Malhotra, *Resolving the Ambiguity Behind the Bright-Line Rule: The Effect of* Crawford v. Washington *on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205 (2006) (noting that after *Crawford*, the focus has changed from a statement's reliability to whether a statement was "testimonial" in nature, without defining "testimonial").

146. A study conducted in the late 1990s illustrated that 64 percent of prosecutors' offices use "excited utterance" testimony when victims fail to cooperate with the prosecution. Rebovich, *supra* note 143, at 186. However, since the Supreme Court ruled in *Crawford* and later in *Davis v. Washington* and *Hammon v. Indiana,* the admissibility of out of court victim statements has become unclear and has hampered many domestic violence prosecutions. *See Crawford*, 541 U.S. 36 (2004); Davis v. Washington, 126 S.Ct. 2266 (2006) (holding that the Confrontation Clause of the Sixth Amendment bars the admission of testimonial statements of a witness who did not appear

enforcing—subpoeanaes to uncooperative victims.[147]

"Soft" no-drop policies codify a prosecutorial preference for pursuing cases despite a victim's wishes, but they expressly contemplate efforts to involve the victim through non-coercive methods such as support services. For example, a jurisdiction with a "soft" policy might offer witness-advocate services to victims to help them understand the benefits of the criminal case and remain cooperative. Further, if a victim's testimony is crucial to a case, a prosecutor may dismiss the charges rather than request a bench warrant for a victim's failure to appear.[148]

Advocates rallied for no-drop prosecution policies to rectify several core problems in the domestic violence criminal justice system.[149] First, when prosecutors dismiss domestic violence cases at the request of victims or because of victim non-cooperation, few cases are prosecuted.[150] A 1982 U.S. Civil Rights Commission report found that the odds of a domestic violence case ending up in court were about one hundred to one.[151] One prosecutor commented, "no matter how heinous the assault, the great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible."[152] One victim observed, regarding her interest in pursuing a prosecution:

> I was afraid every second. If I refused to testify he would maybe not blame me for getting arrested. If I testified and he didn't get convicted he'd have more power over me than ever before. If I testified and he

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at trial unless he or she was available for cross examination and defining testimonial as those statements made during police interrogations when the circumstances objectively indicate that there is no on-going emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution).

147. Cheryl Hanna, *No Right to Choose*, *supra* note 16, at 1863.

148. *Id.* at 1863–64.

149. *See* Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 190 (1997) ("[Mandatory intervention policies] largely are in effect due to the lobbying efforts of battered women's and feminist organizations.").

150. According to statistics gathered in the early days of no-drop prosecution policies, in jurisdictions without no-drop policies, the dismissal rate ranged from fifty to eighty percent as compared with jurisdiction with such policies where the dismissal rate was between ten to thirty-five percent. Angela Corsilles, *No-drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 854 n.7, 873 (1994) (citing several studies of prosecutors' offices in the early 1990s). *See also* LISA G. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 35 (1981) (citing response to her Questionnaire on Prosecution of Domestic Violence Cases: "In Jacksonville, Florida, the District Attorney's office estimates that 80 percent of victims seek to drop charges prior to disposition."); Zack, *supra* note 143, at A1 (half of the domestic abuse cases prosecuted by the Minneapolis city attorney's office are dismissed, often because the victim won't cooperate); *infra* Part III.B.2.

151. RHODE, *supra* note 19, at 240 (citing U.S. COMM'N ON CIVIL RIGHTS, UNDER THE THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE (1982)).

152. Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 177 (1997).

> didn't get jail time, I'd be in the same boat. It seemed like there were about eight scenarios that would go against me and only one that would work out.[153]

Counsel to the Manhattan District Attorney reported that, as of 1993, 80 percent of domestic violence cases filed in Manhattan were dropped.[154] These numbers were discouraging to law enforcement and to advocates.

Second, advocates lobbied for no-drop prosecution policies to create parity in the way that criminal cases are handled. In the view of many advocates, treating domestic violence offenses like other violent offenses where the state prosecutes because a crime has been committed against the state better ensures victim safety and sends a message about our societal intolerance for family violence.[155]

Advocates have also noted that a no-drop prosecution policy allows victims to abdicate responsibility for their cases and thereby wrests control from coercive batterers. Advocates and prosecutors observed that when the decision to pursue a prosecution lies in the hands of the victim, often the decision actually resides in the hands of the abusive party. Therefore, no-drop policies effectively deprive the batterer of a powerful coercive tool. If no-drop prosecution policies are widely publicized and victims can cite them to defendants, batterers may understand the futility of threatening to harm victims who refuse to seek dismissal of criminal charges.[156] As a city attorney and police sergeant

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153. Asmus, *supra* note 138, at 130 (quoting DULUTH ABUSE INTERVENTION PROJECT, DATA COLLECTION FILES, (1990)).

154. Mandulo, *supra* note 141, at 2.

155. *See* Wills, *supra* note 152, at 182 (asserting that a no-drop prosecution policy "tells batterers that violence against intimate partners is *criminal*, that offenders can and will go to jail, and that their victim's refusal to press charges is not a 'get out of jail free' card"). Some prosecutors support no-drop policies because they protect not just the victim of the underlying crime but potential future victims of the perpetrator. *See, e.g.*, Symposium, *Women, Children and Domestic Violence*, *supra* note 7, at 648 (remarks of Assistant District Attorney Carol Stokinger) ("I am in favor of prosecuting many of the cases that we see, even where victims do not want to prosecute . . . One of the reasons is that many offenders re-offend, not only with the original victim, but they go on to re-offend with multiple victims. Frequently, there are other unintended victims, including children, other family members, friends and neighbors, as well as responding police officers."). Other advocates have noted that no-drop policies promote gender parity in prosecutorial decisions. *See* Mills, *Killing Her Softly, supra* note 69, at 563–64 (explaining that many advocates of mandatory prosecution have argued that these policies force state actors to treat intimate abuse crimes in the same way they would if the assailant were a stranger and the victim were male and that the policies present a statement of the state's "feminist consciousness").

156. *See* Corsilles, *supra* note 150, at 874 ("Some prosecutors and advocates also assert that no-drop policies have affected the batterer's conduct toward the victim. As several of them have observed, some batterers cease harassing their victims after they discover that the victim no longer controls the case."); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1865–66 (2002) [hereinafter Epstein, *Procedural Justice*] ("[S]upporters argue that . . . no-drop prosecution is the most effective way to eliminate a perpetrator's ability to escape punishment by threatening victims into dropping charges."); Kalyani Robbins, *No-drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 217–18 (1999) ("[B]atterers even stop

explained: "In San Diego, we learned a number of years ago that abusers would become more violent and aggressive toward the victim when they learned that she controlled the outcome of the criminal prosecution . . . The batterer's control over the victim is generally so complete that he was able to dictate whether she talked to the prosecutor, what she said, and whether she appeared in court."[157]

Even more significantly, prosecutors have found that no-drop policies relieve them of the burden of assessing the voluntariness of a victim's dismissal request. One prosecutor, who implemented a no-drop policy in the U.S. Attorney's office for the District of Columbia, observed after interviewing "'tens of thousands of victims'" that "he could not tell which victims made 'an informed, voluntary and knowing' decision not to pursue prosecution."[158] Thus, he concluded that "a no-drop policy that did not 'make any differentiation between domestic violence as a crime and any other crime' made the most sense."[159]

No-drop policies also liberate prosecutors from their dependence on the victim. Because prosecutors can often pursue the case equally successfully without victim cooperation, prosecutors are no longer at the mercy of victim whims and unreliability.[160] As one prosecutor in a jurisdiction without a no-drop policy stated: "The victim will look you in the eye and say, 'I'm on board,' then the next week or the next month, the victim may be pregnant or engaged and wants to drop the whole thing."[161] Despite the survivor's change of heart, the prosecutor can move forward with the case in a no-drop jurisdiction. In San Diego the "track record for winning domestic assault cases [without victim cooperation] has been so good, prosecutors now prefer that the victim not testify."[162]

2. *Study results*

No-drop prosecution policies, though controversial from the start, have

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harassing their victims about the process once they realize that the victims are not responsible for the case going forward."); Wills, *supra* note 152, at 180 ("By proceeding with the prosecution with or without victim cooperation, the prosecutor minimizes the victim's value to the batterer as an ally to defeat criminal prosecution.").

157. Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor,* 20 W. ST. U. L. REV. 297, 310 (1993).

158. Mills, *Killing Her Softly*, *supra* note 69, at 571 (citing Robert Spagnoletti, Remarks at the First Annual Gender, Sexuality, and the Law Symposium, Georgetown University Law Center on Violence and State Accountability Conference 4, 5 (Feb. 20–21, 1998)).

159. *Id.*

160. *Cf.* Hansen, *supra* note 139, at 14 (citing the reason for the implementation of a no-drop prosecution policy as "the recognition that many battering victims, who overwhelmingly are women, do not want their abusers punished because they fear retaliation from them, depend on them, blame themselves for what happened, or believe it won't happen again.").

161. Zack, *supra* note 143, at A6.

162. Jane Armstrong, Rita Daly, & Caroline Mallan, *Hitting Back in San Diego*, TORONTO STAR, Mar. 16, 1996, at C1.

gained popularity in the United States because most jurisdictions have been able to demonstrate a significant decrease in dismissal rates since their implementation. The Duluth, Minnesota, City Attorney's office reported a reduction in its dismissal rate, from 47.1 percent to 23 percent, after adopting a "hard" no-drop policy.[163] Marion County, Indiana reduced its dismissal rate from 75 percent to 20 percent after the implementation of a no-drop policy.[164] Because prosecutors' offices are evaluated at least partially on their dismissal rates,[165] a reduction reads as success. In addition, lower dismissal rates have symbolic value, conveying the message that law enforcement will not tolerate domestic violence.

C. Judicial denial of petitioners' motions to vacate civil protection orders

Judges too have been influenced by psycho-social theories about domestic violence victims and by their own experiences with victim unreliability. Not only do these influences have an inevitable impact on credibility determinations in civil and criminal cases, but judges have begun denying victims' motions to vacate civil protection orders,[166] reversing the previous practice of granting these motions in a pro forma fashion.[167] These denials express a paradoxical message similar to that of mandatory intervention: domestic violence is an important social problem, but domestic violence victims are expendable agents in the response to the problem.

Wanda's story best illustrates the complexities of judicial denials of victims' motions to vacate protection orders. Wanda petitioned the court for and was awarded a protection order against the father of her daughter, Michael. Two months earlier he had punched her, leaving her with her a black eye. At court, she convinced Michael, with the help of a negotiator, to agree to a protection order mandating that he not assault her, that he stay away from her and her home, and that he attend domestic violence intervention classes.

Wanda worked as a security guard to support herself and her two-year-old daughter. Her job demanded that she work overnight several days a week. With

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163. Asmus, *supra* note 138, at 136 n.95.

164. Corsilles, *supra* note 150, at 857 n.22 (quoting Kim Wessel, *Court Led to Aggressive Prosecution in Indiana*, COURIER-JOURNAL (LOUISVILLE, KY), June 9, 1993, at 5B).

165. *See generally* NEAL MILLER, SHELBY COUNTY, TENNESSEE, ARREST POLICIES PROJECT: A PROCESS EVALUATION 14 (2000), http://www.ncjrs.gov/pdffiles1/nij/grants/201878.pdf (noting decrease in the dismissal rate as measure of success).

166. *See, e.g.*, Janrhett v. Janrhett, 2005 CPO 1307 (D.C. Sup. Ct. 2005); Gallardo v. Vasquez, 2005 CPO 935 (D.C. Sup. Ct. 2005); Lewis v. Mason, 2005 CPO 471 (D.C. Sup. Ct. 2005); Stephens v. Robin, CPO 3530-02 (D.C. Sup. Ct. 2002). *See also*, Hodge v. Young, 2005 CPO 3719 (D.C. Sup. Ct. 2005) (denying motion to vacate when Petitioner failed to appear for vacate hearing but granting her second motion when she appeared).

167. *See* Torres v. Lancellotti, 607 A.2d. 1375, 1376 (N.J. Super. Ct. 1992) (acknowledging that "established case law holds that the reconciliation of parties, separated by court order under [the state's violence prevention act] 'acts as de facto vacation of the court order'" although not itself following this approach).

no family in town and few friends, Wanda scrambled for child care after she received the protection order. Michael had always been home to care for their daughter while she was at work. Now Michael was living in a shelter. Because of the prohibitive cost of overnight babysitting, Wanda asked for daytime hours at work. When her efforts were unsuccessful, she began looking for another job that would permit her to work during the day and put her daughter in daycare.

After a month of searching for child care and looking for alternate work, Wanda asked Michael to sleep at her home on the nights she was at work. The only alternative that remained for her was quitting her job and seeking public benefits. Michael agreed and promised to refrain from any violence. He apologized for his behavior. His agreement, however, was contingent on one condition: that Wanda get the protection order dissolved. Michael did not want to risk violating the order and did not want to attend domestic violence classes. Reassured by Michael's promises and without any other options for child care, Wanda filed for a motion to vacate her protection order.

Wanda appeared at the courthouse alone to make her request. The judge noted that Michael was not present and did not file a motion to oppose the request, and she inquired into Wanda's reasons for moving to vacate. Wanda revealed her child care dilemma, noting that her only other option was quitting her job and seeking public benefits. The judge then asked about the underlying violence. After Wanda discussed the violence, the judge denied her motion to vacate the protection order. "Frankly," said the judge, "I am concerned for your safety."

Wanda left the courthouse despondent, realizing that she had no choice but to quit her job, stay home with her daughter, and collect public benefits until her order expired in ten months. At that point, would Michael agree to come home? Would he believe that she asked the judge to dissolve the order but was denied? Would she able to get her job back? She wished she had never involved the court system in her personal life.[168]

1. Evolution of practice

Judges hearing domestic violence cases constantly confront cases with high-stakes safety ramifications. Erroneously denying a request for a protection order can result in consequences even more dire than a mistaken acquittal in a criminal prosecution for stranger violence. In a domestic violence case, the assailant knows the victim intimately and may live with her; at a minimum, he knows where to find her. Because the victim is proactively seeking redress, she is likely to provoke retaliatory aggression.[169] Indeed, a judge's concern about the

168. This vignette is representative of the stories of several clients whom I have represented and others whose hearings I have attended in the Superior Court of the District of Columbia.

169. *See* BROWNE, *supra* note 42, at 4, 61, 144 (citing the high incidence of further abuse and homicide upon separation); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6 (1991) ("At the moment of separation or attempted

victim's safety might be even more significant when vacating a protection order than when granting one. After all, a judge has *already* determined that abuse has occurred and that the victim is at risk.

Yet, the legal framework for these decisions does not provide extensive guidance for adjudicating a motion to vacate. Looking at the District of Columbia as an example of similar legal redress that is available in all fifty states, a victim of domestic violence in Washington, D.C., is entitled to seek a civil injunction that provides various civil remedies aimed primarily at protection from future abuse, but also at enabling the victim to have as little interaction with the batterer as possible.[170] Relief includes stay-away and no-contact orders; orders to enroll and complete alcohol, drug, and domestic violence counseling programs; grants of custody; and the distribution of certain property.[171] Such an injunction may be granted only after notice and an opportunity to be heard. The victim, who carries the burden of proof, must provide the judge with good cause to believe that the respondent committed a criminal act.[172] Upon this showing, the judge may grant a year-long order. If violated, the order is enforceable by criminal contempt or misdemeanor prosecution.[173]

Under the laws of nearly every state, a judge has virtually unfettered discretion to grant or deny the petitioner's motion to vacate a protection order. The majority of state protection order statutes fail to address motions to vacate, allowing judges to use their inherent power to dissolve judicial orders.[174] A smaller number of statutes allude to a right to vacate or rescind, but they are silent as to the standard a judge must apply in hearing the motion.[175] Only a

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separation . . . the batterer's quest for control often becomes most acutely violent and potentially lethal."). According to one study, at least half of women who leave their abusers are followed, attacked, or harassed by them. *Id.* at 64–65. Another study revealed that half of inter-spousal homicides occurred after the partners had separated. *Id.*

170. *See* D.C. CODE ANN. § 16-1005(c) (LexisNexis 2006).

171. *Id.*

172. *Id.*

173. § 16-1005(f) & (g).

174. ALA. CODE § 30-5-7 (2005); ALASKA STAT. § 18.66.100 (2006); ARK. CODE ANN. § 9-15-205 (2006); CONN. GEN. STAT. § 46b-15 (2006); GA. CODE ANN. § 19-13-4 (2006); HAW. REV. STAT. § 586-3 (2006); IDAHO CODE ANN. § 39-6306 (2006); 750 ILL. COMP. STAT. 60/214 (2005); IOWA CODE § 236.5 (2005); KAN. STAT. ANN. § 60-3107(e) (2006); KY. REV. STAT. ANN. § 403.725 (2006); LA. REV. STAT. ANN. § 46:2136 (2006); MASS. GEN. LAWS ANN. ch.209A, § 3 (West 2006); MINN. STAT. ANN. § 518B.01 (West 2005); MISS. CODE ANN. § 93-21-15 (West 2006); NEV. REV. STAT. § 33.020 (2006); N.H. REV. STAT. ANN. § 173-B:5(III), (VIII) (LexisNexis 2006); N.Y. FAM. CT. ACT § 842 (McKinney 2006); N.C. GEN. STAT. ANN. § 50B-3 (2006); N.D. CENT. CODE § 14-07.1-02(6) (2006); 23 PA. CONS. STAT. § 6108 (2005); R.I. GEN. LAWS § 8-8.1-3 (2006); S.D. CODIFIED LAWS § 25-10-5 (2006); TENN. CODE ANN. § 36-3-605 (2005); TEX. FAM. CODE ANN. § 85.001 (Vernon 2005); VT. STAT. ANN. tit. 15, § 1103 (2006); WASH. REV. CODE § 26.50.030 (2006); W. VA. CODE § 48-27-501 (2006); WIS. STAT. § 813.12(4) (2006). *See also* Rudgayzer & Gratt v. LRS Commc'ns, Inc., 2003 WL 22344990 (N.Y. Civ. Ct. 2003) (holding that the court has discretionary power to vacate its orders for good cause shown).

175. ARIZ. REV. STAT. ANN. § 13-3602(I) (2006) (providing that the court may quash an order

handful of state statutes set forth a specific standard that a judge must apply when deciding whether to vacate a protection order.[176] For example, in D.C., the petitioner must show "good cause" that the protection order be vacated.[177] Even statutes that specify a burden of proof such as D.C.'s leave the judge with wide discretion. What constitutes good cause? Is an uncontested motion good cause? In the context of *granting* the temporary protection order, an uncontested motion that presents the basic elements of family violence generally results in the issuance of an order.[178] However, in the context of a motion to *vacate*, an unchallenged motion may well be denied.

Victims' reasons for seeking to vacate an order vary and typically mirror their reasons for abandoning domestic violence cases prior to their resolution.[179] A survivor may no longer desire the protection; after the trauma of the violent event has receded, she may reconcile with her partner or reconsider involving the legal system in her family life.[180] She may find the financial and child care

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after a hearing); CAL. FAM. CODE § 6345(a) (Deering 2006) (allowing for termination of orders by further order of the court, either on written stipulation filed with the court or on the motion of a party); COLO. REV. STAT. § 13-14-102(17.5)(a) (2005) (stating that either party may apply to the court at any time for dismissal of an order); DEL. CODE ANN. tit. 10, § 1045(d) (2006) (allowing for an order to be rescinded upon motion, after notice to the parties and a hearing); FLA. STAT. § 741.30(10) (2006) (permitting either party to move to dissolve the injunction at any time); IND. CODE § 34-26-5-8 (2006) (making any petitioner seeking to terminate an order responsible for completing forms and filing them with the court); ME. REV. STAT. ANN. tit. 19A, § 4007(8) (2005) ("A plaintiff may extinguish . . . an order only by legal process in accordance with the Maine Rules of Civil Procedure."); MD. CODE ANN., FAM. LAW § 4-507(a) (2006) (allowing orders to be rescinded after notice to the parties and a hearing); MICH. COMP. LAWS ANN. § 600.2950(13) (West 2006) (providing that the respondent may move for a hearing to rescind the protection order within fourteen days of service of the order); MO. REV. STAT. § 455.060(5) (2006) (providing for termination of order upon petitioner's filing of motion to terminate); MONT. CODE ANN. § 40-15-204(5) (2005) (allowing termination of order upon petitioner's request); NEB. REV. STAT. § 42-924(3) (2005) (stating that a petition may not be withdrawn "except upon order of the court"); N.M. STAT. § 40-13-6(B) (2006) (permitting orders to be rescinded upon motion by either party); OHIO REV. CODE ANN. § 3113.31(E)(8)(b) (West 2006) (providing that either party may bring a motion to modify or terminate the protection order); OR. REV. STAT. § 107.720(2)(a), (b) (2006) (providing for termination of protection order by court order); UTAH CODE ANN. § 30-6-4.2(10) (2006) (allowing court to vacate an order after notice and hearing); VA. CODE ANN. § 16.1-279.1(F) (2006) (providing for either party to move for a hearing to dissolve an order at any time); WYO. STAT. ANN. § 35-21-106(b) (2006) (allowing either party to move to terminate an order).

176. D.C. CODE ANN. § 16-1005(d) (LexisNexis 2006) (allowing the court to vacate for good cause shown upon the motion of any original party); N.J. STAT. ANN. § 2C:25-29(d) (West 2006) (permitting dissolution of order upon good cause shown); OKLA. STAT. ANN. tit. 22, § 60.4(G)(3) (2005) (allowing the issuing court, after a hearing, to "take such action as is necessary under the circumstances"); S.C. CODE ANN. § 20-4-70(A) (2005) (permitting termination of protection order "upon motion by either party showing good cause with notice to the other party").

177. D.C. CODE ANN. § 16–1005(d) (LexisNexis 2006).

178. Ninety-one percent of petitions for temporary protection orders were granted during a two-month study conducted in 2004 in the D.C. Superior Court Domestic Violence Unit based on the standard that the petitioner must show immediate endangerment. D.C. CODE ANN. § 16-1005 (LexisNexis 2006). Data on file with author.

179. *See supra* notes 40–55 and accompanying text.

180. *See, e.g.*, People v. Goodsell, No. 235634, 2003 Mich. App. LEXIS 819, at 3 (Mich. Ct. App. Mar. 25, 2003) (petitioner moved to vacate her protection order seven days after its issuance

responsibilities of separate lives too difficult to manage.[181] Alternatively, she may have calculated the relative risks of harm resulting from maintaining versus vacating the order and determined that vacating would be safer.[182] Or a victim may be coerced or threatened by a batterer who is angered by the restraints of a protection order.[183] The vast majority of these petitions are unopposed. Naturally, a respondent rarely wishes to remain under the dictates of a civil protection order unless the petitioner has some reciprocal legal obligations that he values.

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because defendant "promised never to do it again" and because she missed him); Gallardo v. Vasquez, 2005 CPO 935 (D.C. Sup. Ct. 2005) (petitioner moved to vacate because she "does not want problems with the Respondent's family"); Lewis v. Mason, 2005 CPO 471 (D.C. Sup. Ct. 2005) (petitioner moved to vacate, pleading, "Petitioner and Respondent have reconciled. The Petitioner no longer fears for her life"); Janrhett v. Janrhett, 2005 CPO 1307 (D.C. Sup. Ct. 2005) (petitioner moved to vacate stating that she was "trying to seek counsel for [her] marriage [and her] husband . . . to work out [her] marriage"); Copeland v. Copeland, 2004 CPO 2962 (D.C. Sup. Ct. 2005) (petitioner moved to vacate asserting that she wished to work things out with her husband); Hodge v. Young, 2005 CPO 3719 (D.C. Sup. Ct. 2005) (petitioner filed two motions to vacate, stating "I not scared no more he is not calling writing or came around me or my child so I think me and my child are not in harm with he so I think it's ok to remove the order. My mother made me get the order."; the second motion stated "Petitioner wishes to vacate the CPO because the parties have reconciled and have a two-month-old baby boy together"); I.J. v. I.S., 744 A.2d 1246, 1248–49 (N.J. Super. Ct. 1999) (plaintiff's motion stated, "I would like to see this drop, as my daughter's father has been jailed through no fault of his own. I have been under the belief that my restraining order was expired after one year. Thinking this was the case I has asked & allowed to participate in his daughter's life more. He's been working and paying child support. He's been trying to get his life together. So I permitted him to come over any time, as long as he didn't cause trouble. I was trying to be supportive and I gave him the wrong information about the restraining order. Now he is in jail and I feel very bad about it. He's on probation for five yrs. [sic] And I would like to get this matter straight so that he can go home and continue working and doing the rite thing"). *See also* Waul, *supra* note 20, at 56 (reporting on a study of domestic violence victims and civil protection orders that indicated that a frequently cited reason for failing to return to court for a permanent protection order was that the couple had reconciled).

181. *See, e.g.*, Humpries v. Snipe, 2005 CPO 304 (D.C. Sup. Ct. 2005) (petitioner filed a motion to vacate asserting that she needed help with the children.).

182. Victims are in the best position to calculate the comparative risks of two different courses of action. They have the most experience with the batterer, his threats, his history of following through on those threats, and his reaction to various constraints. Research illustrates that victims' risk assessments are more accurate than chance and often more accurate than risk assessment instruments. Cattaneo, *Intimate Partner Violence*, *supra* note 48. *See also*, D.Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault*, 19 J. INTERPERS. VIOL. 778, 796–97 (2004). Further, research suggests that a longer history of abuse and a longer relationship are predictive of risk assessment accuracy. Cattaneo, *Intimate Partner Violence*, *supra* note 48. Researchers hypothesize that this is so because past forecasts of behavior allow a victim to predict her partner's future behavior. *Id.* This suggests that system actors who have limited experience with the abuser are less effectively situated to make an accurate risk assessment in a particular case than is the victim.

183. *See Goodsell*, 2003 Mich. App. LEXIS 819, at *3 (detailing petitioner testimony that she moved to vacate her protection order in part because the respondent threatened to burn her house down if she did not get the order dismissed). *See also* Waul, *supra* note 20, at 56 (reporting that one third of women in a study of domestic violence victims and civil protection orders failed to return to court for a permanent protection order due to pressure by the batterer).

In practice, judges confront motions to vacate frequently,[184] and the number will likely rise as courts increasingly threaten to hold victims in contempt for violating orders issued to protect them. In the past, when a victim no longer wished for the batterer to comply with a protection order, most victims would simply refrain from enforcing the order and eschew further judicial intervention.[185] But increasingly, judges hold that victims who permit respondents to violate court orders are guilty of either violating the underlying orders or aiding and abetting the violation of the orders.[186] Both acts carry criminal penalties in all jurisdictions.[187] As this risk becomes more publicized, victims are more likely to seek to vacate civil protection orders rather than to ignore them.

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184. A Quincy, Massachusetts, study found that nearly half of the domestic violence victims who sought protection orders petitioned the court to vacate those orders before the year-long order expired. Klein, *supra* note 65, at 195–98. This research was completed in 1996, so contemporary research may be required to determine the current frequency of such cases. However, since this research was completed ten years after the district implemented its aggressive, coordinated domestic violence intervention program, it should be a reasonably reliable indicator of current domestic violence interventions.

185. Court action inevitably swallows time, resources, and patience. *See* Hart, *Battered Women*, *supra* note 52, at 98–99; Deborah Nelson & Rebecca Carr, *Some Frustrated Victims Talk of Taking Up Arms*, CHI. SUN-TIMES, July 24, 1994, at 18. Further, many litigants believe that any judicial interaction carries significant risks. For example, clients I have represented worry that their children will be taken away if they raise issues of abuse before the court. Indeed, this fear is rational; some jurisdictions have prosecuted victims of domestic violence for failing to protect their children from violence. Others worry that they will be prosecuted for any past criminal infractions. *See generally* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 833–36 (2001) (summarizing the potential for child protective service intervention in response to domestic violence and quoting a rural victim who stated: "It does more damage to call the police . . . The call to the police opened up so many doors. Then I had three different services watching me and with the kids. Child protective put me at risk for losing my children; they said, next time they'll take the kids! I always thought the police were there to help me. I would never call them again."); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (exploring the ways that race and culture suppress reporting of domestic violence and noting an "unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile"); Goodmark, *Legal Response*, *supra* note 23, at 23–28 (providing an overview of the various negative results that could follow a court filing); Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 589 (1997) (discussing the possibility of deportation faced by immigrant domestic violence victims).

186. *See* Henley v. Iowa Dist. Court, 533 N.W.2d 199, 202 (Iowa 1995) (finding that a statute authorizing contempt for violation of domestic violence protection order makes no exceptions for victims); Hutcheson v. Iowa Dist. Court, 480 N.W.2d 260, 262–63 (Iowa 1992) (abuse victim held in contempt of restraining order for continuing relationship with abuser); State v. Lucas, 770 N.E. 2d 114 (Ohio Ct. App. 2002), *rev'd*, 100 Ohio St.3d 1 (Ohio 2003). *See generally*, Marya Kathryn Lucas, *An Invitation to Liability?: Attempts at Holding Victims of Domestic Violence Liable as Accomplices When They Invite Violations of Their Own Protective Orders*, 5 GEO J. GENDER & L. 763 (2004).

187. *See* state criminal contempt statutes, *supra* note 4.

2. What informs judges' decisions in denying these motions?

New Jersey precedent best illustrates the rationale that informs judicial decisions as judges increasingly deny victims' motions to vacate protection orders. In early cases, plaintiffs' motions were granted without extensive consideration when the parties had reconciled,[188] when there had been mutual violation,[189] and when the motion had been jointly sought.[190] For example, in 1989, a New Jersey Superior Court held that "[i]f the situation which led the domestic violence action is resolved by the parties, the reconciliation should end the matter. The reconciliation of the parties destroys the viability of a domestic violence order."[191] In another New Jersey county in 1995, the Superior Court considered the effect of a victim's intent to dissolve a protection order and found, consistent with their interpretation of legislative intent, that "where the victim has consented to lifting the restraining order and the court finds that the victim is doing so voluntarily, the court should dissolve the order without further consideration or analysis."[192]

Some New Jersey courts in the 1990s, however, ceased automatically granting motions to vacate. Instead they began engaging in increased analysis of victim safety and the voluntariness of the request. The court in *Torres v. Lancellotti* held that the plaintiff's preferences should be an important consideration in the viability of an order:

> It should be noted that [an in-depth] analysis should *not* be employed where both plaintiff and defendant appear and request a closing of the matter without further proceedings. In such a situation the individuals closest to the controversy have decided to halt the legal action. The Prevention of Domestic Violence Act of 1990 is still a civil provision, which requires the active participation and prosecution of a plaintiff.[193]

However, rather than affirming the pro forma dissolution of an order based on mutual reconciliation, the *Torres* court suggested that the trial court analyze the circumstances of the reconciliation, any changed circumstances between the parties, as well as all factors that inform judicial assessment of the initial granting of a protection order. These factors include:

> 1) [p]revious history of domestic violence between the plaintiff and defendant; 2) [t]he existence of immediate danger to person or property;

188. *See* Hayes v. Hayes, 597 A.2d 567, 570 (N.J. Super Ct. 1991) ("Reconciliation of the parties, for example, acts as a de facto vacation of the order."); Mohamed v. Mohamed, 557 A.2d 696, 698 (N.J. Super. Ct. 1989).

189. *See* Torres v. Lancellotti, 607 A.2d. 1375, 1377 (N.J. Super. Ct. 1992) (acknowledging that earlier courts vacated protection orders upon mutual violation but not itself vacating upon mutual violation "without an analysis of the necessity for continued protection and restraints.").

190. *Id.* at 1378.

191. *Mohamed*, 557 A.2d at 698.

192. Carfagno v. Carfagno, 672 A.2d 751, 757 (N.J. Super. Ct. 1995).

193. *Torres*, 607 A.2d at 1378 (emphasis in original).

> 3) [t]he financial circumstances of the plaintiff and defendant; 4) [t]he best interests of the victim and any child; 5) [i]n determining custody and visitation the protection of the victim's safety; and 6) [t]he existence of a verifiable order of protection from another jurisdiction, as well as any proof of changed circumstances since the entry of the prior order.[194]

Citing the influence of psycho-social domestic violence theories, the New Jersey Superior Court first denied a plaintiff's motion to dismiss a protection order in 1998, holding that plaintiffs must meet a "good cause" standard to prevail in such a case.[195] In *Stevenson v. Stevenson*, the plaintiff moved the court to dissolve her protection order because she had reconsidered her relationship with the perpetrator and wanted him involved with their child in ways that the order prohibited.[196] Upon consideration of the motion, the court held that, contrary to the traditional interpretation, the statutory requirement of good cause applied to both defendants and plaintiffs seeking the dissolution of a protection order.[197] The court further held that the most relevant factor to the determination of good cause is the plaintiff's *objective* fear of the abusive partner.[198]

The court rejected an analysis of the plaintiff's *subjective* fear after discussing the psychological dynamics of domestic violence and their distorting effects on the victim's judgment. Citing Lenore Walker, the court reasoned that the plaintiff's dissolution request, despite the brutal violence in this case, was consistent with "phase three of 'battered women's syndrome,'"[199] indicating that she might not have been thinking rationally because she was affected by the batterer's contrition. Further citing power and control dynamics, the court determined that a victim's subjective fear is an unreliable indicator of danger: "[W]here the victim has continual fear of the defendant, the defendant's perceived control over the victim may attenuate the victim's ability to act in the best interests of the children. Moreover, the fear might attenuate the ability of the victim to act in his or her own best interests."[200] In analyzing objective fear, the court substituted its own judgment for the plaintiff's. In *Stevenson*, the court ultimately found the existence of objective fear of future violence, leading it to conclude that the court must deny the motion to vacate, thereby refusing to "be an accomplice to further violence by this defendant."[201]

Representing the controversy in this area, another judge in the same New Jersey county refused to follow the *Stevenson* decision just one year later.

194. *Id.* at 1377.
195. Stevenson v. Stevenson, 714 A.2d 986, 993 (N.J. Super. Ct. 1998).
196. *Id.* at 989–990.
197. *Id.* at 994.
198. *Id.*
199. *Id.* at 993.
200. *Id.* at 994.
201. *Id.* at 995.

Instead, in *I.J. v. I.S.*, the court held that it should not impose a good cause standard on plaintiffs seeking to dissolve their protection orders.[202] The court took the victim's request at face value, noting the importance of respecting the plaintiff's role in a civil case. However, the judge imposed a voluntariness requirement to satisfy concerns arising out of psycho-social coercion theory:

> A civil action is the attempt by one private party to seek relief from another private party . . . The State normally is not a participant in civil disputes. Thus, the private nature of a civil proceeding distinguishes it from criminal matters . . . The dispute exists between the plaintiff and defendant, whereas the restraining order governs the future of the private relationship between those two parties . . . If a plaintiff wishes to dissolve the restraining order, the Act requires no further justification from plaintiff other than a showing that there is a lack of coercion, voluntariness and that plaintiff understand the "cycle of violence" and the consequences of dismissing a restraining order . . . Thus, if plaintiff has the power to institute a civil action, she or he should have the power to dismiss a civil action.[203]

The evolution represented in New Jersey cases dealing with motions to vacate illustrates a noticeable trend in judicial analysis of motions to dismiss protection orders: from early cases holding that courts should dismiss orders without further analysis to later cases illustrating judicial concerns about victim safety leading to the adoption of an objective risk standard. The cases suggest that these concerns are informed by domestic violence psycho-social theories and activism. The *I.J.* decision illustrates the expected inconsistency of judicial philosophy in this area and the permeation of coercion theory.

These cases provide a capsule summary of the analysis that informs judicial decisions where plaintiffs assert that they seek dissolutions of protection orders voluntarily. Judges are informed by the lessons advocates and social theorists have taught them. For the most part, judges are driven by the essential urge or obligation to protect an individual who has been harmed in the past.[204] Rather than place a woman back in a dangerous situation, many judges would prefer to sustain protection orders and deny the victim's request. A judge hearing a motion to vacate faces a victim who has already been determined to need protection. Denying the motion seems to protect both the victim and the

202. I.J. v. I.S., 744 A.2d 1246, 1252 (N.J. Super. Ct. 1999).

203. *Id.* at 1252.

204. A judge could also be acting out of frustration at the repeated appearance of the same woman who seems to be abusing the court process by using it to serve her whims. *See* Kelleher v. Galindo, 796 A.2d 306, 310–11 (N.J. Super Ct. 2002) (denying a motion to vacate a protection order largely on the basis of plaintiff's repeated dismissals and re-filings and seeking to relieve the court system from perpetuating such a cycle and waste of judicial resources); North Dakota Commission on Gender Fairness in the Courts, *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Court*, 72 N. D. L. REV. 1113, 1208 (1996) (quoting a judge who said to a petitioner, "If you go back [to the abuser] one more time I'll hit you myself.").

judge.[205] The victim retains an enforceable injunction against the batterer, and the judge insulates herself from damning headlines that publicize that she placed a known victim in jeopardy.[206]

A judge who denies the motion determines her own assessment of risk is more reliable than the plaintiff's assessment. She makes this ruling despite the fact that the motion is uncontested and that the only testimony she is likely to hear is from the plaintiff. The plaintiff may present a range of testimony justifying her motion. In cases where she has reconciled with the batterer, or simply determined she does not want to be under court protection, or reasoned that she is safer without the order, the judge's decision to deny the motion illustrates that she credits her own independent judgment—an "objective fear" assessment—more than the individual litigant's testimony and stated preferences.

This practice is essentially unheard of in civil litigation.[207] Outside the domestic violence context, if a civil litigant makes a good faith, uncontested request to the court to vacate an order, the court will do so.[208] One can scarcely imagine a court enforcing an order requiring specific performance of a contract if the plaintiff in the contract case no longer desired that the contract be honored. Similarly, if a party who was the subject of a court order to receive damage payments no longer desired those payments, it is ludicrous to imagine a court forcing a party to accept payments. And yet, this is exactly the action that a judge who denies a motion to vacate a protection order takes.

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205. *But see* Klein, *supra* note 65, at 207 (reporting research illustrating that the re-abuse rate of victims was consistent regardless of whether victims maintained or vacated their restraining orders).

206. *See* St. Joan, *supra* note 58, at 265 (reporting that a group of judges in Colorado stated that they were concerned about being blamed for an error in judgment in a domestic violence case); David Feige, *Bumble in the Bronx*, LEGAL AFF. 23, 25 (Jul/Aug. 2002) ("It's not easy being a judge. Every day, you are required to make decisions that have enormous impact on the lives of the people who come before you. In case after case, canny advocates dodge and weave, spinning stories crafted to influence your decision. It's hard to get a straight answer from anyone. To make matters worse, no one pays much attention to you until something goes wrong, and then the media attack. Because most crime reporting focuses on judges who are 'soft on crime' rather than those who are overly harsh, it's tempting to play things safe . . . Despite long judicial terms—or, in the federal system, life tenure—many judges go out of their way to avoid the bad press that often comes from tilting toward the lenient side of the law.").

207. Though denials of uncontested civil motions are unheard of, they are probably sustainable upon review. Judges have wide discretion in considering motions to vacate. *See* notes 174–178 and accompanying text. *But cf.* Blain v. Broussard, 99 S.W.2d 993 (Tex. Civ. App. 1936) (overruling the lower court's order to vacate divorce decree upon plaintiff's motion because court no longer had jurisdiction over the case after death of respondent).

208. The dearth of appellate case law on point supports this proposition. Cases granting a plaintiff's request to vacate a court order are not appealed, because both parties have attained satisfaction. *Cf.* Rudgayzer & Gratt v. LRS Commc'ns, Inc., 3 Misc.3d 159, 162 (N.Y. Civ. Ct. 2003) (denying a plaintiff's motion to vacate summary judgment entered in its favor after finding that the plaintiff made the motion in an attempt to refile as a class action).

IV.

SUCCESS OF MANDATORY INTERVENTIONS AND AGGRESSIVE ENFORCEMENT IS UNCLEAR

Research indicates that mandatory intervention policies may have increased the raw numbers of domestic violence cases processed but may not have enhanced victim safety. Mandatory intervention strategies are crafted to seek a unitary goal that does not vary from case to case or victim to victim. Mandatory arrest legislation seeks to maximize the number of domestic violence arrests. Through no-drop prosecution policies, prosecutors' offices primarily strive to maximize their case retention rates.[209] While victim safety may have motivated systems actors to take domestic violence seriously, and while police officers and prosecutors may be personally committed to victim safety, funding pressures drive criminal justice personnel to focus primarily on more easily quantifiable measures of success. However, a victim intervention that is successful by police and prosecutor measures may have no effect on or may actually decrease victim safety in the long run. In analyzing the success of mandatory arrest programs, no-drop prosecution policies, and denials of civil protection orders, we should focus on the original goals of advocates and system actor interventions—victim safety—and determine how effective these interventions have been at making victims safer from battering partners.

A. Mandatory arrest

Mandatory arrest studies assessing victim safety have found a mixed bag at best.[210] Most suggest that, while some victims may be at a decreased risk of re-abuse under a mandatory intervention regime, the policies tend to have an insignificant effect on victim safety and may even put some victims at increased risk.

In a major mandatory arrest experiment in the late 1980s, a study of 1200 victims in Milwaukee found no long-term reductions in prevalence of same-victim violence or any-victim violence in the group of perpetrators arrested versus those to whom only a warning was given.[211] Instead, some statistics suggested an escalation in violence.[212] Similarly, in a 1986 study in Omaha, Nebraska, domestic violence cases were randomly assigned to one of three

209. *See, e.g.*, Römkens, *supra* note 34, at 281 (asserting that police and prosecutors measure their success by the numbers of arrests and prosecutions).

210. *But see* Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 930–32 (1994) (arguing that the studies of mandatory arrest policies were so flawed that their results should not be taken seriously in assessing the effectiveness of such policies).

211. Lawrence W. Sherman, *The Variable Effects of Arrest on Criminal Careers*, 83 J. CRIM. L. & CRIMINOLOGY 137, 152 (1992).

212. *Id.*

treatments: arrest, mediation, and separation. At six months, researchers found that arrest by itself did not deter future violence any more than the other police responses, nor did arrest increase the level of re-assault. In fact, research indicated that there was a lower frequency of arrest recidivism at twelve months in mediation and separation cases than in arrest cases.[213]

One of the most well-known studies found that mandatory arrest had a deterrent effect only on batterers who stand to lose social or professional status by involvement with the criminal justice system. The Colorado Springs Spouse Abuse Experiment, conducted between 1987 and 1989, studied intimate abuse cases randomly divided among one of four treatments: emergency order of protection and arrest, emergency order of protection for victim coupled with crisis counseling for suspect, emergency order of protection only, and restoring order at the scene. Researchers found that arrest effectively deterred employed batterers who might jeopardize their careers if arrested, but it was not as effective for unemployed batterers. For the unemployed population, arrest can in fact exacerbate violence.[214]

Several studies illustrated that mandatory arrest statutes had no effect on victim safety.[215] For example, a two-year experiment in Charlotte, North Carolina found that the "arrest of misdemeanor spouse abusers is neither substantively nor statistically a more effective deterrent to repeat abuse" than issuing a citation or advising and separating.[216] Only two studies assessing the

213. Franklyn W. Dunford, *The Measurement of Recidivism in Cases of Spouse Assault*, 83 J. CRIM. L. & CRIMINOLOGY 120, 121–23 (1992); JOAN ZORZA & LAURIE WOODS, NATIONAL BATTERED WOMEN'S LAW PROJECT, ANALYSIS AND POLICY IMPLICATIONS OF THE NEW DOMESTIC VIOLENCE POLICE STUDIES 14–25 (1994).

214. Richard A. Berk, Alec Campbell, Ruth Klap & Bruce Western, *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170, 183 (1992). *See also* Sherman, *supra* note 102, at 32 (citing a collection of National Institutes of Justice studies that found that "[a]rrest has consistently more crime reduction effect on employed suspects than it does on unemployed suspects . . . [T]he weaker a suspect's social bonds, the more likely it appears to be that arrest will backfire by causing increased violence."). For criticism of these studies and findings, see Wanless, *supra* note 112, at 556–61. Sherman also concluded that the studies showed that, by official measures, arrests generally have no deterrent effect at six months. Sherman, *supra* note 102, at 30.

215. Judith McFarlane, Pam Willson, Dorothy Lemmey & Ann Malecha, *Women Filing Assault Charges on an Intimate Partner*, 6 VIOLENCE AGAINST WOMEN 396, 405 (2000) ("The 90 women in this study report no greater reduction in new abuse following their attempt to file charges whether the perpetrator was arrested or not."); *Id.* at 398 (citing Franklyn W. Dunford, David Huizinga, & Delbert S. Elliott, *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990); J.D. Hirschel, Ira W. Hutchison III, & Charles W. Dean, *The Failure of Arrest to Deter Spouse Abuse*, 29 J. RESEARCH CRIME & DELINQUENCY 7 (1992)). *See also* Kathleen J. Ferraro & Lucille Pope, *Irreconcilable Differences: Battered Women, Police and the Law*, *in* LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 98 (N. Zoe Hilton, ed. 1993) ("The two replications published in journal form to date have not demonstrated that arrest is significantly more effective than other types of police interventions in deterring future violence.").

216. J. David Hirschel & Ira W. Hutchison, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 115 (1992).

success of mandatory arrest policies concluded unambiguously that victims are at a lower risk of re-abuse as a result of the policies.[217]

Even if improved arrest statistics have not increased victim safety in and of themselves, the arrests may still be considered successful if they bring more cases into a system that enhances victim safety. However, if abusers who enter the system are not prosecuted and convicted, the victims are not likely to benefit from mandatory arrest policies. To prosecute more perpetrators, a jurisdiction must have the resources and the political will to do so. New York City, for example, did not report a significant increase in convictions after the implementation of mandatory arrest statutes and the resulting dramatic increase in arrests.[218] In Suffolk County, New York, the state's mandatory arrest statute resulted in a three-fold increase in arrests.[219] However, the District Attorney's office could not successfully prosecute many of the cases because of "flimsy" proof, creating concern that women could actually be placed at increased risk by virtue of the arrest.[220] As one prosecutor stated, "[w]e create this false expectation of safety that we can't live up to . . . If we can't prosecute their abusers, we return [victims] to a dangerous situation with no protection."[221]

B. No-drop prosecution

Research also shows mixed results as to whether increased prosecutions and case retention enhances victim safety. While no-drop prosecution policies have generally increased the percentage of cases charged and decreased the percentage dismissed, it is not clear that these policies is to make women safer.

Several studies of no-drop prosecution policies were conducted to measure their effect on victim safety generally and on recidivism specifically. None of these studies concluded that the policies enhanced victim safety. In analyzing the effects of no-drop prosecution versus discretionary dismissal prosecution, researchers found that "[a]lthough there seems to be some benefit for victims whose assailant is arrested and prosecuted, we cannot say that these victims are better off than if the men had *not* been arrested or had been arrested and not

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217. McFarlane, *supra* note 215, at 398. Several other analysts have concluded that mandatory arrest has been effective at reducing domestic violence by pointing to broad indicators of a comparative reduction in domestic violence. *See* Leonard, *supra* note 27, at B5 (suggesting the effectiveness of mandatory arrest policies in reducing re-assault by noting a 20 percent reduction in the domestic violence related 911 calls in the period after the implementation of the no-drop and mandatory arrest policies in Orange County); Wanless, *supra* note 112, at 559 (hypothesizing that recidivism has decreased because of mandatory arrest laws based on statistics in Connecticut showing that domestic violence incidents decreased to under 500 in 1992 from 600 in 1987). However, since these indicators could relate to a variety of system and societal changes, the statistics do not conclusively support the effectiveness of mandatory arrest policies.

218. Symposium, *Women, Children and Domestic Violence*, *supra* note 7, at 659 (remarks of Assistant District Attorney Lisa Smith).

219. Michael Luo, *Domestic Violence Policy Assailed*, NEWSDAY, Aug. 9, 2000, at A32.

220. *Id.*

221. *Id.*

prosecuted. But given arrest with prosecution, one policy is no better than another."[222] Further, the researchers found that, although dropping a criminal case in and of itself puts a woman at risk, "*permitting* victims to drop charges gives them the best chance for security."[223]

Moreover, two studies suggested that no-drop prosecution policies increase victim risk of re-abuse. Studies conducted in 1989 and 1991 found that "[m]en with prior arrest records or who had lengthy histories of severe violence toward their partners were more likely to reoffend if prosecuted compared with men not prosecuted."[224] Again, these studies indicated that victims are safer when there is prosecutorial discretion and where women have an influence on prosecution decisions.[225] "[C]ontrary to popular advocacy, permitting victims to drop charges significantly reduces their risk of further violence after a suspect has been arrested on a victim-initiated warrant, when compared with usual policies."[226] Some research suggests a reduction in violence under a victim-controlled policy because "battered women who oppose arrest and prosecution because they predict it will result in further violence are often accurate in their assessment."[227]

Advocates opposing no-drop prosecution policies have hypothesized that wresting control from victims forces women to act in ways that jeopardize their safety. Coercive treatment by the state may actually drive a victim back to her batterer.[228] If a victim is manipulated by both the abuser with whom she has had an intimate relationship and the state actor whom she has just recently met, she is likely to ally herself with the batterer. In the end, her batterer is at least a familiar adversary.

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222. Ford & Regoli, *supra* note 136, at 153.

223. *Id.* at 156 (emphasis added).

224. JEFFREY FAGAN, NAT'L INST. OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 17 (1996).

225. Only one study suggests that women prefer no-drop prosecution policies to those that permit them to have some control over the prosecution. "In interviews conducted with victims subpoenaed to testify against their partners in 1983 and 1984, nine of eleven said they were relieved when they were told that they could not have the charges dropped, even though they never would have voluntarily testified." Asmus, *supra* note 138, at 137 (citing DULUTH ABUSE INTERVENTION PROJECT, DATA COLLECTION FILES (1990)). However, the small sample size of this study and the strong possibility that those who responded to the survey did so because they had had positive interactions with the system calls the relevance of this study into question.

226. Ford & Regoli, *supra* note 136, at 157. *Cf.* GERALD T. HOTALING & EVE S. BUZAWA, FORGOING CRIMINAL JUSTICE ASSISTANCE: THE NON-REPORTING OF NEW INCIDENTS OF ABUSE IN A COURT SAMPLE OF DOMESTIC VIOLENCE VICTIMS 19 (2003) (finding that the majority of victims who do not report re-abuse complained of having no voice or rights in the criminal justice system).

227. Coker, *supra* note 185, at 818.

228. O'Connor, *supra* note 134, at 961 ("[T]aking control of the victim's life . . . in turn may force the victim to align herself with the batterer, because she prefers a known adversary to an unknown one.") (citation omitted).

C. *Judicial denials of motions to vacate*

The more recent phenomenon of denials of motions to vacate has received scant attention, thus, its effect on victim safety is unknown. In some cases, the denial of a motion to vacate may protect the victim. News stories abound of women whose abusers attack or kill them after they dismiss their protection orders.[229] If the order was an effective deterrent to violence prior to the motion to vacate, its maintenance may continue to protect the victim.[230] The judge's denial might also remind the batterer about the sanctity of the order, thereby enhancing its effectiveness. However, the news is equally replete with stories of victims who are abused or killed despite the presence of a protection order.[231]

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229. *See, e.g.*, David Crowder, *Woman Feared Man, Family Says; Family Had History of Claims of Violence*, EL PASO TIMES, Dec. 17, 2003, at 1A (reporting the murder of a woman by her husband after she withdrew her application for a protection order); Kathy Jefcoats, *Family Grieves, But Not Stunned; Victim Feared Alleged Killer*, ATLANTA JOURNAL-CONST., July 7, 2005, at J1 (reporting woman stabbed to death by her ex-boyfriend applied for a restraining order, then requested that the case be dismissed); Cathy Kightlinger, *Suspect Arrested in Park Killing; Ex-boyfriend with Violent History Is Charged with Shooting Woman in Head in Carmel*, INDIANAPOLIS STAR, Nov. 23, 2004, at B1 (reporting ex-boyfriend charged with murdering the mother of his child after she applied for a protection order and then had it dismissed); Corrine Olson, *Will to Live Sparks "Amazing" Recovery*, ARGUS LEADER (Sioux Falls, S.D.), Feb. 16, 2005, at 1A (documenting the recovery of a woman shot by her ex-boyfriend after requesting that the protection order against him be dismissed); Andy Paras, *Slaying Suspect Had History of Spouse Abuse*, GREENVILLE NEWS (S.C.), Apr. 8, 2004, at 1 (reporting woman murdered by her husband after dismissing the protection order in place against him); Penny Brown Roberts, *Tragedy Shows Restraining Orders Useful, Limited*, ADVOCATE (Baton Rouge, La.), May 28, 2006, at A1 (relating case of woman who was shot with four of her relatives by her husband after requesting the dismissal of a protection order against him); Ian Shapira, *Va. Wife Slain After Court Denies Protection; Estranged Husband Arrested in Florida*, WASH. POST, Nov. 27, 2004, at B1 (explaining in a correction appended to the story on Dec. 1, 2004 that the woman murdered by her estranged husband had requested that the protection order be dismissed); Steven Ward, *Domestic Problem Explodes in Murder-Suicide*, ADVOCATE (Baton Rouge, La.), Feb. 12, 2004, at 7B (reporting woman killed by estranged husband after requesting that judge dismiss the temporary protection order in place against him).

230. *But see* Andrew Klein, *supra* note 65, at 207 (concluding that the effectiveness of a protection order derives from its issuance rather than its maintenance).

231. *See, e.g.*, Jennifer Brevorka, *Man Held in Wife's Death; She Had a Court Order Against Him*, NEWS AND OBSERVER (Raleigh, N.C.), May 17, 2005, at B1 (reporting a man allegedly running his wife off the road and "killing her with his bare hands" after she secured a protection order against him); Ruben Castaneda, *Mom Turns Own Tragedy Into Career of Advocacy*, WASH. POST, July 5, 2006, at B1 (reporting on the advocacy career of a woman whose two children were murdered by her husband against whom she had a protection order); Dave Gustafson, *Protective Order Failed Ilderton*, CHARLESTON GAZETTE (W.Va.), Oct. 12, 2005, at 1A (reporting the strangling death of a woman by her husband against whom she had a protection order); Rummana Hussain, *Cops Question Husband After Wife Found Beaten to Death in River Forest; Woman Had Filed Order of Protection Against Him in Dec.*, CHI. SUN-TIMES, Mar. 18, 2005, at 14; Susan Kinzie, *Violence Shatters St. Mary's; Year's Slayings in County Believed Domestic Incidents*, WASH. POST, Dec. 5, 2004, at C1 (reporting the stalking and murder of a woman by her husband against whom she had a protection order); Sheila McLaughlin, *Wife Endured Threats, Abuse*, CINCINNATI ENQUIRER, June 21, 2005, at 1B (relating the escalating abuse and eventual murder of a woman by her husband against whom she had a restraining order); Michele Munz, *Those Near Him Saw John Alexander's Rage*, ST. LOUIS POST-DISPATCH, Mar. 3, 2005, at C1 (reporting the

When a judge overrides a victim's will to dissolve an order and substitutes his own judgment for hers, he might simply get it wrong. According to one advocate who has worked with hundreds of victims:

> I could see this literally becoming a life or death situation for some people—I have had clients who have vacated [protection orders] under the threat of death or serious bodily injury. They may be in much more danger if they do not move to vacate. These petitioners have still told the judge that they were not coerced, however. I believe that petitioners really need to be given control . . . this is so often what keeps them alive."[232]

In the end, a uniform policy of denying petitioners' motions to vacate when the judge suspects that a victim is coerced or at risk will not consistently enhance victim safety. The judge's risk assessment will necessarily be imperfect.

1. The messages conveyed by aggressive policies and judicial actions

Denials of motions to vacate and mandatory policies convey messages about the system's respect for the victim. The inverse relationship between the seriousness with which domestic violence cases and domestic violence victims are taken conveys a strong message about society's tolerance for domestic violence. Is the message about society's intolerance for domestic violence sufficient to justify these policies? To answer, we must examine the correlative message about the value of victims' voices.

a. Overriding victim preferences vs. conveying intolerance for domestic violence

The message sent by mandatory intervention policies that override victim preferences and judges who deny petitioners' motions to vacate protection orders may be interpreted differently depending on victims' true preferences vis-à-vis their cases. First, judicial denials and law enforcement policies can convey the message that victims cannot make rational, informed decisions about themselves, their families, and their futures. If a victim's preference about the handling or outcome of a case is overridden or is not solicited, she may rationally conclude that she has been deemed incapable of healthy decisions about her intimate issues. As one commentator argued, "[m]andatory interventions, such as arrest, prosecution, and reporting, treat battered women as fragile, uncooperative,

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fatal shooting of a woman by her husband against whom she had an order of protection); Pat Reavy & Wendy Leonard, *Man Shoots His Ex-Wife in W.V., Then Himself*, DESERET MORNING NEWS (Salt Lake City, Utah), May 11, 2005, at B3 (reporting that woman was murdered by her ex-husband against whom she had a restraining order before his subsequent suicide); Michael N. Westley, *Suspect Allegedly Shoots His Ex-Wife; Man Allegedly Shoots, Kills Ex-Wife, Wounds Her Father; The Victim's Father Also Shot Trying to Save Her*, SALT LAKE TRIB., Aug. 29, 2005, at B1 (reporting woman shot by her ex-husband even though she had protection order against him).

232. E-mail from Sarah Connell, Senior Staff Attorney, Women Empowered Against Violence, Inc. (WEAVE) (June 14, 2006).

mentally ill, and/or indecisive."[233] The easiest way to deal with fragile, uncooperative, mentally ill, or indecisive individuals is to remove them from a decision-making role—part of the intent and often the effect of state mandatory intervention strategies and judicial practice of denying certain vacate motions.

Second, the policies might convey the message that the system actors who implement these policies and judges who deny motions are more capable of making these decisions *for* the victims. If the system actor or judge imposes his own agenda on a domestic violence matter, a victim may determine that that actor has declared his own judgment superior to hers. When the victim's preference diverges from the prosecution's agenda, these policies officially render the victim's voice irrelevant and can result in a profound sense of disempowerment.[234] She cannot make the case disappear regardless of whether she feels its pursuit is detrimental to her or her family, whether she no longer believes the allegations are true, or whether the defendant threatens her if she cannot succeed in dismissing the case. The state's message—whether intentional or not—that it knows what is best for her and that her input is irrelevant often reinforces her perceptions of the criminal justice system.[235] As one prosecutor stated about no-drop policies, "[w]e trust our system . . . so we're willing to force a woman into it."[236] Similarly, when a plaintiff moves to vacate a protection order voluntarily but is denied, she may well interpret the denial as paternalistic and disrespectful.

However, mandatory policies and judicial denial may also send the message that the system aggressively and proactively protects victims from violence. In some cases, the victim might welcome the prosecutor, police, or judge taking responsibility for the outcome of the case. She may truly want the protection but ask the prosecutors to abandon the prosecution or the judge to vacate the order due to her batterer's coercive efforts. A victim can derive empowerment from her alliance with the prosecution: as a cooperative complaining witness, she can feel the power of the state behind her in seeking punishment and retribution. Similarly, when a judge hears testimony revealing that the batterer coerced his victim into making a motion to vacate, the judge's decision to deny the motion sends an affirming message to victims and a stern warning to perpetrators that courts will not be manipulated by the coercion of abusive partners. While a batterer may be able to threaten or manipulate a victim into filing a motion, the judge stands as the final arbiter who can enforce the order.[237] Mandated state

233. Mills, *Killing Her Softly, supra* note 69, at 584.

234. *See* O'Connor, *supra* note 134, at 961 ("The effect of mandatory policies, however, may be to strip the victim of any sense of control and to foster a sense of disempowerment.").

235. *See* Hanna, *No Right to Choose*, *supra* note 16, at 1856.

236. Jan Hoffman, *When Men Hit Women*, N.Y. TIMES MAG., Feb. 16, 1992, at 22, 26.

237. Inherently, judges are in a position to send messages to the parties in specific cases and their actions reflect generally on the state's response to domestic violence. If a judge belittles the violence, he may put the victim at a higher risk. In one particularly egregious example, a judge was recently investigated for misconduct that included a statement that women seeking protection

responses and judicial denials of motions to vacate allow victims to placate abusers by seeking to deter enforcement while still remaining protected.

b. Feminist critique of intervention policies

Feminist critiques of mandatory intervention policies have charged that these policies rob women of their agency and autonomy by substituting the will of the state for the preferences of the victim.[238] These critiques apply equally to judicial denials of petitioners' motions to vacate protection orders. They argue that state actors subvert women's agency when they adopt mechanical policies that silence victims' voices. Since the implications of a criminal case are far-reaching into the freedoms, relationships, and families of the victims, they reason that women should have the agency to at least participate in, if not control, these decisions. Mandatory intervention policies discourage women's input on issues such as arrest, prosecution, sentencing, and grand jury and trial court testimony. Further, mechanically applied mandatory policies leave no room to credit the voice of a woman who may be in a better position to assess the danger resulting from prosecution or from her testimony. They also leave no room to consider the effect of the batterer's incarceration on his family.

Similarly, a judge denies a woman's agency when she substitutes her judgment for the victim's and maintains a protection order that the victim seeks to dissolve. In fact, judicial denials of motions to vacate may subvert women's

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orders are like busses that come along every few minutes. Ruben Castaneda, *Pr. George's Judge Charged with Misconduct*, WASH. POST, May 3, 2006, at B1. *See also* GENDER AND JUSTICE, *supra* note 137, at 573 (reporting that judges in Georgia commented to domestic violence victims: "You may feel differently under the blanket when it gets cold outside"); *See, e.g.*, Ruben Castaneda, *Palumbo Denies Wrongdoing; Judge Says the Problem Is Mix-Ups, Not Misconduct*, WASH. POST, June 1, 2006, at B4; Ruben Castaneda, *Woman Tells of Md. Judge Denying Her an Interpreter*, WASH. POST, Dec. 15, 2005, at B4 (listing as allegations in a petition filed against Judge Palumbo that he "rejected applications for protective orders based on an erroneous understanding of the law; and that he routinely made disparaging comments about women"); Ruben Castaneda, *After Burning of Woman, Judge's Cases Are Limited*, WASH. POST, Oct. 14, 2005, at B5; Maureen Fan, Salvatore Arena & Frank Lombardi, *Ruffled Duckman Sent to Civil Court*, N.Y. DAILY NEWS, Apr. 26, 1996, at 7; Maureen Fan, Michael Finnegan & Wendell Jamieson, *Panel Slams Duckman: Misconduct Rap Could Sink Jurist*, N.Y. DAILY NEWS, Apr. 23, 1996, at 5; Maureen Fan, Russell Ben-Ali & Michael O. Allen, *Gov Eyes Impeachment: Pataki Rips Judge Who Freed Killer*, N.Y. DAILY NEWS, Feb. 16, 1996, at 7 (reporting the potential removal of Judge Duckman who "ignored a battered woman's pleas for help and freed the obsessive ex-boyfriend who killed her"); Bill Hewitt & Melody Simmons, *Burned Twice; After a Judge Ignored Yvette Cade's Desperate Plea to Extend a Restraining Order, Her Estranged Husband Lit Her on Fire*, PEOPLE, June 19, 2006, at 115; Matthew Purdy & Don Van Natta Jr., *Before the Murder, A Judicial Journey; An Abusive Union, a Testy Judge and a Chaotic System that Failed*, N.Y. TIMES, Mar. 14, 1996, at B1. However, if the judge takes the domestic violence seriously, the batterer may be more likely to comply with the order. *See* Voris, *supra* note 16, at 432 ("Judges can communicate a powerful message about the justice system's view of domestic violence within their own courtrooms.").

238. *See* Römkens, *supra* note 36, at 266–67 ("From a criminal legal perspective . . . there is a growing acknowledgement among feminist legal scholars that mandatory arrest and prosecution policies invoke dilemmas and problems that deserve critical attention when developing policies to help protect victims.").

agency more dramatically than the state's mandatory intervention policies. There is a vital difference between the role of the prosecutor and the role of the judge that affects the propriety of treating the victims as tertiary actors in this case. Prosecutors must enforce the laws of the jurisdiction and treat criminal acts as crimes against the state, thereby protecting society at large.[239] Perhaps those interests are best served by no-drop prosecution policies, which require prosecutors to aggressively enforce the jurisdiction's laws, communicate that domestic violence offenses will be treated seriously, and demonstrate that the batterer will not be able to control the prosecution through the victim. These messages might deter future crimes and potential coercive tactics by the batterer.

A judge, on the other hand, is charged with neutrally dispensing justice. She may utilize her discretion to adjudicate burdens of proof, but her role is not to protect individual litigants against their own "bad" judgment. A judge may assess credibility, but assessing the advisability of a course of action that is otherwise supported by the law lies outside the judge's role. By substituting her own judgment for the victim's desires, the judge ignores the victim's standing as a civil litigant and her autonomy as an individual.

Further, some advocates have accused state actors of replicating battering relationships in their treatment of victims.[240] By bulldozing victims, ignoring their needs and preferences, and substituting the state's interest for the victim's, the state coerces victims into compliance in the same way as the typical batterer might. As Linda Mills describes in critiquing no-drop prosecution, "state approaches that involve coercive and dismissive tactics may effectively revictimize the battered woman, first by reinforcing the batterer's judgments of her, and then by silencing her still further by limiting how she can proceed."[241]

Mandatory intervention policies also replicate the emotional detachment endemic to some battering relationships. As Mills further argues,

> In the era of mandatory interventions, one of the most striking features of the dynamic between state actors and battered women is the state actors' emotional detachment. The police are required to ignore the battered woman's desires and to arrest the batterer regardless of her wishes, prosecutors are encouraged to craft their arguments and to gather evidence without the battered woman's input . . . . physicians are required to ignore a battered woman's request for confidentiality. In these situations, state actors emotionally detach from the battered woman and fail to respond to her emotional (and clinical) need to

239. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7–13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

240. *See* Mills, *Killing Her Softly, supra* note 69, at 556 ("State actors' abusive posture toward survivors comes dangerously close to mirroring the violence in the battering relationship."); O'Connor, *supra* note 134, at 961 ("In taking control of the victim's life, the state substitutes itself for the abuser as a coercive entity in the victim's life.").

241. Mills, *Killing Her Softly, supra* note 69, at 556.

reconnect with people in healthy ways that promote her recovery.[242]

While advocates could level this critique of police and prosecutors against judges when they deny petitioners' motions to vacate civil protection orders, it would be less valid in the context of a judicial hearing, again because of the inherent role of the judge. A victim may expect a police officer or prosecutor to be sympathetic, but she may not have the same expectation of a judge. Emotional detachment and hierarchy are innate in the relationship between judge and litigant.

Motions to vacate present a particularly unusual conundrum to feminists, pitting them against each other and defying easy resolution. Some advocates may applaud judges for their refusal to vacate protection orders, while others may soundly criticize the judicial action. Both reactions are informed by feminist principles—principles that, on the one hand, recognize that the complex dynamics of intimate battering and coercion must be acknowledged, and, on the other hand, urge that women should be treated as autonomous agents in the legal system. Judges may consider these philosophical and practical considerations when hearing motions to vacate. Maintaining a protection order risks sacrificing victim agency and autonomy, while vacating the order ignores the unique dynamics of domestic violence that might have resulted in a coerced motion to vacate.

Because the messages conveyed by mandatory intervention policies and denials of motions to vacate vary wildly based on context and perspective, they alone cannot justify the imposition of such policies.

V.
NEW RESPONSES TO DOMESTIC VIOLENCE AND DOMESTIC VIOLENCE VICTIMS

Having analyzed the success and implications of the mandatory intervention strategies and routinized denials of motions to vacate, we find ourselves at a key moment in time to reassess our systemic response to domestic violence. In developing those responses, system actors and judges must recognize the value of victim participation and recalibrate their policies and decision-making protocols to encourage and incorporate victim perspectives.

A. Victim participation is vital to enhancing victim safety

An effective system response must allow for victim participation. While mandatory interventions represent good faith efforts to address domestic violence, they do not deal with the nuances of this complex social and legal problem. Research has shown that we cannot effectively safeguard victim safety if we continue to exclude victims from our interventions. First, as discussed

242. *Id.* at 594.

above, studies have failed to prove that mandatory interventions that exclude victim input enhance victim safety.[243] Instead, they may place victims in greater jeopardy of re-abuse. Second, research has illustrated that victims are well positioned to predict batterers' future behavior.[244] A recent eighteen-month study of 406 domestic violence victims found that victim self-assessments of risks were accurate for about 66 percent of the sample.[245] This research was highly consistent with earlier studies finding between 63 percent and 74 percent.[246] In contrast, a recent study illustrated that outside parties, such as clinicians treating batterers, are not effective in predicting re-assault.[247] Further, empirical predictive tools for interpersonal violence risk assessment are also flawed and, with some exceptions,[248] are often not sufficient predictors of future violence. Therefore, victim voices are vital to assessing the safety implications of a criminal case or the continued imposition of a protection order.[249]

Whereas legal intervention policies over the last thirty years have sought to *eliminate* the problem of victim ambivalence by removing the victim from the system, system responses should *address* victim ambivalence, thereby promoting victim participation.[250] To effectively create system interventions that are responsive and accessible to all victims, system actors must confront the central issues that nourish victim ambivalence: the victim's fear of physical retribution, the victim's actual reliance on the abusive partner, the abusive partner's coercion and control over the victim, and the victim's distrust of the system.

1. How can system actors address the core issues causing victim ambivalence?

a. A paradigm shift is required

In order for system actors to begin to address domestic violence in the most

243. *See supra* Part IV.A.

244. Cattaneo, *Intimate Partner Violence*, *supra* note 48, at 429.

245. *Id.* at 431, 437. It is interesting to note that victims were equally as likely to accurately predict re-abuse as to predict no re-abuse. *Id.* at 437.

246. *See* Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, *in* ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS 106 (Jacquelyn C. Campbell ed., 1995); Lauren Bennett Cattaneo & Lisa A. Goodman, *Victim-Reported Risk Favors for Continued Abusive Behavior: Assessing Dangerousness of Arrested Batterers*, 31 J. OF COMMUNITY PSYCHOL. 349, 365 (2003); D. Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk versus Risk Factors and Instruments Predicted Repeat Reassault*, 19 J. INTERPERSONAL VIOLENCE 778, 778 (2004).

247. Lauren Bennett Cattaneo & Lisa A. Goodman, *New Directions in IPV Risk Assessments—An Empowerment Approach to Risk Management*, *in* INTIMATE PARTNER VIOLENCE 1-14 (K. Kendall-Tackett & S. Giacomoni, eds., 2008) [hereinafter Cattaneo & Goodman, *New Directions*].

248. *See* Cattaneo, *Risk Factors*, *supra* note 63, at 166.

249. Cattaneo, *New Directions*, *supra* note 247.

250. *See* Römkens, *supra* note 36, at 287 (discussing the current legal framework's limitations in addressing victim ambivalence).

effective, victim-inclusive way, a paradigm shift is necessary in relation to our justice system goals. A successful intervention is not always the termination of the relationship or even a conviction, guilty plea, or protection order. If we care about victims, our ultimate goal must be their safety—a goal that is most effectively served by providing victims with the best possible interaction with the system so that when they are ready to leave the relationship, they know where to seek assistance and that they will be treated with respect.[251]

b. System actors must address victim ambivalence by connecting victims to resources

As discussed extensively above, many victims of domestic violence remain in abusive relationships due to their financial and practical dependence on battering partners.[252] Thus, system interventions must support victims financially and socially to facilitate greater participation in the criminal and civil justice process. They must incorporate a coordinated social response to provide bridge funds and assistance accessing social services that will permit victims to conceive of independent lives.[253] Some jurisdictions have begun to address this need through victim compensation funds.[254] In these jurisdictions, victims of domestic violence who seek protection orders or cooperate with criminal cases are eligible to receive funding to assist with relocation, temporary housing,

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251. *See* HOTALING & BUZAWA, FORGOING CRIMINAL JUSTICE ASSISTANCE, *supra* note 226, at 19–20 (concluding that the majority of victims who failed to report re-abuse complained of having no voice or rights in the criminal justice system); Waul, *supra* note 20, at 56 ("Ending an abusive relationship is not typically a single decision, but rather a process that occurs over time. Therefore, dropping a CPO should not be seen as a failure of the system, but an opportunity to help the petitioner move one step closer to safety."); Deborah Epstein, Margaret E. Bell & Lisa A. Goodman, *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 (2003) [hereinafter Epstein, *Aggressive Prosecution*] (arguing for the promotion of long-term victim safety as a central prosecutorial goal in domestic violence cases).

252. *See supra* notes 41–48 and accompanying text.

253. *See* Epstein, *Procedural Justice, supra* note 156, at 1889–91 (advocating for the provision of resources to domestic violence victims to assist them in optimal decision-making).

254. *See* 42 U.S.C. § 10602(b)(1) (2006) (requiring that state programs offer compensation to victims of criminal violence "including . . . domestic violence" to qualify for federal victim's compensation funding). *See generally* CAL. GOV'T CODE § 13956(b)(2) (Deering 2006) (stating that "a claim based on domestic violence may not be denied solely because no police report was made by the victim"); DEL. CODE ANN. tit. 11, § 9002(3)(g) (2006) (including "any act of domestic violence" in the definition of crime for the purposes of compensation); D.C. CODE § 4-506(c)(1) (2006) (allowing victims of domestic violence to satisfy the reporting requirement for victim's compensation by filing for a protection order); N.J. STAT. ANN. § 52:4B-11(b)(10) (West 2006) (listing domestic violence as a compensable violent crime); OR. REV. STAT. § 147.035(1)(a)(A) (2006) (including counseling for victims and family members of victims of domestic violence in the definition of compensable losses); S.D. CODIFIED LAWS § 23A-28B-1(3) (2006) (including domestic violence in the definition of compensable crime); TENN. CODE ANN. § 29-13-108 (2005) (allowing for good cause waiver of reporting requirement if the compensation claim is for crimes of domestic violence); WYO. STAT. ANN. § 1-40-102 (2006) (including domestic violence in the definition of compensable violent crimes).

medical bills related to the abuse, and other financial needs.[255] The availability of these funds should be highly publicized and the money should be readily available at courthouses where domestic violence cases are processed. All system actors should be fully aware of the parameters of fund eligibility, and actively refer victims for funding. In addition, courthouses should host social service agencies whose staff can refer victims for longer-term government assistance.

c. Training is vital for all system actors to address and unravel the potent power and control dynamics affecting victims

As discussed above, coercion and control dynamics profoundly influence victims' participation in the justice system.[256] In reassessing our system responses to domestic violence, we should not ignore the lessons that have been taught to us. Instead, we should reanalyze our response to those theories. Rather than responding to research on power and control by concluding that all victims are unreliable and therefore should be excluded from our system responses, we should engage our systems at all levels to identify where coercion is operating and develop more effective ways to liberate victims from its influence. As one commentator argues:

> It requires intense training to be aware of the complexities at stake, both from the perspective of professionals and from the victims' perspectives, in order to develop a well-informed, open-minded and supportive attitude. Without proper training the day-to-day decision making used in implementing law or policies reveals highly individual prejudices, biases and moral judgments. When dealing with violence in intimate relationships, the rush to judgment on an individual level fits neatly with the cultural ambivalence, and subsequently the limit of our tolerance and support is easily revealed.[257]

Prosecutors, police, and judges must receive training on how to identify and understand coercion, so that they will be equipped to empathize with victims and respond appropriately to these forces.

To be truly effective, professionals who are knowledgeable about the psychology of domestic violence and risk assessment and most familiar with the most contemporary research on domestic violence should provide this training. Information provided by in-house trainers can often become stale, repetitive, and easy to ignore.[258]

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255. *See* statutes listed *supra* note 254.

256. *See supra* Part II.B.

257. Römkens, *supra* note 36, at 289.

258. For example, in the District of Columbia, the D.C. Coalition Against Domestic Violence, together with several other organizations, has assembled a faculty of social workers and domestic violence professionals who train District of Columbia police officers and District of Columbia Housing Authority police officers on topics such as the dynamics of domestic violence,

Access to current research is vitally important for justice system personnel making decisions about domestic violence cases and advising victims. For example, a recent study has provided new insight into the accuracy of victim risk self-assessment, finding that the accuracy of the assessment is dependent on the victim's psychological, sociological, and abuse history.[259] Such research and its progeny will prove indispensable to system actors in working with victims on domestic violence cases. However, actors in the criminal or civil justice system are not ordinarily exposed to non-legal resources and research. Mental health professionals should be invited to support training efforts.

d. System actors must perform public outreach to rehabilitate their reputations and address victim distrust

In endeavoring to reintegrate victims into our system responses, we must address victim distrust of the system itself. The long history of non-feasance by the system and the subsequent reactionary swing toward engagement without respect for victims have done little to engender the trust of victims of domestic violence. This self-perpetuating problem can be reduced by a more responsive, respectful attitude toward victims and through victim involvement in system interventions.

Only by aggressive public outreach can system actors seek to gain the trust of domestic violence victims. In jurisdictions that treat victims with respect, victim opinion polls reveal that victims respond by engagement with the system and express willingness to cooperate in the future.[260]

Law enforcement's greatest challenge in working with victims is overcoming the historic distrust between domestic violence victims and police officers.[261] Similarly, between the prosecution's historic failure to take domestic violence cases seriously and their more recent aggressive prosecution regardless of victim preferences, many domestic violence victims distrust prosecutors' offices.

Even if training were successful in helping law enforcement and prosecution to become more victim-centered such that individual victims felt uniformly respected, it would take a very long time before public opinion toward law enforcement and prosecution changed. Recent research by the Urban Institute

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stalking, and primary aggressor determinations. E-mail from Sarah Harding, Co-Executive Director of D.C. Coalition Against Domestic Violence (Aug. 15, 2006) (on file with author). *See generally* Epstein, *Aggressive Prosecution*, *supra* note 251, at 486–87 (2003) (discussing the myriad reasons why in-house advocates in prosecutors' offices are generally less effective than external counselors).

259. Cattaneo, *Intimate Partner Violence*, *supra* note 48.

260. Cattaneo, *New Directions*, *supra* note 247 at 1–7 (finding that domestic violence study participants who feel more control over the court process rated services as more helpful and were more likely to use the services again).

261. See *supra* Part III.A.1 for more discussion of this historically problematic relationship.

concluded that agency competence does not, in and of itself, evoke publicity.[262] Instead, the study encouraged agencies to conduct concerted public outreach campaigns to inform victims of their services rather than to rely solely on word-of-mouth to publicize programs.[263]

e. Actors across disciplines must collaborate.

Studies have revealed that interventions by one professional without input from other disciplines are rarely successful in protecting women and that in fact, they may actually put women at higher risk of re-abuse.[264] On the other hand, the studies that measure coordinated approaches have concluded that coordination of police, batterer treatment, and tough prosecution may lead to lower recidivism rates than solitary interventions.[265] A large scale Urban Institute study found that when agencies collaborate on domestic violence cases, victims find their services more useful and cooperate with system actors more frequently.[266]

One critical form of coordination is between advocates, law enforcement, prosecutors, and social service partners who are qualified to counsel victims under the coercive influences of abusive mates. External coordination with counselors is superior to bringing counselors in-house, because victims are more likely to view external counselors as independent from the system actor's agenda and less likely to advise them in a way that serves the system actor's interests.[267]

2. How should policies be changed to address the core issues causing victim ambivalence?

a. Law enforcement must reassess its specific response to address the core issues that prevent victims from effectively cooperating with them

In addition to public outreach and training to work with victims, law enforcement should address victim ambivalence from a policy perspective. Police should be instructed to supplement mandatory arrest policies by referring victims to social service support on the scene; providing follow-up contact with

262. Zweig, *supra* note 64, at 161.

263. *Id.* at 162.

264. *See* Waul, *supra* note 20, at 55 (providing an overview of several studies of mandatory arrest and intervention policies).

265. *Id.* at 55. For an example of a program that has taken a coordinated approach, *see* Epstein, *Aggressive Prosecution, supra* note 251, at 495–499. *But see* Jeffrey L. Edelson, *Coordinated Community Responses, in* WOMAN BATTERING: POLICY RESPONSES 203 (Michael Steinman, ed., 1991) (arguing that collaborative services have yet to be adequately tested and face many challenges).

266. Zweig, *supra* note 64, at 128, 132–33.

267. *See generally*, Epstein, *Aggressive Prosecution, supra* note 251, at 486–87 (discussing the short-comings of in-house advocates in prosecutor's offices).

domestic violence investigators who are educated in safety planning; and, when possible, partnering with social service agencies to have advocates on call or present with officers at the scene.[268] These policy enhancements would help connect victims with social and financial support at the inception of a case, counteract coercion by batterers on the scene, and augment law enforcement's respectful treatment of victims.

b. Prosecutors must recalibrate their specific responses to encourage victim participation

In addition to public outreach that conveys the prosecution's interest in considering victim preferences, prosecutors might eliminate hard no-drop policies in favor of pursuing results based on the specific needs and facts of each case. Hard no-drop prosecution policies have failed to protect victims and alienated some from the system. Meanwhile, softer policies would allow prosecutors to work more closely with victims and consider whether proceeding with or dismissing each case would be most likely to enhance victim and community safety. Collaboration with advocacy groups, police, and social workers would help prosecutors gain access to vital information and determine how to proceed in a way that vindicates both the public and individual victim interest.[269]

c. Judicial officers must reconsider their responses so that they address the concerns that prevent victims from effectively participating in domestic violence cases

In order to assist judges in ruling on petitioners' motions to vacate protection orders in a way that enhances victim safety—and when possible takes advantage of the insight that petitioners themselves can offer in these challenging cases—judicial training, and legislative and procedural changes must take place.

Judicial training should be focused on helping judges understand coercion in a more nuanced way and ask questions to unpack coercion and the true motivations behind a filing. This would allow a judge to use her discretion to deny a motion if the petitioner has been coerced into filing the motion and would be at more risk without the continuing protection of the order.

For example, in order to determine the level of coercion behind the filing of a vacate motion, a judge could ask the petitioner, "How did you get to court today? If you came with the respondent, please describe your interactions with

268. Such a program is active in the District of Columbia. *See* Nikita Stewart, *For Victims of Abuse, On Call Aid: Program Will Offer Protective Orders*, WASH. POST, Mar. 22, 2007, at T1; Survivors and Advocates for Empowerment (SAFE), Inc., https://volunteer.united-e-way.org/uwamerica/org/22275050.html.

269. For a more extensive discussion of ways in which the prosecution could be more responsive to victims, see generally Epstein, *Aggressive Prosecution*, *supra* note 251.

him today"; "When do you expect to see him again?"; "If I deny this motion, how do you expect the respondent to respond?"; "What kind of burden has this protection order imposed on you?"; "What has the respondent said to you about this order?"; "If I grant this motion, how will it affect your behavior?" "Describe your interactions with the respondent when you last saw him. What has changed since you obtained this order? What makes you believe you will be safe without this order?"; "Whom were you with when you came to court to file the motion to vacate?"

If both parties are present, the judge could make the following inquiries of the respondent to gauge the level of coercion present: "How has this order affected your behavior?"; "How have you felt about the order?"; "How will your behavior change if the order is vacated?"; "Have you had discussions with the petitioner about this order? Have you had discussions with the petitioner about her asking the court to dissolve this order? What are your feelings about her doing so?"; "The Court found good cause to impose this order because it felt the petitioner was in danger. How do you feel circumstances have changed since this order was imposed?"; "Did the petitioner tell you how she felt about asking the court to dissolve this order? What did she say? When did you last talk about dissolving this order?"; "When was the last time you attended, for example, if ordered by the court, domestic violence intervention classes? How do you feel about the classes? How would you feel about continuing with the classes?"

Training on risk assessment could assist a judge in situations where she suspects that the petitioner will be in greater danger without the order, but her inquiries suggest that the petitioner has filed voluntarily. Even despite the limitations in risk assessment accuracy,[270] knowledge about risk assessment tools might permit the judge to use her discretion to craft a ruling that could include granting the motion to vacate in its entirety; granting the motion to vacate in part, but maintaining safety provisions such as a no assault or stay away order; and granting the motion to vacate, but referring petitioner for safety planning.

Collaboration with social workers or therapists could also assist a judge in making risk assessment determinations. In New Jersey, for example, any plaintiff filing for dissolution of a protection order must undergo a risk assessment conference with a family court staff therapist prior to appearing before the judge.[271]

From a legislative perspective, a statutory amendment requiring that hearings to vacate, dissolve, or rescind an existing order take place in the presence of both parties would help judges construct rulings in ways that respect and protect victims. At present, most statutory schemes permit these hearings to proceed *ex parte*. Because it is more difficult to assess coercion and risk when the judge has only one party before him or her, statutes could assist a judge by

270. See *supra* notes 243–250 for a discussion of accuracy of risk assessment tools.

271. *See, e.g.*, Stevenson v. Stevenson, 714 A.2d 986, 992 (N.J. Super. Ct. Ch. Div. 1998).

codifying a preference for two-party hearings. Statutes could afford a respondent two opportunities to appear, followed by a bench warrant if a respondent does not appear. This would ensure that petitioners are not precluded from proceeding on their motions due to a respondent's consistent failure to appear. However, in such a case, a judge should still issue a bench warrant to warn respondent about the implications of any criminal acts he might commit against the petitioner and about the seriousness of her prior allegations.

VI.
CONCLUSION

We are on the crest of the next wave of domestic violence system reform. Due to the tremendous efforts of advocates of the past, society finally has engaged domestic violence as a serious social and legal problem. However, the inverse relationship between the seriousness with which domestic violence cases are taken and the seriousness with which domestic violence victim participation is taken fails to serve society's interest in victims' safety. Though our response to domestic violence has improved enormously over the past thirty years, much of that improvement is symbolic and illusive rather than borne out in victim safety statistics. Victim participation, a vitally important component of system response, has been lost and must be encouraged by system reforms.

Many of the proposals suggested in this article will require financing. Training, collaboration, and enhanced personnel will not materialize for free. However, the domestic violence field at present is fortunate—because of the lobbyists' efforts, the Violence Against Women Act authorizes significant funding for domestic violence projects.[272] This funding should not perpetuate existing policies, but rather improve victim participation and victim safety.

Only when system actors actively engage with domestic violence victim will we truly be able to confront the social and legal problem ahead of us and effectively strive to reduce re-abuse and lethality.

272. *See generally* OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, 2004 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT (2004).