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Protective Order Enforcement: Another Pirouette

Margaret Martin Barry*

Introduction

A psychologist friend expounded recently on her views regarding domestic violence. She believes that women contribute to the violence of their batterers, in part, by demanding changes in the interpersonal dynamic that men are not psychologically equipped to handle. The cultural trends that have led women to make these demands are more advanced than ingrained social mores, and the result is tension, frustration, and violence. According to her, the courts, especially those in the criminal justice system, should have no role in resolving these intricate family issues. They need to be worked out over time through counseling and with the goal of preserving these essential relationships.

My friend’s view relegates domestic violence1 to the realm of enigma,

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1. Definitions of the term domestic violence have been both over-inclusive and under-inclusive. According to Del Martin, “domestic violence” refers to the use of physical force by one adult member of a household against another adult member, as distinct from “family violence” which includes physical and sexual abuse of children. Del Martin, The Historical Roots of Domestic Violence, in DOMESTIC VIOLENCE ON TRIAL 3 (Daniel Jay Sonkin ed., 1987). The Model Code on Domestic and Family Violence by the National Council of Juvenile and Family Court Judges (adopted Jan. 1994), describes domestic violence as the occurrence of one or more of the following acts by a family or household member, but does not include acts of self defense:

(a) Attempting to cause or causing physical harm to another family or household member;
(b) Placing a family or household member in fear of physical harm; or
(c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.


Due to the violence experienced by women and girls in dating relationships, a number of jurisdictions have included dating relationships within the statutory definition of domestic violence, calling into question the requirement that there need be cohabitation or other forms of intimacy associated with familial contact. See D.C. CODE ANN. § 16-1001(5)(B)
makes intervention loathsome to police and prosecutors alike, and supports notions that place judicial intervention in the basement of the courthouse, at best. I could dismiss my friend as biased, out of touch, or ill-informed. In truth, however, her view represents how many people continue to view the situation despite what the literature and community initiatives would lead one to believe.

The sluggish criminal justice response to domestic violence led women's groups in the early 1970s to seek legislative alternatives to state prosecution and to obtain structural reform of state law enforcement efforts through statutory requirements and conforming policy changes. The approach by women's groups has been three-pronged: to gain better police intervention, to increase criminal prosecution, and to utilize civil orders of protection. Civil orders tend to be most accessible and attractive to


The definitions of domestic violence are gender neutral, and should be, although it is an exception to the rule that men (in other than gay relationships) are the objects of domestic abuse. 90% to 95% of those experiencing domestic violence are women. Russell P. Dobash, The Myth of Sexual Symmetry in Marital Violence, 39 SOC. PROBS. 71, 74-75 (1992). At the same time, it should be noted that domestic violence is as prevalent in the gay and lesbian community as it is in the heterosexual community. Sandra Lundy, Abuse that Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts, 28 NEW ENG. L. REV. 273, 277 (1993); Denise Bricker, Note, Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners, 58 BROOKLYN L. REV. 1379, 1382 (1993).

2. The literature dates back through the ages, including times in which "women knew their place." We use the following quote from the Fifth Canto of Orlando Furioso, by Ludovico Ariosto (1474-1533), in the clinic in which I teach:

Every species of beast which dwells on this earth lives in peace among its kind - and if fight it must, yet the male will never attack the female. The mother-bear goes safely through the forest with her mate. The lioness lays herself down beside the lion; the she-wolf lives secure in her consort's company, and the heifer has no fear of the young bull. What scourge, though, what abomination has descended to wreak disturbance in human breasts? Listen to husband and wife constantly bandying insults, tearing each other's faces, striking each other black and blue and leaving their wedding beds bathed in tears - and not only tears, for sometimes brute anger has bathed them even in blood. That a man should bring himself to strike a fair maiden in the face or break but a strand of hair

I take to be not merely a great wrong, but an act wrought against nature, an act of rebellion against God; as for the man who gives her poison, or who sunders soul from body with steel blade or garotte, never shall I believe that such a one is truly a man, but rather a fiend in human shape.

LUDOVICO ARIOSTO, ORLANDO FURIOSO 39 (Guido Waldman trans., 2d ed. 1983).

3. The bias against domestic violence cases has been reported by numerous state gender bias task forces. Responses range from prosecutors refusing to prosecute domestic violence complaints to criminal judges sanctioning women who drop charges. The gender bias practiced by these "officials" is also evidenced by victim-blaming and disbelieving the women's stories. The Effect of Woman Abuse on Children, NATIONAL CENTER ON WOMEN AND FAMILY LAW 86 (1991) [hereinafter Effect on Children].
survivors\textsuperscript{4} of domestic violence for reasons I will discuss below. Enforcement of the orders in most jurisdictions, however, leaves much to be desired. This article first examines the reasons for committing significant resources to fight domestic violence. It then discusses the central role of effective enforcement of protective orders as a strategy for responding to this debilitating problem.

I. Why Make Domestic Violence Intervention A Priority?

This society places a high value on safety, particularly in the home. Individual expressions of concern vary with regard to whose safety is contemplated, but the strongest emotions\textsuperscript{5} are usually expressed with regard to the healthy development and security of children. Domestic violence has a negative physical and emotional impact on children.\textsuperscript{6} Violence often begins or increases during pregnancy.\textsuperscript{7} Nearly 50 percent of abusive husbands batter their pregnant wives, and these wives are four times more likely to bear infants of low birth weight.\textsuperscript{8} Children who

\textsuperscript{4} "Survivor" has entered the lexicon as an alternative to the concept of learned helplessness reflected in the term victim. See EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988); LEE A. HOFF, BATTERED WOMEN AS SURVIVORS (1990). The term survivor forces acknowledgement of the struggle that women in abusive situations undertake to preserve important relationships within the confines of a hostile social structure. The strength is there, shockingly at times, to persevere in an effort to maintain dangerous relationships and the structure surrounding them. Gondolf and Fisher conclude that "battered women demonstrate tremendous resiliency, persistence, and strength which press for a less pathological orientation . . . . [W]e believe their experience points to an alternative characterization—one that considers battered women fundamentally as survivors." GONDOLF & FISHER, supra note 4, at 3.

The problem with the term survivor is that it imposes bravado on women who want their lack of power in the face of constant assault acknowledged. Survivor may not describe how those who have experienced domestic violence feel about where they are or have been. It also requires a resilience of them that is not expected from other victims of crime who are viewed with sympathy. Nonetheless, survivor is preferable to victim because passivity is often dangerous, given the distance that must be travelled in countering the societal tolerance of domestic violence and the limitations of the most responsive social structures, in the face of domestic abuse. See Elizabeth M. Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse, 67 N.Y.U.L. REV. 520, 529-66 (1992).

\textsuperscript{5} I use the term "emotions" since policies regarding the treatment of children hardly reflect a societal commitment to their welfare.


\textsuperscript{7} See Catherine F. Klein & Leslye Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law, 21 Hofstra L. REV. 801, 827 (1993) (stating that pregnant women face an increased risk of physical abuse that often results in greater instances of physical injury).

\textsuperscript{8} Hearings on Women and Violence, Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990).
witness parental violence are always affected; they are traumatized by shock, fear, and guilt. Children suffer somatic complaints, such as insomnia, diarrhea, generally higher rates of illnesses as infants, and a higher incidence of colds, sore throats, abdominal pain, asthma, headaches, as well as bedwetting for older children. The effect of parental violence on children is also evidenced by delayed speech, delayed motor and cognitive skills, and poor school performance. In addition to the effects that result from witnessing violence in the home, children are often "accidentally harmed by blows or flying objects aimed at the mother, or are stepped on, or stumbled over, or dropped when the mother is attacked." These children are also at high risk to become targets of abuse.

Violent crime is consistently identified as a major concern in this country. It is not unfounded to conclude that the trauma and aggressive behavior learned in violent homes finds expression in aberrant behavior elsewhere. In fact, experiencing violent behavior in the home as a child is the single highest predictor of violent behavior, inside and outside of domestic relationships, as an adult.

In addition to concerns about children and non-domestic crimes, there is a societal interest in protecting women who are subjected to domestic violence.

10. Id. at 8.
11. Id. at 9.
12. Id. at ii.
15. See WILLIAM L. HART ET AL., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 2-3 (1984) (concluding that family violence is cyclical, as manifested by children who have grown up in violent homes and later become abusers of their own children); Murray A. Straus, Physical Violence in American Families: Incidence Rates, Causes, and Trends, in ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE 28-29 (Dean D. Knudsen & JoAnn L. Miller eds., 1991) (illustrating that family violence suffered by a child greatly contributes to the probability that as an adult the child will engage in similar violent behavior).
violence. Despite our culture's historical ambivalence on this issue,\textsuperscript{16} it is difficult to accept abandoning the fierce sense of protection and concern for the safety and well-being of one's daughter, wife, mother or friend to precepts of male privilege. A survivor's family and friends may seek alternatives to this perceived societal indifference. Furthermore, to the extent that women feel isolated, abandoned, and trapped, they may resort to violence to protect themselves; society has an interest in avoiding that level of desperation in its citizens.\textsuperscript{17}

The social costs of domestic violence have not been proportional to the level of response. Our tendency has been to shunt domestic violence into a fuzzy corner, where the state, like a careless parent, coddles the criminal and scolds the wayward survivor for her lack of resolve. This system that perpetuates misplaced blame must continue to be modified so that it can more effectively address the negative societal impact of violence within the family.

II. Legal Responses to Domestic Violence

A. Mandatory Arrest

The police are on the front line of intervention in domestic violence incidents since they are often called in to stop or prevent an attack. The message sent by the reporting officer plays an important role in the woman's safety, influencing both the batterer's view of his actions and the woman's faith in legal intervention. So long as police intervention amounts to no more than mediation, encouraging the batterer to "walk around the block" to cool off in an attempt to keep the family intact, women are in danger. For this reason, forty-three states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have passed legislation requiring warrantless arrests where there is probable cause to believe that a domestic assault or threat of assault has occurred.\textsuperscript{18} These laws and

\textsuperscript{16} R. Emerson Dobash & Russell P. Dobash, Wives: The 'Appropriate' Victims of Marital Violence, 2 Victimology 426 (1978), reprinted in BEVERLEY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION 185-93 (1994) (discussing the legal, religious, and cultural support of a marital hierarchy that subordinated women and legalized violence against them).

\textsuperscript{17} See ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987).

policies make it clear to police officers that domestic violence is to be viewed as criminal activity and should not be replaced by theories that would have them preserve the family at all costs.

Mandatory arrest has not, however, been a panacea for the jurisdictions in which it applies. In fact, there have been several negative implications. For instance, police officers have arrested the survivor, or both the survivor and the batterer, because they failed to determine who the primary aggressor was in the situation. The reasons for this type of inadequate police response include the police officers' fear of failing to comply with the requirement that an arrest occur, their resistance to the requirement, and confusion as to who the primary aggressor was in the incident.

The woman who has been assaulted may be angry or traumatized, while at the same time her partner, having vented his rage, is calm and in control, making it difficult to identify the aggressor.

Illustrating this point is a case in which I represented a survivor in seeking a protective order. When the assault occurred, the survivor was so upset by her partner beating her, breaking furniture, and destroying her things that by the time the police arrived, she was sitting on the floor shredding the remainder of her clothes. Her partner calmly reported to the police that she had gone crazy and was responsible for trashing the place and destroying her clothes. The police, misjudging the situation entirely, took her to the local mental institution where she was kept for one week before being released.

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20. See, e.g., Developments in the Law—Legal Responses to Domestic Violence: New State and Federal Responses to Domestic Violence, 106 HARV. L. REV. 1528, 1538-39 (1993) (discussing the phenomenon of dual arrests, the result of mandatory arrest schemes that require arrest where there has been bodily harm, thereby making a woman who hurts her abuser in self-defense also subject to arrest).

21. See ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 89 (1994) (discussing how batterers can appear perfectly reasonable, in control, and agreeable to others, especially police officers, when such behavior is in their best interests).
In instances where the police arrest the batterer, survivors often experience mixed feelings about pursuing prosecution. The survivor's response to arrest may include feelings that she has betrayed her partner, regret over the loss of this central though damaging relationship, fear of his or his family's response, and stress related to the economic implications of separation. This may discourage police support and willingness to arrest, despite legal mandates to the contrary and evidence indicating that merely arresting the batterer can reduce the incidents of violence.22

B. CRIMINAL PROSECUTIONS

Upon arrest, domestic violence can be prosecuted under state criminal statutes proscribing assault, mayhem, threat of violence, and destruction of property, to name a few. Domestic violence can also be prosecuted under the Violence Against Women Act of 1994 (VAWA), which makes it a federal crime to cross state lines with the intent to injure a spouse or another intimate party when such action results in bodily injury.23 The failure of states to vigorously prosecute domestic violence crimes has contributed to the proliferation of protective order statutes. When domestic violence is prosecuted, survivors can become alienated or angered by the process. Prosecutors can become frustrated by the survivor's lack of resolve, and it is difficult to gain convictions for crimes that often lack corroboration. Where convictions do occur, the results can be disastrous for the survivor, who may lose financial support from the defendant and suffer the condemnation of his, and sometimes her, family for causing their loved one to be incarcerated.

Policies that inhibit prosecution can increase the danger to the survivor. Until recently in the District of Columbia, cases were routinely not prosecuted in instances in which the survivor did not file a complaint on the morning following the alleged incident. Unless the survivor successfully communicated to the prosecutor's office that she was hospitalized, her case is dropped. This happened despite her fear, her inability to obtain child care, her inability to miss work, and her aches and pains resulting from the assault. This unfortunate practice placed the burden of prosecution squarely on the survivor, who is intimately aware of the danger of such a responsibility.

The perpetrator has a greater interest in returning to, and is more vested in continuing with, his criminal activity towards the victim where the relationship is familial and emotions are deep and conflicted. For this reason, many jurisdictions have recognized the importance of prosecuting

domestic violence cases so as to take the responsibility for the prosecution away from the survivor. 24 Police officers and other witnesses can be relied upon as complaining witnesses in bringing criminal charges, at least until the actual trial. 25 It should be made clear that the state, not the survivor, is seeking the sanctions. Recognizing the implications of the survivor’s relationship with her assailant, and incorporating this into the prosecution strategy, requires the training of special prosecution units. Such units would have a sufficient background in the dynamics of domestic violence so as to possess the ability to respond effectively to the survivor’s conflicted behavior and the risks she faces. These special units also would be responsible for handling the prosecution of all crimes in which the survivor and perpetrator have a domestic relationship. Several jurisdictions have, in fact, already established such units. 26

Criminal prosecution of domestic violence cases also requires creativity in applying criminal sanctions. If the prosecutor takes the survivor’s need for child support into account when advocating sentencing, the prosecutor could avoid punishing the survivor who must otherwise compensate for the lack of financial support for the children. 27 Yet, this must be done

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24. Policies that require domestic violence crimes to be prosecuted with or without the participation of the survivor started almost a decade ago in San Diego, California. Mark Hansen, New Strategy in Battering Cases, 81 A.B.A. J. 14 (1995). Between 30% to 40% of the jurisdictions in the country have followed suit. While drawbacks, such as forgetting the survivor’s welfare in the zeal to prosecute, have been noted, the increase in the conviction rate has been tied to a reduction in domestic homicide and rearrest rates. Id.

25. Requiring the survivor of domestic violence to sign the complaint makes it appear as though the decision to prosecute is hers, not that of the prosecutor and the judge. Furthermore, there is no federal constitutional right to confrontation at preliminary hearings. By avoiding such appearances, the survivor is spared some of the harassment and intimidation caused by repeated appearances and confrontation with the abuser. HART ET AL., supra note 15, at 29-31.

26. The establishment of special domestic violence prosecution units was recommended by the Attorney General’s Task Force on Family Violence. Id. at 27-29. See also THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, §§ 210-11 (1994) (recommending written procedures for prosecutors, including notification to the survivor when the prosecutor has decided not to prosecute, dismiss, or enter a plea agreement). Los Angeles has implemented programs and policies to encourage the prosecution of restraining order violations. The Office of the Los Angeles City Attorney has established a Domestic Violence Prosecution Unit, whose stated mission is to “prosecute provable violations of domestic violence restraining orders in order to prevent further acts of violence,” pursuant to California’s Domestic Violence Prevention Act. CAL. FAM. CODE § 6220 (Deering 1995). The unit applied a “no-drop” policy which stated that the survivor may not drop criminal charges once filed by the City Attorney’s Office. The U.S. Attorney’s Office for the District of Columbia, which prosecutes all of that jurisdiction’s non-juvenile criminal matters, is also preparing to establish a domestic violence unit. This operational plan is still being developed, and preliminary changes have been made to incorporate a number of the Attorney General’s Task Force’s recommendations.

27. See Report of the Missouri Task Force on Gender and Justice, 58 Mo. L. REV. 485 (1993); Harvey Wallace & Shanda Wedlock, Federal Sentencing Guidelines and Gender
without undermining the impact of the sanctions imposed. It is not useful or fair to designate batterers as a special category of criminals who deserve counseling instead of incarceration due to their familial ties with their victims. This response sets domestic violence apart from other crimes, treating the perpetrator as one in need of guidance and treatment, thereby absolving him from societal reproach. While alternative sentencing should be encouraged as a general proposition, it sends the wrong message to the batterer and society if this discreet group of criminals is regarded as less culpable, warranting treatment instead of punishment, because of their intimate relationship with their victims. At the same time, the societal interest in punishing the batterer should not mean that the survivor and the rest of her family suffer destitution. Issues of support relate directly to protection; economic responsibilities must not be completely abandoned in pursuit of traditional incarceration. Efforts at creative sentencing, including the integration of family and criminal systems to allow for support and protection of the survivor and her children, are a long way down the road in jurisdictions still restrained by dated concepts of criminal justice.

Issues: Parental Responsibilities, Pregnancy, and Domestic Violence, 2 SAN DIEGO JUSTICE J. 395 (1994); HART ET AL., supra note 15, at 34-35 (recommending dispositional alternatives in family violence cases in order to address the financial responsibilities of the batterer to the survivor and the family, as well as the therapy needs of the batterer). See also Reed, infra note 28.

28. While arrest in and of itself is significant in expressing to the batterer society's denunciation of his behavior, it is imperative that sentencing reflect the seriousness of the crime so as not to depreciate the importance by imparting lenient sentences. See Stephen B. Reed, The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 364-68 (1991).

29. The debate surrounding creative sentencing raises a multitude of issues regarding the appropriate sanctions for various crimes. While advocates argue that alternative sentencing alleviates prison crowding and reduces costs, opponents assert that liberalizing sentencing terms undermines appropriate punishment for criminal offenders. In the domestic violence context, the diversion of cases to counseling programs separate from the criminal justice system has been suggested. Apart from the danger of domestic violence being viewed as a less serious crime because of diversion, concerns about such an option revolve around who is to make such a recommendation or determination, and what factors should be considered in doing so. Factors that may be considered are the batterer's prior criminal history and the seriousness of the abuse. See, e.g., Developments in the Law: Legal Responses to Domestic Violence, 106 HARV. L. REV. 1528, 1548 (1993); See also Report of the Missouri Task Force on Gender and Justice, supra note 27; Wallace & Wedlock, supra note 27.

30. Judges should use a variety of sentencing alternatives in cases where there are not serious concerns about the survivor's safety if the abuser were to be allowed any freedom. Creative sentencing that combines no-contact orders with work-release punishes the abuser, while incorporating a mechanism for requiring him to meet his financial obligations. In addition to support, these obligations should cover lost wages, medical, counseling and other treatment fees, and the replacement cost of property destroyed or damaged by the abuser. Presentence diversion, conditioned upon complying with specific conditions, may work in less serious cases. HART ET AL., supra note 15, at 34-35.
C. CIVIL PROTECTION ORDERS

The primary legal antidote to domestic violence which is used today by all fifty states, the District of Columbia, the U.S. Virgin Islands, Guam, and Puerto Rico\(^3\) is the civil protection order. The protective order serves as a convenient middle ground for dealing with the criminal justice system's failure to prosecute crimes committed against intimates and its traditional limitations in responding to the needs of the survivor. The orders are injunctive, proscribing future assault or threat of assault. The orders also allow for a variety of additional remedies, including custody orders, support orders, and orders requiring the abuser to vacate the residence. The survivor initiates the action, thereby controlling the remedies available to assist her in disengaging from her batterer. The process can also allow her an alternative to seeking a criminal conviction, at least until the order is violated. This is attractive to those who are not prepared to seek criminal prosecution for the reasons discussed in the previous section.

Protective orders may be enforced through a variety of methods, such as civil and criminal contempt proceedings, as well as criminal prosecution.\(^3\) Where enforcement is sought through an action for criminal contempt, the offender may, as with other criminal prosecutions, have the right to counsel and other procedural protections\(^3\) unavailable to the survivor. The result is that enforcement becomes as elusive as it is intimidating.

III. THE SURVIVOR AS PROSECUTOR

Survivors of domestic violence are at a significant psychological, social, economic, and procedural disadvantage in seeking to enforce

\(^3\) All 50 states, the District of Columbia and Puerto Rico have civil protection order provisions. KLEIN & ORLOFF, supra note 7, at 810. See also P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT (1990) [hereinafter DOJ STUDY]. The U.S. Virgin Islands also have a statute providing for civil protection orders in cases of domestic violence. V.I. CODE ANN. tit. 16 § 97 (1994).

\(^3\) A survey of the protection order statutes in the 50 states, the District of Columbia, and Puerto Rico reveals that five statutes provide for civil contempt in the event of a violation of a protection order; four statutes provide for criminal contempt; eight statutes provide for both civil and criminal contempt; nine statutes classify violations as a misdemeanor; and 13 statutes provide for civil contempt and classify violations as a misdemeanor.

\(^3\) Some states applying criminal contempt procedures do not hold that the right to counsel applies. See People ex rel. Williams v. Rhodes, 185 Ill. App. 3d 114 (Ill. App. Ct. 1989).
protective orders. Many battered women\(^{34}\) fear threats of reprisal, the loss of their children, shame, and a lack of financial support. They often blame themselves for the violence and try to minimize the extent of it. They also try to rationalize the violence by focusing on the pressures or problems facing their batterers, such as his job or lack of one, his status in the community, and his relationships with the rest of his family.\(^{35}\)

This is a particular problem for African-American women,\(^{36}\) who must seek help from a system that has thrived on mistreating them and shackling their men and boys.\(^{37}\)

34. Battered is a difficult image to use for purposes of identifying a group of people. Battered conjures up gory visions of a person who does not exist beyond her state of assault. See Schneider, supra note 4, at 530. The challenge is not defining a woman by the abuse she has suffered, but fully crediting its impact upon her life.

35. The literature is replete with references to the barriers faced by survivors of domestic violence seeking to stop the violence. See Lenore Walker, The Battered Woman (1979) (for the seminal discussion of domestic violence, including the phenomena of learned helplessness and the cycle of violence); Mary Ann Dutton, Empowering and Healing the Battered Woman (1992) (discussing the psychological impact of battering, including post traumatic stress disorder); Evelyn C. White, Chain Chain Change (1985) (discussing abuse as it relates to black women). See also What's Love Got To Do With It? (Touchstone Pictures 1993) (the Tina Turner story).

36. The sociology of domestic violence differs among culturally diverse women of color, depending upon their cultural context and the treatment of women within that context. These differences underscore the challenge presented in considering the particularities that need to be preserved, even as they are molded into workable generalities for purposes of developing theories for responding to domestic violence. See Schneider, supra note 4. See also Sharon Allard, Rethinking the Battered Woman Syndrome: A Black Feminist Perspective, 1 UCLA Women's L.J. 191, 196-200 (1991) (discussing the different stereotypes applied to black women and how that affects their treatment as survivors of domestic violence). According to Allard, the concept of the battered woman as weak and fearful is how white women in this society are viewed, not black women. Justifications for the treatment of black women during slavery still cast black women as strong and suffering, at best. Thus, black women are in less need of protection. Allard discusses this distinction in the context of the battered woman syndrome, but she argues that feminist jurisprudence must be redefined to reflect the impact of race, class, and gender.

37. See Beth Riche, Battered Black Women: A Challenge for the Black Community, 16 Black Scholar 40 (1985) (discussing black women's perspectives on domestic violence, including the difficulty of relying on a racist criminal justice system).

Being sensitive to the effects of racism and the victimization of black men does not mean that African-American women must endure abuse by their partners. White, supra note 35, at 23. White quotes the following from Pat Parker:

\[
\text{Brother} \\
\text{I don't want to hear} \\
\text{about} \\
\text{how my real enemy} \\
\text{is the system.} \\
\text{I'm no genius,} \\
\text{but I do know} \\
\text{that system} \\
\text{you hit me with} \\
\text{is called}
\]
Thus burdened, women who have successfully obtained a protective order must figure out how to persuade the court to enforce it when violated. Most survivors and batterers enter the protective order stage pro se. 38 States that specify a burden of proof generally require survivors to demonstrate, by a preponderance of the evidence, that the person accused in the petition caused the harm alleged. 39 In most jurisdictions, courts tend to be open to providing an injunction against future harm and to creating other temporary remedies, such as custody and support, 40 that allow the survivor to function in the short term with a modicum of independence from the abuser. 41 The remedial nature of the statutes

a fist.

Id. (quoting PAT PARKER, MOVEMENT IN BLACK (1983)).

38. According to a study conducted by the National Institute of Justice, the majority of petitioners seek protective orders without the assistance of counsel. The study reports that in Nashville, during a three-month period in 1987, 80% of petitioners appeared pro se. DOJ STUDY, supra note 31, at 24. During the last quarter of 1992, 80.03% of petitioners in Maryland appeared pro se, while only 2.67% were represented by counsel (the remaining 17.3% is unknown). MARYLAND NETWORK AGAINST DOMESTIC VIOLENCE, REPORT ON FINDINGS FROM THE STATEWIDE STUDY ON DOMESTIC VIOLENCE PETITIONS FILED FOR THE QUARTER OCTOBER 1 THROUGH DECEMBER 31, 1992 47 (1994) [hereinafter MNADV STUDY]. In the District of Columbia, 65.8% of petitioners and 70.1% of respondents appeared pro se, while 15.6% of petitioners were represented by Corporation Counsel (in addition to those represented by private counsel or law students). Only 5.9% of respondents were represented by attorneys. DISTRICT OF COLUMBIA COURTS, FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS 143 (1992) [hereinafter D.C. GENDER BIAS TASK FORCE REPORT].


40. See, e.g., D.C. GENDER BIAS TASK FORCE REPORT, supra note 38, at 146-49 (outlining measures of relief granted in civil protection cases, including custody, support, and visitation); DOJ STUDY, supra note 31, at 43 (discussing protective order provisions for child custody and visitation).

41. This openness in imposing protective orders can be abused. In the District of Columbia, jurisdiction for granting relief in the form of a protective order is, by statute, available to the court upon finding that an intra-family offense occurred. D.C. CODE ANN. § 16-1005 (1981 & Supp. 1995). Judges often take the position that the protective order should be entered to keep the peace. They often encourage respondents to consent to such orders despite protestations of their innocence. This casual attitude toward the law in these matters can have the negative impact of undercutting the court's interest in enforcement and discrediting the protective order as evidence of a history of violence.
Encourages courts to issue protective orders. Nonetheless, many survivors approach the court with fear of both the abuser and the institution, and they are often confused by the process. Many expect the order obtained to provide a greater shield than it does, believing that the court will automatically mete out punishment upon violation. They see obtaining the protective order as the end of their advocacy, unaware that the order is not self-enforcing and that they must initiate its enforcement.

42. See, e.g., Powell v. Powell, 547 A.2d 973, 974 (D.C. 1988) (discussing the 1982 amendments to the District of Columbia’s Intrafamily Offenses Act as remedial of “several critical weaknesses” in the Act, such as the growing, unmet demand for Civil Protection Orders (CPOs), and the inadequate response of local police in assisting in the enforcement of CPOs); Clouterbuck v. Clouterbuck, 556 A.2d 1082, 1084 (D.C. 1989) (noting the 1982 amendment to the District of Columbia’s Intrafamily Offenses Act allowing petitioners of CPO’s to proceed pro se); Cruz-Foster v. Foster, 597 A.2d 927, 929-31 (D.C. 1991) (emphasizing that the remedial nature of the Intrafamily Offenses Act demands liberal construction in furtherance of its remedial purpose; and the 1982 amendments broadened the scope of available remedies because of the need to ensure that truly effective remedies are ordered); 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.”); Green v. Green, 642 A.2d 1275, 1280 (D.C. 1994) (discussing the 1982 amendments to the District of Columbia’s Intrafamily Offenses Act that target the need to meet the growing demand for CPOs, in part, by authorizing survivors of domestic violence to seek CPOs on their own initiative); Commonwealth v. Allen, 486 A.2d 363, 367 (Pa. 1984) (describing Pennsylvania’s Protection from Abuse Act as the only method to remedy the serious and widespread societal problems of domestic violence and spousal and child abuse, which would otherwise be effectively beyond reach); Yankoskiev v. Lenker, 526 A.2d 429, 432-33 (Pa. Super. Ct. 1987) (characterizing Pennsylvania’s Protection from Abuse Act as a “vanguard measure dealing with the problems of wife and child abuse” and stating that the Act was designed to compensate for the deficiencies of the criminal justice system in handling domestic abuse matters); State v. J.F., 621 A.2d 520, 522 (N.J. Super. Ct. App. Div. 1993) (describing New Jersey’s Prevention of Domestic Violence Act as remedial legislation necessary to immediately and effectively address the occurrence of domestic violence); Bates v. Bates, 795 S.W.2d 359, 360 (Ark. 1990) (stressing that Arkansas’ Domestic Abuse Act is remedial legislation that targets the prevention of domestic abuse, not after-the-fact punishment, by prescribing simplified processes enabling survivors to promptly seek protective relief); Calloway v. Kinkelaar, 633 N.E.2d 1380, 1384 (Ill. App. Ct. 1994) (describing one of the purposes of the Illinois’ Domestic Violence Act as expanding civil remedies for survivors of domestic violence, such as allowing pro se petitions for orders prohibiting such abuse).

43. A study conducted by The Urban Institute in 1993 surveyed the issuance, enforcement, and effectiveness of restraining orders in Colorado. Over half the women who participated in the study reported violations of the restraining orders they had obtained, including physical beating, forced sex, death threats, and harm to the children. Adele Harrell et al., The Urban Institute, Court Processing and the Effects of Restraining Orders for Domestic Violence Victims 49, 61 (1993).

Lawrence Sherman goes so far as to conclude that “[t]here is still no evidence that these orders have any effect in reducing the risk or seriousness of future violence against the victims. There is even one non-experimental study suggesting that protection orders may increase the risk of further violence due to their weak enforcement.” Lawrence W. Sherman, Policing Domestic Violence 238 (1992).

44. See Harrell, supra note 43, at 67-68, 78.
Tyree Castro’s case is illustrative of this point. Tyree is a twenty-four-year-old woman who lives in a subsidized apartment with her four-year-old daughter, Tia Castro. She is fearful of Lloyd Davis, the father of her daughter, with whom she lived for several months a few years ago. Tyree came to our clinic seeking assistance in enforcing the protective order she obtained on her own. The order required Lloyd to refrain from molesting, assaulting, threatening, or otherwise harassing Tyree. The order also required Lloyd to stay away from her home and person. It granted Lloyd unsupervised visitation with his daughter, with pick up and delivery provided by his mother so as to avoid the proscribed contact. The order was entered based on Tyree’s testimony that Lloyd

45. This story is based on one of my cases, but the names of people and several facts have been changed to protect the client’s identity.

46. The District of Columbia defines an “intrafamily” offense as one that is committed against a person “to whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence [or] with whom the offender maintains or maintained an intimate relationship not necessarily including a sexual relationship.” D.C. CODE ANN. § 16-1001 (1995).

47. Although three-fourths of domestic violence cases occur where the woman and her abuser do not live together because of divorce, separation, or never having cohabitated, most states define a survivor eligible to file for protection orders as a spouse, family member, cohabitant, or one who shares a child with the alleged abuser. DOJ STUDY, supra note 31, at 10. Recent changes in some states’ legislation expand the definition of the protected class in civil protection order statutes to include: parties in a “dating or engagement relationship” (CAL. CIV. PROC. CODE § 1219(A) (West 1994); D.C. CODE ANN., § 16-1001(5)(B) (1981 and Supp. 1995); “past or present unmarried couples” (COLO. REV. STAT. § 18-6-800.3 (1994)); “former spouses” (MD. CODE ANN., FAM. LAW § 4-501 (1993)); “any other category of individuals deemed to be a victim of domestic violence as defined by the department in regulation” (N.Y. SOC. SERV. LAW § 459(a) (Consol. 1995)); “intimate partners . . . currently or formerly involved in a romantic relationship, whether or not such relationship was ever sexually consummated” (N.H. REV. STAT. ANN. § 173B:1 (IV) (1994)); parties with a “sufficient relationship” (N.D. CENT. CODE § 14-07.1-01 (1995)); and parties who “have been involved in a sexually intimate relationship with each other within two years immediately preceding the filing” (OR. REV. STAT. § 107.705(2)(e) (1994)).

48. I refer here to the Families and the Law Clinic at Columbus School of Law, The Catholic University of America.

49. This language appears on the District of Columbia’s Civil Protection Orders which are form orders required by the court. See D.C. CODE ANN. § 16-1005(c) (1995).

50. The judge’s tendency in these cases has been to require unsupervised visitation, despite the impact of violence upon the children and the opportunity to continue intimidation and manipulation through the children. However, the Model Code does provide that a court may “[s]pecify arrangements for visitation of any minor child by the respondent and require supervision of that visitation by a third party or deny visitation if necessary to protect the safety of the petitioner or child.” THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 306(3)(b) (1994). Jurisdictions such as Maryland allow for supervised visitation “[i]f the court finds that the safety of a person eligible for relief will be jeopardized by unsupervised or unrestricted visitation.” MD. CODE ANN., FAM. LAW § 4-506(d)(7) (1995). Additionally, some jurisdictions, North Dakota for example, consider evidence of domestic violence as creating a presumption against an award of custody or the
had followed her and slapped her around on several occasions and on her testimony that on one occasion a few days before she had filed her petition for a civil protection order (CPO), Lloyd had punched and kicked her several times in her stomach, head, back, and arms. Even after Tyree had obtained the protective order against him, Lloyd continued to engage in violent and threatening behavior. Our initial interview with Tyree revealed that Lloyd had threatened to kill her over the phone five days earlier. The night before this call, she had seen him lurking outside of her apartment, and a witness had seen Lloyd throw a rock through her bedroom window. She was certain that he intended to carry out his threat to kill her. Her visit to our office was only the second time she and her daughter had dared to venture out of her apartment since Lloyd’s telephone call. The first time was their trip to court to tell the judge. Tyree had entered the courtroom expecting to tell the judge what Lloyd had done in violation of the order and that the judge would be duly incensed and impose the punishment set down by law. Instead, she learned that Lloyd was entitled to notice, that a hearing would be set, that an attorney would be appointed to defend him, and that the government would even pay for his attorney if he could not afford the cost. Having learned this from the courtroom clerk, Tyree had filed her motion for contempt of the CPO and had gone home. She came to our office a few days later frustrated and afraid.

We then had to add to the discouraging information that she had already received. Lloyd’s attorney would not be appointed until the day we went to court. His counsel would come in and immediately request time to prepare the case, and a new date would therefore be set, two to three weeks hence. If Tyree had been proceeding with the contempt on her own, the criminal defense attorney might have approached Tyree to talk. The attorney would probably use high-pressure tactics to attempt to dissuade her from pursuing the action. Tyree would have been up against not only her abuser, but also his attorney, who is comfortable and familiar with the courthouse environment.

A survivor in Tyree’s position has not yet encountered a shift in the burden of proof: the leap from the preponderance of evidence standard granting of visitation to a battering spouse. BARBARA J. HART, ESQ., STATE CODES ON DOMESTIC VIOLENCE 31 (1992). Approximately 40 states require courts to consider domestic violence when making custody awards. Nancy S. Erickson & Joan Zorza, Women and Family Law in 1994, 28 CLEARINGHOUSE REVIEW 1117, 1119 (1995). The District of Columbia requires that the court make written findings supporting a grant of custody to an abusive party and limits an award of visitation to cases where the judge finds that the child and custodial parent can be adequately protected from harm by the abusive party. The abusive party carries the burden of proving that visitation will not endanger the child or significantly harm the child emotionally. D.C. CODE ANN. §§ 16-911, 914 (1994). In the District of Columbia, implementation of these provisions has been slow, with judges reluctant to change long-held precepts about the importance of maintaining parental contact.
applied to obtaining a protective order to the beyond a reasonable doubt standard required for a criminal contempt conviction. 51 Also problematic for a survivor is that the extent to which these quasi-criminal contempt proceedings are criminal in other respects is not absolutely clear. Do criminal rules apply with regard to discovery and evidence? Criminal lawyers appointed to these cases are intent on applying the criminal rules, which are the most familiar and favorable, but may not necessarily apply. 52 This situation is not one specifically contemplated by the criminal rules. The power balance is decidedly in favor of the respondent/defendant due to the nature of his relationship with the survivor. It is tipped further in his favor because constitutional protections give him the right to counsel and other benefits. This imbalance often leads to withdrawal or dismissal of the contempt petition by the survivor,53 a result that diminishes the remedial nature of the statute and seriously undermines the physical safety of the petitioner.

Tyree was fortunate to have counsel representing her. The court-appointed counsel for the defendant, however, was extremely aggressive. Viewing the student attorney54 and myself as the prosecution, as opposed to counsel for the petitioner, he blew past us, tapped our client on the shoulder and said to her, "Come with me; I want to talk with you." After

51. I have observed this standard being met solely on the basis of the petitioner's testimony in protective order contempt hearings in the District of Columbia. See also Klein & Orloff, supra note 7, at 1109 (citing People v. Blackwood, 476 N.E.2d 742 (Ill. App. Ct. 1985) (upholding a conviction based solely on the petitioner's testimony)).

52. Criminal rules of procedure have been held inapplicable in the context of an intrafamily contempt proceeding for the violation of a civil protection order by the D.C. Court of Appeals. Green v. Green, 642 A.2d 1275, 1280 (D.C. 1994). The Jencks Act provides that the defense in a criminal prosecution may obtain for impeachment purposes statements which have been made to government agents by government witnesses when the "witness has testified on direct exam in the trial of the case." Jencks Act, 18 U.S.C. § 3500(a) (1969). The court concluded that the criminal defendant's entitlement to Jencks material is wholly inapplicable to the intrafamily contempt respondent. The court stated that the Intrafamily Rules, not the criminal rules, govern. Id. at 1281-82.

53. The D.C. Gender Bias Task Force expressed concern over the inherent imbalance in CPO contempt hearings, citing the frequency of prosecution by unrepresented parties, as opposed to representation by private counsel or Corporation Counsel attorneys, as a substantial contributing factor in the "low rate of contempts found at trial." See D.C. GENDER BIAS TASK FORCE REPORT, supra note 38, at 153-54, 156. This source of concern is similarly reflected in a study performed by the Maryland Network Against Domestic Violence in 1994. The survey indicates that up to 25 percent of civil protection orders are dismissed because of the petitioner's failure to appear at the initial hearing, another policy that fosters an imbalance against the petitioner. See MNADV STUDY, supra note 38, at 74-5. See also MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 12-13 (1989) (discussing barriers facing survivors of domestic violence who attempt to petition for civil protection orders, including failure of judges to give the survivor's testimony appropriate weight).

54. Students in clinics practice as attorneys under state student practice laws, provided they are under the supervision of an attorney/instructor.
a moment of shock, I stated that my client did not wish to speak with him. He then proceeded to make a scene, marching into the courtroom, asking that the case be called, telling the judge that we were obstructing justice, and asking for an instruction that the complaining witness speak with him. I argued that he had no right to talk directly to my client, and that even under the criminal rules (which should not apply for reasons discussed earlier), he had no right to talk to a complaining witness who did not wish to speak with him. The judge did not address the procedural issue regarding access to a criminal complainant/prosecutor who is represented by counsel, stating simply that Tyree did not have to speak with defense counsel if she did not want to.55

Tyree, nonetheless, was quickly losing her will to proceed. She said that she would not take the stand if that meant she had to answer the opposing counsel’s questions. No amount of coaxing could dissuade her. We could have tried to proceed with the one witness who had seen Lloyd throw the rock, but that would have greatly weakened the case. Also, we could not be sure that defense counsel would not call upon her to testify.

Cases that are expected to go to trial are called last on the domestic violence calendar in the District of Columbia. Non-contested protective orders, dismissals, no shows, and minor motions are handled first. This means that while all litigants are expected to show up at 8:30 a.m., trials do not begin until late morning or early afternoon. By 11:40 a.m., Tyree was ready to leave court. Despite our efforts to shield her from the courtroom tension, she was exhausted. We said that we would ask for a continuance, but she insisted that we drop the case. She finally agreed to more negotiation on our part with opposing counsel. After intense negotiations, the contempt charge was held in abeyance with a return date set for six months later. At least this gave Lloyd some reason to pause if he planned to bother Tyree in the next several months.

Without counsel, Tyree may have fled the courthouse shortly after her first confrontation with Lloyd’s attorney. I have seen other women of firmer resolve who were proceeding pro se intimidated or worn down by

55. Neither case law nor criminal rules of procedure expressly address whether or not defense counsel can approach a complaining witness. A leading case dealing with witness contact stresses that witnesses in a criminal proceeding cannot be claimed by either the prosecution or the defense. Gregory v. United States, 369 F.2d 185 (D.C. 1966).

The Model Rules of Professional Conduct prohibit a lawyer from communicating with a party the lawyer knows to be represented. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995). Currently the ABA’s Standing Committee is circulating for public comment a proposal that would substitute the word “person” for “party.” In its proposed amendment, the Standing Committee clarified that Rule 4.2 “protects represented persons whether or not they are, in a formal sense, actual or prospective ‘parties’ to a proceeding or transaction.” STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 261-62 (1995).
defense counsel. The significant body of law designed to protect the individual right to a presumption of innocence\textsuperscript{56} weighs against a survivor proceeding alone in a foreign and, at this juncture, procedurally hostile environment. As a result, the force of a civil protection order is undermined.

IV. Protective Order Enforcement Options

A. MISDEMEANOR

In those jurisdictions in which violation of a protective order is itself a crime, the government prosecutor is responsible for seeking enforcement. Thirty states and the District of Columbia have made the violation of protective orders a misdemeanor.\textsuperscript{57} The 1994 Violence Against Women Act makes interstate violation of a protective order a federal crime.\textsuperscript{58} This trend toward criminalization is a statement about the seriousness of the orders and the situations they reflect. It formally places enforcement in the criminal context for procedural purposes and relieves the survivor of the onus of conducting the prosecution. In practice, however, this enforcement authority has not been pursued, and the survivor is still expected to take responsibility for enforcement.\textsuperscript{59} As Tyree's case suggests, criminal prosecution does not protect her from defense counsel, nor does it assure her a determinative voice in enforcement. Since the charge that the perpetrator faces is directly related to the survivor's effort to get protection, retaliation becomes more likely.

Neither the prosecutors nor the courts are accustomed to considering the victims of crimes in more than an abstract way, at least until the sentencing phase of a case where the victim impact statement may have

\begin{itemize}
  \item[57.] DOJ STUDY, supra note 31, at 50-51; Domestic Violence in Romantic Relations Act of 1994, § 2(b), D.C. Act 10-380 (March 1995). This Act imposes a fine of up $1000 and/or imprisonment for up to a period totalling 180 days.
  \item[59.] Although there appears to be no comprehensive data available as to actual numbers of prosecutions, in states that offer a choice, advocates for survivors of domestic violence report that most violations are still handled by the petitioner herself, not a prosecutor. State coalitions against domestic violence in Alabama, Arkansas, Illinois, Maryland, Minnesota, and Virginia, six states that offer the choice, report that the level of prosecution occurring can vary widely from county to county within a state and that in most counties criminal prosecution for violation of protection orders is not the norm.
\end{itemize}
some bearing upon the length of the incarceration. Misdemeanor prosecution of protective order violations challenges the criminal justice system to consider the safety of the survivor and the domestic responsibilities of the defendant in fashioning the appropriate punishments. It is a challenge that courts are increasingly called upon to meet.\textsuperscript{60}

Enforcement of the protective order should be cumulative to prosecution of the underlying crime. This underscores the weight the order must be given while demonstrating that domestic violence crimes are not a separate category of lesser offenses. In pursuing both manners of enforcement, complaints must be fashioned so as to avoid double jeopardy challenges. The Supreme Court held in \textit{United States v. Dixon} that such challenges can be avoided so long as the contempt and criminal offenses each contain an element that is not contained in the other.\textsuperscript{61} Care should be taken to assure that actions by the batterer that lead to prosecution for violation of the protective order and prosecution for violation of criminal statutes avoid the double jeopardy issue. A survivor proceeding pro se to enforce the protective order is usually unaware of the double jeopardy issue or unable to communicate with the prosecutor on this matter. If state prosecution of protective order contempt citations is not pursued or if counsel is not provided to the survivor, the result may be that the batterer is insulated from penalties under the criminal statutes, which are often more severe.

One type of protective order violation for which courts are reluctant to impose criminal sanctions is the failure to make a required child support payment. Protections accorded to debtors should not apply to batterers who fail to pay support.\textsuperscript{62} Money can, and is used to, continue the

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\textsuperscript{60} In New York, for example, Family and Criminal Courts have concurrent jurisdiction to handle cases involving spousal abuse. See \textit{N.Y. CRIM. PROC. LAW § 530.11(1)} (McKinney 1984). See also Reed, supra note 28 (asserting that a single theory of punishment for batterers is not sufficient to address the complexities presented by a domestic violence case).

\textsuperscript{61} \textit{United States v. Dixon}, 113 S. Ct. 2849 (1993). \textit{Dixon} was the first time the Supreme Court ruled in a domestic violence case. The Court found, using the "same-elements" or Blockburger test, that double jeopardy did not attach to a conviction for contempt of the no assault provision of a civil protection order (CPO) followed by indictment for assault with intent to kill and threats to injure or kidnap for the same events. Double jeopardy did attach with regard to the simple assault indictment since proving the contempt of the CPO required proof of the same elements with regard to the criminal activity. In so ruling, the Court specifically overruled the "same-conduct" rule established in \textit{Grady}. \textit{Id.} at 2859.

\textsuperscript{62} Most courts dealing with the issue of a criminal prosecution for the failure to pay support under a civil protection order focus their concerns on the possibility of incarceration resulting from such a prosecution. Although such punishment seems to run afoul of the constitutional prohibition against imprisonment for a debt, courts have explained that the imprisonment is not actually a result of the failure to pay a debt, but rather is imposed solely for willful disobedience of a court's mandate. See \textit{Cramer v. Petrie}, 637 N.E.2d
manipulation and intimidation of the survivor. In order to send a strong message that the state intends to protect the survivor, it must be clear that support ordered in domestic violence cases is not subject to the general concerns about protecting debtors. Criminal sanctions, including incarceration, should apply in failure to pay support cases. Once nonpayment is shown, the batterer must demonstrate that there are unavoidable circumstances which make it impossible for the batterer to pay support. Demonstrating the existence of unavoidable circumstances causes the criminal case to collapse because of the lack of requisite intent.

For criminal sanctions to work, the prosecutor and judge, as well as the correction, probation, and parole facets of the system, must commit themselves to enforcement. It does no good for the prosecutor to aggressively pursue enforcement if the judge will acquit or provide exceptionally lenient sentences. Similarly, it does no good for the judge to sentence an offender to probation if the probation officer is not vigilant or to prison only to see the batterer paroled early. Domestic violence survivors must be considered at each of these stages. If the batterer is to be released, the survivor must be warned in advance. If sentencing involves batterer’s counseling, the counselors must be trained in the area of domestic violence, the batterer’s attendance must be monitored, and

882, 886 (Ohio 1994); Diggs v. Diggs, 663 P.2d 950 (Alaska 1983); People v. Stanley, 376 N.E.2d 1095 (Ill. App. Ct. 1978); Hoyt v. Pierce, 31 A.D.2d 582 (N.Y. App. Div. 1968). To ensure that the constitutional prohibition against incarceration for failure to satisfy a debt is not violated, courts have undertaken two inquiries: (1) is the failure to pay support under a civil protection order truly a debt, and (2) is the defendant’s failure to pay support a result of willful disobedience or indigence? Courts have consistently indicated that support in arrears is not a debt in the ordinary sense of the word, but rather an obligation that arises “by operation of law and is a personal duty owed to the former spouse, the child, and society in general. It does not arise out of any business transaction or contractual agreement, as does an ordinary debt.” Cramer, 637 N.E.2d at 886. See also Stanley, 376 N.E.2d at 1096. The mere fact of nonpayment alone does not establish the failure as willful, justifying imprisonment. Rather, the court must hear evidence as to the willfulness of the violation based on the financial ability of the respondent, past violations, the needs of the petitioner, and all the facts and circumstances bearing on the alleged willful failure. Poverty and misfortune may be valid excuses for nonpayment. See Stanley, 376 N.E.2d at 1097; Hoyt, 31 A.2d at 582.

63. See, e.g., WALKER, supra note 35, at 28, 172 (discussing the financial power held by batterers, specifically by surveying financial manipulation of women regarding access to checking and charge accounts); DUTTON, supra note 35, at 80-81 (identifying the lack of battered women’s resources to live independently as a major deterrent to women seeking escape).

64. Minnesota law clearly states that before an individual arrested on a domestic violence charge is released, a “reasonable and good faith effort” must be made to orally notify the victim. MINN. STAT. § 629.72(6)(a) (1995). Such statutes indicate an increased understanding by officials of the risks a survivor faces when seeking intervention by authorities to help stop the abuse.

65. Counseling programs must challenge batterers to take responsibility for their violence. Batterers may deny the behavior or try to minimize the effects. Poor counseling,
consequences must follow a failure to attend. In this way, criminal sanctions can be imposed in a manner that conveys intolerance of domestic abuse while addressing the survivor's concerns. This calls for an integration of criminal punishment and rehabilitative goals with domestic relations concerns about family welfare.66

B. SHOW CAUSE ORDERS

Where there is reason to believe that a violation of an order has occurred, a court has the authority to require a person who may have violated the order to demonstrate why he or she should not be found in contempt. Courts do this by issuing show cause orders. If the abuser is found to have violated the protective order, then the statutory sanctions would apply. Procedurally, this puts the initial burden on the batterer and sends a clear message that the court has an interest in enforcing its own orders. It also has the benefit of removing from the survivor the onus of initiating prosecution. Notification of a violation should come by way of a police or probation report filed with the court or by way of an affidavit filed by the survivor or other witness. Notification should go directly to the judge who issued the order.67 As a practical matter, to go forward on a criminal contempt, the batterer may have the right to have defense counsel appointed. As discussed in the following section, for this procedure to be effective, counsel for the survivor should also be appointed by the court.

Judges are often unwilling to issue show cause orders because the initiation of such action adds to already crowded dockets. Thus, for such an enforcement approach to be reliable, judges would have to be required to issue these orders, either by statute68 or by court rule.

that does not confront attitudes that allow the batterer to blame his conduct on the survivor, merely serves to reinforce the beliefs that contributed to the batterer abusing the woman in the first place. Programs that do not have a staff familiar with the dynamics of an abusive relationship and the power and control issues involved in these relationships, not only fail as rehabilitative measures, but may also place the survivor in danger of further abuse. See ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER (1993) (discussing how to conduct effective batterer’s programs).

67. This is particularly important in jurisdictions, such as the District of Columbia, where judges rotate through the domestic violence calendar on a monthly basis. It is highly unlikely that the issuing judge will be the judge hearing the contempt action. The judge hearing the contempt action may not necessarily be familiar with domestic violence issues, law, and procedure. The judge who takes up the case anew has little of the history and may not be as committed as the issuing judge to the integrity of the order. Thus, the inclination to issue a show cause order will be all the less attractive.
68. It is not clear whether on the state level this would cross any separation of power lines. Courts are instructed by legislators with regard to standards of proof, sentencing, awards, and so on. The enforcement of civil protection orders, by requiring show cause hearings, is analogous.
C. COURT-APPOINTED COUNSEL FOR THE SURVIVOR

In states where the survivor is responsible for pursuing criminal contempt for the violation of a protective order, the accused has no right to a public prosecutor.\(^69\) There is neither authority supporting the right to a public prosecutor, nor to court-appointed counsel, for one seeking to enforce the order. The court may have the authority to appoint counsel for the survivor,\(^70\) but it is not required to do so. As described above, this can leave the survivor with the overwhelming task of having to battle both her abuser and his counsel on her own.

Federal funding, comparable to that provided to guarantee defendant's access to counsel under the Criminal Justice Act,\(^71\) would provide states with the ability to appoint counsel to represent survivors in enforcing protective orders.\(^72\) Under this scheme, lawyers trained in domestic violence law would be chosen from a list kept by the court for appointments. While protecting the rights of the accused in a criminal action is essential, it is no less essential to protect the survivor, who asks the court to enforce its order.

Since there is currently no federal funding of this type, and with local law and budget constraints limiting the court's ability to pay fees to counsel, pro bono counsel should, at a minimum, be appointed from a court-maintained list of attorneys trained in the area of domestic violence to represent the survivor who is seeking to enforce her protective order. The court or the bar should provide training in this area for these attorneys.\(^73\) In any event, thrusting the burden of enforcement of civil

\(^{69}\) The District of Columbia Court of Appeals has held that one accused of violating a protective order does not have a constitutional right to a public prosecutor. Green v. Green, 642 A.2d 1275, 1281 (D.C. 1994).

\(^{70}\) For example, the Superior Court of the District of Columbia authorizes the court to "request" that the Corporation Counsel, a hybrid of some of the functions of a state attorney and attorney general, represent the petitioner seeking to enforce the protective order. D.C. SUP. CT. R. INTRA-FAM. 12(c)(2).


\(^{72}\) While federal funding of any kind seems elusive in the current political climate, one exception is in the area of criminal prosecution. Translating enforcement of civil protection orders into criminal prosecution may gain some support even in this austere fiscal climate.

\(^{73}\) In the District of Columbia, once a year, the local bar provides training and materials, free of charge, to lawyers who are willing to represent survivors of domestic violence in at least two protective order cases. The cases can, but are not required to, be enforcement cases. A list of lawyers willing to represent survivors of domestic violence is maintained by a project associated with the Georgetown University Law Center's Sex
protection orders upon the survivor, without assuring that she will be represented, is both unrealistic and ineffective.

Conclusion

Family violence is a horrific crime because it both engulfs its victims with fear and brings danger that seeps through the crevices of the survivor's sanctuary, exploding where there is little chance for respite. Without a firm commitment to combat family violence, this behavior will continue to flow from generation to generation, surfacing in criminal activity within and beyond the home. The very existence of protective orders suggests a failure on the part of the criminal justice system to effectively respond to domestic violence. These orders also highlight the complexity of the issues raised and the difficulty of applying a narrow state-versus-perpetrator-to-the-exclusion-of-victim approach to these crimes. Domestic violence necessarily entails a hybrid of criminal and family law and thus demands creativity. This does not mean counseling instead of punishment, nor does it mean light sentences. The message that violence in the home is serious, and will not be tolerated, must be clear. That this message requires a complex response makes it no less compelling.

While protective orders exist because of the historical failure of jurisdictions to prosecute domestic violence, the response to domestic violence by the state should not be relegated entirely to the criminal justice system. Many domestic violence incidents cannot meet criminal prosecution standards because of the high burden of proof required in criminal cases. Intervention by the courts, through protective orders, provides immediate relief by way of vacate, stay away, and support orders. Furthermore, injunctive relief against violence, while redundant of criminal statutes, is beneficial because it provides quick relief in a relatively user-friendly setting. It also provides an intermediate step for the survivor, who is not prepared to seek criminal prosecution, yet wishes to send a message that violence will not be tolerated. Once issued, these orders must be enforced.

Enforcement of protective orders may be accomplished through a variety of methods, including criminal prosecution, judicially initiated show cause orders, and survivor initiated criminal contempt proceed-

Discrimination Clinic. There is no provision requiring the court to appoint counsel for the petitioner from that list, nor is there any governmental support that would assure that such a project continue.
The availability of all of these methods to the survivor is essential in combatting domestic violence.

Without diligent enforcement, the protective order becomes yet another symbol of the cultural denigration of issues central to the health and security of women. Courts will continue to issue orders, but without a system that ensures enforcement there will be little commitment to their integrity. The resulting devastation for families and, by extension, society, is as much beside the point as it is the point.

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74. Although creative approaches like civil contempt of protective orders may have some impact, for the most part, criminal contempt carries a stronger message of condemnation. Tort law may also provide some relief. See HART, supra note 50, at 41-43.