Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders

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While countless studies demonstrate the complex and dangerous nature of intimate partner abuse, most jurisdictions permit only the entry of yearlong domestic violence protection orders. Judges may assume that danger ceases once the order takes effect, but evidence of the recurrent nature of violence demonstrates the importance of providing judicial protection over time. The brevity of domestic violence protection orders stands in stark contrast to the long duration of orders in other areas of the law, such as intellectual property, corporations, real property, and tax, where courts routinely enter permanent injunctions to protect individuals and businesses against "irreparable harm." What explains this differential treatment? Why would the law deny courts the ability to protect those who experience physical and psychological harm at the hands of an intimate partner?

This Article is the first scholarship to identify and attempt to explain the dichotomy between injunctive relief for domestic violence and other areas of the law and to explore the potential for indefinite domestic violence injunctions in normative depth. To establish the generally temporary nature of domestic violence protection orders, the Article reports the results of a fifty-state survey on protection order lengths and extension standards, a survey undertaken for this piece. To explain the differential treatment of domestic violence injunctions, the Article situates its analysis in the historic backdrop of the state condoning domestic violence through the husband's right of chastisement and the family privacy theory, ideologies now considered

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untenable. Recent decades have seen the ensuing struggle to develop the civil protection order remedy in a continuing climate of family law exceptionalism.

In conducting a comparative analysis among areas of the law in which permanent injunctions are commonplace, the Article applies to domestic violence cases the equitable principles for permanent injunctions that the Supreme Court recently announced as a four-factor test in eBay Inc. v. MercExchange, L.L.C. *The Article addresses potential due process concerns and draws heavily on social science to demonstrate the harm of domestic violence, physical and psychological dangers of returning to court, risk of reengaging with an abusive partner year after year, efficacy of protection orders, and inadequacy of other forms of relief. Abuse survivors come to court seeking protection, but current statutory durations often prove inadequate, and violence survivors merit the same protections readily available to property and business interests. To harmonize domestic violence law with other areas of the law, the Article proposes the nationwide availability of indefinite domestic violence protection orders and a presumption that orders be at least two years in duration.*

I. INTRODUCTION

Susan's husband strangled her and beat her so severely that he called 9-1-1 and said, "I think I've killed my wife."[1] Anna's boyfriend held a gun to her and threatened her life. The father of Regina's children liked to practice wrestling moves on her. He held Regina upside down and dropped her onto the concrete floor in a "pile drive" move, her head hitting the floor with the force of gravity and weight of her body. Annette's ex-boyfriend came to her home, beat her, raped her, and started a house fire. All of these women[2] soon sought and

1. Clients' names have been changed and identifying information omitted. These examples from my clients' lives represent only several of the countless instances of violence beyond measure that are perpetrated against domestic violence survivors on a daily basis. *See, e.g.*, Green v. Green, 642 A.2d 1275, 1276–77 (D.C. 1994). In *Green*, when the petitioner was eight months pregnant, her husband banged her head against a brick wall, kicked her in the abdomen while threatening to kill her and their unborn baby, threw her down a flight of stairs, and stabbed her sister, and these events were part of a history of violence. *Id.* Based on these facts, the court issued a yearlong protection order and, prior to its expiration, extended the order for an additional year. *Id.*

2. Recognizing that domestic violence occurs in same-sex relationships at the same rate as in opposite-sex relationships, I have chosen to use gender-neutral pronouns throughout this Article. *See* Joanna Bunker Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44

received domestic violence civil protection orders[3] that were in effect for one year. Every year, each woman returns to court for another adversarial proceeding to seek another year of protection. Courts have already found the intimate partners described to be dangerous. This year, however, when Annette requested that the court extend her protection order beyond the initial year, the judge did so reluctantly and warned her that she would not be able to return each year for further renewals unless additional violence occurred.

The state's response to domestic violence is relatively recent. Historically, courts vested husbands with the right of chastisement over their wives, who were considered their property; courts later characterized marriage as existing in a domain beyond law and in a "sphere separate from civil society."[4] Both the property approach and the romantic notion of the companionate relationship, however, had the effect of condoning domestic violence. This lack of governmental response persisted until recent decades, when the criminal and civil justice systems began responding to intimate partner violence. From 1970 to 1993, state legislatures created special laws and proceedings

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FAM. CT. REV. 287, 287 (2006) ("Initial research suggests that violence occurs at the same rate (12-50%) in same-gender couples as it does in cross-gender couples . . . ."). The case examples in the Introduction, however, concern female clients, which is consistent with the fact that women are much more likely than men to be victimized by an intimate partner. *See* MATTHEW R. DUNROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS 1 (2005) (finding that approximately eighty-five percent of victims of intimate partner abuse are female); *see also* LAWRENCE A. GREENFELD ET AL., U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 3 (1998) (finding that women are eight times more likely than men to be victimized by an intimate partner). The majority of social science research examines women who have been abused by men, and in a quest to have our laws respond to survivors' needs and lived experiences, this Article draws heavily on social science research.

3. Depending on the state, civil protection orders may also be known as restraining orders, protective orders, orders of protection, or injunctions. For consistency, the term "protection order" is used throughout this Article. Upon the petitioner proving by a preponderance of the evidence that the respondent committed domestic violence against the petitioner, the court may award a civil protection order. Such orders may prohibit the respondent from contacting, coming near, assaulting, harassing, or stalking the petitioner; award child custody, visitation, and possession of property and pets; and order the respondent to vacate a shared residence and attend counseling, among other relief. *See, e.g.*, D.C. CODE § 16-1001 to 1005 (2013); WASH. REV. CODE ANN. § 26.50.010–.060 (West 2012). Some jurisdictions permit courts to award child support and spousal support. *See, e.g.*, CAL. FAM. CODE § 6341 (West 2013):

> [T]he court may, if requested by the petitioner, order a party to pay an amount necessary for the support and maintenance of the child . . . . If the parties are married to each other and no spousal support order exists, after notice and a hearing, the court may order the respondent to pay spousal support . . . .

4. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2167–68 (1996).

for domestic violence protection orders,[5] a type of injunction intended to intervene in abusive relationships and prevent further violence.[6] The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act defines "protection orders" as injunctions issued by a court under the domestic violence, family violence, or anti-stalking laws of the issuing state to prevent an individual from engaging in violent or threatening acts, harassment, contact, communication, or physical proximity to another person.[7] Protection orders are now the most widely used legal remedy against domestic violence, with more survivors utilizing this civil justice system remedy than seeking tort remedies or having involvement with the criminal justice system.[8]

Domestic violence survivors apply for civil protection orders in pursuit of safety. Many of these individuals have experienced high

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5. LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 33 (2008).

6. *See* MacDonald v. State, 997 P.2d 1187, 1189 (Alaska Ct. App. 2000) (relying on the state civil rules that govern injunctions and restraining orders, rather than looking broadly to general rules governing service of process, in determining whether the defendant had adequate notice of a protection order); Cruz-Foster v. Foster, 597 A.2d 929, 929–30, 930 n.3 (D.C. 1991) (applying federal principles regarding injunctions to a protection order extension case and explaining, "This is the normal standard in civil cases, and we see no reason to apply a different one here"); Mitchell v. Mitchell, 821 N.E.2d 79, 87 (Mass. App. Ct. 2005) (identifying select published opinions in which states handle domestic violence protection orders in the same manner as other civil injunctions, and citing cases which describe protection orders as a "form" or "species" of injunction); Sjomeling v. Stuber, 615 N.W.2d 613, 616 (S.D. 2000) (recognizing that domestic violence protection orders are a type of injunction and using traditional rules of injunctions and rules of civil procedure to determine the standard for modifying domestic violence protection orders); State *ex rel.* Cockerham v. Cockerham, 218 S.W.3d 298, 304 (Tex. Ct. App. 2007) (stating that protection orders are in the nature of civil injunctions); *see also* Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 855 (2004) (identifying domestic violence protection orders as "injunctions"); Hallie Bongar White et al., *Creative Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 442 (2008) (noting that protection orders are a common example of an injunction).

7. UNIF. INTERSTATE ENFORCEMENT OF DOMESTIC VIOLENCE PROT. ORDERS ACT § 2 (2002).

8. TK Logan & Robert Walker, *Civil Protection Order Outcomes: Violations and Perceptions of Effectiveness*, 24 J. INTERPERSONAL VIOLENCE 675, 685 (2009); *see also* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008) (noting that civil protection orders are the "most commonly used legal remedy for domestic violence"); Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA (SPECIAL ISSUE) 589, 589 (2002) (finding that each year, approximately twenty percent of the 1.5 million victims of domestic violence obtain civil protection orders); Susan Keilitz, *Improving Judicial System Responses to Domestic Violence: The Promises and Risks of Integrated Case Management and Technology Solutions*, *in* HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES: POLICIES, PROGRAMS, AND LEGAL REMEDIES 147, 149 (Albert R. Roberts ed., 2002) (finding that domestic abuse survivors are more likely to seek protection from violence solely through civil protection orders, as compared with using the criminal justice system).

levels of violence. They have been punched, choked, beaten, kicked, burned, set on fire, and raped.[9] They have suffered emotional, psychological, and economic harm, and have been threatened with weapons and words promising lethality.[10] Rather than these being isolated incidents, as with stranger violence, the abusive partner targets the victim, and the abuser's efforts to exert power and control over the survivor pervade the survivor's experience.[11] Abuse is recurrent and typically escalates in frequency and severity over time,[12] with past intimate partner violence being the "best predictor of

9. *See, e.g.*, Maldonado v. Maldonado, 631 A.2d 40, 41 (D.C. 1993) (reporting that the petitioner sought a civil protection order because her husband beat her with his hands, a belt, and a thick cable; threatened her with a gun; and used other physical force that, on separate occasions, caused her to lose consciousness and require hospitalization); Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1510 (2003) (arguing against marital immunity for sexual offenses and providing graphic examples of the violence of marital rape); Deborah Epstein, *Fighting Domestic Violence in the Nation's Capital*, 3 GEO. J. FIGHTING POVERTY 93, 94 (1995) (recounting the story of a young mother whose boyfriend burned her arm with a hot iron).

10. *See, e.g.*, Hernandez v. Ashcroft, 345 F.3d 824, 829–30 (9th Cir. 2003) (establishing that Ms. Hernandez suffered "extreme cruelty" in the United States because the cycle of violence occurred while she was in America, and recounting the physical and psychological violence she experienced while living in Mexico, which included her husband breaking objects across her head and back, hitting and kicking her, lifting her by her hair, throwing her body, and threatening to kill her); JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 10 (1999) (describing the powerful dynamics of "social entrapment" that characterize many battering experiences, including the social isolation and fear caused by the abuse; the indifference of powerful institutions to intimate partner violence; and the ways in which an abuser's coercive control is aggravated by structural inequalities of racism, gender, and class).

11. *See* Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire that Predicts the Likelihood that a Victim of Intimate Partner Violence Will Be Murdered by Her Partner*, 24 WIS. J.L. GENDER & SOC'Y 277, 306 (2009) (describing the "chronic" nature of intimate partner abuse, high rates of recidivism, and the typical domestic violence pattern of a series of crimes perpetrated against the same victim); *see also* Myrna S. Raeder, *Being Heard After Giles: Comments on* The Sound of Silence, 87 TEX. L. REV. 105, 111 (2009) (characterizing physical violence as instrumental to the abuser's goal of controlling the victim's life, rather than constituting the goal itself).

12. *See, e.g.*, NORA K. PUFFETT & CHANDRA GAVIN, CTR. FOR COURT INNOVATION, PREDICTORS OF PROGRAM OUTCOME AND RECIDIVISM AT THE BRONX MISDEMEANOR DOMESTIC VIOLENCE COURT 2 (2004), *available at* http://perma.cc/AV8D-HFFL (finding the re-arrest rate for domestic violence offenders in New York to be sixty-two percent, which only accounts for a small percentage of domestic violence due to underreporting); Marie L. Crandall et al., *Predicting Future Injury Among Women in Abusive Relationships*, 56 J. TRAUMA-INJURY INFECTION & CRITICAL CARE 906, 906 (2004) (finding that forty-four percent of women who were murdered by their intimate partner had received emergency room treatment within two years of the homicide and that nearly all had at least one emergency room visit for domestic violence injuries); Jane Koziol-McLain et al., *Predictive Validity of a Screen for Partner Violence Against Women*, 21 AM. J. PREVENTIVE MED. 93, 97–99 (2001) (finding that women who have experienced past intimate partner violence are at "heightened risk" for continuing violence, a conclusion that is consistent with the "well-known pattern of repeated abuse that many women endure"); Jeffrey Sonis & Michelle Langer, *Risk and Protective Factors for Recurrent Intimate Partner Violence in a Cohort*

future violence."[13] A survivor, thus, is often unable to feel secure at home, the supposedly safest place in the world.

The protection order remedy has proven to be highly effective in preventing future violence,[14] but in most states, this remedy is only available for one year or for a similarly limited duration.[15] If an abusive partner threatens to kill an intimate partner, will that danger terminate when the yearlong domestic violence protection order expires? The legal construction suggests that it does, but social science data and the lived experiences of domestic violence survivors prove otherwise. At the end of the year, petitioners may generally seek the extension of the order through a motion and adversarial hearing.[16] Some jurisdictions permit only one brief extension,[17] while others require violence or threats to have occurred during the duration of the order[18] rather than interpreting the absence of violence as proof of the court order's effectiveness and reason for it to remain in place. Given the persistent and potentially fatal nature of domestic violence, granting judicial protection in the form of indefinite protection orders could increase survivors' safety and autonomy while saving them from

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of Low-Income Inner-City Women, 23 J. FAM. VIOLENCE 529, 535 (2008) ("Frequency of [intimate partner violence] incidents in the year prior to the baseline interview strongly increased the odds of any recurrent [intimate partner violence].").

13. Daniel Jay Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 218, 222 (Daniel Jay Sonkin ed., 1987); *see also* Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 TRAUMA, VIOLENCE & ABUSE 141, 166 (2005) (finding that a history of physical abuse in a relationship is a strong predictor of reabuse, while the severity of the particular offense that brought the batterer into the system does not appear to be an important predictor, although many systems focus only on the most recent incident); Debra Houry et al., *A Positive Domestic Violence Screen Predicts Future Domestic Violence*, 19 J. INTERPERSONAL VIOLENCE 955, 962 (2004) (finding that, in a study to determine whether a Partner Violence Screen would predict whether domestic violence would occur during the following four months, the question, "Have you been hit, kicked, punched, or otherwise hurt by someone in the past year?" was an extremely accurate predictor of future violence).

14. *See infra* Part VI.B.2 (explaining the effectiveness of protective orders).

15. *See infra* Part V.A (explaining that protective orders in most states have a limited duration of typically only one year).

16. *See, e.g.*, D.C. CODE § 16-1005 (2013) ("A protection order issued pursuant to this section shall be effective for such period up to one year as the judicial officer may specify, but the judicial officer may, upon motion of any party to the original proceeding, extend, rescind, or modify the order for good cause shown.").

17. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1045(c) (West 2013) (permitting only one six-month extension).

18. *See, e.g.*, *id.* (allowing for a six-month extension of the original yearlong order only "after the Court finds by a preponderance of the evidence that domestic violence has occurred since the entry of the order, a violation of the order has occurred, if the respondent consents to the extension of the order or for good cause shown").

having to reengage with an abusive partner each year, which poses substantial safety risks.[19]

The brief timeframe for orders regarding human safety can be juxtaposed with long-term or truly permanent injunctions issued in many other areas of the law to prevent "irreparable harm" to property, copyrights, trademarks, employment, and other tax and business interests.[20] These readily available indefinite orders stand in stark contrast to the short-lived domestic violence orders that are supposed to prevent bodily harm. Given the historic lack of response to domestic violence, the differential and exceptional treatment of domestic violence is not surprising. Short-term statutory injunctions against domestic violence problematically give the appearance of remedying domestic abuse while permitting domestic violence to continue. This is a form of what Reva Siegel has termed "preservation through transformation,"[21] in which legal change gives the appearance of correcting a wrong but, in fact, perpetuates the status quo.

This Article begins by describing the dangerous, recurrent, and escalating nature of domestic violence to illustrate why a longer duration for domestic violence protection orders is generally desirable. Part II utilizes social science research to describe the dynamics of domestic violence, including the increased violence at the time of separation, danger of appearing in court, and persistence of the abuser in striving to maintain power and control over the survivor.

Part III discusses the legal standard for awarding permanent injunctions in equity and identifies the many areas of the law in which long-term or indefinite injunctions are commonplace. Part IV seeks to reveal the basis for the law's differential treatment of domestic violence. It situates the development of domestic violence protection orders in historical context by describing how the state's response to domestic violence evolved from the husband's right of chastisement and correction, which permitted abuse as long as the husband did not kill or maim his wife; to the family privacy theory, in which formal

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19. *See infra* Part II (describing the ongoing nature of domestic violence and the danger associated with frequent court dates).

20. *See infra* Part III (detailing the availability of permanent injunctions in other areas of law).

21. Siegel, *supra* note 4, at 2119 ("When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend."); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1111 (1997) (identifying how "efforts to dismantle an entrenched system of status regulation can produce changes in its constitutive rules and rhetoric, transforming the status regime without abolishing it").

and informal immunities allowed marital violence to persist; to the relatively recent advent of laws prohibiting intimate partner abuse and providing channels for court protection.

Part V analyzes the results of an original state-by-state survey of statutes that was conducted for this Article. This section details the limited time periods for domestic violence protection orders across the United States and the periods for which orders may be extended.

Because injunctive relief is rooted in equity and most injunctions are equitable, equitable principles illuminate what matters in doing analysis for injunctive relief. Part VI describes both the legal test for issuing permanent injunctions that the U.S. Supreme Court announced in *eBay Inc. v. MercExchange, L.L.C.*[22] and the standards used in state courts, and conducts a comparative analysis between domestic violence cases and the equitable standards courts apply in other legal contexts, such as commercial and property law. While applying the general legal standards for issuing permanent injunctions to the domestic violence context, the Article addresses potential procedural and substantive due process concerns, concluding that there is no rational justification for differential treatment that manifests in allowing only short-term protection from domestic violence.

Finally, Part VII proposes that indefinite domestic violence protection orders be available across states and recommends a national standard that orders have a minimum duration of two years. The Article posits that domestic violence cases typically satisfy both the statutory requirements for protection orders and the traditional equitable principles for permanent injunctions; however, to expand upon the current system in which each state has a statutory remedy and many jurisdictions have specialized domestic violence courts, the proposed remedy is statutory.

II. THE RECURRENT AND DANGEROUS NATURE OF DOMESTIC VIOLENCE

An abuser's recurrent exertion of power and control over the survivor pervades the survivor's experience, and without effective intervention, battering typically escalates in frequency and severity over time.[23] The following sections describe the ongoing, dangerous

22. 547 U.S. 388 (2006).

23. Jessica R. Goodkind et al., *A Contextual Analysis of Battered Women's Safety Planning*, 10 VIOLENCE AGAINST WOMEN 514, 515 (2004) ("Once battering begins, it often escalates in frequency and severity over time.").

nature of domestic violence and the unnecessary danger that frequent court dates present.

A. Re-Victimization and Separation Assault

Domestic violence is different from other crimes in ways that make past acts highly relevant and predictive of future danger.[24] Intimate partner abuse rarely consists only of a single, isolated event; instead, the abusive partner more commonly engages in an ongoing process of violence and control.[25] In fact, multiple studies have now shown that past domestic violence is the best predictor of future abuse.[26] In comparison with victims of stranger violence, domestic violence survivors are more likely to be reassaulted, experience more severe levels of violence, and sustain worse injuries, such as knife wounds and internal injuries.[27] As violence escalates, the likelihood that the perpetrator will use a weapon against the survivor also increases,[28] which dramatically increases the risk of lethality.[29] The dynamics of power and control, and the repetitive, escalating nature of domestic violence distinguish intimate partner abuse from single-incident stranger violence, which "continues to garner a

24. *Supra* notes 12–13 and accompanying text; *see also* Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated,* 34 EMORY L.J. 855, 868 (1985) ("[A]s long as the batterer's underlying problem with violence is glossed over or ignored it is almost inevitable that violence will recur.").

25. *E.g.,* United States v. Meade, 175 F.3d 215, 226 (1st Cir. 1999) (finding defendant guilty of unlawfully possessing a firearm based on his conviction for a domestic violence crime and noting, "The dangerous propensities of persons with a history of domestic abuse are no secret, and the possibility of tragic encounters has been too often realized. We think it follows that a person who is subject to such an order would not be sanguine about the legal consequences of possessing a firearm, let alone of being apprehended with a handgun in the immediate vicinity of his spouse."); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, at iii–iv (2000).

26. *Supra* notes 12–13.

27. MICHAEL RAND, U.S. DEP'T OF JUSTICE, VIOLENCE-RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS 5–8 (1997) (reporting that among women treated for domestic violence in emergency rooms, twenty-five percent are treated for serious stabs, cuts, and internal injuries); Amy Sisley et al., *Violence in America: A Public Health Crisis-Domestic Violence*, 46 J. TRAUMA 1105, 1105–12 (1999) (finding that fifty-two percent of domestic violence survivors receive injuries when being physically assaulted, as compared to twenty percent of victims of stranger assault, and measuring reassault over a six-month period).

28. *See* 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, 1155 (1993) (citations omitted) ("[I]t is well documented that as domestic violence escalates, batterers often begin using weapons against their victims.").

29. *See* Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination*, 79 FLA. B.J. 79, 79 (2005) ("Family and intimate assaults involving firearms are 12 times more likely to end in fatality than those not associated with firearms.").

disproportionate amount of public attention and criminal justice resources."[30]

Judges may assume that the danger is over if the parties have separated, but domestic violence survivors face the greatest risk of acute violence and lethality during the actual separation from an abusive partner and the ensuing years.[31] Rather than ensuring safety, leaving or attempting to leave often escalates and intensifies the violence. Martha Mahoney coined the phrase "separation assault" to describe the increase in the batterer's quest for control when the survivor seeks to leave the relationship and the subsequent "attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return."[32] Mahoney explains,

> Men who kill their wives describe their feeling of loss of control over the woman as a primary factor; most frequently, the man expresses the fear that the woman was about to abandon him . . . The fact that marital separation increases the instigation to violence shows that these attacks are aimed at preventing or punishing the woman's autonomy. They are major—often deadly—power moves.[33]

Further quantitative and qualitative research confirms that high-level violence is often the result of the abuse survivor's departure from the relationship, not the survivor's failure to leave. Studies have shown that an abuse survivor's risk increases by seventy-five percent upon leaving and that this level of danger continues for two years.[34] Approximately two-thirds of all women who separate from their abusive partners are revictimized by them.[35] In one study, researchers

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30. Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 348 (2007) (identifying the ongoing need to change the public's perception of non-stranger violence as less serious than stranger violence).

31. Barbara Hart, *Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 234, 240 (Kersti Yllö & Michele Bograd eds., 1988) ("The decision by a battered woman to leave is often met with escalated violence by the batterer."); Klein & Orloff, *supra* note 28, at 815–16 ("Violence is often triggered by the anger aroused by threatened loss and excessive feelings of dependency—making the period during and after separation an extremely dangerous time.").

32. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6, 65 (1991) (exploring abusers' attacks and violent and coercive acts when a woman decides to separate or begins to prepare to separate from her batterer).

33. *Id.* at 65.

34. SIN BY SILENCE (Quiet Little Place Productions 2008).

35. Koziol-McLain et al., *supra* note 12, at 97–99 (finding that two-thirds of separated abused women were revictimized during the four-month period of the study, and concluding that "even though abused women separate from their partners, they do not automatically become safe"); *see also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 110 (1987) ("Some estimates suggest that at least 50 percent of women who leave their abusers are followed and harassed or further attacked by them.").

found that seventy-five percent of reported domestic violence incidents involved women who were already separated from their batterers.[36] In a qualitative study on attempted homicides by intimate partners, the femicide attempts typically occurred as the abused women were attempting to leave their relationships.[37] Consistent with Mahoney's theory, women described a sequence of arguments about the abusive partner's behavior, the survivor's decision to leave the relationship, the abuser's pleas to get her back, and his attempt to kill her when he realized she intended to leave.[38] Another study revealed that the proximity of an abusive partner to the victim is a key factor in post-separation assaults.[39]

In addition to the immediate threat of separation assault, continued abuse can happen over lengthy periods of time with prolonged gaps between incidents.[40] While at least one-third of abusers reabuse in a short timeframe, more do so when examining longer periods of time, with longitudinal studies showing gaps of several years between abusive incidents for some abusers.[41]

B. Courthouse Dangers

The short-term nature of most states' protection orders fails to account for the risk the courthouse itself poses to victims and the danger of repeatedly engaging the abusive partner in litigation about the violence. Abuse survivors go to court seeking protection, but returning to court every year to seek extensions of the court's protection is a physically and psychologically dangerous prospect.[42] Regarding the psychological risk, one scholar notes, "If one set out by

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36. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 3 (2d ed. 1988).

37. Christina Nicolaidis et al., *Could We Have Known? A Qualitative Analysis of Data from Women Who Survived an Attempted Homicide by an Intimate Partner*, 18 J. GEN. INTERNAL MED. 788, 791 (2003).

38. *Id.* (Consistent with the concept of separation assault, in a small number of cases, the man initiated the separation and became violent when the woman began a new dating relationship or refused to return to him.).

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

40. Andrew R. Klein, Practical Implications of Current Domestic Violence Research, Part I: Law Enforcement, 29–30 (April 2008) (unpublished research report), *available at* http://perma.cc/V9J-4EYQ.

41. *Id.*

42. *See* Kathleen A. McDonald, *Battered Wives, Religion, and Law: An Interdisciplinary Approach*, 2 YALE J.L. & FEMINISM 251, 260 (1990) (discussing intimidation from both a survivor's batterer as well as from the court).

design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law."[43] As the order draws near to expiring, abuse survivors weigh the risks against the benefits and determine whether to reengage the abusive partner. For those who desire the court's protection for another year, they brace themselves as they return to the courthouse, file a motion to extend the order, arrange for personal service, and anticipate encountering once again the person who has abused them.[44]

Domestic violence courts are more dangerous than any other type of court.[45] A court hearing provides an abusive party with a precise date and time where the abuser will find his or her target of abuse. Attorneys who specialize in representing abuse survivors are well aware of the frequency of courthouse assaults and insist that "[b]attered women not only need good laws, they need safe courthouses so they will not be killed, abused, or followed home by their abusers."[46] Describing the eruption of violence at the courthouse in a jurisdiction with yearlong protection orders, one scholar writes, "On numerous occasions lawyers were forced, by default, to intervene during verbal and physical attacks by batterers."[47]

Accounts of domestic violence victims being killed at the courthouse are sobering reminders of the lethality of domestic violence. Shirley Lowery had moved to an undisclosed location to escape her abusive boyfriend, Benjamin Franklin, who had raped her,

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43. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 72 (1992).

44. Survivors' safety concerns extend beyond the initial civil protection order hearing to subsequent extension, modification, or contempt proceedings, along with paternity, dissolution, custody, and child support actions. *See* Andrew Klein, *Dear Readers*, NAT'L BULL. ON DOMESTIC VIOLENCE PREVENTION, Aug. 1999, at 1:

> It's a well-known fact that leaving a violent partner is particularly dangerous for victims. Flight may replace repeated physical and emotional abuse with life-threatening attacks, even death. But if the victim is married to her batterer, she faces another dangerous obstacle: divorce court. Abusive men often use divorce court to further their campaign of control, abuse, and terror against their victims. Unwittingly, divorce courts often act as compliant coconspirators with the batterers.

45. *See* Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 308–09 (1995) (reporting on the frequency of physical or verbal assaults experienced by protection order litigants in Colorado); *see also* Phil Trexler, *Woman Seeking Protection Order Attacked in Summit County Courtroom*, http://perma.cc/8X3W-E4Z4 (ohio.com, archived Mar. 16, 2014) (noting that there is only one security guard assigned to that floor of the courthouse).

46. Zorza, *supra* note 45, at 308.

47. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 33–34 (1999) (noting that in the District of Columbia, occurrences of hallway assaults declined with increased security and better lighting).

threatened her life and the life of her family members, and stalked her.[48] She filed for a protection order in Milwaukee, and her daughter drove her to court on the trial date to seek a two-year order of protection. Just a few feet outside of the courtroom, Mr. Franklin stabbed Ms. Lowery nineteen times with a butcher knife, killing her.[49] When he was arrested, police found that he also was carrying a loaded firearm.[50] Ms. Lowery's daughter reflected, "My mother had so much hope in the courthouse. But if you can't go to the courthouse, what kind of hope do these women have? My mother has none. She's dead."[51] Another highly publicized example involved Timothy Blackwell, who attempted to strangle his wife the day after they married.[52] During divorce proceedings to dissolve their brief and abusive marriage, Mr. Blackwell fatally shot his wife, her unborn child, and her two friends inside King County Superior Court in Seattle, Washington, moments before closing arguments were scheduled to begin.[53]

Advocates in many jurisdictions strive to remedy courthouse security and structural issues that endanger domestic violence litigants. Common problems include dark, overcrowded, and poorly monitored hallways; the absence of a safe waiting area for litigants; unsecured bathrooms; the failure to make daycare available to litigants; and courthouses that close entirely during lunchtime.[54] Electronic security is now common. Security guards, however, may not be vigilant, and the entryway-screening process causes opposing parties to wait in lengthy lines, often in close proximity to each other.[55] Security officers who witness abuse, harassment, or other

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48. Don Terry, *Killing of Woman Waiting for Justice Sounds Alert on Domestic Violence*, N.Y. TIMES, Mar. 17, 1992, at A14, *available at* http://perma.cc/U4HD-RVY6.

49. *Id.*

50. *Id.* ("The death of Mrs. Lowery saddened this city because of the viciousness of the slaying and, even more perhaps, because of where it happened: in the weary heart of the system she had hoped would help and protect her.").

51. *Id.*

52. Timothy Egan, *Mail-Order Marriage, Immigrant Dreams and Death*, N.Y. TIMES, May 26, 1996, at A10 (recounting the history of the relationship between Timothy and Susana Blackwell, including the domestic violence that began the day after they were married, and reporting that Timothy shot and killed his wife, who was eight months pregnant at the time, and her two friends in the lobby of the courthouse during divorce proceedings).

53. Mia Consalvo, *"3 Shot Dead in Courthouse": Examining News Coverage of Domestic Violence and Mail-Order Brides*, 21 WOMEN'S STUD. COMM. 188, 188 (1998) (describing how Timothy Blackwell took a semi-automatic handgun from his briefcase and fatally shot each woman).

54. Zorza, *supra* note 45, at 309 (citing JOYCE KLEMPERER, TWICE ABUSED 40, 72 (1993)).

55. *Id.* (reporting the complaints of New York City's Coalition of Battered Women's Advocates); *see* Epstein, *supra* note 47, at 33–34 (saying that, in the District of Columbia,

blatant violations of protection orders often respond merely by asking one party to move away from the other rather than arresting the respondent or serving as a witness to the protection order violation.[56]

There are also security-related problems due to the scheduling of protection order cases. The norm across jurisdictions is for litigants on the protection order docket to be told to arrive to court at the same time even though the court will not hear the first case for some time. For example, while courts commonly order litigants to appear at 8:30 a.m., courtroom doors often remain locked until 9:00 a.m., and the judge may not take the bench until around 9:30 or 10:30 a.m.[57] This scheduling practice creates overcrowded hallways and makes it impossible for parties to comply with stay-away orders.

The child support context provides an example of the government acknowledging the danger that courthouses and litigation pose to domestic violence survivors. Welfare regulations originally mandated that custodial parents cooperate with the establishment of paternity and collection of child support from the non-custodial parent, even in the face of domestic violence.[58] Recognizing the danger of the courtroom setting and potential for renewed violence,[59] Congress created several avenues to permit state child support agencies to waive the child support cooperation requirements of victims of domestic violence, including the "good cause" waiver to the former Aid to Families with Dependent Children program[60] and the Family Violence Option to the Temporary Assistance to Needy

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protection order cases were heard in a single courtroom that was located in a dimly lit basement that was not monitored by security guards, and noting that occurrences of hallway assaults declined with increased security and better lighting).

56. *See* Zorza, *supra* note 45, at 308–09 (explaining that when batterers or their friends and family violate a protection order in the courthouse in front of court officers, they typically respond by attempting to quiet the parties and asking one party to move to a different area).

57. Jane K. Stoever, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1196 n.156 (2009) (indicating that the judge takes the bench around 9:30 a.m., although parties are notified to appear at 8:30 a.m.); Epstein, *supra* note 47, at 33 (describing how civil protection order cases were scheduled for 8:30 a.m., but judges did not take the bench until around 10:30 a.m.).

58. 42 U.S.C. § 608(a)(2)–(3) (2012).

59. *See* Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L.J. 47, 49 (2003):

> Because of a batterer's desire to control his former partner, his contact with her in a courtroom setting could result in renewed violence against her. Paradoxically, therefore, many low-income victims of domestic violence who are leaving or who have already left their abusers often must choose between poverty and increased violence for themselves and their children at their abusers' hands.

60. 45 C.F.R. § 232.40 (1996); Stern, *supra* note 59, at 49.

Families program.[61] The adoption of these waivers signals recognition of the danger that survivors face when they are required to come to court for an adversarial proceeding and continually reengage with an abusive partner. In contrast, most protection order statutes require a victim of violence to return to court and confront his or her abuser after three, six, or twelve months, which does not protect against violence in the manner that a long-term or indefinite domestic violence injunction would.

III. THE WIDESPREAD AVAILABILITY OF PERMANENT INJUNCTIONS

Injunctions are traditionally equitable remedies and are typically available based on common law equitable principles.[62] They may also be rooted in constitutional sources[63] or statutory construction,[64] with some statutes conferring on plaintiffs a right to injunctive relief.[65]

Regarding injunctions based in equity, case law provides standards, and the U.S. Supreme Court recently declared a four-prong test for issuing permanent injunctions. The question of the appropriate standard for issuing permanent injunctions arose in *eBay*

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61. 42 U.S.C. § 602(a)(7)(A)(i)–(iii); OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM: EIGHTH REPORT TO CONGRESS 131–32 (2009), *available at* http://perma.cc/8FWB-K83K (acf.hhs.gov, archived Mar. 16, 2014) (reporting that thirty-nine states, the District of Columbia, and Puerto Rico have adopted the Family Violence Option); *cf.* Taryn Lindhorst & Julianna D. Padgett, *Disjunctures for Women and Frontline Workers: Implementation of the Family Violence Option*, 79 SOC. SERV. REV. 405, 407, 409 (2005) (discussing problems with the implementation of the exemption); Katie Scrivner, Comment, *Domestic Violence Victims After Welfare Reform: Looking Beyond the Family Violence Option*, 16 WIS. WOMEN'S L.J. 241, 249–50 (2001) (explaining that waivers are not regularly provided).

62. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390 (2006) (noting that "a federal court considering whether to award permanent injunctive relief to a prevailing plaintiff applies the four-factor test historically employed by courts of equity").

63. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 699 (1978) (upholding equitable remedies to correct prison conditions that violated the Eighth Amendment guarantee against cruel and unusual punishment); Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) (addressing the remedial issue of how to correct violations of the guarantee of equal protection, following the initial school desegregation opinion in 1954).

64. *See, e.g.*, Lanham Act, 15 U.S.C. § 1116 (2012) (permitting courts to enter injunctions for trademark violations); The Rehabilitation Act, 29 U.S.C. § 794(a) (2012) (permitting injunctive relief, declaratory relief, and monetary awards); Americans with Disabilities Act, 42 U.S.C. §§ 12101–213 (2012) (permitting injunctive relief in the form of reasonable accommodations).

65. *See, e.g.*, Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 23, 34–35, *amended by* 50 U.S.C. app. § 925(a) (2012) (conferring a right to injunctive relief); Hecht Co. v. Bowles, 321 U.S. 321, 321–22 (1944) (addressing the right to injunctive relief conferred by the Emergency Price Control Act of 1942); Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 181 (Iowa 2001) (addressing a right to injunctive relief under Iowa competition law).

Inc. v. MercExchange, L.L.C., an intellectual property case under the Patent Act.[66] The Court declared that, in equity, permanent injunctions are issued based on a four-factor test that requires the plaintiff to show (1) the plaintiff has suffered an "irreparable injury," (2) the remedies available at law, such as financial relief, are inadequate, (3) an equitable remedy is warranted after balancing the hardships to the parties, and (4) the public interest would not be disserved by issuing a permanent injunction.[67]

Although the Supreme Court characterized these four prongs as "well-established principles of equity"[68] and recently reaffirmed this test,[69] the test has not been without criticism.[70] For example, Douglas Laycock notes, "[W]e may be stuck for the indefinite future with an ill-conceived four-part test that generates a lot of wasted effort and confusion as it clumsily reaches the result that would have been reached without it."[71] Nonetheless, post-*eBay*, courts apply the four-factor test to injunctions in equity beyond the intellectual property context,[72] with the Second Circuit declaring that "*eBay* strongly

66. 547 U.S. at 388.

67. *Id.* at 391 (specifically applying these principles to the Patent Act and noting that the test likewise applies to injunctions under the Copyright Act).

68. *Id.*

69. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157–58 (2010).

70. Scholars and courts have extensively critiqued this test for its deviation from the traditional rules applied to permanent injunctions. *See* MercExchange, L.L.C. v. eBay Inc., 500 F. Supp. 2d 556, 569 (E.D. Va. 2007) (noting on remand from the Supreme Court that there does not appear to be a difference between the first and second prongs); Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 206 (2012) ("*eBay* has become a remarkable legal juggernaut. In federal courts throughout the country, and for violations of almost any kind of statutory, regulatory, or judge-made law, the four-factor test from *eBay* has overrun and abrogated prior judicial approaches, all in the name of restoring traditional equity practice."); Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 792-94 (2012) (identifying the *eBay* holding as an example of the Court changing the law without consciously attempting to do so through its restatement of existing law); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 76 n.71 (2007) ("Remedies specialists had never heard of the four-point test. . . . [T]he Court appears to vindicate a 'traditional' stand for a final injunction that never existed, except perhaps for a preliminary injunction.").

71. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 83 (Supp. 2009).

72. *See* Gergen, *supra* note 70, at 215 ("[F]ederal courts now commonly accept the *eBay* test as the test for injunctions in virtually all types of cases, from constitutional challenges under 42 U.S.C. § 1983, to actions under various federal regulatory or antidiscrimination statutes, to diversity actions centered on state tort, contract, or statutory law."); *see, e.g.*, *Monsanto*, 130 S. Ct. at 2747–48 (applying the four-prong *eBay* test to permanent injunctions sought due to violations of the National Environmental Policy Act); Legend Night Club v. Miller, 637 F.3d 291, 297 (4th Cir. 2011) (applying *eBay* and upholding a permanent injunction against the enforcement of an overbroad statute that revoked the liquor licenses of all establishments that featured adult nudity); Brown v. Colegio de Abogados de P.R., 613 F.3d 44, 49 (1st Cir. 2010)

indicates that the traditional principles of equity it employed are the presumptive standard for injunctions in *any* context."[73] Recent examples of courts issuing permanent injunctions under *eBay* abound, and by May 2010, *eBay* had been cited over 4,100 times.[74] Most states use considerations that are similar to the second, third, and fourth factors stated in the *eBay* decision, but they require plaintiffs to show that the permanent injunction is necessary to prevent irreparable injury[75] rather than utilizing the new *eBay* formulation that requires proof of a past irreparable injury.

In contrast to the historic principles governing injunctive relief, where a statute expressly authorizes the issuance of an injunction, the traditional equity grounds need not be proven.[76] Instead, satisfying the statutory conditions is sufficient, even where the statutory requirements of proof set a lower or different standard.[77] In the domestic violence context, injunctions are a statutory creation due to the historic reasons detailed in Part IV.[78] While domestic violence protection orders have been treated as a unique and distinct remedy, they are not conceptually different from other civil injunctions.[79] Because the general field of injunctions is equitable and equity reveals the principles that matter more broadly to injunctive relief analysis, we can situate the analysis of domestic violence protection orders in this broader field.

(applying *eBay* to a request for a permanent injunction against Puerto Rico's integrated bar association and finding the injunction warranted even where damages may be quantifiable when harm affects the entire class); C.F. v. Capistrano Unified Sch. Dist., 647 F. Supp. 2d 1187, 1191 (C.D. Cal. 2009) (applying *eBay* to a student's request to enjoin a teacher from expressing negative views about religion); McManus v. District of Columbia, 530 F. Supp. 2d 46, 80 (D.D.C. 2007) (applying *eBay* to an employment law case); Owner-Operator Indep. Drivers Assoc. v. C.R. Eng., Inc., 508 F. Supp. 2d 972, 984 (D. Utah 2007) (applying *eBay* to a case under the Federal Truth in Leasing Act).

73. Salinger v. Colting, 607 F.3d 68, 78 (2d Cir. 2010) (emphasis added).

74. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 427 (4th ed. 2010).

75 *See, e.g.*, Grove Hill Homeowners' Ass'n, Inc. v. Rice, 90 So.3d 731, 734 (Ala. Civ. App. 2011); City of Dover v. City of Russellville, 215 S.W.3d 623, 625 (Ark. 2005); Saint John's Church in Wilderness v. Scott, 194 P.3d 475, 480 (Colo. App. 2008).

76. Henderson v. Burd, 133 F.2d 515, 517 (2d Cir. 1943) ("Where an injunction is authorized by statute it is enough if the statutory conditions are satisfied."); City of Houston v. Proler, 373 S.W.3d 748, 764–65 (Tex. Ct. App. 2012) (holding that the requirements for injunctive relief were defined by a specific statute, thus superseding the equitable requirements generally applicable to common law injunctive relief).

77. *Henderson*, 133 F.2d at 517; *Proler*, 373 S.W.3d at 764–65.

78. *Infra* notes 104–18 and accompanying text.

79. *See supra* note 6 (listing cases in which protection orders have been recognized as functionally equivalent to injunctions).

Looking across areas of the law, permanent injunctions are readily available in a variety of contexts. They are widely acknowledged as the appropriate remedy in trademark,[80] copyright,[81] trade secret,[82] unfair competition,[83] and patent[84] cases upon a finding of infringement, with courts historically noting that plaintiffs were entitled to this relief.[85] Permanent injunctions are commonly issued in a variety of other areas of the law as well, including tax,[86] food safety,[87] torts,[88] cybersquatting,[89] zoning,[90] trespass to land,[91] waste,[92]

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80. *See* Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1180 (9th Cir. 1988) (characterizing permanent injunctions as the "remedy of choice for trademark and unfair competition cases, since there is no adequate remedy at law for the injury caused by a defendant's continuing infringement").

81. *See* Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 968 (8th Cir. 2005) (stating that permanent injunctions in copyright cases are regularly issued because their denial would amount to "forced license to use the creative work of another," causing irreparable harm to "inescapably" flow (citations omitted)); L'Anza Research Int'l, Inc. v. Quality King Distrib., Inc., 98 F.3d 1109, 1120 (9th Cir. 1996) (stating that "[a]s a general rule, a copyright plaintiff is entitled to a permanent injunction when liability has been established and there is a threat of continuing violations" (citation omitted)); Cable/Home Commc'n Corp. v. Network Prods., Inc., 902 F.2d 829, 849 (11th Cir. 1990) ("[I]njunctive relief is a common judicial response to infringement of a valid copyright.").

82. *See, e.g.*, 18 U.S.C. § 1836 (2012) (permitting the Attorney General to obtain injunctive relief for any violation of the Uniform Trade Secrets Act); MINN. STAT. ANN. § 325C.02 (West 2012) (enjoining actual or threatened misappropriation).

83. Game Power Headquarters, Inc. v. Owens, No. CIV. A. 94-5821, 1995 WL 273663, at *7 (E.D. Pa. May 4, 1995) (noting that injunctive relief is the standard remedy in unfair competition claims because monetary damage alone can only address past wrongs and continued irreparable injury could include the loss of trade, goodwill, and control of reputation).

84. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (holding that a patent owner possesses "the right to exclude others from using his property")); Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 429 (1908) ("The right which a patentee receives does not need much further explanation. We have seen that it has been the judgment of Congress from the beginning that the sciences and the useful arts could be best advanced by giving an exclusive right to an inventor."); Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1246–47 (Fed. Cir. 1989):

> Infringement having been established, it is contrary to the laws of property, of which the patent law partakes, to deny the patentee's right to exclude others from use of his property. . . . It is the general rule that an injunction will issue when infringement has been adjudged, absent a sound reason for denying it.

85. *See, e.g.*, Walt Disney Co. v. Powell, 897 F.2d 565, 567 (D.C. Cir. 1990) ("When a copyright plaintiff has established a threat of continuing infringement, he is *entitled* to an injunction." (emphasis in original)).

86. *See, e.g.*, United States v. Pugh, 717 F. Supp. 2d 271, 300–01 (E.D.N.Y. 2010) (permanently enjoining a tax preparer from preparing federal tax returns pursuant to an Internal Revenue Code provision authorizing the injunction of a preparer who "continually or repeatedly" engages in conduct subject to penalty).

87. *See, e.g.*, U.S. Food and Drug Administration, FDA News Release, Federal Government Gains Permanent Injunction Against Raw Milk Producer (Feb. 22, 2012), *available at* http://perma.cc/X7Z3-N4EX (prohibiting the distribution of unpasteurized milk across state lines).

chattel recovery,[93] money judgment enforcement proceedings,[94] employment,[95] defamation,[96] and nuisance cases, especially those which are of a public character or that affect health and safety.[97] As one example of a permanent injunction issued in a trademark case, the fast food franchisor McDonald's received a permanent injunction to prevent a dental office from using the name "McDental."[98] The court issued this permanent order even though there was no proximity between dental services and fast food and no likelihood that the fast food franchisor would enter the field of dental service.[99] Countless examples of the widespread issuance of indefinite injunctions could be offered; as an example from a tort case, which is more akin to domestic violence cases, Jacqueline Kennedy Onassis received a permanent

88. *See, e.g.*, Bayview Loan Servicing, L.L.C. v. Forster, No. 09–1574, 2010 WL 1881594, at *3–4 (Iowa Ct. App. May 12, 2010) (issuing a permanent injunction against a buyer who made numerous harassing phone calls).

89. *See, e.g.*, Citigroup, Inc. v. Chen Bao Shui, 611 F. Supp. 2d 507, 512–13 (E.D. Va. 2009) (finding that the willful, deliberate, and bad faith registration and use of disputed citybank.org Internet domain name violated the Anticybersquatting Consumer Protection Act and merited a permanent injunction against the registrant, as well as the maximum statutory award of $100,000 and attorneys' fees).

90. *See, e.g.*, County of Kendall v. Rosenwinkel, 818 N.E.2d 425, 435–36 (Ill. App. Ct. 2004) (finding that facts could have supported a permanent injunction issued for the zoning violation of building a grain bin too close to a roadway, but remanding for a determination of intentional violations).

91. Floyd Abrams & Gail Johnston, *Prior Restraints*, *in* COMMUNICATIONS LAW IN THE DIGITAL AGE 2008 169 (2008).

92. *Id.*

93. *Id.*

94. *Id.*; *see also* Preferred Med. Imaging, P.C. v. Liberty Mut. Ins. Co., 816 N.Y.S.2d 700 (Table), 3 (Dist. Ct. 2006) (identifying situations in which a New York district court can grant a permanent injunction to include "money enforcement proceedings").

95. Nordson Corp. v. Plasschaert, 674 F.2d 1371, 1377 (11th Cir. 1982) (affirming the trial court's issuance of a covenant not to compete that covered Western Europe, the United States, and Canada).

96. Am. Univ. of Antigua Coll. of Med. v. Woodward, 837 F. Supp. 2d 686, 701–02 (E.D. Mich. 2011) (enjoining defendant permanently from making certain defamatory remarks).

97. *See, e.g.*, Parker v. Stark Cnty. Health Dep't, No. 5:12cv2552, 2012 WL 6569285, at *1–2, *6 (N.D. Ohio Dec. 17, 2012) (upholding a permanent injunction regarding the maintenance of property found to be a public health nuisance).

98. McDonald's Corp. v. Druck & Gerner, DDS., P.C., 814 F. Supp. 1127, 1135, 1139 (N.D.N.Y. 1993) ("[T]he court has found that Plaintiff is entitled to a permanent injunction based on its federal trademark claims[.]").

99. *Id.* at 1134–35 ("[T]his court is disinclined to find that Plaintiff, even if it begins providing dental floss with its french fries, is likely to 'bridge the gap' in any appreciable manner in this case.").

injunction to restrain a photographer from violating the former First Lady's rights of privacy.[100]

In addition to permanent injunctions being available to protect business and property interests, in a number of states, judges may enter permanent injunctive orders regarding domestic violence as part of a divorce or final child custody decree.[101] The fact that many states permit permanent protection from violence in these arenas shows that states are not opposed to making this remedy indefinite, although they generally fail to do so in domestic violence protection orders.[102] The selective use of permanent protection in the divorce context denies protection to non-married individuals, including individuals in dating relationships and lesbian and gay survivors of domestic violence who are not permitted to marry in a majority of states.[103] Furthermore, this selective use does not account for the religious, cultural, financial, and other reasons that an individual may determine to remain married but may also desire protection from abuse.

The widespread availability of permanent injunctions in a variety of contexts prompts the question of why orders against domestic violence are typically of brief duration.

IV. HISTORY REVEALS THE LAW'S DIFFERENTIAL TREATMENT OF DOMESTIC VIOLENCE

Part IV seeks to explain the exceptional treatment of domestic violence injunctions. Section A explores the historic failure of the state to sanction or respond to domestic abuse. Section B describes how the statutory remedy of civil protection orders was a breakthrough that provided protection—although limited—where none previously existed.

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100. Galella v. Onassis, 487 F.2d 986, 994, 998 (2d Cir. 1973) (affirming the trial court's finding that the photographer was guilty of harassment, intentional infliction of emotional distress, assault and battery, invasion of privacy, and commercial exploitation).

101. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 60/220(b) (West 2012) (permitting permanent orders in other types of civil proceedings, but not through the Illinois Domestic Violence Act); WASH. REV. CODE ANN. § 26.09.050 (West 2012) (permitting permanent restraining orders to be entered in divorce decrees).

102. *See, e.g.*, Commonwealth v. Blessing, 683 N.E.2d 724, 725–26 (Mass. App. Ct. 1997) (finding the Probate Court's issuance of a permanent protective order to be invalid because it was not issued concurrent with an active divorce case).

103. At the time of this writing, same-sex marriage is permitted in seventeen states and the District of Columbia. *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, http://perma.cc/6FZY-APEN (ncsl.org, archived Mar. 16, 2014).

A. The Right of Chastisement and Family Privacy Theory

The historical context in which domestic violence laws evolved is important to understanding the current limited duration of civil protection orders. Laws in the United States were constructed to exclude marital relations from an otherwise comprehensive scope, with the family deemed private and exempt from legal scrutiny.[104] Because family law pertains to intimate and emotional relationships and is rooted in "sacred command,"[105] law defining and regulating the family has traditionally been treated as exceptional in comparison to the market.[106]

The exceptionalism of family law and the legal rules that apply to violence in the family is a historically driven phenomenon.[107] Historically, the doctrine of family privacy shielded abusive partners from judicial reach and prevented abuse survivors from receiving protection.[108] At common law, a wife's identity was subsumed in her husband's,[109] which prevented her from bringing suit against him. Husbands had the right of chastisement over their wives and could

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104. *See, e.g.*, State v. Edens, 95 N.C. 693, 695–97 (1886) ("We are not disposed . . . to break in needlessly upon that oneness of husband and wife, which is the fundamental and cherished maxim of the common law . . . .").

105. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 754 (2010) (identifying the religious roots of family law).

106. *See* Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498, 1501 (1983) ("[T]he woman's sphere has been described as 'private' and contrasted with the 'public sphere of the marketplace and government, ...' "); Ann Shalleck, *Introduction Comparative Family Law: What Is the Global Family? Family Law in Decolonization, Modernization and Globalization*, 19 AM. U. J. GENDER SOC. POL'Y & L. 449, 454 (2011) ("[T]he family/market dichotomy . . . is so present across legal systems.").

107. *See generally* Janet Halley, *What is Family Law? A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1 (2011) ("[T]his Article tells a story of American family law . . . . Almost without exception, throughout this account Domestic Relations/Family Law are what they are by virtue of their categorical distinction from the law of contract and, more broadly, the law of the market.").

108. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 263–69 (2d ed. 2003):

> There is widespread agreement among feminist scholars that notions of 'privacy' and 'private relationships' have stifled change. Elizabeth Schneider, for example, talks of the 'violence of privacy' to indicate how the conception of male battering as a private issue continues to . . . lead many to deny the pervasiveness and seriousness of domestic violence as a political issue.

See also Edens, 95 N.C. at 697 (noting that the law regards marriage as permanent and sacred and "leaves temporary differences and wrongs which one may do to the other to the corrective hands of time and reflection").

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

not be subject to prosecution unless they inflicted permanent damage.[110] In the 1868 case of *State v. Rhodes*, the North Carolina Supreme Court refused to prosecute a husband for repeatedly whipping his wife, concluding, "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."[111] The Court further explained:

> [H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber. Every household has and must have, a government of its own, modeled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive . . . .[112]

Even after the husband's right of corporal punishment of his wife was formally repudiated in the late nineteenth century, husbands were granted formal and informal immunities from criminal prosecution in the interest of family harmony and privacy.[113] Likewise, while women obtained the capacity to sue without their husband's consent and joinder, courts continued to grant husbands immunity

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110. Blackstone stated that the husband has the right of "restraining [his wife], by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children." 1 WILLIAM BLACKSTONE, COMMENTARIES *444. *See also Edens*, 95 N.C. at 695–96 (holding that a man could "assault and batter[ ]" his wife if he inflicted no permanent injury upon her, and also that a husband could "wanton[ly] and malicious[ly] slander" the good name of his wife with impunity); State v. Rhodes, 61 N.C. 453, 455–56 (1868) (holding that the law recognizes family government "as complete in itself," and will not "invade the domestic forum, or go behind the curtain" in the absence of permanent injury); State v. Black, 60 N.C. 262, 267 (1864) (holding that a husband has a responsibility to "make [his wife] behave herself" and to thrash her, if necessary to that end); State v. Hussey, 44 N.C. 123, 126 (1852) (finding that a wife is not a competent witness against her husband to prove battery that does not inflict permanent damage). The *Hussey* court stated:

> We know that a slap on the cheek, let it be as light as it may, indeed any touching of the person of another in a rude or angry manner—is in law an assault and battery. In the nature of things it cannot apply to persons in the marriage state, it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign.

Id. at 126.

Siegel, *supra* note 4, at 2118 ("The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or 'chastisement' so long as he did not inflict permanent injury upon her.").

111. 61 N.C. at 458–59 (observing that prosecution in middle-class households would be "harassing to them, or injurious to society," and that exposure of the higher class would bring "disgrace" and "ruin").

112. *Id.*

113. Siegel, *supra* note 4, at 2120 (noting that such immunities were granted by economic status to the benefit of middle- and upper-class men).

from interspousal tort claims[114] to preserve the "tranquility of family relations"[115] and prevent "perpetual domestic discord."[116] Multiple other vestiges of coverture persisted throughout the twentieth century,[117] such as the marital rape exception.[118]

While family privacy theory has traditionally condoned family violence, this theory has also influenced the whole of family law in a variety of noteworthy ways. During the twentieth and twenty-first centuries, the Supreme Court developed a robust doctrine of family privacy, setting national norms in many areas affecting families.[119] The Court recognized a right to marital privacy,[120] upheld the fundamental right to marry and prohibited states from criminalizing

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114. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611, 617–18 (1910) (considering the District of Columbia's Married Women's Property Act, invoking marital privacy rationale for interspousal tort immunity, and noting that such suits would "open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel"); Abbott v. Abbott, 67 Me. 304, 308 (1877) (holding the husband immune from tort liability for assaulting his wife and stating, "[t]he private matters of the whole period of married existence might be exposed by suits," which would "add a new method by which estates could be plundered"); Longendyke v. Longendyke, 44 Barb. 366, 368 (N.Y. Sup. Ct. 1863) (examining a statute that gave women the right to sue in contract or tort, and interpreting it to bar suits for assault against a spouse, noting that even though the woman's right to sue her spouse for assault "may perhaps be covered under the literal language," this could not be "the meaning and intent of the legislature, and . . . should not be the construction given to the act").

115. Perkins v. Perkins, 62 Barb. 531, 535 (N.Y. Sup. Ct. 1872) (finding that allowing a cause of action between spouses would "overwhelm" the courts and allow "the parties to a marriage contract to sue each other for every fireside controversy").

116. *Longendyke*, 44 Barb. at 369.

117. *See* Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 190 (2003) (observing that marriage "creates a partial void in civil and criminal law enforcement, a space for wrongdoers to get away with what the state would elsewhere remedy, punish, and deter. This detriment can be classified as tertiary because even though law plays a direct role in these exceptions and immunities, many of them are unwritten or informal, a question of norms."); *see also, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981) (considering the validity of a Louisiana statute that named the husband the "head and master" of the marital community); Forbush v. Wallace, 341 F. Supp. 217, 222–23 (M.D. Ala. 1971) (holding constitutional a law requiring a wife to use her husband's surname).

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

119. *See* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 529 (2008) (noting that the Supreme Court's "constitutionalization" of the doctrine has been "[a]mong the forces transforming American family law over the last fifty years").

120. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

interracial marriage,[121] and further protected the marital unit by upholding the marital presumption regarding paternity, notwithstanding proof that the husband in the case was not the biological father.[122] The Court recognized relational privacy interests between unmarried couples, specifically in the context of accessing contraceptives[123] and with respect to an adult's right to conduct consensual sexual relationships in the privacy of his or her home.[124] Parents' interests in the care, custody, and control of their children, and the need for courts to defer to fit parents' decisionmaking, has been established through multiple cases as well.[125] In sum, much of recent family law has grown from rights developed under the family privacy theory, which positively permits pluralism and a diversity of family forms to flourish.[126] An ongoing theme in family law is the tension between family privacy and the need for the state to intervene to further the fundamental function of government to protect citizens

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121. Loving v. Virginia, 388 U.S. 1, 2 (1967) ("[A] statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.").

122. Michael H. v. Gerald D., 491 U.S. 110, 115, 129–32 (1989) (plurality opinion) ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.").

123. Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972):

> If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible . . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

124. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)):

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

125. Troxel v. Granville, 530 U.S. 57, 70 (2000) (plurality opinion) (requiring that courts give "special weight" to fit parents' preferences regarding nonparent visitation); Wisconsin v. Yoder, 406 U.S. 205, 207, 234–36 (1972) (permitting Amish parents to withdraw their children from school after the eighth grade); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (protecting parents' rights to educate their children); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (holding that the Fourteenth Amendment protects a teacher's liberty to provide foreign language instruction, and affirming that parents' right to educate their children is a constitutionally protected liberty).

126. *See generally* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 60 (1999) ("[T]he American tradition of respect for individual freedom in shaping one's own destiny and making important personal choices free of government intrusion, and of encouraging diversity and pluralism warrants that all family relationships that, in the totality of circumstances, possess such attributes be accorded equal respect, recognition, and rights . . . .").

from harm—for example, in cases of child abuse or intimate partner violence.[127]

Regarding the state's response to family violence, in the early 1900s, state legislatures created family and juvenile courts to handle criminal acts committed against spouses and children outside of the traditional criminal system.[128] Rather than punishing the perpetrator and criminalizing violence against a family member, family courts encouraged reconciliation, sought to preserve family unity, and resulted in keeping family violence private.[129] Thus, the legal treatment of domestic assault only shifted in structure and rationale from marital prerogative to marital privacy; the discourse of forgiveness and altruism toward this affective bond continued.[130]

Prior to the 1970s, the only civil remedy available to domestic violence survivors was to seek a restraining order in the context of a divorce.[131] At that time, divorce was difficult to obtain without an attorney and required grounds, fees, and extensive proceedings.[132] Divorce also necessarily meant that the parties were in a marital relationship and the petitioner had decided to dissolve the marriage. Emergency ex parte orders in the divorce required proof beyond a reasonable doubt, and the penalty for violating the restraining order

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127. Logan & Walker, *supra* note 8, at 676.

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

129. *Id.* at 137–38; *see* Siegel, *supra* note 4, at 2118 (laying out the history of the treatment of wife battering in the Anglo-American common law); *see also* Camille Carey, *Correcting Myopia in Domestic Violence Advocacy: Moving Forward in Lawyering and Law School Clinics*, 21 COLUM. J. GENDER & L. 220, 226–27 (2011) (identifying how the roots of family courts prevented domestic violence from being recognized as a public issue and influenced the legal response to family violence).

130. Siegel, *supra* note 4, at 2119, 2166, 2169–70. Professor Seigel describes the superficial change in the status regime of married women as "preservation through transformation." *Id.* at 2119. She summarizes:

> [I]t was no longer necessary to justify a husband's acts of abuse as the lawful prerogatives of a master. Rather, the state granted a husband immunity to abuse his wife in order to foster the altruistic ethos of the private realm. In this way, laws that protected relations of domination could be justified as promoting relations of love. The regulation of marital violence was thus translated into the language of companionate marriage prevailing during the industrial era.

Id. at 2169–70.

131. *See* Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 161 (2003):

> The only civil remedy available to most women before the movement to make Orders for Protection available was an injunction in one of three varieties: temporary (emergency), preliminary, or a permanent restraining order. In order to get an injunction, the woman had to bring a lawsuit, which, in most cases, meant a divorce proceeding.

132. *See id.* at 161–62 (discussing civil remedies available to domestic violence victims in the 1970s).

was civil contempt, which typically only amounted to a "verbal slap on the hand."[133] This route that demanded divorce was not expeditious or appealing to many married women, and the relief was insufficient to actually end violence, especially given the weak enforcement mechanisms. An alternative legal remedy was needed.

B. The Creation of the Domestic Violence Protection Order

Laws against domestic violence grew out of the work of the battered women's movement of the 1960s and 1970s.[134] During this period, feminists created the first domestic violence shelters and organized support groups for abused women based on a feminist-theory approach centered on contextual responses to individual women's needs.[135] Battered-women's activists and scholars then undertook the substantial task of revolutionizing domestic violence laws. They sought to transform domestic violence from a private matter into a public one by creating legal mechanisms to enhance women's safety and independence.[136]

Because of historic failures of police to respond appropriately to domestic violence[137] and of prosecutors to treat intimate partner violence as a crime,[138] significant energy went into developing aggressive criminal justice responses to domestic violence, with most states creating mandatory arrest laws and "no-drop" prosecution

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133. *Id.*

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

135. *Id.*

136. David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1451 (2010).

137. *See* DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 45, 233 (1995) (discussing minimal attention given to domestic violence complaints and finding that of every one hundred domestic violence assaults, only fourteen victims call the police, resulting in only 1.5 arrests and 0.49 convictions); Goodman & Epstein, *supra* note 134, at 480 (describing how police officers ignored domestic violence calls, delayed their response for multiple hours, or mediated incidents); *see also, e.g.*, Fajardo v. County of Los Angeles, 179 F.3d 698 (9th Cir. 1999) (permitting the relatives of a domestic violence homicide victim to maintain an equal protection claim against the sheriff and county under § 1983 based on allegations that the county had a policy or custom that discriminated against victims of domestic violence by giving lower priority to 9-1-1 domestic violence calls than to 9-1-1 non-domestic violence calls); Thurman v. Torrington, 595 F. Supp. 1521 (D. Conn. 1984) (finding that the Fourteenth Amendment's Equal Protection Clause was violated by a police department that consistently provided less protection to domestic violence victims than to victims of stranger violence).

138. Goodman & Epstein, *supra* note 134, at 480 (describing how prosecutors rarely pressed charges in domestic violence cases).

policies.[139] These mandatory responses have been lauded for fulfilling the state's "promise of equal protection, bodily integrity, and sex equality,"[140] as well as critiqued as disempowering[141] and endangering survivors because they discount the survivor's assessment of how the criminal intervention will affect his or her safety.[142] Alongside the development of mandatory criminal justice system responses to domestic violence, reformers developed the civil justice remedy of the protection order.

While traditional civil injunctions have historical roots that date back to the Court of Chancery in England,[143] the first domestic violence protection order legislation was passed in 1970,[144] when advocates recognized that injunctive relief could "radically alter the balance of power between abusers and their victims."[145] By 1993, each

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139. *Id.* at 480–81 (explaining that mandatory arrest laws require law enforcement to arrest a perpetrator of domestic violence when there is probable cause to believe that domestic violence has occurred). "No-drop" prosecution policies mandate that a criminal case will proceed regardless of the victim's wishes, assuming there is evidence that demonstrates criminal conduct. *Id.*

140. Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 304 (2005) ("Thus, mandatory state intervention functions as a signal that the private is no longer a site of male control and dominance, or a space where men can abuse women with immunity . . . ."); *see also* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 186 (2000) (discussing the arguments of proponents of "no-drop" policies).

141. Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 583–84, 588 (2012) (arguing that feminist criminal law reformers ended up adopting the agenda of the criminal justice system, and contending that prosecutors "systematically ignore women's desires to stay out of court, express disdain for ambivalent victims, and even infantilize victims to justify mandatory policies while simultaneously prosecuting the victims in other contexts"); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 244 (2005) (discussing how proponents of mandatory policies have conservatized the battered women's movement, dislocated it from its feminist origin, and contributed to the disempowerment of abused women).

142. *See* Jane K. Stoever, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 313–17 (2011) (discussing "no-drop" policies). Tarr explains that, under "no-drop" policies, prosecutors "force an abused woman to testify regardless of the likely impact of her testimony. Tarr, *supra* note 131, at 160. The prosecutors may or may not get a conviction, but even if they do, the conviction will rarely result in incarceration. *Id.* Regardless, by forcing her to testify, the prosecutor has created more chaos for the woman who has already suffered from her lack of meaningful control over her abuser's violent behavior. *Id.*

143. OWEN M. FISS, INJUNCTIONS 74 (1972).

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

145. Jaros, *supra* note 136, at 1451; *see also* Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 3, 23 (1992):

state had enacted a protection order statute.[146] This survivor-initiated remedy was intended to be autonomy enhancing[147] while also enabling survivors to further invoke protections of the criminal justice system.[148] In light of the deeply entrenched laws and practices that condoned violence and the abject failure of police and prosecutors to respond to domestic violence,[149] statutes providing for yearlong domestic violence protection orders offered significant remedies that were heretofore unavailable.

As with most legal issues related to family relationships, including the issuance of divorce and custody decrees, state law largely governs protection orders and thus varies by state.[150] As states enacted domestic violence protection order statutes to protect victims of domestic violence and their children from further harm, each state determined the types of relationships covered, how to define domestic violence, the relief available, and the length of the orders. While early statutes addressed "wife abuse," these statutes are now gender-neutral and generally cover relationships involving marriage, dating, relatives, or household members.[151] Domestic violence is commonly defined as an actual or threatened criminal offense against an intimate partner or family member. The District of Columbia requires proof of an offense under the criminal code,[152] and Washington State similarly defines domestic violence as physical harm, assault, bodily injury, sexual assault, stalking, or the infliction of fear of imminent physical injury.[153] Even if the court determines that abuse has

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> A new remedy was needed. One that would enjoin the perpetrator from future abuse. One that would not displace the abused woman from her home but could compel relocation of the abuser. . . . One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders were this new remedy.

146. GOODMAN & EPSTEIN, *supra* note 5, at 33.

147. Kuennen, *supra* note 144, at 48.

148. *See* Tarr, *supra* note 131, at 159.

149. *Supra* notes 137–38 and accompanying text.

150. The U.S. Supreme Court has frequently proclaimed that family law is a matter of state law. *See, e.g.*, Simms v. Simms, 175 U.S. 162, 167 (1899) ("[T]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the state, and not to the laws of the United States."); Barber v. Barber, 62 U.S. 582, 584–85 (1859) (including dicta which gave birth to the "domestic relations exception" to federal diversity jurisdiction).

151. *See, e.g.*, D.C. CODE § 16-1001 (2012) (covering domestic partnerships); WASH. REV. CODE ANN. § 26.50.010–.020 (West 2012) (defining "[f]amily or household members" and allowing teenagers to receive orders for protection); *cf.* FLA. STAT. ANN. § 741.28(3) (West 2012) (requiring that parties who are not married or who do not have a child in common have lived together).

152. *See, e.g.*, D.C. CODE § 16-1001 (defining intimate partner violence as "an act punishable as a criminal offense").

153. WASH. REV. CODE ANN. § 26.50.010; *see also* FLA. STAT. ANN. § 741.30(7)(b) (permitting the entry of a protection order upon determining that the petitioner has been abused or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic

occurred, trial judges have wide discretion in granting domestic violence protection orders based on their perception of what is necessary to prevent further violence.[154] For example, the Oregon statute requires the respondent to have abused the petitioner within the prior 180 days and the court to find that the petitioner is in "imminent danger" of further abuse and that the respondent presents a "credible threat" to the physical safety of the petitioner or petitioner's child.[155]

States have developed their protection order statutes over the past few decades to include a wide array of injunctive relief that extends beyond relief available through criminal restraining orders. Protection orders may prohibit the respondent from abusing, threatening, harassing, contacting, or coming near the petitioner; require the respondent to vacate a shared residence; order him or her to complete counseling for domestic violence, drug abuse, alcohol abuse, or parenting skills; and award temporary child custody and visitation, along with attorney's fees.[156] Some jurisdictions permit monetary awards for child support, maintenance, housing payments, property destruction, or medical expenses due to violence.[157] Select states allow courts to order global positioning system tracking of a respondent using a system that has victim-notification capabilities.[158] Statutes typically also contain a provision that allows a judge to enter additional relief that is tailored to the unique safety needs presented

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violence, and identifying factors that suggest imminence, such as past threats, harassment, stalking, and abuse; threats to kidnap children; abuse of pets; actual or threatened use of weapons; the respondent's criminal history and history of past protection orders; property destruction; or the respondent's physical restraint of the petitioner in the home or interference with calling law enforcement); 15 VT. STAT. ANN. tit. 15, § 1101 (West 2012) (defining abuse as causing or attempting to cause bodily harm, placing another in "fear of imminent serious physical harm," or committing child abuse, stalking, or sexual assault).

154. *See, e.g.*, KY. REV. STAT. ANN. § 403.750(1) (West 2012) (permitting entry of a protection order if abuse has occurred and may reoccur); OKLA. STAT. ANN. tit. 22, § 60.3(A) (West 2012) (allowing courts to enter protection orders when "necessary to protect" the victim).

155. OR. REV. STAT. ANN. § 107.718(1) (West 2012).

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

157. *See* CAL. FAM. CODE § 6341 (2012) (allowing for child support and spousal support); R.I. GEN. LAWS § 8-8.1-3 (West 2012) (allowing for various forms of monetary support and reimbursement).

158. *See, e.g.*, IND. CODE ANN. § 34-26-5-9(c)(3)(E) (West 2012) (permitting electronic monitoring if the respondent violates a protection order); WASH. REV. CODE ANN. § 26.50.060(1)(j) (West 2012) (permitting judges to require respondents to submit to and pay for electronic monitoring).

in the case.[159] These survivor-initiated proceedings carry the weight of enforcement by the criminal justice system or through a separate contempt action.[160]

Domestic violence protection order laws are developing as legislators, judges, academics, and advocates gain greater understanding of the dynamics of domestic violence, the needs of abuse survivors, and the means to prevent further abuse. For example, statutes have evolved over the past four decades to protect unmarried women and men in heterosexual or homosexual relationships,[161] and many states have expanded relief to address teen dating violence and the abuse of pets.[162] On a national level, the Violence Against Women Act requires states to give full faith and credit to protection orders issued in other states.[163] The generally limited duration of protection orders, however, persists, as detailed in Part V. Making it possible to permanently enjoin abuse is a needed part of the evolution of the protection order remedy.

V. DOMESTIC VIOLENCE EXCEPTIONALISM IN INJUNCTIVE RELIEF

Injunctive relief operates to prevent future harm or injury,[164] and domestic violence protection orders, which derive from the traditional common law civil injunction,[165] are widely understood to be a type of injunction.[166] Injunctions are generally assumed to be of unlimited, permanent duration unless otherwise specified.[167]In contrast to seemingly all other areas of law, however, domestic violence protection orders are typically of brief duration.

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159. *See, e.g.*, D.C. CODE § 16-1005 (stating that the protective order can "[d]irect[ ] the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter").

160. *See* Tarr, *supra* note 131, at 191 (discussing criminal charges as "[o]ne of the greatest developments of the Order for Protection statutes").

161. *See, e.g.*, WASH. REV. CODE ANN. § 26.50.010 (West 2012) (covering "[f]amily or household members," not just those who are married).

162. *See, e.g., id.* §§ 26.50.020, 26.50.060 (covering teenagers and pets).

163. 18 U.S.C. § 2265 (2012).

164. Bear v. Iowa Dist. Court for Tama Cnty., 540 N.W.2d 439, 441 (Iowa 1995); *see also* Kocken v. Wis. Council 40, 732 N.W.2d 828, 835 (Wis. 2007) ("Before the circuit court can issue a permanent injunction, 'a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and injure the plaintiff.' ") (quoting Pure Milk Prods. Coop. v. Nat'l Farmers Org., 280 N.W.2d 691, 700 (1979)).

165. Kuennen, *supra* note 144, at 47 (identifying "deep historical roots" of civil protection orders dating to the English Court of Chancery).

166. *See supra* note 6.

167. *Bear*, 540 N.W.2d at 441.

A. The Limited Duration of Domestic Violence Injunctions

A fifty-state survey of protection order statutes conducted for this Article reveals that domestic violence protection orders are effective for only a limited interval in most states.[168] Although states have proclaimed that "[p]reservation of the fundamental human right to be protected from the devastating impact of family violence"[169] is their public policy, most states offer only short-term domestic violence protection orders. The statutory time period for protection orders is as brief as three months in Arkansas and West Virginia,[170] or six months in Michigan, Missouri, New Mexico, South Carolina, and Utah.[171] Most commonly, the initial order is effective for up to one year; twenty-two states take this approach.[172] Other states have chosen to make initial orders available for other limited periods of specified duration; nine state statutes allow orders to be issued for eighteen

168. While orders beyond an ex parte, temporary order are frequently referred to as "permanent" protection orders, this term is misleading because they are rarely permanent.

169. Mitchell v. Mitchell, 821 N.E.2d 79, 84 (Mass. 2005) (quoting Champagne v. Champagne, 708 N.E.2d 100, 102 (Mass. 1999)).

170. ARK. CODE ANN. § 9-15-205(b) (West 2013) (requiring courts to enter orders for protection for a fixed period that may range from ninety days to ten years); W. VA. CODE ANN. § 48-27-505 (West 2013) (permitting courts to enter orders for ninety or 180 days, and allowing for a full year in specified instances, such as when the respondent has made a material violation of a prior protection order; has been convicted of domestic battery, assault, or a felony against a household member; or has had two or more protection orders issued against him or her in the preceding five years).

171. MICH. COMP. LAWS ANN. § 600.2950(13) (West 2013); MO. ANN. STAT. § 455.040(1) (West 2013) (allowing entry of the order for a minimum of 180 days to a maximum of one year); N.M. STAT. ANN. § 40-13-6(C) (West 2013) (limiting protection orders involving child custody or support to six months); S.C. CODE ANN. § 20-4-70(A) (2013) (allowing judges to enter protection orders for six to twelve months); UTAH CODE ANN § 78B-7-106 (6) (West 2013) (permitting judges to enter civil protection orders that include child custody, child support, or other relief beyond the no-contact and stay-away provisions, for fixed periods not to exceed 150 days as the norm without greater written justification).

172. Twenty-two states permit only yearlong initial orders. ALASKA STAT. ANN. § 18.66.100 (West 2013); ARIZ. REV. STAT. ANN. § 13-3602(K) (2013) (increasing the duration from six months to one year in 2001); CONN. GEN. STAT. ANN. § 46b-15(d) (West 2014); DEL. CODE ANN. tit. 10, § 1045(b) (West 2014); D.C. CODE § 16-1005(d) (2013); FLA. STAT. ANN. §§ 741.30, 784.046 (West 2013) (orders typically last for one year as a convention, rather than a rule of law); GA. CODE ANN. § 19-13-4(c) (West 2013); IDAHO CODE ANN. § 39-6306(5) (West 2013); IOWA CODE ANN. § 236.5(2) (West 2013); KAN. STAT. ANN. § 60-3107(e) (West 2013); MD. CODE ANN., FAM. LAW § 4-506(j)(1) (West 2013); MASS. GEN. LAWS ANN. ch. 209A, § 3(c) (West 2014); MO. ANN. STAT. §455.040(1); NEB. REV. STAT. ANN. § 42-924(3) (West 2013); NEV. REV. STAT. ANN. § 33.080(3) (West 2013); N.H. REV. STAT. ANN. § 173-B:5(VI) (2013); N.C. GEN. STAT. ANN. § 50B-3(b) (West 2013); OR. REV. STAT. ANN. § 107.716(6) (West 2013); S.C. CODE ANN. § 20-4-70(A); TENN. CODE ANN. § 36-3-605(b) (West 2013); W. VA. CODE ANN. § 48-27-505; WYO. STAT. ANN. § 35-21-106(b) (West 2013).

months to two years,[173] and eight states permit orders for three to five years.[174]

Several states take a hybrid approach by assigning different timeframes to different forms of relief and allowing certain provisions to last indefinitely. For example, in Alaska, protection orders are only in effect for a maximum of one year, but the provision that prohibits the respondent from abusing, stalking, threatening, or harassing the petitioner is effective indefinitely unless the court orders otherwise.[175] Louisiana similarly permits a permanent order prohibiting physical abuse and harassment but limits all other relief in the protection order to eighteen months.[176]

In a handful of states, judges have complete discretion over the time period of the initial protection order[177] and may enter permanent

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173. *See* 750 ILL. COMP. STAT. ANN. 60/220(b), (e) (West 2013) (two years); IND. CODE ANN. § 34-26-5-9(e) (West 2012) (providing a presumptive period of two years, but a judge may shorten it); LA. REV. STAT. ANN. § 46:2136(F)(1) (2013) (eighteen months); ME. REV. STAT. ANN. tit. 19-A, § 4007(2) (2013) (two years); MINN. STAT. ANN. § 518B.01 (West 2013) (setting a standard of issuing orders for up to two years, but permitting judges to issue longer orders when needed); N.Y. FAM. CT. ACT § 842 (McKinney 2013) (standard orders are for up to two years, and judges may issue orders for up to five years if there are aggravating circumstances or if the respondent violates a valid protection order); TEX. FAM. CODE ANN. § 85.025(A)(1)–(2) (West 2013) (standard protection orders last two years, but a court may issue a lengthier order if the respondent caused serious bodily injury to the petitioner or if the respondent has been the subject of two or more prior protection orders); UTAH CODE ANN. § 78B-7-106 (permitting the no-contact and stay-away relief in a protection order to last for two years, but limiting child custody and support to 150 days); VA. CODE ANN. § 16.1-279.1(B) (West 2013) (permitting initial and subsequent orders to last up to two years).

174. *See* CAL. FAM. CODE § 6345(a), (c) (West 2013) (stating that the first long-term protection order is not to be more than five years and that, if the judge fails to state an expiration date, the order will expire after three years); KY. REV. STAT. ANN. § 403.750(2) (West 2013) (three years); OHIO REV. CODE ANN. § 3113.31(3)(a) (West 2013) (providing protection orders for a maximum of five years for adults, or, in cases regarding juvenile respondents, until the respondent turns age nineteen); OKLA. STAT. ANN. tit. 22, § 60.11(3) (West 2013) (orders last for a fixed period of five years); 23 PA. CONS. STAT. ANN. § 6108(d)–(e) (West 2014) (three years); R.I. GEN. LAWS ANN. § 8-8.1-3(i) (West 2013) (three years); S.D. CODIFIED LAWS § 25-10-1(3) (2013) (permitting courts to enter protection orders for five years or less); WIS. STAT. ANN. § 813.125(3)(c) (West 2012) (four years).

175. ALASKA STAT. ANN. § 18.66.100; *see also* DEL. CODE ANN. tit. 10, § 1045(b) (permitting the provisions prohibiting abuse and contact to last two years or longer).

176. LA. REV. STAT. ANN. § 46:2136.

177. *See* ALA. CODE § 30-5-7(d)(2) (2013) (stating that final protection orders are permanent unless otherwise specified and may later be modified by court order); COLO. REV. STAT. ANN. § 13-14-102 (West 2012) (permitting orders to be permanent or shorter); MISS. CODE ANN. § 93-21-15(2)(b) (West 2013) (regarding duration, stating that final orders are issued for an "appropriate" time period and noting that orders may be amended at any time); MONT. CODE ANN. § 40-15-204 (West 2013) (permitting courts to enter orders for a specific period or permanently); N.J. STAT. ANN. § 2C:25-29 (West 2013) (permitting orders to be permanent or shorter); N.D. CENT. CODE ANN. § 14-07.1-02(4) (West 2013) (entirely the judge's discretion); WASH. REV. CODE ANN. § 26.50.060 (West 2013) (permitting permanent orders for adult petitioners, but limiting restraints on contact between a respondent and his or her child to one

or fixed orders of any duration.[178] Judges in Hawaii, for example, are instructed to enter the order for a "fixed reasonable" time period, as the court deems appropriate.[179] Some states provide a presumptive duration but allow judges to deviate and enter shorter or lengthier periods of protection. For example, Utah provides a presumptive maximum period of 150 days unless the court issues the order for a more extended period.[180]

The following map shows how the durations of domestic violence protection orders vary across the country. Interestingly, there is not a pronounced geographic pattern.

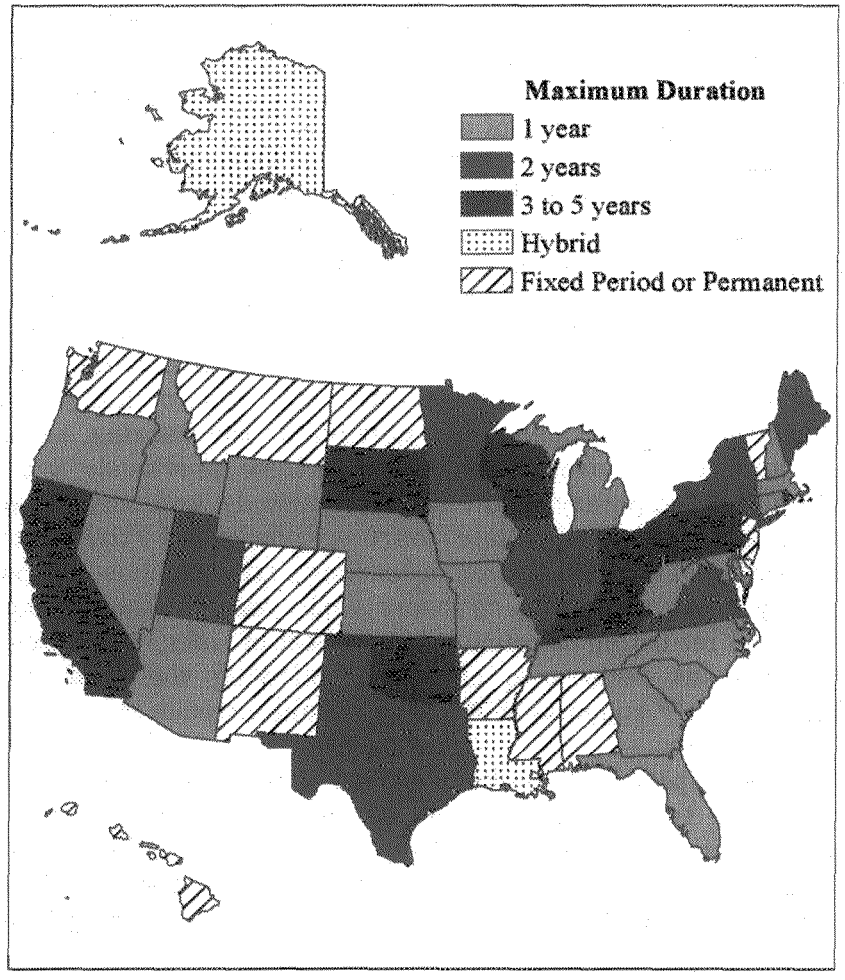
year); *see also* VT. STAT. ANN. tit. 15, § 1103(d) (West 2013) (explaining that judges grant orders for a "fixed period").

178. MD. CODE ANN., FAM. LAW § 4-506(a)(2)(iii) (West 2012); MISS. CODE ANN. § 93-21-15(2)(b); MONT. CODE ANN. § 40-15-204 (for a specific period or permanently); N.J. STAT. ANN. § 2C:25-29(b).

179. HAW. REV. STAT. § 586-5.5(a)–(b) (West 2013).

180. UTAH CODE ANN. § 78B-7-106(6)(a) (West 2013) (the norm is that the order shall not exceed 150 days, unless the judge makes findings on the record for an extended order).

Figure 1: Maximum Domestic Violence Protection Order Durations in the United States



For a description of the length of the initial protection order and extended orders in each state, see the Appendix.

The examination of states' statutes reveals that protection orders are often curtailed when the parties have children in common.[181] For example, some states limit the duration of protection orders when child custody is ordered. Utah limits provisions regarding child custody and support to five months,[182] while New Mexico limits

181. Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 214, 233 (Eve Buzawa & Carl Buzawa eds., 1996).

182. UTAH CODE ANN. § 78B-7-106 (6)(a).

protection orders with custody to six months,[183] and North Carolina limits orders regarding custody to one year.[184] Washington similarly limits restraints on communication or contact with children to one year.[185] These practices should be viewed alongside social science findings that women with children are more likely to experience violence following the entry of a restraining order or protection order than women without children.[186] The statutory treatment of abused parents is thus contrary to the need to protect survivors with children.

B. Restrictions on Extended Orders

Across the United States, domestic violence protection order statutes typically provide only temporary, short-term relief. Unless a survivor petitions the court for an extension of his or her protection order, serves the respondent, and prevails at the hearing, the order expires and the survivor loses the protections previously provided, including the temporary grant of child custody and any monetary relief. A Washington appellate court acknowledged "the relatively short duration of each protection order (one year)" and how the parties will likely need to return to court each year.[187] Reengaging the batterer and returning to court carries a host of risks,[188] and evidence of the frequent recurrence of abuse following the expiration of yearlong orders[189] suggests that states should increase the duration of protection orders.

When a petitioner seeks to extend or renew a protection order, the petitioner typically carries the burden of proving that extended court protection is necessary for the petitioner's safety. For example, in Missouri, the petitioner must prove that expiration of the full order will place the petitioner in immediate and present danger of abuse.[190]

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183. N.M. STAT. ANN. § 40-13-6(C) (West 2013) (limiting protection orders that award child custody or support to six months and permitting one six-month extension).

184. N.C. GEN. STAT. ANN. § 50B-3(b) (West 2013).

185. WASH. REV. CODE ANN. § 26.50.060(2) (West 2013); *cf.* MONT. CODE ANN. § 40-15-204 (West 2013) (permitting permanent or time-limited orders that restrain a respondent from having contact with his or her children if the child was abused, witnessed abuse, or was endangered by the abusive environment).

186. Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 374 (2002).

187. *In re* Marriage of Fischer, No. 36828-5-II, 2009 WL 2469282, at *5 n.6 (Wash. Ct. App. Aug. 13, 2009).

188. *See supra* Part II (describing the dangers of domestic violence in greater detail).

189. Epstein, *supra* note 47, at 24 n.118.

190. MO. ANN. STAT. § 455.040 (West 2013); Vinson v. Adams, 192 S.W.3d 492, 495 (Mo. Ct. App. 2006); *cf.* FLA. STAT. ANN. §§ 741.30, 784.046 (West 2013) (requiring proof of continuing fear

In the District of Columbia and North Carolina, orders may be extended for "good cause."[191] Minnesota requires petitioners to prove one of the following for an extension or a subsequent protection order against the respondent: reasonable fear of physical harm, the violation of a past or existing protection order, stalking, or imminent release from incarceration.[192] Washington, however, places the burden of proof on the respondent, who is required to prove that he or she will not "resume acts of domestic violence" against the petitioner or the petitioner's children once the order expires.[193] Some states request evidence of a violation of the order before extending it,[194] while others specify that additional acts of abuse need not have occurred during the pendency of the original order.[195]

While extension durations vary across the map, they are typically only available for statutorily limited periods of time, similar to the initial orders.[196] For example, after the initial three-month order in Idaho, upon motion and hearing, a judge can extend the order for one year.[197] A majority of the states that permit yearlong initial orders allow for yearlong extensions,[198] although Delaware only

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of violence by the respondent that is objectively reasonable to extend an existing protection order).

191. D.C. CODE § 16-1005(d) (2013) (permitting judges to also modify or vacate orders for good cause); N.C. GEN. STAT. ANN. § 50B-3(b) (West 2013).

192. MINN. STAT. ANN. § 518B.01(6a) (West 2013).

193. WASH. REV. CODE ANN. § 26.50.060(3) (West 2013).

194. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1045(c) (West 2014) (A six-month extension of the original yearlong order will only be granted "after the Court finds by a preponderance of the evidence that domestic violence has occurred since the entry of the order, a violation of the order has occurred, if the respondent consents to the extension of the order or for good cause shown."); *cf.* Bree Buchanan & Cindy Dyer, *76th Legislative Session Domestic Violence Law Update*, 62 TEX. B.J. 922, 923 (1999) (noting that the state previously required proof of a violation of the original protection order, but amended the law to permit extensions upon proof that the petitioner fears imminent bodily harm or sexual assault).

195. MO. ANN. STAT. § 455.040(1); Barber v. Barber, 150 P.3d 124, 126 (Wash. Ct. App. 2007) (noting that new acts of violence are not required for a trial court to renew a protection order).

196. *See, e.g.*, MO. ANN. STAT. §455.040 (following the initial order which lasts from six months to one year, a judge may reissue the order for another six months to one year).

197. IDAHO CODE ANN. § 39-6306(5) (West 2013).

198. *See, e.g.*, KAN. STAT. ANN. § 60-3107(e)(1) (West 2013) ("Upon motion of the plaintiff, such period may be extended for one additional year."); NEV. REV. STAT. ANN. § 33.080(3) (West 2013) ("An extended order expires within such time, not to exceed 1 year, as the court fixes."); OR. REV. STAT. ANN. § 107.725(1)(a) (West 2013) (requiring a finding that the petitioner would reasonably fear abuse by the respondent if the order were not renewed); TENN. CODE ANN. § 36-3-605(b) (West 2013) (allowing the court to extend an order for a period of not more than one year under certain circumstances); WYO. STAT. ANN. § 35-21-106(b) (West 2013) (the order may be extended for one year upon a showing of good cause); *cf.* N.H. REV. STAT. ANN. § 173-B:5(VI) (West 2013) (stating that the first extension can only be for one year and that additional extensions can be granted for up to five years each).

permits a six-month extension.[199] As an example of how Wyoming anticipates that survivors may need additional years of protection, the statute states, "The order may be extended repetitively upon a showing of good cause for additional periods of time not to exceed one (1) year each."[200] Select states provide extension periods lasting several years.[201]

Some states base the length of the extension on whether or not the respondent has violated the initial order.[202] While the typical extension in Tennessee is for only one year, if the respondent has violated a protection order, an extended order may be granted for five years for the first violation and ten years for a subsequent violation.[203] In West Virginia, judges are allowed to extend the initial ninety-day order for as long as is necessary to protect the petitioner if there has been a violation of the initial order.[204] In Minnesota, after an initial two-year order, a fifty-year order prohibiting abuse and contact may be issued if the respondent has violated the prior order more than two times or if the petitioner has had two or more orders for protection against the respondent.[205] When the statutory framework focuses on violations in determining the duration of protection, judges often refuse to extend or reissue orders in the absence of evidence of a violation of the order. Illogically, some judges surmise that there is no longer a need for the order when the respondent has followed the order, rather than understanding that the fact that the respondent has not violated the time-limited order might mean that the order successfully prevented danger during its duration.

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199. DEL. CODE ANN. tit. 10, § 1045(b) (West 2014).

200. WYO. STAT. ANN. § 35-21-106(b).

201. *See, e.g.*, KY. REV. STAT. ANN. § 403.750(2) (West 2013) (permitting three-year protection orders to be extended for additional three-year periods); N.H. REV. STAT. ANN. § 173-B:5(VI) (following the issuance of a yearlong protection order, a judge may extend the order for one additional year, and then for up to five years); N.C. GEN. STAT. ANN. § 50B-3(b) (West 2013) (following an initial one-year order, a judge may extend the order for up to two years; however, custody orders may only last one year); VA. CODE ANN. § 16.1-279.1(B) (West 2013) (permitting initial and subsequent orders to issue for up to two years); WIS. STAT. ANN. § 813.125(4) (West 2013) (permitting four-year orders and a four-year extension when necessary to protect the petitioner).

202. MD. CODE ANN., FAM. LAW § 4-506(b) (West 2013) (While initial orders in Maryland cannot be in effect for longer than one year, Maryland allows for a two-year extension if the respondent violates an original order that was at least six months long).

203. TENN. CODE ANN. § 36-3-605(d).

204. W. VA. CODE ANN. § 48-27-505(c) (West 2013).

205. MINN. STAT. ANN. § 518B.01(6a)(b) (West 2013).

Seven states permit petitioners to seek permanent orders after a statutorily fixed brief initial order.[206] In Georgia, for example, after the initial one-year order, the judge may extend the order for three years or permanently.[207] The possibility of permanent orders after short orders shows that these states are not opposed to indefinite orders altogether and that the legislature recognizes the need for ongoing protection from violence. This statutory scheme, however, requires petitioners who have already proven domestic abuse to return to court after brief periods to again make the case for why they need protection.

C. Family Law Exceptionalism Perpetuates the Differential Treatment of Domestic Violence

The protection order remedy has evolved in significant ways during the past four decades to cover a broader range of intimate and family relationships and provide more comprehensive forms of relief; however, across states the duration of orders has remained fairly stagnant despite projections for expansion and calls for reform. In 1993, Catherine Klein and Leslye Orloff published an article that provided a comprehensive review of protection order statutes.[208] Regarding the length of protection orders, they reported that over half of states issue protection orders for only one year, small numbers issue them for briefer periods, and a handful offer protection orders for two or three years or without imposing a limit.[209] Although these scholars predicted a statutory trend toward lengthier durations of protection orders,[210] twenty years have passed, and their forecast has not come to fruition. Additionally, between 1991 and 1994, a Model Code on Domestic and Family Violence was developed by the National Council

206. The following states with yearlong initial orders permit petitioners to return to court at the conclusion of the year to seek a permanent order: GA. CODE ANN. § 19-13-4 (West 2013); IDAHO CODE ANN. § 39-6306 (West 2013); IOWA CODE ANN. § 236.5 (West 2013); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 2013).

Select states with varying initial orders also allow for permanent extended orders. *See* CAL. FAM. CODE § 6345 (West 2013) (permitting judges to renew orders for five years or permanently); ME. REV. STAT. ANN. tit. 19-A, § 4007(2) (2013) (following an initial two-year order, a court can enter an order for "such additional time as it determines necessary to protect the plaintiff or minor child from abuse"); R.I. GEN. LAWS ANN. § 8-8.1-3(i) (West 2013) (after an initial three-year order, the court may extend the order "for additional time as it deems necessary to protect the plaintiff from abuse").

207. GA. CODE ANN. § 19-13-4(c).

208. Klein & Orloff, *supra* note 28, at 1085.

209. *Id.*

210. *Id.*

of Juvenile and Family Court Judges.[211] Significantly, this model legislation recommended that civil protection orders should remain in effect "until further order of the court."[212] While scholars hailed the Model Code as the "most influential model law" regarding intimate partner violence,[213] the recommendation for protection orders to be issued without an expiration date never took hold.

The historic treatment of domestic violence and the continuing resistance to legal remedies for family violence help explain why calls for reform have gone unheeded. The ongoing climate of family law exceptionalism[214] has additionally prevented further reform from occurring in a way that preserves existing status regimes and gender hierarchies.[215]

In comparison with other areas of the law, family law has a marginalized, inferior status,[216] with one scholar referring to constitutional law as "King" and family law as "Cinderella's

211. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, at introduction (1994), *available at* http://perma.cc/RZ2A-YYN3. The Council was aided by an advisory committee composed of judges, prosecutors, defense attorneys, civil family law attorneys, domestic violence advocates, medical and health professionals, law enforcement personnel, legislators, and scholars. The model legislation addressed a range of topics, including criminal remedies, civil protection orders, legal presumptions regarding child custody, and the overall prevention and treatment of abuse. *See also* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1862–65 (2002) (noting procedural due process deficiencies in the proposed means for issuing orders).

212. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 306(5).

213. Thomas L. Hafemeister, *If All You Have Is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 944 (2011).

214. Halley & Rittich, *supra* note 105, at 753 (observing that colonial expansion introduced the idea of the "family/market, family-law/contract-law distinction," and that developing legal order followed this distinction, and defining family law exceptionalism as "the myriad ways in which the family and its law are deemed, either descriptively or normatively, to be special").

215. *See* Siegel, *supra* note 4, at 2119 (noting that the legal system plays an important role in perpetuating status differences between husbands and wives).

216. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 828 n.4 (2004) (noting the relatively low status of family law in the legal academy and profession, especially when compared to an extremely high-status field like constitutional law or other fields such as taxation, commercial law, or antitrust, which have more prestige); Martha Minow, *"Forming Underneath Everything that Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819, 819 ("Family law is . . . 'underneath' other areas of the law. Its low status within the profession is well-known."); Emily J. Sack, *The Burial of Family Law*, 61 SMU L. REV. 459, 459 (2008) (examining the increasing restriction of women's rights; ways the legal system excludes family law from consideration, including inter-spousal tort immunity, domestic violence, and the domestic relations exception; and the isolation of family law in the legal academy, and recommending that family law refocus on the rights of individuals in families); Shalleck, *supra* note 106, at 451 (identifying family law exceptionalism and marginalization, and the project of recasting family law).

stepsister."[217] Commercial litigation is routinely characterized as "high-stakes," "complex," and involving powerful financial interests.[218] Intellectual property cases are described in a similar vein.[219] A market/family dichotomy has long existed and is reflected through comparative scholars' separation of the individualist and universal sphere of the market from the altruistic and traditional family sphere.[220] With family law being a highly gender-segregated subject in academia, this leads to greater isolation and the continuation of the marginal treatment of family law by courts and the legal academy.[221] The domestic relations exception to federal diversity jurisdiction is one demonstration of the marginalization of family law issues in federal law and federal jurisdiction.[222] Scholars have argued that family law

217. Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 177 (2000); *see also* Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 833 (1988) (stating that female professors who write about family and juvenile law are considered to be writing on "soft" areas which are unworthy of serious consideration); Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2195 (1993). Professor Resnik recounts the advice that she received as she became a law professor: "Be careful. Don't teach in any areas associated with women's issues. Don't teach family law; don't teach sex discrimination. Teach the real stuff, the hard stuff: contracts, torts, procedure, property," and recalling many other women who shared that they received similar warnings. *Id.*

218. Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 78–81, 84–87 (2010) (discussing the risk to corporations as a result of the government's prosecution of Arthur Andersen LLP); Amy Tindell, *Toward a More Reliable Fact-Finder in Patent Litigation*, 13 MARQ. INTELL. PROP. L. REV. 309, 314 (2009) (advocating that specialized courts handle businesses and corporations competing in "high stakes technology races"); Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1585 (2010):

> For business transactions, including high-stakes securities offerings and mergers and acquisitions, a corporation will routinely engage a law firm, investment bank, and an accounting firm—and often several of each—to plan, negotiate, and execute these transactions. After all, business transactions are complex and raise myriad legal, financial, accounting, and other hurdles for the corporations that undertake them.

Kara Scannell, *Proxy Plan Roils Talks on Finance Rules*, WALL ST. J., Mar. 17, 2010, at A2 (discussing the "high-stakes issue" of proxy access, or the right of shareholders to nominate directors and to have their nominees included in the company's proxy statement).

219. Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1013–14 (2008); David E. Sosnowski, *Resolving Patent Disputes Via Mediation: The Federal Circuit and the IFC Find Success*, MD. B.J. March/April 2012 , at 24, 24.

220. Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 777–78 (2010) (arguing that this dichotomy further marginalizes family law). *See generally* Olsen, *supra* note 106, at 1497 (arguing that "transcending the market/family dichotomy" is a prerequisite to "improving the lives of all individuals").

221. Sack, *supra* note 216, at 481–82.

222. Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493, 500 (1996) (discussing that public norms shape violence against battered immigrant women, and that the "traditional marginalization of family law issues in federal law

litigation is treated as less worthy or important than other federal questions and less deserving of court time and resources in local courts.[223]

Family law, however, has enormous social and political impacts,[224] and individuals are in court on family law matters more frequently than in any other area of the law.[225] Despite the lower status of family law in the profession and legal academy, individuals consistently report that family is the most meaningful aspect of their lives, significantly more so than work, status, or wealth.[226] Personal safety and safety in one's home are surely to be highly valued as well.

Despite progress in the creation of laws against violence, the legal system continues to perpetuate status differences by giving diminished protection to domestic violence survivors, most of whom are female.[227] While an overreliance on gender as the explanation for domestic violence undermines efforts to address same-sex domestic violence, most abuse is committed by men against women, with approximately eighty-five percent of victims being female and ninety percent of perpetrators being male.[228] Despite concentrated efforts to

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and federal jurisdiction hampers responses to domestic violence," reflecting a public determination, "tacit or active, about the relative priority of women's claims").

223. Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 138–39 (2009). Professor Harbach observes that the trend toward a domestic relations exception to federal question jurisdiction "manifests an attitude that federal family law questions and litigants are less important or worthy than other federal questions. This expressive message lowers the status of these issues, reinforcing the inferior status of family law issues vis-à-vis the federal courts, and assuring the continued marginalization of family law." *Id.* at 139.

224. Zvi Triger, *Introducing the Political Family: A New Road Map for Critical Family Law*, 13 THEORETICAL INQUIRIES L. 361, 370 (2012) (noting that family law has been marginalized and cast to the outer periphery of law, despite its social and political importance).

225. CONFERENCE OF STATE ADM'RS, THE STATE JUSTICE INST. AND THE NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1996, at 25, 37 (1997) (reporting that in 1996, family law filings constituted sixty-six percent of the civil court docket, while tort cases, the second most common filing, made up only seventeen percent of the docket).

226. Law, *supra* note 217, at 175 (discussing how family is generally more valued by Americans than wealth, employment, or status); Richard Powers, *Identity; American Dreaming*, N.Y. TIMES MAG., May 7, 2000, at 67 (discussing a random sample of over 1,000 adults who were asked, "Which do you think shows more of who you really are: your role at work, or your role at home?" Seventy-five percent of respondents said their role at home, seventeen percent said their role at work, and eight percent were not employed in paid labor outside of the home).

227. *See* Siegel, *supra* note 4, at 2119.

228. Studies by the Department of Justice and the American Medical Association have shown that eighty percent of abuse is male to female, ten percent is male to male, six percent is female to female, and four percent is female to male. Anne Ganley, *Integrating a Feminist and Socialist Analysis of Aggression: Creating Multiple Models for Intervention With Men Who Batter*, *in* TREATING MEN WHO BATTER: THEORY, PRACTICE, AND PROGRAMS (P.L. Caesar and L.K. Hamberger, eds., 1989); *see also* TJADEN & THOENNES, *supra* note 25, at 5 (indicating that one in four women will experience intimate partner violence during her lifetime).

combat domestic abuse, each year approximately 1.3 million women in the United States are physically assaulted by an intimate partner,[229] and women experience over five million physical assaults and rapes by intimate partners yearly.[230] In the United States, women sustain severe injuries through domestic violence at a rate that is more frequent than the combined number of automobile accidents, muggings, and stranger rapes they experience.[231] As Joan Zorza notes, "Being female is her greatest predictor of being abused."[232] Women also experience greater severity of violence than men, including higher levels of serious physical assault and being choked, drowned, or threatened with a gun.[233] The gendered nature and effects of domestic violence thus give credence to the feminist construction of domestic violence as a gender-specific deployment of power and violence. Public norms and the absence of legal protection shape and perpetuate private violence, and the minimal length of protection afforded to domestic violence survivors, in comparison to business and property interests, adversely affects women.

Remnants of the historic treatment of domestic violence persist, with current statutes offering only limited relief from family violence and many judges continuing to be reluctant to intervene in family matters.[234] There are countless examples of judicial resistance or refusal to enforce domestic violence laws.[235] Even today, judges

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229. U.S. DEP'T OF HEALTH AND HUMAN SERVS. ET AL., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 14 (2003).

230. *Id.* at 2 ("[A]n estimated 5.3 million [intimate partner violence] victimizations occur among U.S. women ages 18 and older each year. This violence results in nearly 2.0 million injuries, more than 550,000 of which require medical attention.").

231. David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1158 (1995); *see also* Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 495, 507–09 (2008) (describing differences between stranger and intimate abuse, and suggesting stronger protection for abuse victims).

232. Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 386 (1994).

233. *See* Lois Schwaeber, *Recognizing Domestic Violence: How to Know It When You See It and How to Provide Appropriate Representation*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 2-1, 2-12 (Mo Therese Hannah & Barry Goldstein eds., 2010); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1211 (1993).

234. *See generally* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 4–5 (2000) (noting that violence against women has historically been characterized as "belonging to the private sphere, removed from the realm of law and politics").

235. *See* Epstein, *supra* note 47, at 42–43 ("Too many judges call [family abuse] cases 'unimportant work' and make it known that they do not want them in their courtrooms."); Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1063–67 (1995) ("The reports of state supreme court task forces on gender bias in the courts are replete with reports of

impose more lenient sentences on defendants convicted of domestic violence crimes than on defendants who commit crimes against strangers.[236] The recent protracted battle to reauthorize the Violence Against Women Act, which eventually passed five hundred days after the bill expired, displays the reality of political opposition to measures to combat domestic violence.[237]

VI. APPLYING EQUITABLE PRINCIPLES FOR PERMANENT INJUNCTIONS TO THE DOMESTIC VIOLENCE CONTEXT

> I need to renew my protection order against [my ex-husband] due to his physical violence inflicted upon me for years. He was physically abusive with me during our marriage and has been since our divorce and I desperately fear bodily harm, if not death, will come to me without this protection order. He has had absolutely no regard of people being present to witness his violence towards me and [I] believe that would resume without this order.[238]

This survivor's plea captures the danger she faces, the fear she carries, the value she puts on a protection order, and the inadequacy of the length of her short-term order.

While domestic violence protection orders are traditionally issued under statutory authority, injunctive relief has its roots in equity. We can thus look to equitable principles to reveal what matters when considering injunctive relief across areas of the law, including in the domestic violence context. Part VI explores how domestic violence cases generally meet the elements for injunctions found in state law and pronounced by the U.S. Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, wherein the Court declared that in equity, permanent injunctions are issued based on a four-factor test that requires the plaintiff to show:

(1) the plaintiff has suffered an irreparable injury;
(2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
(3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and

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judges who trivialize violence against women."); Stoever, *supra* note 142, at 357–58 (citing examples of judges' cavalier attitudes toward women subjected to potentially lethal domestic violence).

236. Epstein, *supra* note 47, at 43.

237. Josh Israel, *The Nine Republican Men Who Won't Consider Any Version of the Violence Against Women Act*, http://perma.cc/AWT9-4JZ3 (thinkprogress.org, archived Mar. 16, 2014); Ashley Parker, *House Renews Violence Against Women Measure*, http://perma.cc/V9NN-7N2U (nytimes.com, archived Mar. 16, 2014) (describing the controversy to reauthorize the Act, and noting that over 1,300 women's rights and human rights organizations had signed a letter in support of the reauthorization).

238. Barber v. Barber, 150 P.3d 124, 125 (Wash. Ct. App. 2007).

(4) the public interest would not be disserved by a permanent injunction.[239]

Analysis of domestic violence injunctions through the lens of equitable principles suggests the need for long-term domestic violence injunctions, which could be achieved by reforming the current statutory scheme.

A. Irreparable Harm

The first factor of the *eBay* test for permanent injunctions requires the petitioner to show that she or he has suffered irreparable harm. In the trademark context, for example, plaintiffs can raise the likelihood of confusion between goods or services to satisfy this factor.[240] Courts post-*eBay* have noted that in copyright litigation, proof of harm to market share or business reputation from copyright infringement "should not be difficult to establish"[241] because once the copyright is violated, the harm is done. Other ways to prove irreparable harm in copyright cases include claiming damage to a company's brand, goodwill, or competitive position, or the ability to infringe on copyrights.[242] Across subject areas, to meet the burden of proving irreparable harm, courts have noted that damage that is difficult to calculate qualifies as irreparable harm,[243] an interpretation which seems to repeat the second prong of the *eBay* test. In deciding whether the petitioner has experienced irreparable harm, courts also consider emotional harms.[244]

Many state standards for issuing permanent injunctions maintain the pre-*eBay* element that requires the plaintiff to show that it would suffer irreparable injury without a permanent injunction.[245] While the *eBay* test requires proof that the plaintiff has suffered irreparable injury, case law reveals multiple examples of irreparable

239. 547 U.S. 388, 391–92 (2006) (specifically applying these principles to the Patent Act and noting that the test likewise applies to injunctions under the Copyright Act).

240. Gen. Nutrition Inv. Co. v. Gen. Vitamin Ctrs., Inc., 817 F. Supp. 2d 66, 73 (E.D.N.Y. 2011) (finding sufficient brand recognition confusion between General Nutrition Center (GNC) and General Vitamin Center (GVC) for GNC to receive a permanent injunction preventing GVC from using its current name).

241. Apple, Inc. v. Psystar Corp., 673 F. Supp. 2d 943, 948 (N.D. Cal. 2009), *aff'd*, 658 F.3d 1150 (9th Cir. 2011).

242. *Id.*

243. Rent–A–Ctr., Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991).

244. Opat v. Ludeking, 666 N.W.2d 597, 604–05 (2003) (finding that substantial emotional injury would result unless an injunction were issued).

245. *Supra* note 75 and accompanying text.

harm being established because of potential harm to a business's financial position or competitive edge and to prevent consumer confusion. For example, courts have issued permanent injunctions to ensure that vitamin companies and liquor products appear sufficiently distinguishable in their respective spheres of competition to eliminate brand confusion.[246] Distinctive branding devices like the use of a red wax seal by Maker's Mark to cap its whisky bottles are now protected through permanent injunctions.[247] Permanent injunctions are widely accepted in these commercial contexts; even more compelling circumstances, though materially different, exist in the domestic violence context. A domestic abuse survivor seeking a long-term protection order would generally be able to prove a past irreparable injury or future threat of harm in satisfaction of this element.

Part II described the escalating nature of domestic abuse, the danger and lethality of domestic violence, and how an abuser's recurrent exertion of power and control over the survivor pervades the survivor's experience.[248] When we examine individuals' lived experiences of domestic violence, various contexts, barriers to escaping violence, and the multiple oppressions abuse survivors face—such as racism, poverty, immigration status, and disability—we can recognize the complexities of family violence. For example, research surrounding domestic violence and pregnancy illustrates the irreparable harm experienced by many pregnant abuse survivors. Numerous studies reveal that violence perpetrated during and after pregnancy has harmful immediate and long-term maternal, fetal, neonatal, and infant outcomes.[249] Pregnant women experience domestic violence at

246. *Gen. Nutrition Inv. Co.*, 817 F. Supp. at 73–74 (finding that the owner of trademark "GNC General Nutrition Center" demonstrated irreparable injury, as required for a permanent injunction to issue against its competitor, prohibiting it from using the "GVC General Vitamin Center" mark); Tiramisu Int'l LLC v. Clever Imports LLC, 741 F. Supp. 2d 1279, 1287–88 (S.D. Fla. 2010) (issuing a permanent injunction to prevent the importer of "Europa Tiramisu" liquor from infringing on the mark of "Tiramisu" liquor after conducting a balancing of hardships and finding "Tiramisu" liquor would suffer irreparable harm based on potential product confusion).

247. Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc., 703 F. Supp. 2d 671, 680, 705 (W.D. Ky. 2010) (finding that a lack of adequate remedy at law necessitated issuing a permanent injunction for distiller in trademark infringement action against competitors who infringed distiller's registered red wax whisky-bottle-seal mark by producing and distributing a tequila bottle capped with a similar seal), *aff'd*, 679 F.3d 410 (6th Cir. 2012).

248. Goodkind et al., *supra* note 23, at 515 ("Once battering begins, it often escalates in frequency and severity over time.").

249. Beth A. Bailey & Ruth Ann Daugherty, *Intimate Partner Violence During Pregnancy: Incidence and Associated Health Behaviors in a Rural Population*, 11 MATERNAL & CHILD. HEALTH J. 495, 496 (2007) (reporting that researchers estimate that in the United States, on a yearly basis, more than 300,000 pregnant women experience domestic violence and that this figure is likely an underestimate because of pregnant women's reluctance to disclose intimate partner violence); Daniel C. Berrios & Deborah Grady, *Domestic Violence Risk Factors and*

rates that are twice as frequent and severe in injury as the rates for nonpregnant abuse survivors, and research shows that abuse escalates as the pregnancy progresses.[250] Abuse during pregnancy is associated with significantly increased risks of low birth weight;[251] preterm birth;[252] fetal trauma, such as miscarriage and spontaneous abortion;[253] maternal uterine and membrane ruptures;[254] and maternal death and concomitant fetal death.[255] Pregnant women experiencing abuse are also at greater risk of homicide than nonpregnant abuse victims.[256] Finally, if domestic violence occurs during pregnancy, there is a strong probability that the abuse will continue after the pregnancy.[257]

Outcomes, 155 W.J. MED. 133, 134–35 (1991) (recommending that medical professionals suspect domestic violence when a pregnant woman has injuries such as bruises or lacerations to the head, extremities, or torso and finding that thirty percent of pregnant domestic violence victims seeking emergency room treatment reported that they had been abused during a prior pregnancy and five percent of the study's participants had miscarried due to abuse); Pajarita Charles & Krista M. Perreira, *Intimate Partner Violence During Pregnancy and 1-Year Post-Partum*, 22 J. FAM. VIOLENCE 609, 609 (2007) (describing physical and psychological effects of experiencing violence during pregnancy); Sandra L. Martin et al., *Changes in Intimate Partner Violence During Pregnancy*, 19 J. FAM. VIOLENCE 201, 202 (2004) (finding that half of the low-income pregnant women who sought prenatal care from a public clinic reported having experienced domestic abuse during the pregnancy); *see also* Julie A. Gazmararian et al., *Violence and Reproductive Health: Current Knowledge and Future Research Directions*, 4 MATERNAL AND CHILD. HEALTH J. 79, 80 (2000) (discussing how domestic violence during pregnancy is more common than other health conditions that doctors routinely screen for, such as preeclampsia and gestational diabetes).

250. Rebecca L. Burch & Gordon G. Gallup Jr., *Pregnancy as a Stimulus for Domestic Violence*, 19 J. FAM. VIOLENCE 243, 243, 245 (2004) (also reporting high rates of sexual jealousy); Sandra Martin et al., *Pregnancy-Associated Violent Deaths*, 8 TRAUMA, VIOLENCE & ABUSE 135, 206 (2007) (reporting that pregnant women experienced increased sexual violence victimization and psychological aggression); *see also* Sandra L. Martin et al., *Stressful Life Events and Physical Abuse Among Pregnant Women in North Carolina*, 5 MATERNAL & CHILD. HEALTH J. 145, 145 (2001) (finding, in a statewide survey of 2,600 postpartum women in North Carolina, that nine percent of women reported that they had experienced domestic violence during the pregnancy).

251. Prakesh S. Shah & Jyotsna Shah, *Maternal Exposure to Domestic Violence and Pregnancy and Birth Outcomes: A Systematic Review and Meta-Analyses*, 19 J. WOMEN'S HEALTH 2017, 2017 (2010).

252. *Id.*

253. Jana L. Jasinski, *Pregnancy and Domestic Violence: A Review of the Literature*, 5 TRAUMA, VIOLENCE & ABUSE 47, 56 (2004).

254. Dina El Kady et al., *Maternal and Neonatal Outcomes of Assaults During Pregnancy*, 105 OBSTETRICS & GYNECOLOGY 357, 359 (2005).

255. *Id.*

256. Linda Chambliss, *Intimate Partner Violence and Its Implication for Pregnancy*, 51 CLINICAL OBSTETRICS & GYNECOLOGY 385, 388 (2008) (identifying increased homicide rates during pregnancy); Martin et al., *supra* note 250, at 135.

257. Jasinski, *supra* note 253, at 53 (citing a study which reported that victims of marital rape continue to experience sexual assault during and after the pregnancy); Rebecca O'Reilly, *Domestic Violence Against Women in Their Childbearing Years: A Review of the Literature*, 25 CONTEMP. NURSE: J. FOR AUSTL. NURSING PROF. 13, 13–15 (2007) (finding that women are

The direct and indirect harms of domestic violence to children are also now well understood. Research shows that intimate partner abuse is more frequent when there are children in the home.[258] Children of batterers are commonly targets of violence, and studies show a correlation between the frequency and severity of a batterer's abuse toward an intimate partner and their children.[259]

Given the complex, prevalent, and dangerous nature of domestic violence and the vast health, economic, and social consequences,[260] many, if not most, abuse cases would satisfy the "irreparable harm" prong. The kind of irreparable harm in domestic violence is different from that in copyright or trademark cases. Such harm, however, is worthy of recognition under this standard; the textured nature of the injunction is related to the harm. Injunctions can thus be used to target a copyright violation, address an employment relationship, or enjoin domestic violence—in each case acting to prevent recurring and irreparable harm.

B. The Inadequacy of Legal Remedies

In equity, courts must consider whether there are other adequate legal remedies before issuing a permanent injunction. The *eBay* test is no different and incorporates this need for establishing that remedies available at law, such as monetary damages, are

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especially vulnerable to domestic violence during pregnancy and during post-natal years, and that intimate partner abuse during pregnancy strongly predicts violence following birth, whether the violence begins during the pregnancy or predates the pregnancy).

258. Burch & Gallup, *supra* note 250, at 245.

259. *Id.*

260. *See* Berrios & Grady, *supra* note 249, at 134–35 (finding, in a study of 218 women who sought emergency room care for domestic violence assaults, that 86 percent had previously been abused by the same partner, approximately 40 percent had previously received medical care for the abuse, and 13 percent had been admitted to a hospital for prior abuse); Sisley et al., *supra* note 27, at 1105–12 (noting the "enormous impact" of domestic violence on individuals' health and well-being, the "complexity of the social and legal issues surrounding it," and how it is "highly prevalent, recurrent, and potentially life-threatening"); *see also* Lauren Bennett Cattaneo et al., *Intimate Partner Violence Victims' Accuracy in Assessing Their Risk of Re-Abuse*, 22 J. FAM. VIOLENCE 429, 434 (2007) (surveying four hundred women who sought protection orders, were residents of domestic violence shelters, or were complaining witnesses in domestic violence prosecutions, and finding that nearly ninety percent had experienced "severe" violence during the past year, such as being "beat up," assaulted with a knife or gun, or raped; that the women had experienced similarly high levels of psychological abuse; and that seventy percent met the criteria for being diagnosed with post-traumatic stress disorder); Hilary G. Harding & Marie Helweg-Larsen, *Perceived Risk for Future Intimate Partner Violence Among Women in a Domestic Violence Shelter*, 24 J. FAM. VIOLENCE 75, 79 (2009) (In a study of women residing in four domestic violence shelters in Pennsylvania, approximately half of the residents had been threatened by their partners with a gun or knife, and nearly twenty percent of the women had had a bone broken by their partner.).

inadequate to compensate for the injury. Even if alternative legal remedies are available, the plaintiff can additionally pursue an injunction to prevent potential future harm as long as there is a threat of continuation of the injury.[261] Furthermore, if permanent injunctive relief is the only adequate remedy, its denial may be an abuse of the trial court's discretion.[262]

In analyzing this prong in the domestic violence context, this Section rejects the notion that monetary damages can prevent future violence. It also examines evidence that protection orders are currently the most effective remedy for preventing violence and that the duration of orders is associated with their efficacy. This evidence discounts the adequacy of other remedies and shows the need for the availability of indefinite protection orders. Furthermore, this Section explores the ways in which alternate civil and criminal remedies are frequently insufficient.

1. The Inadequacy of Monetary Damages

When courts evaluate the second prong and inquire whether there is an adequate remedy at law, they typically focus on whether damages are difficult to quantify in monetary terms, as is the case with damage to a business's reputation, goodwill, or brand.[263] If damages are difficult to quantify, pecuniary damages are considered inadequate, and a permanent injunction is the appropriate remedy.[264] The monetary value of preventing physical harm to a person is more difficult to quantify than business losses, thus suggesting the appropriateness of indefinite injunctions against abuse.

Domestic violence is the most common tort committed.[265] However, accessing tort remedies may be prohibitive due to the expense of maintaining such an action, the lengthiness of related proceedings, and the judgment-proof nature of many defendants.

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261. Penn Oil Co. v. Vacuum Oil Co., 48 F.2d 1008, 1011 (D.C. Cir. 1931) (enjoining fraudulent substitution in gasoline sales); Opat v. Ludeking, 666 N.W.2d 597, 604–05 (Iowa 2003) (finding that the "mere existence of criminal penalties does not preclude a party from obtaining injunctive relief," that substantial emotional injury would result unless an injunction was issued, and that no adequate legal remedy is available, and issuing a permanent injunction to prevent stalking and harassment).

262. U.S. Jaycees v. Phila. Jaycees, 639 F.2d 134, 142 (3d Cir. 1981) (finding that the trial court abused its discretion in allowing the Philadelphia Jaycees to continue to use the name "Jaycees," since there was great likelihood of confusion with the United States Jaycees, and that only a likelihood of confusion was required, rather than actual confusion).

263. Apple Inc. v. Psystar Corp., 673 F. Supp. 2d 943, 949–50 (N.D. Cal. 2009), *aff'd*, 658 F.3d 1150 (9th Cir. 2011).

264. *Id.*

265. Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 122 (2001).

Monetary damages neither prevent future violence nor relieve a survivor of the fear and emotional terror he or she may experience as a result of an abuser's behavior.

Injunctions are also considered appropriate where one can anticipate that the defendant's future misconduct would require repeated lawsuits.[266] Part II described the recurrent and dangerous nature of domestic violence and presented studies showing that past abuse is the best predictor of future domestic violence. Petitioning for a protection order can fuel retaliatory violence,[267] and the "separation assault" danger often continues after legal interventions.[268] Studies have shown that the severity of abuse prior to the issuance of a protection order frequently correlates with the future abuse that the respondent perpetrates against the petitioner,[269] making safety planning and extended court protection crucial.

2. The Efficacy of Protection Orders

Beyond consideration of the difficulty of putting a price on past violence and future safety, evidence of the efficacy of domestic violence protection orders reveals the unique value of these injunctions. Multiple studies have shown that protection orders are effective both at eliminating or substantially decreasing violence[270] and at helping

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266. *Opat*, 666 N.W.2d at 604.

267. Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 567 n.178 (2003) (providing examples of a Chicago woman who was fatally shot by her ex-boyfriend the day before the civil protection order hearing and of a woman whose husband shot her to death when she obtained a temporary protection order against him).

268. Hart, *supra* note 145, at 33.

269. Harrell & Smith, *supra* note 181, at 218, 231 (discussing abuse following the issuance of a protection order in a 1991 study. While eighty-six percent of abused women reported that the temporary protection order was "very helpful" or "somewhat helpful," less than half of the women thought the abusive partner knew he had to obey the order. The study found that the severity of abuse prior to the issuance of the order is predictive of the severity of abuse that occurs after the court issues a protection order.).

270. *See* Matthew Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 205, 214–15 (1999) (concluding that violence survivors experience a "significant decline in the probability of abuse" following the entry of a protection order); Holt et al., *supra* note 8, at 590–92 (2002) (conducting a population-based study and reviewing police records to examine the effectiveness of protection orders, and finding that having a permanent protection order was associated with a significantly decreased risk of new episodes of violence); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. PUB. HEALTH 613, 613–18 (2004) (finding significant reductions in physical assaults, stalking, threats to do bodily harm, and worksite harassment among women who sought and qualified for protection orders); Judith McFarlane et al., *Intimate Partner Violence Against Immigrant Women: Measuring the Effectiveness of Protection Orders*, 16 AM. J. FAM. L. 244, 248 (2002) (finding that immigrant women who sought protection orders experienced a significant decrease in violence and stalking

survivors feel safer and more empowered.[271] Social scientists have concluded that protection orders "appear to be one of the few widely available interventions for victims of [intimate partner violence] that has demonstrated effectiveness."[272] Furthermore, lengthier orders have been found to produce greater safety outcomes.[273] While protection orders considerably reduce violence, studies also reveal that abusive partners frequently violate the orders, which demonstrates the ongoing danger that survivors face and the need for extended court protection.

Regarding the efficacy of protection orders, a study of nearly 2,700 women who had reported domestic violence to the police found that those who obtained civil protection orders experienced an eighty percent decrease in subsequent police-reported physical violence.[274] Overall, these women experienced a significantly decreased likelihood of physical and non-physical intimate partner violence, including decreased risk of contact by the abusive partner, weapon threats, injuries, and abuse-related medical treatment.[275] An interview-based study found a seventy percent decrease in physical abuse among women who maintained their protection orders.[276] Similarly, in another study, eighty-six percent of the women who received a protection order stated that the abuse either stopped or was greatly reduced.[277] As one example of the life-changing effect of obtaining a

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throughout the duration of the study, comparable to reduced violence experienced by women born in the United States who receive protection orders, and concluding, "Clearly, contact with the justice system and application for a protection order is a powerful deterrent to further abuse and can be deemed highly effective in terms of subsequent intimate partner violence against immigrant women."); *cf.* Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 510–14 (recognizing that abuse survivors use multiple legal and non-legal strategies to prevent violence; that obtaining only an emergency temporary protection order achieves some women's goals; and that significant institutional barriers and the lack of representation make it difficult for many litigants to complete the protection order process).

271. Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 423–25 (1995); *see also* TK Logan et al., *Factors Associated with Separation and Ongoing Violence Among Women with Civil Protective Orders*, 23 J. FAM. VIOLENCE 377, 382 (2008) (in a study of seven hundred women who received protection orders, seventy-eight percent reported that they felt safe as a result of the order and the orders were effective).

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

273. *Id.* at 18–19.

274. Holt et al., *supra* note 8, at 589, 591–92.

275. *Id.*

276. Holt et al., *supra* note 272, at 20.

277. PTACEK, *supra* note 10, at 164; *see also* Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 AM J. FAM. L. 59, 60 (2001) (discussing Ptacek's research on the effectiveness of protection orders).

protection order, one abuse survivor stated, "[My batterer] has left me alone and I've been safe for the first time in years."[278]

Of particular importance to the argument in favor of long-term protection orders, social scientists have found that lengthier orders produce more substantial safety outcomes.[279] Multiple studies have now found a correlation between the duration of the protection order and the survivor's safety, which researchers have described as a "dose-response relationship according to the duration of the [civil protection order]."[280] Maintaining the court's protection over time, therefore, is key to significantly decreasing future violence and sustaining an end to all forms of abuse.

In conjunction with their length, additional factors can contribute to the effectiveness of protection orders. For example, orders that contain more comprehensive and specified relief are more likely to provide protection to survivors.[281] Research has shown that survivors who are not awarded relief they have sought are more likely to be re-abused,[282] a conclusion that supports the importance of listening to a survivor's identification of what will make him or her safe. Differences in communities' implementation and enforcement of orders and in the availability of confidential shelters and other safety resources in a geographic region can also affect the efficacy of orders.[283]

Another measure of effectiveness is abuse survivors' perceptions of the value of orders, and studies show that they perceive protection orders to be effective and crucial to their safety.[284] In a study of women who had recently obtained temporary protection orders, ninety-eight percent felt more in control of their lives, ninety-one percent felt that obtaining the order was a good decision, and eighty-nine percent felt more in control of their relationship as a

278. Epstein, *supra* note 9, at 96.

279. Carlson et al., *supra* note 270, at 214 (showing a sixty-six percent overall decline in women reporting violence before and after protection orders during a two-year follow-up period, with a sixty-eight percent decline in those with permanent orders, compared to a fifty-two percent reduction in violence for those with temporary orders); Holt et al., *supra* note 272, at 20 (finding significant decreases in risk among women who kept their protection orders in effect over time).

280. Holt et al., *supra* note 272, at 21.

281. TK Logan et al., *Protective Orders in Rural and Urban Areas*, 11 VIOLENCE AGAINST WOMEN 876, 906 (2005).

282. Harrell & Smith, *supra* note 181, at 233, 237–40.

283. Logan et al., *supra* note 281, at 899.

284. Logan & Walker, *supra* note 8, at 677–78, 682–83 (reporting on a study of seven hundred women with protection orders and finding that fifty-one percent believed the orders were "extremely effective," twenty-seven percent found their orders to be "fairly effective," while fourteen percent did not find the orders effective and seven percent were unsure).

result of the court order.[285] A majority of women report feeling safer after obtaining protection orders; in a recent study of seven hundred women with protection orders, forty-three percent felt "extremely safe," thirty-four percent felt "fairly safe," while ten percent did not feel safe, and twelve percent were unsure about how they felt.[286] Abuse survivors also report that the orders help document that the abuse occurred and convey to the abusive partner that physical violence is wrong.[287]

Although protection order holders generally experience an overall decrease in violence, multiple studies have still found high rates of protection order violations by abusive partners.[288] A review of thirty-two studies concluded that approximately forty percent of protection orders are violated.[289] Violations are particularly likely when the respondent stalks the petitioner prior to or following the issuance of the protection order, or when the parties remain in a relationship.[290] Other factors that predict especially high rates of domestic violence recidivism include the abuser's use of a weapon, the number of criminal charges filed against the perpetrator, the presence of an arrest record for domestic violence and nondomestic violence crimes, and the history of protection order violations.[291] The overall

285. Fischer & Rose, *supra* note 271, at 417.

286. Logan & Walker, *supra* note 8, at 683 (finding that women who experienced very severe violence or stalking felt less safe than protection order recipients who had not had such experiences).

287. ADELE HARRELL ET AL., COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS 34 (1993); *see also* Murphy, *supra* note 270, at 513 (listing reasons given by women for dropping requests for permanent orders after obtaining temporary ex parte orders, such as feeling that the order sent the abuser a "message" and that he knows that "if he does it again he'll be locked up").

288. TJADEN & THOENNES, *supra* note 25, at 52. The National Violence Against Women survey found 69.7% of those stalked, 67.6% of those sexually assaulted, and 50.6% of those physically assaulted by a partner reported a violation of the order. *Id.*; *see also* Carlson et al., *supra* note 270, at 205 (surveying police reports and finding that twenty-three percent of women who filed for a protection order reported experiencing physical violence after the court filing); Logan & Walker, *supra* note 8, at 682–83 (studying seven hundred women with protection orders using self-reports of specific violent behaviors, arrest records for protection order violations, and perceptions of violations, and finding that three-fifths of women experienced a violation of the order and there was no difference in violation rates between urban and rural jurisdictions).

289. Brian Spitzberg, *The Tactical Topography of Stalking Victimization and Management*, 3 TRAUMA, VIOLENCE & ABUSE 261, 261, 275 (2002) (examining thirty-two existing studies to estimate an average of violations reported across the studies).

290. Logan & Walker, *supra* note 8, at 685 (finding that women who were stalked following the entry of the protection order were four times more likely to be physically abused by the respondent, 4.8 times more likely to experience severe physical harm, and 9.3 times more likely to be sexually assaulted, as compared with protection order recipients who were not stalked).

291. Rodney Kingsnorth, *Intimate Partner Violence: Predictors of Recidivism in a Sample of Arrestees*, 12 VIOLENCE AGAINST WOMEN 917, 930 (2006).

decrease in violence positively demonstrates the value and potential of protection orders, while the reabuse rates show the need for continued court protection through long-term or indefinite orders.

The protection order remedy is the legal remedy that most abuse survivors choose to utilize, but it is not the right path for every individual. Formal state intervention, either criminal or civil, can bring unexpected, complicated consequences.[292] In some jurisdictions, the report of children being abused or witnessing abuse will trigger a Child Protective Services investigation and prompt a "failure to protect" case to be filed against the abuse survivor.[293] A survivor may also weigh the potential for facing discrimination in housing; employment;[294] and health, life, and homeowner's insurance[295] even when such discrimination is illegal—along with the loss of welfare benefits[296] and potential immigration consequences.[297] The psychological impact of the court process is an additional material factor for many survivors.[298] Protection orders are not a panacea for every abuse survivor, but where a survivor desires long-term court-ordered protection through a civil protection order, such a remedy should be available.

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292. Tarr, *supra* note 131, at 158 ("By obtaining an Order of Protection, a woman may be substituting an intimate batterer with the all-powerful state machine.").

293. *See generally* Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 94–95 (2001).

294. Tarr, *supra* note 131, at 181 (noting that employers' concerns about their liability make abuse survivors unappealing candidates for employment).

295. *See* Michelle J. Mandel, *Ensuring that Victims of Domestic Abuse Are Not Discriminated Against in the Insurance Industry*, 29 MCGEORGE L. REV. 677, 678 (1998) (reporting that insurance companies categorize battered women as a high-risk group and state that it is unfair to have others pay for the cost of their injuries); Sheri A. Mullikin, *A Cost Analysis Approach to Determining the Reasonableness of Using Domestic Violence as an Insurance Classification*, 25 J. LEGIS. 195, 197–98 (1999) (considering insurance generally); Michael J. Sudekum, *Homeowner's Policies and Missouri Law Make Recovery for the Domestic Violence Victim/Co-Insured an Olympic Challenge*, 69 UMKC L. REV. 363, 363 (2000) (regarding homeowner's insurance); Ellen J. Morrison, Note, *Insurance Discrimination Against Battered Women: Proposed Legislative Protections*, 72 IND. L.J. 259, 260, 272 (1996) (reporting that insurance companies use court documents as underwriting criteria to deny applications, regard domestic abuse as a "preexisting condition," and charge battered women higher rates because of their proclivity toward dangerous behavior). Health care reform should address this problem in the health care industry.

296. Tarr, *supra* note 131, at 159–60 (recommending that lawyers and advocates counsel abuse victims about the potential negative consequences of protection orders).

297. *See* Cecelia M. Espenoza, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 205–09 (1999) (discussing unique issues posed by domestic violence in immigrant communities).

298. *See* Stoever, *supra* note 57, at 1189–90 ("With the public nature of domestic violence proceedings, clients are concerned about the consequences of revealing personal information in open court.").

3. Criminal Alternatives Prove Insufficient

In general, even if the complainant can maintain an action at law for monetary damages for a past injury or if there are alternative criminal penalties, he or she can additionally pursue an injunction to prevent potential future harm as long as there is a threat of continuation of the wrong.[299]

Most acts of domestic violence are criminalized,[300] making companion criminal misdemeanor or felony cases possible based on the same underlying facts of violence. However, many survivors do not desire criminal justice involvement for themselves or their partners for numerous reasons, including the collateral consequences of criminal convictions, the historically negative impact of the criminal justice system on communities of color, and the sense that the abuser's arrest will not improve the survivor's safety.[301] Safety concerns surrounding arrest or prosecution are especially warranted because criminal remedies, such as jail sentences and probationary periods, are typically very brief.[302] Criminal law, therefore, does not necessarily create safety, and some of the inadequacies of the criminal remedy are not in the law itself but in its enforcement.

Criminal restraining orders also fail to encompass the range of relief available through civil protection orders. In contrast to the civil protection order process, the complaining witness in the criminal case is rarely involved in negotiating terms of this order and may not even be aware of its existence. The criminal restraining order is typically a boilerplate form imposed when the defendant is arraigned, sentenced, or released. It may not contain the relief necessary for the survivor and survivor's children's protection. The order commonly requires the defendant to stay away from and not contact the complaining witness, but the criminal order typically does not include victim-specific provisions such as counseling, property possession, custody, child support, and specific locations to avoid that are tailored to the victim's school, work, social, and religious activities and those of the children. Therefore, the criminal restraining order fails to sufficiently meet the

299. Penn Oil Co. v. Vacuum Oil Co., 48 F.2d 1008, 9 U.S.P.Q. (BNA) 137 (D.C. Cir. 1931) (enjoining the fraudulent substitution in gasoline sales); Opat v. Ludeking, 666 N.W.2d 597, 604–05 (Iowa 2003) (finding that the "mere existence of criminal penalties does not preclude a party from obtaining injunctive relief," substantial emotional injury would result unless an injunction was issued, and that no adequate legal remedy is available, and issuing a permanent injunction to prevent stalking and harassment).

300. *See, e.g.*, CAL. PENAL CODE § 240 (West 2013).

301. Stoever, *supra* note 142, at 316–17.

302. *Id.* at 316 (discussing the commonality of one- to three-day jail sentences for defendants convicted of domestic violence assaults).

survivor's individualized safety needs. The criminal order also may not be for a sufficient duration, and frequently is effective for a shorter period of time than yearlong civil protection orders.[303] In contrast, the civil protection order is initiated by the petitioner and offers survivor-centered relief. In addition, some jurisdictions permit the enforcement of civil protection orders through private civil or criminal contempt actions as an alternative to relying on the prosecutor's office to bring criminal charges,[304] although the District of Columbia has found private enforcement mechanisms to be unconstitutional.[305]

As previously discussed, some states permit permanent protection orders as part of a divorce or final child custody decree.[306] However, while someone who has experienced violence may desire a protection order, he or she may not wish to file for divorce or custody for manifold reasons, including religious beliefs; social and familial pressures; economic barriers; and personal reasons, such as hope for an end to the violence.[307] The abuse survivor may also fear escalated danger upon seeking this "final" remedy and ultimate dissolution of the relationship, and will weigh the prospect of further abuse occurring through litigation.[308] If an abusive parent is not currently present in the child's life, the abuse survivor may desire a continuation of the status quo rather than initiating a custody case

303. For example, in the District of Columbia, it is common for the criminal order to be in effect for nine months while the civil protection order is regularly in effect for one year.

304. *E.g.*, 23 PA. CONS. STAT. ANN. § 6114 (West 2013); OHIO REV. CODE ANN. § 3113.31 (West 2013); *see also* Margaret Martin Berry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 351 (1995) (explaining the procedural challenges of private prosecutions of protection order violations, particularly for unrepresented individuals); Zlotnick, *supra* note 231, at 1154 ("[T]he criminal contempt route empowers the battered woman and assists her in escaping from a violent relationship.").

305. *In re* Taylor, 73 A.3d 85, 101 (D.C. 2013) (finding the private prosecution of protection orders unconstitutional and stating:

> A criminal prosecution conducted by a self-interested, pro se individual, rather than by a prosecutor, is simply a different, lesser proceeding. Such a proceeding not only fails to comport with due process guarantees owed to a defendant, but also does not fulfill our societal expectations for the prosecution of crime.

306. *See supra* note 101 and accompanying text.

307. *See* Heather R. Parker, *Access Denied: The Disconnect Between Statutory and Actual Access to Child Support for Civil Protection Order Petitioners*, 76 U. CIN. L. REV. 271, 293 n.134 (2007) (discussing reasons that divorce may not be an option for certain survivors of domestic violence).

308. *See generally* Elayne E. Greenberg, *Beyond the Polemics: Realistic Options to Help Divorcing Families Manage Domestic Violence*, 24 ST. JOHN'S J. LEGAL COMMENT. 603, 604 (2010) (explaining that divorce provides abundant opportunities for continued abuse); Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053 (2011) (examining the means by which batterers continue their abuse through the legal process).

through which the abusive party could gain further access to the child and petitioner.

Legislatures creating protection orders envisioned that these injunctions would coexist with or be chosen instead of criminal sanctions or other civil options. For example, the legislative history regarding protection orders in the District of Columbia states that "criminal sanctions should not be the only avenue for correcting such abuses, because problems of proof and threats to the long-term stability of the family or home may arise in the seeking of criminal sanctions."[309] Washington State's Domestic Violence Prevention Act likewise mandates that orders of protection be available even when similar relief is available in other courts or has already been entered in a family law or criminal proceeding.[310]

In sum, while alternative remedies to civil injunctions for domestic violence may exist, these companion cases and corresponding orders may not adequately prevent future harm, are not duplicative, and can coexist with an indefinite domestic violence protection order. Additionally, injunctions remain necessary because many abuse survivors wish to reorder their relationships so that they are safe, but they do not wish to bring in criminal law to do so.

Separation assault and recurrent violence often takes place over time as the batterer seeks to regain power over the survivor or punish the survivor for leaving,[311] and our laws should respond to the reality that domestic violence is dangerous when the survivor is in the relationship, leaving, or remaining apart. Brief protection orders lasting only three months to one year often will not provide sufficient protection from harm. As the law evolves to provide further protections, attorneys, judges, and advocates must avoid putting survivors in greater danger. Courts also fail to adequately protect survivors when they assess the need for continued protection only by examining whether a protection order violation occurred during the brief span of the average order.

C. Balancing the Hardships

When considering whether to issue a permanent injunction, federal and state courts compare the extent to which the petitioner benefits from the injunction with the burden on the defendant. Courts

309. D.C. COUNCIL, COMM. ON THE JUDICIARY, REPORT OF MAY 12, 1982 ON THE AMENDMENTS TO THE DC INTRAFAMILY OFFENSES ACT BILL 4-195 11 (1982).

310. WASH. REV. CODE ANN. § 26.50.025(2) (West 2013).

311. Mahoney, *supra* note 32, at 64–66.

are accustomed to balancing rights and burdens, deciding which party should bear the burden and why, and tailoring the injunctive relief.[312]

Prior sections of this Article described the dynamics of domestic violence, including the recurrent and escalating nature of abuse; the safety benefits petitioners generally receive from protection orders; and the necessity of petitioners frequently returning to court to maintain judicial protection due to the protection order's brevity—a return that poses substantial danger and hardship to violence survivors. In balancing the benefits of long-term protection orders against the potential burden on respondents, the following subsections address potential procedural and substantive due process concerns respondents may raise and the ability to modify or vacate orders in light of changed circumstances.

1. Procedural Due Process

Protection order respondents may claim that protection orders unduly infringe upon their liberty and property interests in violation of due process, thereby creating significant hardship.[313] However, protection order statutes provide for procedural safeguards that satisfy the due process clause and the *Mathews v. Eldridge* balancing test, which requires consideration of (1) the private interest involved, (2) the risk that the current procedures will erroneously deprive a party of that interest, and (3) the governmental interest involved, to determine what process is due.[314]

Before the government can deprive an individual of liberty or property interests, due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner."[315] Protection order statutes fulfill the fundamental requirements of due process of

312. For example, in cases regarding protests at medical clinics that perform abortions, the U.S. Supreme Court has considered the extent to which protesters can be enjoined from approaching the clinics and the women and doctors entering these facilities, balancing First Amendment rights with access to medical facilities, doctors, and procedures. *Cf.* Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (rejecting a "bubble" rule that requires a protester to remain a defined distance away from a person entering or leaving the facility); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (considering a First Amendment challenge and upholding an injunction that restricts protesters from coming within thirty-six feet of the health center).

313. *See* David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 93–102 (2008).

314. 424 U.S. 319, 332, 334–35 (1976).

315. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); *see also* Zemel v. Rusk, 381 U.S. 1, 14 (1965) ("[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.").

providing notice and a meaningful opportunity for the respondent to be heard by a neutral decisionmaker.[316] To receive a temporary or long-term protection order, the petitioner must first file an affidavit sworn under oath detailing the allegations of domestic violence and threat of future harm.[317] As with other areas of the law, a judge may enter a temporary protection order on an ex parte basis if a petitioner faces "imminent harm" or an "immediate and present danger of domestic violence."[318] The emergency order is in effect pending a full hearing, which, depending on the jurisdiction, is scheduled to occur in five days to three weeks.[319] Regarding emergency orders that are issued ex parte, courts have held that the state has a legitimate and important interest in immediately and effectively protecting abuse survivors from additional violence, which outweighs individual liberty concerns so long as the deprivation is temporary and a hearing is promptly and properly held.[320]

Longer-term orders require that the respondent receive notice of the allegations and requested relief by personal service.[321] States also require the opportunity for an adversarial, evidentiary hearing that includes the right of confrontation and cross-examination, along with a judicial finding of abuse before a civil protection order can be entered against a respondent.[322] Additional procedural safeguards

316. State v. Karas, 32 P.3d 1016, 1020–21 (Wash. Ct. App. 2001); Spence v. Kaminski, 12 P.3d 1030, 1035–36 (Wash. Ct. App. 2000).

317. *See, e.g.*, TEX. FAM. CODE ANN. § 82.009 (West 2012).

318. In general, for an ex parte temporary restraining order to be issued, the petitioner must show that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." FED. R. CIV. P. 65(b)(1); *see also, e.g.*, FLA. STAT. ANN. § 741.30(5) (West 2012) (requiring the court to find an "immediate and present danger" before awarding an ex parte temporary protection order, and permitting the court to prohibit the respondent from committing acts of domestic violence, to award the petitioner temporary use and possession of a shared dwelling, and to issue a temporary parenting plan); TEX. FAM. CODE ANN. §82.0085(a)(2) (requiring that a petition for a temporary protection order contain "a description of the threatened harm that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault").

319. *See, e.g.*, D.C. CODE § 16-1004(b) (2012) (permitting the entry of a fourteen-day temporary protection order if the petitioner's safety is "immediately endangered" by the respondent); TEX. FAM. CODE ANN. §§ 84.001, 84.002 (requiring a hearing within fourteen days and only permitting ex parte orders to last twenty days).

320. State v. Poole, 745 S.E.2d 26, 34–38 (N.C. Ct. App. 2013) (holding that an emergency protective order did not violate defendant's procedural due process rights); Rogers v. State, 183 S.W.3d 853, 867 (Tex. App. 2005) ("The temporary and emergency nature of emergency protective orders allows them to pass constitutional muster.").

321. *See, e.g.*, D.C. CODE § 16-1004 (requiring personal service).

322. *See, e.g.*, IND. CODE ANN. § 34-26-5-9(c) (West 2012) (permitting an order of protection lasting up to two years to be entered after the respondent has received notice and an opportunity for a hearing); Furry v. Rickles, 68 So. 3d 389, 390 (Fla. Dist. Ct. App. 2011). *Furry* held that the trial court violated due process when it issued a domestic violence protection order without

include the requirements that the order be issued by a judicial officer, that the respondent have actual notice of the order or be personally served with it to be bound by the order, and that the respondent have the right to appeal the decision.[323] Furthermore, under the Violence Against Women Act, due process requirements must be met for a state to be required to enforce a protection order issued by another state.[324]

Protection orders are a central legal process through which the state intervenes to protect individuals from harm.[325] Legislative history reveals that protection order laws have the multiple purposes of protecting the safety of the petitioner and his or her children, and carrying out the government's and public's interest in preventing domestic abuse.[326] When legislation that is intended to promote public health, safety, and welfare bears a reasonable and substantial relationship to that purpose, "every presumption must be indulged in favor of constitutionality."[327] While justice principles can be applied to

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conducting a full evidentiary hearing, and noting that time constraints are not a valid excuse for failing to conduct a full hearing. *Id.* The court conducted all questioning of the parties and most questioning of the other witnesses, denied the litigant's request to present the relevant noncumulative testimony of a pertinent witness, and did not allow him to object to or cross-examine the opposing party's expert witness. *Id.*; *see also* Raney v. Raney, 86 S.W.3d 484, 486–88 (Mo. Ct. App. 2002) (finding that where the trial court failed to swear in witnesses; asked all of the questions; and prohibited the respondent's attorney from calling witnesses, presenting documents, or cross-examining the petitioner's witnesses, the process did not constitute an adversarial hearing); Doza v. Kitcher, 987 S.W.2d 826, 826–27 (Mo. Ct. App. 1999) (holding that the trial court erred when it entered an extended protection order without holding a hearing, and permitting the respondent to offer evidence in opposition); Castano v. Ishol 824 N.W.2d 116, 119–20 (S.D. 2012) (holding that the trial court improperly limited the former husband's cross-examination and failed to make adequate factual findings before issuing a domestic violence protection order).

323. State v. Karas, 32 P.3d 1016, 1020–21 (Wash. Ct. App. 2001); *see also* MacDonald v. State, 997 P.2d 1187, 1189–90 (Alaska Ct. App. 2000) (finding that, although there were questions regarding whether personal service was properly achieved, the litigant had actual notice of the protection order and could therefore be bound by it).

324. *See* 18 U.S.C. § 2265(b)(2) (2012). For full faith and credit to be given to a protection order, "reasonable notice and opportunity to be heard" must be given to the respondent "sufficient to protect that person's right to due process." *Id.* "In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." *Id.*

325. Logan & Walker, *supra* note 8, at 676.

326. State v. Dejarlais, 969 P.2d 90, 92 (1998) (en banc):

> Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more.

(quoting LAWS OF 1992, ch. 111, § 1).

327. State v. Lee, 957 P.2d 741, 752 (Wash. 1998) (en banc).

protect state intrusion into families, they may also be applied to protect individuals from harm, as is the case with domestic violence protection orders.[328]

In general, injunction decrees are to be as clear and precise as possible to inform the defendant of the acts he or she is restrained from doing, but "obviously the injunction must be in broad enough terms to prevent repetition of the evil sought to be stopped."[329] When examining injunctive relief in equity, courts sometimes provide broad injunctive relief beyond what is strictly necessary in order to ensure the respondent's compliance so that the plaintiff receives the amount of injunctive relief to which he or she is entitled.[330] The breadth of the injunctive relief will depend on the nature of the enjoined party's harmful acts.[331] Furthermore, in weighing whether an injunctive order should be entered, the defendant's "voluntary cessation" of the harm is not grounds for denying a permanent injunction.[332] The mere passage of time and consistent compliance with an injunction also does not invalidate a permanent injunction.[333]

2. Substantive Due Process

The respondent in a protection order action may also raise substantive due process concerns.[334] Potential private interests of the

328. Logan & Walker, *supra* note 8, at 676.

329. Wesware, Inc. v. State, 488 S.W.2d 844, 849 (Tex. Civ. App. 1972) (examining the breadth of injunctive orders and degree of specificity required, and commenting that orders should provide notice, but "should not be greatly concerned with rights of the defendants that are asserted largely in the abstract"); *see also* People *ex rel.* Hanrahan v. La Salle Nat'l Bank, 348 N.E.2d 220, 222–23 (Ill. App. Ct. 1976) (examining a permanent injunction that enjoined a "massage" parlor from allowing employees to engage in sexual activity with patrons, and construing the order more broadly to uphold a contempt conviction for activities that occurred after the establishment was renamed to be a "manicure" parlor).

330. People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 533 (7th Cir. 1997) ("The discretionary power of a district court to formulate an equitable remedy for an adjudicated violation of law is broad. Where necessary for the elimination of the violation, the decree can properly fence the defendant in by forbidding conduct not unlawful in itself.").

331. JAMES FISCHER, UNDERSTANDING REMEDIES 297–99 (2d ed. 2006) (differentiating between types of permanent injunctions and describing "prophylactic" injunctions).

332. Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 800–01 (4th Cir. 2001) (finding that the district court improperly denied a permanent injunction in a copyright and trademark case because the denial was based on the defendant's supposed "voluntary cessation" of infringement).

333. *See* Bldg. & Constr. Trades Council v. NLRB, 64 F.3d 880, 889 (3d Cir.1995) (unwilling to hold that mere passage of time and temporary compliance are sufficient to warrant lifting an injunction, and maintaining the permanent injunction despite the contention that the Council fully complied with the decrees for the last six years and is suffering vexatious harassment and undue hardship due to the continuing existence of the decrees).

334. Taylor, *supra* note 313, at 93.

respondent include freedom of movement, the interest in one's children, property rights that may be violated through the exclusion from a dwelling, and other property interests.[335] The state, however, generally has sufficient interests to intervene in these areas, as described herein.

In some permanent injunction cases, courts find that the defendant simply does not have a legitimate interest in the behavior or does not suffer a legitimate hardship.[336] This would naturally be the case when restraining someone from committing inherently unlawful acts of assaults, threats, stalking, or harassment. Furthermore, someone who engages in deliberate misconduct is "barred from raising disproportionality as a reason for refusing equitable relief."[337]

Regarding liberty interests, protection orders may restrict a respondent from coming within a certain number of feet of the petitioner or from going to certain locations, such as the petitioner's home or workplace. Courts have consistently held that restrictions on such movement are permissible and do not violate due process when someone has been deemed to present a danger to others.[338] Regarding injunctive relief, courts are permitted to issue broad injunctions to make violation more difficult. For example, if a respondent has a history of abusing and stalking someone, the respondent could be banned from living within a certain distance of the petitioner to decrease the risk of future contact.[339] Such restrictions are only

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335. *Id.* at 84.

336. *See, e.g.*, Mary Kay Inc. v. Ayres, 827 F.Supp.2d 584, 595–97 (D.S.C. 2011) (imposing a permanent injunction against the cosmetic company's former independent beauty consultant, prohibiting the former consultant from continuing to advertise or sell the company's products, and finding that her activities adversely impacted the company's interests in providing customers with high quality products and that the public's interest in protecting intellectual property rights was greater than permitting the former consultant to infringe on the trademark); Apple Inc. v. Psystar Corp., 673 F. Supp. 2d 943, 950 (N.D. Cal. 2009) ("Since Psystar does not (and cannot) claim any legitimate hardships as a result of being enjoined from committing unlawful activities, and Apple would suffer irreparable and immeasurable harms if an injunction were not issued, this factor weighs strongly in favor of Apple's motion."), *aff'd in relevant part by* 658 F.3d 1150 (9th Cir. 2011).

337. FISCHER, *supra* note 331, at 302 (providing the example of a defendant intentionally encroaching on another's land and noting that not all harms are amenable to cost-benefit balancing).

338. *See* Coyle v. Compton, 940 P.2d 404, 414 (Haw. Ct. App. 1997) ("[F]reedom of movement may be restricted under the State's police power unless such restrictions unreasonably infringe upon that freedom.").

339. *See* FISCHER, *supra* note 331, at 297–98 ("A proven infringer may be required to keep a greater distance away from the plaintiff's protected activity than would a non-infringer because the proven infringer's past actions have demonstrated a weakness to temptation."); *see, e.g.*, Zappaunbulso v. Zappaunbulso, 842 A.2d 300, 301 (N.J. Super. Ct. App. Div. 2004) (affirming the trial court's entry of a protection order that required the respondent to move out of a house he

imposed following a judicial finding that the respondent engaged in acts of domestic violence and presents a danger to the petitioner. While these types of liberty-restricting injunctions are serious, so are the underlying actions that necessitate the injunctions.

Second, the constitutionally protected liberty interest in the parent-child relationship is not without limits: the state can intervene to protect children's safety and welfare.[340] In protection order cases, after the court makes a finding of domestic violence, the court can award custody and visitation based on the best interests of the child and statutory factors.[341] All states at least require the court to consider evidence of domestic violence when determining child custody, and many states have a rebuttable presumption against the abusive parent receiving custody.[342] The court may find that the respondent poses such a high level of danger to necessitate supervised visitation or to prohibit contact with the children.[343] If the court determines that visitation is in the best interest of the child, the court may enter a visitation plan that permits contact between the restrained parent and the child but also maximizes safety to the petitioner by limiting the location and frequency of visits.

Regarding custody determinations in domestic violence injunctions, respondents could raise concerns that protection order hearings are commonly expedited hearings that typically do not provide for extensive discovery, home studies by court evaluators, or the appointment of guardians ad litem, which are more common in permanent custody cases. These are strong counterarguments, but on balance, long-term protection orders satisfy substantive due process for several reasons. First, a finding of domestic violence must be made before awarding custody or visitation, as described above, and the same legal standards for custody apply in protection order and

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had recently moved into in his ex-wife's neighborhood based on his history of stalking, harassing, and threatening his ex-wife).

340. *See* Troxel v. Granville, 530 U.S. 57 (2000); Santosky v. Kramer, 455 U.S. 745 (1982); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

341. *E.g.*, CAL. FAM. CODE § 6323 (West 2013); D.C. CODE § 16-1005 (2013); 725 ILL. COMP. STAT. ANN. 5/112A-14 (West 2013); MO. ANN. STAT. § 455.050(5) (West 2013).

342. *E.g.*, 725 ILL. COMP. STAT. ANN. 5/112A-14; MO. ANN. STAT. § 455.050(5); N.J. STAT. ANN. § 2C:25-29(b)(11) (West 2013).

343. *E.g.*, CAL. FAM. CODE § 6323; Marquette v. Marquette, 686 P.2d 990, 995 (Okla. Civ. App. 1984) (finding that "interference with [defendant's] visitation rights is significant," but justifiable given statutory procedural safeguards, where an ex-parte civil protection order forbidding a domestic violence defendant from communicating with his ex-wife resulted in denial of his right to visit his children).

permanent custody cases.[344] Although protection order cases are heard on an accelerated schedule due to the underlying allegations of violence, either party in a protection order case may depose the other party and witnesses, issue interrogatories and requests for document production, seek the appointment of a guardian ad litem or custody evaluator, or call expert witnesses.[345] Finally, a permanent custody order supersedes the civil protection order, so the respondent can concurrently or consecutively pursue a permanent domestic relations case.

Respondents may additionally raise concerns about the validity of a long-term order to vacate a shared residence. An order to vacate regards possession of property and does not affect title,[346] but a permanent order for the respondent to vacate a residence in which the petitioner lacks a property interest would likely amount to an unconstitutional taking without just compensation.[347] While a temporary order to vacate a shared residence is necessary for immediate safety and is constitutional, some state statutory provisions regarding vacate orders may need to be amended to satisfy substantive due process concerns. A long-term or indefinite order should require, as many states already do, that the petitioner have a property interest in the dwelling through ownership or lease.[348] There

344. *E.g.*, MO. ANN. STAT. § 455.050.

345. *See, e.g.*, MO. ANN. STAT. § 455.050(5)–(6) (permitting the court to appoint a guardian ad litem or court-appointed special advocate to represent the minor child); CAL. R. CT. 5.215 (providing the domestic violence protocol for Family Court Services evaluations); D.C. SUP. CT. DOM. VIOLENCE R. 8 (providing procedures for discovery in civil protection order cases).

346. *See, e.g.*, OHIO REV. CODE ANN. § 3113.31(E)(5) (West 2013); Peters-Riemers v. Riemers, 624 N.W.2d 83, 90 (N.D. 2001) (finding that because title was not affected by the order to vacate the home that was titled only in the respondent's name, the respondent's due process rights were not violated).

347. U.S. CONST. amend. V ("No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."); U.S. CONST. amend. XIV, § 1 (applying the Fifth Amendment to states); *see* State v. Mueller, 702 N.E.2d 139, 141 (Ohio Ct. App. 1997) (finding that the district court exceeded its authority when it ordered the defendant to sign a quitclaim deed turning over to the domestic violence victim his interest in the home they jointly owned, and finding that while the court had the ability to order him to vacate the residence, forcing him to give up his property interest amounted to a taking without due process).

348. D.C. CODE § 16-1005(c)(4) (2013); 725 ILL. COMP. STAT. ANN. 5/112A-14(b)(2) (2013) (permitting courts to grant exclusive possession of a residence to the petitioner for a residence that the petitioner has the legal right to occupy, and providing a test for the court to balance the hardships to the petitioner and respondent regarding a shared home); WIS. STAT. ANN. § 813.12(4)(a)(3)(am) (West 2013):

> If the petitioner and the respondent are not married, the respondent owns the premises where the petitioner resides and the petitioner has no legal interest in the premises, in lieu of ordering the respondent to avoid the petitioner's residence under par. (a) the judge or circuit court commissioner may order the respondent to avoid the

remains a question of whether an indefinite protection order that grants exclusive possession of a home to the petitioner could constitute a taking because it would deny the respondent means to exercise many of the rights and indicia of property ownership.[349] This question has not been adjudicated, and the vacate provisions of indefinite or long-term orders may need to be curtailed to account for both parties' property rights.

Defendants' due process rights are serious judicial concerns because of the significance of constitutional protections and procedural justice. Research shows that respondents are more likely to comply with protection orders issued by a system that provides procedural justice.[350]

3. Modifying or Terminating Injunctive Relief

Respondents subject to orders that are no longer necessary are not without recourse. Permanent injunctions are equitable remedies subject to judicial modification or termination on a showing of "good cause" by either the petitioner or respondent.[351] As such, domestic violence protection orders can typically be vacated or modified for good cause,[352] such as a change in circumstances.[353] This is significant because judges may be reluctant to enter an indefinite order if they

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> premises for a reasonable time until the petitioner relocates and shall order the respondent to avoid the new residence for the duration of the order.

See also State v. Kameenui, 753 P.2d 1250, 1252 (Haw. 1988) ("There is no constitutionally protected right to remain free in [one's] home after physically harming someone residing there."); Boyle v. Boyle, 12 Pa. D. & C.3d 767, 773 (1979). *Boyle* upheld the Pennsylvania civil protection order statute and found that the act "validly employs the police power of the Commonwealth, in a reasonable manner, to abate a well recognized and widely spread social problem. . . . The restrictions that the act places on the use of property to protect abused spouses . . . are necessary to dispel the dangers of domestic violence." *Id.*

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

350. Epstein, *supra* note 211, at 1846–47.

351. FISCHER, *supra* note 331, at 318.

352. N.J. STAT. ANN. § 2C:25-29 (West 2013).

353. Alkhoury v. Alkhoury, 54 So. 3d 641 (Fla. Dist. Ct. App. 2011) (applying general rules regarding permanent injunctions and finding that they may be modified or dissolved "whenever changed circumstances make it equitable to do so"). The court also determined:

> In the specific context of a domestic violence injunction, we believe the 'changed circumstances' rule can best be carried out by a requirement that a party, against whom a domestic violence injunction has been entered, must, if such party seeks to dissolve the injunction, demonstrate that the scenario underlying the injunction no longer exists so that continuation of the injunction would serve no valid purpose.

Cf. UTAH CODE ANN. § 78B-7-106(11) (West 2013) ("A protective order may be modified without a showing of substantial and material changes in circumstances.").

believe that the threat of violence may not last beyond several years or if they think the parties may resume their relationship. Instead of the judge predicting future relationship patterns, it is the role of the petitioner or respondent to return to court to seek modification or vacatur of an order if circumstances and needs change. For example, if the parties resume a relationship, the petitioner may want to remove provisions that prohibit the respondent from contacting or coming near the petitioner but keep in place a continuing order that prohibits the respondent from abusing, threatening, or harassing the petitioner and that requires the respondent to participate in a domestic violence intervention program, parenting skills class, or substance abuse treatment. As with permanent injunctions in other areas of the law, if the terms of the injunction are no longer fair or just, the order may be vacated or modified.[354]

In balancing the hardships to the parties in protection order actions, multiple courts have concluded that protection order statutes satisfy a respondent's procedural due process rights and provide a significant benefit to the public and governmental interests of preventing irreparable injury.[355]

D. The Public Interest

For the final prong of the *eBay* test, the petitioner seeking a permanent injunction must show that the injunction would not disserve the public interest.[356] Courts consider public health, safety, and economic interests to be of paramount consideration.[357] Courts also value enforcing the law; for example, courts have found a public benefit in upholding the rights of copyright and patent holders.[358]

Legislatures have recognized that "domestic violence is a problem of immense proportions affecting individuals as well as

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354. FISCHER, *supra* note 331, at 318.

355. *See, e.g.*, United States v. Baker, 197 F.3d 211, 216–17 (6th Cir. 1999); Ohrn v. Wright, 963 So. 2d 298, 298 (Fla. Dist. Ct. App. 2007); Nkurunziza v. Nyamusevya, No. 10AP-134, 2010 WL 4968636 (Ohio Ct. App. Dec. 7, 2010); State v. Karas, 32 P.3d 1016, 1020–21 (Wash. Ct. App. 2001); Spence v. Kaminski, 12 P.3d 1030 (Wash. Ct. App. 2000); State v. Lee, 917 P.2d 159, 167–68 (Wash. Ct. App. 1996), *aff'd en banc*, 957 P.2d 741 (Wash. 1998).

356. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

357. *See, e.g.*, City of Milwaukee v. Activated Sludge, Inc., 69 F.2d 577, 593 (7th Cir. 1934) (denying an injunction based on the public interest because it would have closed the city's sewage plant, allowing the entire community's raw sewage to run into Lake Michigan, with obvious substantial detriment to the public health).

358. *See* Apple Inc. v. Psystar Corp., 673 F. Supp. 2d 943, 950 (N.D. Cal. 2009) ("[T]he public receives a benefit when the legitimate rights of copyright holders are vindicated."), *aff'd*, 658 F.3d 1150 (9th Cir. 2011).

communities" and that this growing crisis is "at the core of other major social problems."[359] From a policy perspective, the justice system "has a vested interest in eradicating domestic violence, ending the intergenerational effects of violence against women, and protecting the welfare of 'future member[s] of our society.'"[360] Protection orders were created to increase victim safety and offender accountability and provide victims with "easy, quick, and effective access to the court system."[361] Statutes and court opinions also state that protection order statutes are remedial laws that should be liberally construed to offer safety and protection to victims, their children, and the public at large.[362] While there is widespread agreement on the general purpose of protection orders, there is an absence of legislative history to shed light on the limited length of most orders or the extended periods offered by several states. When states have amended their statutes to lengthen the permissible timeframe of protection orders, the simple reason they offer is that more time results in more protection.[363]

Costs related to experiencing domestic violence and to ending violence are substantial. In the United States, the annual cost of medical care, mental health services, and time away from work due to intimate partner violence is estimated to be $8.3 billion (in 2003 dollars).[364] Every year, survivors of intimate partner violence lose nearly 8 million days of paid work, which amounts to more than

359. S.B. 6347, Reg. Sess., 52d Leg. (Wash. 1992) (amending WASH. REV. CODE ANN. § 26.50.030).

360. Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 167 (2009).

361. Wash. S.B. 6347 (amending WASH. REV. CODE ANN. § 26.50.030).

362. Maldonado v. Maldonado, 631 A.2d 40, 42 (D.C. 1993) ("The Intrafamily Offenses Act is a remedial statute and as such should be liberally construed for the benefit of the class it is intended to protect."); Wilker v. Wilker, 630 N.W.2d 590, 596 (Iowa 2001) ("[T]he domestic abuse chapter is meant to be protective rather than punitive in nature and is given a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." (internal quotation marks omitted)); Zappaunbulso v. Zappaunbulso, 842 A.2d 300, 306 (N.J. Super. Ct. App. Div. 2004) ("Remedies under the [Domestic Violence] Act are liberally construed for the protection and safety of the victims and the public at large." (citing N.J. STAT. ANN. § 2C:25–29(b)).

363. DEL. CODE ANN. tit. 10, § 1045 (West 2010). The committee report regarding revisions explains, "Victims of domestic violence and abuse will be afforded better protection if the Family Court is permitted to extend no contact provisions of protection for up to 2 years and even in some special cases for indefinite periods of time." *Id.*; *cf.* TENN. CODE ANN. §§ 36-3-603, -605 (permitting three-year or five-year renewals of protection order when the respondent violates the original order, and deeming that "the public welfare requires it").

364. Wendy Max et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 VIOLENCE & VICTIMS 259, 268 (2004).

32,000 full-time jobs.[365] They also lose approximately 5.6 million days of household productivity due to domestic violence,[366] and there are significant costs for services to children exposed to domestic violence.[367] For a survivor seeking to end violence through a civil protection order, he or she must bear the costs of transportation to and from court, daycare for children, and time away from work.[368] For the court case, there are often costs associated with receiving copies of 9-1-1 recordings, medical records, and police reports, and achieving personal service of the petition and court documents.[369] The petitioner may be able to seek reimbursement for attorney's fees and court-related expenses from the respondent, but this depends on the respondent's financial situation.

Protection orders serve the public interest by producing widespread economic and safety benefits. According to a recent study on the costs and benefits of domestic violence protection orders, every dollar spent on protection order interventions produced $30.75 in avoided costs to society.[370] In Kentucky alone, protection orders were estimated to save the state $85 million annually because of significant declines in domestic abuse and the associated expenses.[371] Coupled with the safety benefits of long-term orders that were discussed in Part VI.B.2, the financial, physical, and psychological benefits of protection orders are of value to individual survivors and society at large.

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365. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 1 (2003), *available at* http://perma.cc/WF6-YGRU.

366. *Id.*

367. S.B. 6347, Reg. Sess., 52d Leg. (Wash. 1992) (amending WASH. REV. CODE ANN. § 26.50.030).

368. Regarding employment protections, some states have recently enacted laws to permit domestic violence survivors to seek judicial protection through the civil or criminal justice systems without jeopardizing their employment. These laws typically require employees to be permitted to attend court without pay, and with the assurance that they will not be fired for missing work. *See, e.g.*, WASH. REV. CODE ANN. § 49.76.040 (West 2013).

369. Logan et al., *supra* note 281, at 899 (finding that in a Kentucky study, in rural areas, petitioners were charged for service and there was a ninety-one percent rate of non-service in rural counties).

370. TK LOGAN ET AL., THE KENTUCKY CIVIL PROTECTIVE ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTIVE ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COSTS 144 (2009), *available at* http://perma.cc/9AL3-YTE4.

371. *Id.* at 8.

VII. PROPOSED REFORM

The limited duration set by most domestic violence protection order statutes differs from the issuance of injunctions in other areas of law, and this disparate treatment persists without a legitimate basis. Most domestic violence cases would meet the statutory and equitable standards for issuing permanent injunctions, and indefinite relief should be available in protection order statutes across states to provide meaningful protection against abuse. This Part explains that complete judicial discretion has resulted in inadequate protection for abuse survivors, which necessitates a national standard regarding the duration of orders. Specifically, this Article proposes the statutory availability of indefinite domestic violence protection orders. There are multiple potential solutions that flow from the analysis in this Article; along with the availability of indefinite protection orders, this Article recommends a statutory minimum presumptive length of two-year orders based on current social science data.

A. The Problem with Complete Discretion

Judicial discretion allows courts to tailor protection order relief to an individual survivor's particular context and safety needs, which is essential to meaningfully ending violence.[372] Unfettered discretion, however, proves problematic in areas where judges have traditionally been hostile to the remedy and use their discretion to enter less relief than the facts warrant and statutes allow. In the child support context, for example, judges previously had complete discretion over entering support orders, and their only direction was to make awards "for the needs of the child."[373] This resulted in vastly inconsistent, unpredictable outcomes and relatively low levels of support awards, which persisted even after statutory factors provided guidance to courts.[374] As a condition of receiving funding, the federal government eventually required states to adopt presumptive guidelines for child support awards and to implement enforcement procedures.[375]

372. *See* Stoever, *supra* note 142, at 363–65.

373. *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES § 1.01, 4 (2d ed. 2013).

374. *Id.* (citing studies finding that child support awards in one district court ranged from 6% to 41% of the obligor's income); CTR. FOR POL'Y RESEARCH, THE IMPACT OF CHILD SUPPORT GUIDELINES: AN EMPIRICAL ASSESSMENT OF THREE MODELS 37–53 (1989) (finding consistently higher awards across all income levels after guidelines were enacted).

375. *See generally* Patricia W. Hatamyar, *Interstate Establishment, Enforcement, and Modification of Child Support Orders*, 25 OKLA. CITY U. L. REV. 511 (2000) (arguing that the Uniform Interstate Family Support Act and the Full Faith and Credit for Child Support Orders Act are essentially working as intended and establishing predictable rules for parties involved in

Similarly, many judges have been resistant to the protection order remedy since its inception and have failed to comprehend the serious nature of domestic violence, as detailed in multiple Gender and Justice Commission Gender Bias Task Force reports and Fatality Review studies.[376] As one scholar has noted, "Unregulated authority is not only flawed in cases involving violence against women, it is dangerous."[377] Regarding the length of protection orders, judges frequently fail to issue long-term orders or to extend orders because the physical violence is not "recent enough," although the past history, context, and other factors suggest ongoing danger.[378]

Even when states permit permanent protection orders, judges often enter orders for limited periods of time. For instance, in the Washington case *Phasavath v. Haggerty*, the husband abused his wife throughout their marriage by raping her, punching her, and throwing her across the room when she was pregnant, throwing large objects at her, and denigrating her.[379] After the wife separated from her

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child support cases); Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 210 (1991) (arguing that judges have unfettered discretion in family law, as compared to other areas of law, and that their exercise of discretion jeopardizes fundamental rights of parents and children, and recommending fixed rules in the context of divorce, similar to child support formulas); Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Reality of Shared Parenting*, 37 FAM. L.Q. 165, 169 (2003) (arguing that requiring states to establish guidelines for "appropriate child support awards" does not solve the problem of unfettered judicial discretion because there is no specific definition of appropriateness).

376. Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 58 (1996) (surveying multiple states' Gender Bias Task Force reports and finding that women are often revictimized by their treatment by judges, who presume the victim deserved or provoked the violence, and finding that many judges only consider visible injuries, some judges inappropriately impose mediation or issue mutual orders, and the court system, in general, trivializes domestic violence); Philip Trompeter, *Gender Bias Task Force: Comments on Family Law Issues*, 58 WASH. & LEE L. REV. 1089, 1090 (2001) (reporting that Gender Bias Task Forces found that judges are not generally knowledgeable about the dynamics of domestic abuse, and judges believe myths which affect their judicial decision making, including notions that family violence is a private matter, domestic incidents are momentary losses of temper, and victims can easily leave the relationship); *see also* Epstein, *supra* note 47, at 4 ("A law is only as good as the system that delivers on its promises, and the failure of the courts and related institutions to keep up with legislative progress has had a serious detrimental impact on efforts to combat domestic violence.").

377. Conner, *supra* note 360, at 166.

378. *See, e.g.*, Tosta v. Bullis, 943 A.2d 824, 829 (N.H. 2008) ("We have also required a plaintiff to show more than a generalized fear for personal safety based upon past physical violence and more recent non-violent harassment to support a finding that a credible threat to her safety exists."); Goodness v. Beckham, 198 P.3d 980, 982–84 (Or. Ct. App. 2008) (vacating a permanent protection order despite a history of severe physical violence and death threats, because seven years had lapsed since the last physical incident and the court determined that the ex-husband's recent harassing email messages did not threaten imminent violence).

379. Phasavath v. Haggerty, 151 Wash. App. 1029, at *4 (Wash. Ct. App. 2009).

husband, he persisted in stalking and harassing her.[380] Although the Domestic Violence Prevention Act permitted the judge to make the order permanent, the judge renewed the yearlong protection order for only a one-year term.[381]

In most states, the statutory time periods are maximums, and the length is left to judicial discretion.[382] The fact that a jurisdiction permits a judge to enter an order for up to one or two years does not mean the judge will award the full time period. Even in jurisdictions that make permanent orders available, some judges only enter orders for several months and instruct petitioners to return to court for a lengthier order if the respondent violates the protection order during that time.[383] When the parties have a child in common or are married, some judges routinely issue the protection order for only a few months and order the petitioner to file a permanent custody or dissolution case to receive further court protection.[384] Protection order petitioners may not wish to litigate a divorce or permanent custody case for many reasons, including reasons related to safety, culture, religion, indecision about the future of the relationship, and uncertainty of the court outcome.[385] The frequency of court hearings in custody and dissolution cases creates the danger and emotional toll of repeated interaction with the abusive partner, the need to take time away from work, additional transportation and daycare arrangements, and the expense of extended litigation.[386]

To encourage judges to enter orders with tailored, comprehensive relief that expands beyond a standardized form and carries out the legislative purpose of ending violence, judges must be permitted discretion to issue customized relief. However, in response to the use of judicial discretion in ways contrary to legislative intent and in light of abuse survivors' need for long-term protection, for the reasons explain below, this Article proposes a minimum two-year duration when longer-term or indefinite orders are not entered.

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380. *Id.*

381. *Id.* at *5–6.

382. *Supra* Part V.A.

383. The Author has observed this in multiple jurisdictions.

384. The Author has observed this and has received multiple reports from attorneys across Washington of this occurrence.

385. *See* Conner, *supra* note 360, at 184–88 (discussing risks to petitioners and children in divorce and permanent custody cases).

386. *See, e.g.*, Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. 57, 59 (2003) (discussing "psychological and emotional abuse" by the abusive partner in custody proceedings); Janet R. Johnston, *High-Conflict Divorce*, 4 FUTURE OF CHILDREN 165, 168 (1994) (describing the correlation between domestic violence and ongoing disputes over child custody).

B. A National Standard for Protection Order Duration

While states primarily regulate the family, the federal government has considerable authority to intervene and has done so on multiple occasions to promote particular public policies or "family values" and establish national norms.[387] For example, Congress has established child support standards and enforcement mechanisms,[388] adopted a series of laws to ensure uniform standards for establishing child custody jurisdiction and enforcing custody decisions,[389] created unpaid family medical leave from employment,[390] and required states to follow guidelines for issuing public benefits.[391] Thus, in numerous areas affecting intimate relationships, Congress has willingly established uniformity in family laws.

When Congress determines that a national, standardized approach is desirable, this can be accomplished either through federal legislation or state adoption of uniform laws.[392] While domestic abuse can occur in manifold and complex ways, survivors' need for long-term protection from violence does not differ geographically. In addition to the practical value of a uniform approach, scholars have argued that the assumption that states should be responsible for the development of family law should be repudiated because this assumption is "grounded in archaic sexist notions about women and marriage that perpetuate the devaluation of women, children, and families."[393]

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387. Law, *supra* note 217, at 184. For example, under the Defense of Marriage Act, Congress defined marriage for federal purposes as a legal union between a man and a woman and did not require states to recognize a marriage entered into by a same-sex couple in another state. The U.S. Supreme Court subsequently struck down the Defense of Marriage Act, but resisted pure federalism grounds. Defense of Marriage Act §§ 2–3, 1 U.S.C. § 7 (2012), 28 U.S.C. § 1738C (2012); United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) ("[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."); *see also* Courtney G. Joslin, *Windsor, Federalism and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 165 (2013) (noting that the Court "declined to formally embrace or accept the categorical family status federalism claim").

388. Child Support Recovery Act, 18 U.S.C. § 228 (2012); Family Support Act of 1988, 42 U.S.C. §§ 651–69 (2012).

389. Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2012); Unif. Child Custody Jurisdiction & Enforcement Act § 103, 9 U.L.A. 1 (1997); Unif. Child Custody Jurisdiction Act, 9 U.L.A. 1 (1968).

390. Family Medical Leave Act, 29 U.S.C. §§ 2601–54 (2012).

391. *See generally* Law, *supra* note 215, at 177 (identifying multiple laws that affect families, including farm subsidies, minimum wage laws, the treatment of military forces, and the rules defining eligibility for cash assistance, including tax exemptions, Social Security, Medicaid, Medicare, disability benefits, welfare, and food stamps).

392. *Id.* at 183 & n.39.

393. *Id.* at 180; *see also* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1098–1101 (1994).

Although the family has historically been shielded from judicial reach and national legislation, correcting the inferior treatment of domestic violence injunctions requires a cohesive, national response.

C. Indefinite Protection Orders and Presumptive Minimum Lengths

Given the legal system's historic condonation of domestic abuse, coupled with ongoing evidence of judicial failure to handle domestic violence matters appropriately, it is insufficient to merely make indefinite protection orders available. Instead, it is necessary to mandate a presumptive minimum length for protection orders to serve as a baseline. The proposed framework of indefinite orders with a presumptive minimum length allows for flexibility, ensures greater protection than is currently offered by most states, and eliminates the complete discretion that judges typically possess, which can result in extremely brief orders. With judicial training and oversight, this approach would also remedy the differential treatment of domestic violence injunctions, as compared with the permanent protection available for intellectual property and business interests, and would be a meaningful manifestation of the public policy against domestic violence.

Making long-term and indefinite orders available serves multiple goals,[394] the most significant being the protection of domestic violence survivors from further harm. This approach implements recent social science research showing that lengthier orders produce greater safety outcomes,[395] thereby furthering the legislative purpose of protection orders.[396] Based on recent social science data,[397] a minimum length of at least two years of court protection is necessary to provide meaningful judicial oversight, threat of criminal penalties, and distance between parties who have separated to allow the survivor to extricate herself or himself from the abusive partner's control, and lengthier orders are often advisable. Longitudinal studies of domestic violence survivors are rare, and further empirical research could support lengthier mandatory minimum periods for protection orders. Many respondents closely monitor a protection order's

394. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 686–87 (7th ed. 2011) (explaining the general rationale for rebuttable presumptions to be fourfold: to serve policy interests, to recognize what is most probably true across a wide range of cases, to place the burden of proof on the party most likely to have access to the information, and to assist in cases where definitive proof is not available).

395. *Supra* notes 273, 279–80, and accompanying text.

396. *Supra* notes 169, 325–26, 359–61, and accompanying text.

397. *Supra* notes 34, 40–41, 273, 279–80, and accompanying text.

expiration date and resume contact, harassment, stalking, or violence immediately upon the order's expiration, assuming they actually followed the order while it was in effect.[398] For many intimate relationships with domestic violence, long-term or indefinite orders are warranted for the reasons described herein, and courts should be amenable to entering such relief.

Rebuttable presumptions are utilized in many areas of civil and criminal law.[399] Significantly, in the marriage dissolution and child custody context, proof of domestic violence triggers certain presumptive outcomes. When there is a finding of domestic violence in child custody decisionmaking, many states have either a rebuttable presumption either against joint custody or against an abusive parent receiving custody.[400] Some states provide that evidence of certain forms of domestic violence triggers a rebuttable presumption that any visitation between the abusive parent and child must be supervised.[401] As a final example, in dissolution cases in some states, a domestic violence conviction prompts a rebuttable presumption that the Family Court judge should deny or terminate spousal support.[402]

The proposed approach maintains the current burden of proof on the petitioner to prove the statutory elements required for the court to grant a protection order. The current statutory requirements for granting protection orders provide a sufficiently high bar for awarding indefinite or long-term protection orders. Survivors choose particular courses of action based on their assessments of how much danger they are in,[403] and those who experience greater severity of violence engage

398. *See* Epstein, *supra* note 47, at 24 (noting that once the protective order expires, the couple is "back at square one"). The Author has also represented multiple clients who reported this occurrence.

399. In marital dissolution proceedings, for example, states commonly have a statutory rebuttable presumption that spouses have contributed equally to the acquisition of marital assets during marriage, and courts are to consider both the economic and noneconomic contributions of the parties. *See, e.g.*, Lovell v. Anderson, 533 S.E.2d 64, 65 (Ga. 2000) (regarding the application of a rebuttable presumption in an estate matter).

400. *See, e.g.*, ARIZ. REV. STAT. ANN. 25-403.03(D) (2012) (creating a rebuttable presumption that awarding custody to a parent found to have committed an act of domestic violence would be contrary to the child's best interest); IOWA CODE ANN. § 598.41(1)(b) (West 2012) (applying a rebuttable presumption against joint custody upon a finding of domestic violence); *see also* NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, REBUTTABLE PRESUMPTION STATES, *available at* http://perma.cc/W4CT-5GLN (reporting that as of September 2012, twenty-three states and the District of Columbia had adopted statutes creating a rebuttable presumption against sole or joint custody to batterers).

401. *See, e.g.*, IND. CODE ANN. § 31-17-2-8.3 (West 2012).

402. *See, e.g.*, CAL. FAM. CODE § 4325 (West 2012).

403. *See* Margaret E. Bell et al., *Understanding Domestic Violence Victims' Decision-Making in the Justice System: Predicting Desire for a Criminal Prosecution*, 19 FAM. VIOLENCE & SEXUAL ASSAULT BULL. 6, 6–15 (2003).

in more help-seeking efforts, including seeking protection orders as violence escalates and continues over time.[404] Multiple studies have found that women seeking protection orders have typically experienced a history of severe violence.[405] Taking the initiative to seek a protection order commits a survivor to a course of action and indicates an "awareness of serious safety concerns."[406] Prior physical abuse is also well established as a primary risk factor for intimate partner femicide, although previous physical violence is not present in all femicide cases.[407] While additional factors beyond proof of domestic violence are unnecessary for granting a protection order, courts could be instructed to accept evidence regarding the history of the relationship and the respondent's controlling behaviors that are not in and of themselves illegal, especially because research suggests that controlling behaviors indicate heightened danger.[408]

A review of the small number of state statutes that currently permit permanent domestic violence protection orders reveals a spectrum of requirements, some of which are problematic. Delaware permits the entry of a permanent order of protection upon the finding of "aggravating circumstances," such as the use of a deadly weapon against the petitioner, prior convictions of crimes committed by the respondent against the petitioner, or a history of repeated violations of prior protection orders.[409] Delaware's standard is inadvisable because it permits too much injury before offering action. Montana, in contrast, instructs courts to consider the history of violence, severity of the offense at issue, and the evidence presented at the hearing in considering whether the petitioner needs permanent protection from harm.[410] Montana's process is more desirable than Delaware's, but

404. *See* A.L. Coker et al., *Help-Seeking for Intimate Partner Violence and Forced Sex in South Carolina*, 19 AM. J. PREVENTIVE MED. 316, 319 (2000) ("[W]e found that help-seeking increases with increasing violence severity.").

405. Logan et al., *supra* note 281, at 877; *see also* Lisa Shannon, *Intimate Partner Violence, Relationship Status, and Protective Orders: Does "Living in Sin" Entail a Different Experience?*, 22 J. INTERPERSONAL VIOLENCE 1114, 1124 (2007) (in a study of over 750 women with protection orders, the women had experienced high levels of all forms of intimate partner violence).

406. Logan & Walker, *supra* note 8, at 688.

407. Nicolaidis et al., *supra* note 37, at 790.

408. *See* Keith E. Davis et al., *Stalking Perpetrators and Psychological Maltreatment of Partners: Anger-Jealousy, Attachment Insecurity, Need for Control, and Break-Up Context*, 15 VIOLENCE & VICTIMS 407, 407 (2000) (finding that stalking had a significant correlation with psychological abuse of the partner); Troy E. McEwan et al., *A Study of the Predictors of Persistence in Stalking Situations*, 33 LAW & HUM. BEHAV. 149, 149 (2008) (noting that "[s]talkers engaging in persistent campaigns of harassment have the potential to cause immense harm to their victims and themselves").

409. 10 DEL. CODE ANN. § 1045(f) (West 2012).

410. MONT. CODE ANN. § 40-15-204(1) (West 2012).

heightened attention to the most recent event may obscure evidence of control and past relevant abuse. Washington permits permanent orders upon a finding that the respondent is likely to resume acts of domestic violence if the order were to expire.[411] The permanent order, however, is not available for relief that restricts contact between the respondent and his or her children; this relief may only be in effect for one year.[412] Washington's statutory construction values the parent-child relationship by building in yearly review, but there are cases in which the violence is so extreme that lengthier protection is warranted from the outset. Washington's failure to permit permanent orders pertaining to relief regarding children forces parents to return to court on a yearly basis, making the possibility of permanent orders illusory.

Prioritizing certain forms of violence or attempting to use a danger or risk assessment tool to determine the appropriate level of court protection is also ill advised.[413] In a study of women whose partners had attempted to kill them, researchers administered Jacquelyn Campbell's Danger Assessment tool to measure lethality.[414] This instrument is thought to be the most accurate available, but the women's scores varied dramatically, with some women only identifying one or two factors and others identifying a majority of the factors indicating lethality risk.[415] Most of the male abusive partners engaged in "stalking, extreme jealousy, social isolation, physical limitations, or threats of violence" prior to attempting to kill their female partners.[416] These behaviors are correlated with higher incidences of severe or lethal violence, but they are also behaviors that are frequently minimized by fact finders and are difficult to uncover in the current court structure, which focuses on criminal acts.[417]

While one possible recommendation would be to make all domestic violence protection orders permanent, there are several reasons for alternatives to this approach. First, a permanent order could be contrary to the petitioner's wishes, and the petitioner in a

411. WASH. REV. CODE ANN. § 26.50.060 (West 2012).

412. *Id.*

413. *See* Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 519–20 (2010) (discussing the limitations of danger-assessment tools).

414. Nicolaidis et al., *supra* note 37, at 790.

415. *Id.*

416. *Id.*

417. *See id.* (noting 83% of women experienced such behavior prior to the attempted femicide); *see generally* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1138 (2009) (noting that while all states offer remedies for severe or lethal violence, far fewer states offer remedies for harms such as "emotional, psychological, or economic abuse").

civil action is entitled to request the relief he or she seeks, including the duration of the order within the statutory structure. A petitioner can therefore have decisional autonomy in shaping the requested scope and duration of the order to be responsive to his or her particular safety needs. Additionally, if judges are only permitted to enter permanent orders, they may hold petitioners to higher standards than the law requires or be more inclined to deny orders. Reform efforts should seek to minimize negative repercussions, such as the unintended consequence that the protection order remedy may become unattainable to those needing protection from violence. Finally, given that there is potential criminal liability for the violation of certain provisions of the remedial order, there are legitimate questions about the length of state involvement and the state's role in ordering relationships that advise against making all protection orders permanent.[418] The civil protection order remedy should be flexible enough to provide an abuse victim with tailored long-term protection while also allowing for modification or termination by the respondent if the order becomes unnecessary.

Reform typically occurs through stages as a movement builds consensus needed for legislative change.[419] Making indefinite protection orders available in each state would be a meaningful advancement alone. Some states could even choose to enact a presumption of permanent protection orders. In such a regime, once the court finds that the respondent has committed domestic violence against the petitioner and that a protection order is warranted, there would be a presumption that an indefinite order be awarded unless the respondent offers a compelling justification against the entry of a permanent order. Given the current limited duration of most domestic violence injunctions, this Article's proposal for the availability of indefinite orders with a presumptive minimum length of two years significantly advances the protection order remedy and sufficiently protects the constitutional rights of respondents.

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418. *See generally* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 53–66 (2006) (discussing final protective orders as a form of "de facto divorce" and their implication on a possible "right to marry").

419. Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 439–45 (2001) (describing how women's property rights developed through stages of reform); Theodore R. Marmor & Mark A. Goldberg, *Reform Redux*, 20 J. HEALTH POL. POL'Y & L. 491, 494 (1995) ("Everything else being equal, sooner is better than later, but comprehensive reform in stages is better than inadequate reform all at once."); Ralph Peeples & Catherine T. Harris, *Learning to Crawl: The Use of Voluntary Caps on Damages in Medical Malpractice Litigation*, 54 CATH. U. L. REV. 703, 703 (2005) ("In a politically charged climate, broad scale, equitable reform is not likely. Instead, we should begin a steady movement toward such reform in stages.").

VIII. CONCLUSION

The argument for indefinite injunctions in the domestic violence context gives safety in one's home and person the same priority as the protection of intellectual property and business interests. Domestic violence law developed distinctly from other areas of the law for reasons that are no longer socially tenable, and harmonizing domestic violence injunctions with the treatment of other injunctive relief is overdue. For many survivors of intimate partner abuse, the threat of violence is always present—if not carried out—and returning to court is a terrifying and dangerous prospect. In a society and legal system that have historically tolerated and condoned intimate partner abuse, the nationwide availability of indefinite domestic violence protection orders and presumption that orders be at least two years in duration would serve as an expression of the public policy that domestic violence is intolerable. And, perhaps more important, this solution could also save lives.

IX. APPENDIX: DURATION OF DOMESTIC VIOLENCE PROTECTION ORDERS AND EXTENDED ORDERS BY STATE

JURISDICTION	PROTECTION ORDER DURATION	EXTENSION DURATION (left blank when statute is silent)
Alabama ALA. CODE § 30-5-7(d)(2).	Permanent unless otherwise specified.	
Alaska ALASKA STAT. § 18.66.100(b).	Hybrid: one year unless dissolved by court order earlier. Permanent for provisions prohibiting respondent from threatening to commit or committing domestic violence, stalking, or harassment.	
Arizona ARIZ. REV. STAT. ANN. § 13-3602(K).	One year.	One year.
Arkansas ARK. CODE. ANN. § 9-15-205(b).	Ninety days to ten years.	
California CAL. FAM. CODE § 6345.	Up to five years. The failure to state an expiration date on the order creates an order for three years.	Five years or permanent.
Colorado COLO. REV. STAT. § 13-14-102(9)(a).	Fixed period or permanent.	
Connecticut CONN. GEN. STAT. § 46b-15(d).	Up to six months.	As the court deems necessary.

JURISDICTION	PROTECTION ORDER DURATION	EXTENSION DURATION (left blank when statute is silent)
Delaware DEL. CODE ANN. tit. 10, § 1045(f).	Hybrid: Standard order lasts up to one year and up to two years for provisions restraining the respondent from committing domestic violence or from contacting the petitioner. Order can be permanent if aggravating circumstances are found.	
District of Columbia D.C. CODE § 16-1005(d).	Up to one year.	One year.
Florida FLA. STAT. § 741.30(6)(c).	Typically one year, but the court has discretion to issue indefinite orders.	
Georgia GA. CODE ANN. § 19-13-4.	Up to one year.	Up to three years or permanent.
Hawaii HAW. REV. STAT § 586-5.5(a).	Fixed period at the court's discretion.	Fixed period at the court's discretion.
Idaho IDAHO CODE ANN. § 39-6306(5).	Up to one year.	Fixed period or permanent.
Illinois 750 ILL. COMP. STAT. ANN. § 60/220(b).	Up to two years.	Fixed period or permanent.
Indiana IND. CODE ANN. § 34-26-5-9(e).	Two years.	
Iowa IOWA CODE ANN. § 236.5(2).	Up to one year.	Fixed period or permanent.

JURISDICTION	PROTECTION ORDER DURATION	EXTENSION DURATION (left blank when statute is silent)
Kansas KAN. STAT. ANN. § 60-3107(e).	Up to one year.	Up to one year.
Kentucky KY. REV. STAT. ANN. § 403.725(2).	Up to three years.	Fixed period or permanent.
Louisiana LA. REV. STAT. ANN. § 46:2136(F).	Hybrid: Up to eighteen months; court may order defendant to permanently refrain from abusing, harassing, or interfering with the petitioner.	
Maine ME. REV. STAT. ANN. tit. 19-A, § 4007(2).	Up to two years.	Fixed period or permanent.
Maryland MD. CODE ANN. FAM. LAW § 4-506(j).	Up to one year; up to two years for repeat parties.	
Massachusetts MASS. GEN. LAWS ANN. ch. 209A, § 3.	Up to one year.	Fixed period or permanent.
Michigan MICH. COMP. LAWS ANN. § 600.2950(13).	Not less than 182 days.	
Minnesota MINN. STAT. ANN. § 518B.01(6)(b).	Up to two years except when court determines a longer period is appropriate.	Up to fifty years.
Mississippi MISS. CODE ANN. § 93-21-15(2)(b).	Fixed period at the court's discretion.	
Missouri MO. ANN. STAT. § 455.040(1).	Six months to one year.	Up to one year.

JURISDICTION	PROTECTION ORDER DURATION	EXTENSION DURATION (left blank when statute is silent)
Montana MONT. CODE ANN. § 40-15-202(1), 204(1).	Fixed period or permanent at the court's discretion.	
Nebraska NEB. REV. STAT. § 42-924(3).	One year.	
Nevada NEV. REV. STAT. ANN.§ 33.080(3).	Up to one year.	
New Hampshire N.H. REV. STAT. ANN. § 173-B:5(VI).	Up to one year.	Initial renewal for one year. Subsequent renewals for up to five years.
New Jersey N.J. STAT. ANN. § 2C:25-29.	Fixed period or indefinite at the court's discretion.	
New Mexico N.M. STAT. ANN. § 40-13-6(C).	Indefinite period; only up to six months if custody or child support is involved.	Orders involving custody may be renewed once for six months.
New York N.Y. FAM. CT. ACT § 842.	Up to two years generally, or up to five years upon a finding of aggravating circumstances or a finding that the conduct alleged in the petition is a violation of an order of protection.	Fixed reasonable period.
North Carolina N.C. GEN. STAT. ANN. § 50B-3(b).	Up to one year.	Renewal for up to two years except award of temporary custody cannot be renewed beyond the initial yearlong protection order.
North Dakota N.D. CENT. CODE § 14-07.1-02(4).	Not specified; to be determined at the court's discretion.	

JURISDICTION	PROTECTION ORDER DURATION	EXTENSION DURATION (left blank when statute is silent)
Ohio OHIO REV. CODE ANN. § 3113.31(E)(3)(a).	Up to five years; however, if the respondent is under 18 years old, until the respondent turns 19.	Up to five years.
Oklahoma OKLA. STAT. ANN. tit. 22 § 60.11.	Five years.	Fixed period or permanent.
Oregon OR. REV. STAT. ANN. § 107.716(5).	One year.	
Pennsylvania 23 PA. CONS. STAT. ANN. § 6108(d).	Up to three years.	Three years.
Rhode Island R.I. GEN. LAWS § 8-8.1-3(i).	Up to three years.	Fixed period or permanent.
South Carolina S.C. CODE ANN. § 20-4-70(A).	Six months to one year.	
South Dakota S.D. CODIFIED LAWS § 25-10-5.	Up to five years.	
Tennessee TENN. CODE ANN. § 36-3-605(b).	Up to one year.	Typically one year. May be extended for five years for first violation of a protection order and ten years for subsequent violations.
Texas TEX. FAM. CODE ANN. § 85.025(a).	Up to two years or a fixed period at the court's discretion if court finds aggravating circumstances.	
Utah UTAH CODE ANN. § 78B-7-105(v), 106(c)(i).	Up to 150 days for civil provisions (e.g., child custody and support). Two years for criminal provisions (e.g., no assault and no contact provisions).	

JURISDICTION	PROTECTION ORDER DURATION	EXTENSION DURATION (left blank when statute is silent)
Vermont VT. STAT. ANN. tit. 15, § 1103(c).	Fixed period set at the court's discretion. The respondent may be ordered to pay petitioner's living expenses for a period not to exceed three months. Child support may be ordered for a period not to exceed three months.	Fixed period.
Virginia VA. CODE ANN. § 16.1-279.1(B).	Up to two years.	Up to two years.
Washington WASH. REV. CODE ANN. § 26.50.060(2).	For a fixed period or permanent. Relief restricting contact with the respondent's children may only last one year.	Fixed period or permanent.
West Virginia W. VA. CODE ANN. § 48-27-505(a).	Ninety to 180 days or up to one year with a finding of aggravating circumstances.	Ninety days to one year.
Wisconsin WIS. STAT. ANN. § 813.12(c)(1).	Up to four years.	Up to four years.
Wyoming WYO. STAT. ANN. § 35-21-106(b).	Up to one year.	Up to one year.