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Behind the Screen: The Constitutionality of Remote Testimony for Survivors of Domestic Violence

Rachel Harris

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Behind the Screen: The Constitutionality of Remote Testimony for Survivors of Domestic Violence

BY RACHEL HARRIS*

“Before my hearing for my order of protection, I knew that he would try to contact me through other people, send me flowers, send presents to the kids, and all of those things will make me feel powerless when I have to go into court and see him face-to-face. I knew after all of that I would tell the judge that I changed my mind and that I am going to give him another chance. But being on the screen, I tell you, gave me a sense of empowerment. When the judge asked me if I wanted an order of protection, I was able to stand there in my living room and say yes, I do. I do not believe that I would have been able to do that standing beside my abuser. As survivors, we are typically in these situations with people that we love. We want to be able to trust them again and hope that it can work out. So, when we are standing in the same room with that person, it is a lot. When you are in the courtroom with your abuser, he can be unpredictable. You cannot control what he will do once you walk outside down the street and around the corner to your car. It is a lot more empowering to be behind the screen. The big bad wolf is over there in the courthouse. He cannot get me because I am safe behind my screen.”¹

- Delicia Harris, survivor of domestic violence and survivor navigator.

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*JD Candidate, University of California, Hastings College of the Law, 2022. I would like to thank Delicia Harris for sharing her story of survival, resilience, and perseverance with me.

1. Zoom Interview with Delicia Harris, a survivor of domestic violence, (Feb. 16, 2021).

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I. Introduction

Remote testimony during COVID-19 empowered survivors like Delicia Harris, quoted above, to feel safe enough to speak their truth during civil protection order proceedings. Remote testimony and e-filing procedures offer domestic violence survivors equitable, constitutional solutions in the civil setting. Survivors and advocates indicate that e-filings and remote testimony options during COVID-19 increased accessibility, efficiency, and survivor participation in proceedings.² It would be a grave mistake to thrust this observation aside and return to the status quo. Prior to the pandemic, survivors of domestic violence were required to file for protective orders in-person and make accusations against their abusers face-to-face. This practice was ineffective and unconscionable in light of the trauma it triggers for survivors. From a public policy perspective, the legal community should never return to this outdated procedure.

In this note, I advocate for expanded access to remote testimony and e-filing options for survivors of domestic violence to increase access, mitigate the risk of witness intimidation, and amplify survivors' willingness to participate in proceedings. First, I argue that remote testimony in civil domestic violence proceedings would not violate the limited confrontation and cross-examination right guaranteed by the Due Process Clause. Next, I argue that courts should allow domestic violence survivors to appear remotely and utilize e-filing procedures in civil protection order proceedings because these practices will increase survivors' participation in proceedings and mitigate witness intimidation. Finally, I discuss the avenues through which courts may implement e-filings and remote testimony. The pathways to implementation are either through state and federal legislation or modification of state court's rules regarding the practice of remote testimony. State legislators should model laws similar to the newly enacted Washington Senate Bill 1320 ("Wash. S.B. 320") and California Senate Bill 538 ("Cal. S.B. 538") that permit remote testimony for survivors. In the alternative, state courts could create parallel provisions to the good cause test located in Rule 43 of the Federal Rules of Civil Procedure ("FRCP"). I argue for expansion of the good cause exception to live testimony based on domestic violence survivors' extreme discomfort testifying in open court against their abuser, the elevated risk of survivor retraumatization, and survivors' inability to testify truthfully due to fear and coercion.

2. E-mail from Rylie Shore, Program Coordinator of the Alliance for Hope International, to Rachel Harris, author (Feb. 1, 2021) (on file with author).

Over ten million people per year experience domestic violence.³ Intimate partner domestic violence affects individuals who identify as men, women, and non-binary.⁴ However, this note focuses on the primary target of domestic violence: women. The most common perpetrators of violence against women are male intimate partners or ex-partners.⁵ Studies indicate that over 30% of women worldwide have been subjected to intimate partner violence, and 38% of all murders of women globally are committed by intimate partners.⁶ Domestic violence is not limited to the confines of the home. Its impact pours out from those four walls into all aspects of our society, beyond individual survivors, and throughout entire communities. Domestic violence is at the root of numerous social issues, including child abuse, violent crime, juvenile delinquency, homelessness, and substance abuse, “costing lives as well as millions of dollars each year . . . for health care, absence from work, and services to children.”⁷ Additionally, throughout the COVID-19 pandemic (“COVID-19”), domestic violence has increased dramatically worldwide.⁸ While this human rights crisis affects every corner of society, very little has been done to make protection orders more accessible to survivors in the 50 years since states began providing civil remedies for individuals who have experienced domestic violence.⁹

II. Background

Delicia Harris stood before a judge in a vast courtroom.¹⁰ The piercing eyes of spectators burned through her back.¹¹ She stood across the aisle just feet away from her abuser.¹² Delicia tried to keep her voice as low as possible so only the judge and court reporter could hear her state her name.¹³ After recounting the abuse that she experienced, she turned to walk out of

3. *Some Statistics About Domestic Violence*, PROJECT SANCTUARY DOMESTIC VIOLENCE PREVENTION, <https://www.projectsanctuary.org/dv/some-statistics-about-domestic-violence/> (last visited Feb. 21, 2021).

4. *Id.*

5. *Violence Against Women*, WORLD HEALTH ORG. (Mar. 9, 2021, 12:00 PM), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

6. *Id.*

7. *Gourley v. Gourley*, 158 Wash.2d 460, 468 (2006) (citing Laws of 1993, ch. 350 §1).

8. *The Shadow Pandemic: Violence Against Women During COVID-19*, UNITED NATIONS WOMEN, <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19> (last visited Mar. 13, 2021).

9. CHRISTOPHER T. BENITEZ ET AL., *Do Protection Orders Protect*, J. AM. ACAD. OF PSYCHIATRY & LAW (2010), <http://jaapl.org/content/38/3/376>.

10. Harris, *supra* note 1.

11. *Id.*

12. *Id.*

13. *Id.*

the courtroom feeling as small as she had ever felt.¹⁴ Intense pangs of shame and embarrassment washed over her.¹⁵ Delicia did not know where her abuser would go or what he would do.¹⁶ She walked out of the courtroom through the same building, the same elevators, and the same parking structure as him.¹⁷ By seeking a civil protection order in the courtroom, Delicia gave her abuser access to her location and jeopardized her safety. Delicia's memories of obtaining a civil order of protection in open court resonate with survivors across the country. Research shows that in many domestic violence cases, the women who seek help from the courts have suffered through numerous abuse incidents and have exhausted other paths that have ultimately failed them.¹⁸ Civil protection orders are often their last resort.

III. Historical Background

Domestic violence has always existed in our civilization. Legal acceptance of wife-beating can be traced to 753 B.C. in the Roman Empire under Romulus's rule.¹⁹ During Romulus' reign, the Laws of Chastisement allowed wife-beating so long as the tool used to beat the woman was not larger than the circumference of a man's thumb; the "rule of thumb."²⁰ The commentaries of William Blackstone were pivotal in shaping the status of women in England and then early America.²¹ Blackstone posited that the husband and wife were one person under the law, "the woman is suspended during the marriage."²² Based on this premise, Blackstone stated that if the husband must answer for a wife's misbehavior under the law, "the law thought it reasonable to entrust him with the power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children."²³ Fast forward to the 1500s, after the Founding Fathers put down roots in the United States, they upheld the notion that wife-beating was a necessary and permissible form of punishment under

14. Harris, *supra* note 1.

15. *Id.*

16. *Id.*

17. *Id.*

18. ALISSA POLLITZ WORDEN, NAT'L INST. OF JUST., NCJ 225722, *Violence Against Women* (Sept. 2003), <https://www.ojp.gov/pdffiles1/nij/grants/199911.pdf>.

19. Sara Trieu, *History of Intimate Partner Violence Reform*, FREEDOM AND CITIZENSHIP, COLUM. UNIV. (2019), <https://freedomandcitizenship.columbia.edu/ipv-history>.

20. Trieu, *supra* note 19.

21. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765), *442-445.

22. *Id.*

23. *Id.*

the common law.²⁴ In the late 1800s, some states finally began to create legislation to retract men's legal right to beat their wives and instead began punishing abusers.²⁵ In the 1960s, the American women's liberation movement spotlighted violence against women and deemed violence within the confines of the home to be a profoundly political issue.²⁶ By the late 1970s it was illegal in almost every state in America for a husband to inflict injury on his wife; however, few resources existed for survivors.²⁷ During the 1990s, the United States began to recognize domestic violence as a public health crisis. In 1992, the Surgeon General of the United States ranked domestic abuse by husbands as the leading cause of injury to women under 45.²⁸ That same year, the American Medical Association released guidelines for doctors to screen women for signs of domestic violence. In 1993, the United Nations declared domestic violence an international human rights issue and recognized it as a human rights violation.²⁹ The following year the Violence Against Women Act was enacted ushering in a new age of victims' services.³⁰ While domestic violence itself has remained a constant, societal views of domestic violence have changed over time—transforming it from a private issue to a public health and human rights crisis.³¹

IV. Factual Background

Delicia experienced both the traditional procedures that survivors must endure to obtain a civil protection order in open court and the modernized civil protection order procedures enacted in the wake of COVID-19. She experienced the new e-filing procedures developed during the COVID-19 and has given remote testimony as a survivor herself. Uniquely, she also observed these procedures from the perspective of an advocate for other survivors. She believes that the new procedures offer immeasurable benefits to survivors.

24. *Domestic Violence Timeline*, THE PA. CHILD WELFARE RES. CTR., <http://www.pacwrc.pitt.edu/Curriculum/310DomesticViolenceIssuesAnIntroductionforChildWelfareProfessionals/Handouts/HO3DomesticViolenceTimeline.pdf> (last visited Mar. 13, 2021).

25. *Herstory of Domestic Violence*, MINN. CTR. AGAINST VIOLENCE & ABUSE (1999), <https://people.uvawise.edu/pww8y/Supplement/-ConceptsSup/Gender/HerstoryDomV.html>.

26. *Id.*

27. *Id.*

28. MINN. CTR. AGAINST VIOLENCE & ABUSE, *supra* note 25.

29. *Declaration on the Elimination of Violence Against Women*, UNITED NATIONS HUM. RTS. OFF. (1993), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx>.

30. *History of the Violence Against Women Act*, THE WOMEN'S LEGAL DEF. & EDUC. FUND, <https://www.legalmomentum.org/history-vawa>.

31. *Domestic Violence*, ENCYCLOPEDIA (Feb. 21, 2021, 10:13 AM), <https://www.encyclopedia.com/social-sciences-and-law/law/crime-and-law-enforcement/domestic-violence>.

I connected with Delicia Harris through the Alliance for Hope International (“Alliance for Hope”), a nonprofit organization that aims to create innovative, collaborative, trauma-informed approaches to address the needs of survivors of domestic violence, sexual assault, child abuse, elder abuse, and human trafficking.³² Delicia is part of the Voices Survivor Network (“Voices”). Voices chapters around the United States aim to hold local agencies accountable in implementing policies and procedures that impact survivors. She is also a survivor navigator, which is an individual who helps survivors navigate the different social systems that help them to survive.³³ Alliance for Hope has conducted hundreds of focus groups with survivors across the United States, gathering vital qualitative data related to the experiences and needs of survivors.³⁴ From these focus groups, the CEO of Alliance for Hope, Gael Strack, commented that one thing is clear: “the courtroom is the scariest place for survivors of domestic violence.”³⁵ Strack believes that the courtroom offers an abuser another opportunity to intimidate and isolate his victim. Strack sees remote testimony options for survivors as the future because it promotes “access to justice, enhances safety, and increases offender accountability.”³⁶ Strack’s observations ring true through the stories of survivors like Delicia who lead busy lives and are afraid to face their abuser in open court. The process of obtaining a civil protection order puts survivors at risk and excludes low-income, marginalized individuals.³⁷ Advocates believe that the integration of videoconferencing platforms and e-filing systems will allow many survivors who are unable to miss work and pay for childcare to access protection orders. The judicial system has historically disregarded the struggles of working mothers.³⁸ A small but growing number of progressive states such as California and New York are now requiring employers to provide paid sick leave for survivors to handle legal, medical, and practical matters relating to domestic violence.³⁹ Courts and legislatures should collect data to analyze the impact of remote testimony and e-filing options on domestic violence survivors during COVID-19 and determine whether more survivors have been able to tell their story and obtain protection.

32. *About Us*, ALLIANCE FOR HOPE INT’L (Mar. 13, 2021, 8:14 AM), <https://www.allianceforhope.com/about-us/>.

33. Harris, *supra* note 1.

34. Shore, *supra* note 2.

35. *Id.*

36. *Id.*

37. Women of Color Inc. FAQ Collection, *Domestic Violence in Communities of Color* (Feb. 23, 2021), <https://wocninc.org/wp-content/uploads/2018/11/DVFAQ-1.pdf>.

38. Lisa Guerin, *Domestic Violence Leave: Taking Time Off Work*, NOLO (Feb. 17, 2022, 5:40 PM), <https://www.nolo.com/legal-encyclopedia/domestic-violence-leave-taking-time-30129.html>.

39. Guerin, *supra* note 38.

Civil protection orders allow survivors of domestic violence to request protection outside of the criminal justice system.⁴⁰ David Martin, a Senior Deputy Prosecutor in King County, Washington, remarked, “Protection orders are what victims want and need. They are the most victim-driven and victim-centered; research says civil protection orders are the most effective justice response that we have. Nevertheless, obtaining an order has become an arduous, emotional, and risky pass for victims.”⁴¹ When a judge reads a survivor’s name off of the domestic violence calendar and is met with silence, few people consider the reason for the survivor’s absence. Witness intimidation, fear of the legal system, and access issues weigh heavily on a survivor’s shoulders. Court officials are none the wiser. Since civil protection orders are the primary judicial response that the legal system has to domestic violence, obtaining them must become more efficient and accessible. Survivors need a greater sense of safety while attempting to secure protection orders. Advocates maintain that threats and intimidation from abusers often result in survivors’ non-attendance at the permanent protection order hearing.⁴² Survivors’ failure to appear often results in a dismissal of the case leaving survivors at risk of serious harm.⁴³

In one case study, a family court in Tulsa, Oklahoma, reported that over one-third of protective order cases are dismissed because the survivor fails to appear often due to fear, intimidation, and access issues.⁴⁴ A court hearing itself is intimidating for most people—adding an abuser and their friends and family members to a courtroom creates a toxic and triggering environment for a survivor. Remote hearings during COVID-19 have offered a glimpse at a potential solution to survivors’ non-attendance at their restraining order hearings.⁴⁵ For instance, the City Attorney of San Diego stated, “[V]ictim participation at restraining order hearings has swelled with the use of online hearings, as remote appearances can remove the specter of threats and intimidation from the abuser in open court, as well as other obstacles victims

40. H.R. 1320, 67th Legis., Reg. Sess. (Wash. 2020).

41. House Civil Rights & Judiciary Committee, *Public Hearing: HB 1219 - Concerning the appointment of counsel for youth in dependency court proceedings. (Remote testimony.) HB 1294 - Addressing misdemeanor supervision services by limited jurisdiction courts. (Remote testimony.) HB 1320 - Modernizing, harmonizing, and improving the efficacy and accessibility of laws concerning civil protection orders. (Remote testimony.)*, TVW (Jan. 28, 2021), <https://tvw.org/video/house-civil-rights-judiciary-committee-2021011496/?eventID=2021011496>.

42. Whitney Bryen, *Court Order Would Allow Abuse Victims to Testify by Video*, ALLIANCE FOR HOPE INT’L (Nov. 13, 2019), <https://www.allianceforhope.com/court-order-would-allow-abuse-victims-to-testify-by-video/>.

43. *Id.*

44. Bryen, *supra* note 42.

45. *Support Grows for Bill Allowing Domestic Violence Victims to Testify in Court Remotely*, SAN DIEGO CITY NEWS SERV. (June 11, 2021, 7:00 AM), <https://www.10news.com/news/local-news/support-grows-for-bill-allowing-domestic-violence-victims-to-testify-in-court-remotely>.

face.”⁴⁶ Advocates believe that remote testimony options for survivors of domestic violence “would help clients who are revictimized over and over again every time they go to court.”⁴⁷ Traditional civil protection order procedures are flawed and dangerous. To crack open those procedures and address the successes and failures of the new procedures implemented during COVID-19, one must first understand the different forms of restraining orders that are available to survivors.

A. Forms of Restraining Orders

A civil domestic violence protection order is a legally binding court order meant to protect survivors from abuse or threats from a family member, spouse, or dating partner.⁴⁸ “Civil protection orders ... give victims an option other than filing a criminal complaint against a family member [or loved one], a course of action many victims resist.”⁴⁹ Domestic violence protection orders generally require that the accused person has abused or threatened to abuse the petitioner and has a close relationship with them.⁵⁰ There are three types of civil restraining orders: emergency protective orders, temporary restraining orders, and permanent restraining orders.⁵¹ Alternatively, criminal protective orders are sometimes granted in criminal domestic violence cases while the case is ongoing, and for up to three years after the close of the case if the defendant is found guilty.⁵² An emergency protective order can only be requested by law enforcement and granted by judges who are available twenty-four hours a day.⁵³ Once an emergency protective order is granted it is effective immediately and can last up to seven days.⁵⁴ In contrast, survivors must petition for temporary restraining orders, which the judge grants if they believe the individual needs protection.⁵⁵ Temporary restraining orders generally last twenty to twenty-five days until the hearing date for a permanent restraining order.⁵⁶ At the court hearing,

46. *Id.*

47. *Id.*

48. Peter Finn & Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, NAT'L INST. OF JUST. (1990), <https://www.ojp.gov/pdffiles1/Digitization/123263NCJRS.pdf>.

49. *Id.*

50. *Domestic Violence*, CAL. CTS. (Feb. 17, 2022, 8:25 PM), <https://www.courts.ca.gov/selfhelp-domesticviolence.htm>.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Domestic Violence*, CAL. CTS. (Feb. 17, 2022, 8:25 PM), <https://www.courts.ca.gov/selfhelp-domesticviolence.htm>.

55. *Id.*

56. *Id.*

the judge decides whether to continue or cancel the temporary restraining order.⁵⁷ If the judge decides to extend the temporary restraining order, the permanent restraining order can last for up to five years.⁵⁸

B. E-Filing

Electronic filing involves filing court papers using a computer instead of handing them to a court clerk in person.⁵⁹ Many courts fast-tracked e-filing projects to keep COVID-19 transmission low in courthouses.⁶⁰ Remote testimony allows survivors to testify as witnesses in civil protection order hearings from a remote location through a videoconferencing platform designated by the court. The pandemic illustrated that the courts could successfully utilize e-filing and videoconferencing technology. Legislatures should analyze the successes and failures in using these procedures during COVID-19 and utilize that data to permanently incorporate e-filing and remote testimony options with the necessary safeguards.

Many family courts embraced e-filing systems and remote testimony for temporary and permanent restraining order hearings during the COVID-19 pandemic. In response to the transmission risks associated with COVID-19, state courts began conducting as many proceedings remotely as possible for public safety purposes.⁶¹ Orders varied from state to state, but most courts were permitted to utilize remote options for proceedings on an emergency basis.⁶² California courts allowed counsel and parties to appear via telephone or video conference platforms under an emergency order. The order was issued by the California Supreme Court in response to the public health orders issued regarding the COVID-19 pandemic under the provisions of the Government Code section 68115.⁶³ COVID-19 vaccines and booster shots are now in circulation throughout California and pandemic restrictions are lifting. California Superior Courts are now hybrid allowing survivors to choose whether to appear live in court masked or remotely via

57. *Id.*

58. *Id.*

59. *Court Filing and Electronic Court Filing*, SERVENOW, <https://www.serve-now.com/resources/court-filing-and-e-filing> (last visited Mar. 13, 2021).

60. *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations>.

61. *Court Operations During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources> (last visited Feb. 25, 2021).

62. *Id.*

63. *How the Judicial Branch Kept Courthouses Open*, CAL. CTS. NEWSROOM (Dec. 22, 2020), <https://newsroom.courts.ca.gov/news/2020-year-review-judicial-council-california>.

videoconferencing platforms pursuant to California Rules of Court Emergency Rule 8.⁶⁴ California, unlike the majority of states, will not be reverting back to requiring survivors to face in-person filing and testimony for restraining orders as Cal. S.B. 538 amended the California Family Code to solidify the right of survivors of domestic violence to access restraining orders remotely.⁶⁵ Approximately half of all U.S. states' emergency COVID orders permitting remote appearance are set to expire in the coming months, for example, Texas' Emergency Order is set to expire in April 1, 2022.⁶⁶ This expiration will revert hearings back to in-person if no legislation to permanently extend the practice is introduced. This return to "normal" will burden survivors with the same obstacles they faced pre-pandemic.

V. Domestic Violence Background

To understand domestic violence, one must first understand coercive control. Evan Stark, a forensic social worker and Professor at Rutgers University, characterizes coercive control as "a strategic course of oppressive behavior designed to secure and expand gender-based privilege by depriving women of their rights and liberties and establishing a regime of domination in personal life."⁶⁷ Coercive control describes the power dynamic between an abuser and a survivor. Domestic violence is rarely, if ever, a single isolated instance.⁶⁸ The coercive control that an abuser holds over a survivor has deep roots that entrap and entangle the survivor. Over time, an abuser micro-regulates every aspect of a survivor's life.⁶⁹ Stark goes on to describe domestic violence as "a range of behaviors beyond physical and emotional abuse."⁷⁰ Abusers often use violence, intimidation,

64. California Rules of Court Emergency R. 8. (Jan. 21, 2022), <https://www.courts.ca.gov/documents/appendix-i.pdf>.

65. California Family Code §§ 6307, 6308.

66. *Supreme Court of Texas Forty-Seventh Emergency Order* (Jan. 19, 2022), <https://3mdo6uiysh2epqc73y6o59w4-wpengine.netdna-ssl.com/wp-content/uploads/2022/01/229005.pdf>; *State emergency health orders during the coronavirus pandemic, 2021*, BALLOTPEdia, [https://ballotpedia.org/State_emergency_health_orders_during_the_coronavirus_\(COVID-19\)_pandemic_2021](https://ballotpedia.org/State_emergency_health_orders_during_the_coronavirus_(COVID-19)_pandemic_2021), (last visited Feb. 13, 2022).

67. *N.Y. State Office for the Prevention of Domestic Violence Interview with Dr. Evan Stark*, END COERCIVE CONTROL (2013), <http://www.coercivecontrol.us/new-york-state-office-for-the-prevention-of-domestic-violence-interview-with-dr-evan-stark>.

68. ANDREW R. KLEIN, NAT'L INST. OF JUST., *NCJ 225722, Practical Implications of Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges* 7 (June 2009), <https://www.ojp.gov/pdffiles1/nij/225722.pdf>.

69. UNITED NATIONS HUM. RTS. OFF., *supra* note 29.

70. *Id.*

degradation, and isolation to deprive survivors of their rights to physical security, dignity, and respect.”⁷¹

This strategic course of oppressive behavior follows a survivor into the courtroom. As a survivor walks into a courthouse, she knows that her abuser in many situations has control over her finances, living situation, and her children’s custody. Research indicates that 99% of domestic violence survivors have experienced economic abuse.⁷² Financial abuse occurs when the abuser limits the victim’s access to assets, or reduces accessibility of family funds.⁷³ Additionally, 57% of unhoused women across the nation confirm that domestic violence is the direct cause of losing their permanent home.⁷⁴ Survivors fear that if they leave their abuser they will lose custody of their child because they may become financially unstable and appear unfit.⁷⁵ Additionally, they fear that the abuser will harm their children if they lose custody.⁷⁶ An intimidating stare or exchange of words between a survivor and an abuser in the courthouse may seem inconsequential to an onlooker. However, these actions terrify survivors who live in a world where their abuser controls every aspect of their existence. Coercive control creates a pervasive culture of fear that prevents survivors from accessing the court’s services, including protective orders, that they vitally need.

71. UNITED NATIONS HUM. RTS. OFF., *supra* note 29.

72. *About Financial Abuse*, NNEDV, <https://nnedv.org/content/mission-vision/>, (last visited Feb. 13, 2022).

73. *Id.*

74. Julia Paskin, *How Domestic Violence became the No. 1 Cause of Homelessness for Women in LA*, LAIST (June 28, 2021), <https://laist.com/news/housing-homelessness/how-domestic-violence-became-the-no-1-cause-of-homelessness-for-women-in-los-angeles>.

75. *Why do victims stay?*, NCADV, <https://ncadv.org/why-do-victims-stay> (last visited Feb. 13, 2022).

76. DANIEL G. SAUNDERS ET. AL., *Child Custody Evaluators’ Beliefs about Domestic Abuse Allegations*, OJP (June 2012), <https://www.ojp.gov/pdffiles1/nij/grants/238891.pdf>.

VI. Domestic Violence Approach within the Court System Background

While legislation to protect domestic violence survivors has steadily emerged and expanded over time, the courts have failed to readily adapt their approach to civil restraining orders. Many judges lack trauma-informed domestic violence training and often fail to understand domestic violence's psychological implications and the nature of the relationship between a survivor and her abuser.⁷⁷ Judges in family courts across the country who handle the domestic violence calendars do not necessarily come from family law or domestic violence backgrounds.⁷⁸ They are generally placed in the family law division for three years as part of the regular rotation of the general civil and criminal divisions of a superior court.⁷⁹ While California Rules of Court § 5.30 calls for the presiding judge of the superior court to consider prior experience in family law litigation and mediation when making judicial assignments to the family court division, this is not a requirement.⁸⁰ Recently, survivors and advocates have called for additional trauma-informed judicial training regarding domestic violence.⁸¹ In most jurisdictions, judicial training in domestic violence is voluntary rather than required.⁸² What's more alarming is the fact that "judges whose attitudes are the most incompatible with current laws and policies on violence against women appear to be the least likely to participate in training programs."⁸³

The court system's failure to utilize the technological resources at their fingertips revictimizes survivors by requiring survivors to appear in the same live setting as their abuser. Even before the coronavirus pandemic emerged, California Superior Courts were overburdened and backlogged.⁸⁴ Family courts in particular tend to be especially overburdened with cases.⁸⁵ Survivors of domestic violence must endure a lengthy process to obtain an order of protection. The filing process alone can require a whole day away from work in the courthouse.⁸⁶ Survivors then must wait another business

77. WORDEN, *supra* note 18.

78. Jessica Klein, *How Domestic Abusers Weaponize the Courts*, THE ATLANTIC (July 18, 2019), <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/>.

79. California Rules of Court § 5.30(a).

80. *Id.*

81. WORDEN, *supra* note 18, at 16.

82. *Id.*

83. *Id.*

84. *California Superior Courts in Crisis*, COTCHETT & MCCARTHY LLP (July 24, 2013), <https://www.cpmlegal.com/news-142>.

85. Klein, *supra* note 78.

86. Harris, *supra* note 1.

day for their temporary restraining order to be granted.⁸⁷ It can take 25 days from the date a survivor files their paperwork to schedule the permanent restraining order hearing where they will have to testify against their abuser face-to-face.⁸⁸ The aforementioned timeline is based on the premise that the survivor was able to have their abuser properly served, which is a challenge.⁸⁹ These outdated practices fail to consider the high rates of witness intimidation among survivors of domestic violence and the coercive control that abusers exert over them.⁹⁰ Complete and accurate statistics on witness intimidation in the domestic violence area are difficult to obtain due to the challenges in identifying and interviewing witnesses who have experienced the most effective forms of intimidation.⁹¹ Police and prosecutors identify witness intimidation as a significant problem in domestic violence cases.⁹²

COVID-19 forced the legal system to transform and integrate technology into the courtrooms. This technology, while frustrating to some, has simultaneously put many survivors of domestic violence at ease as these new court procedures are more trauma-sensitive.⁹³ Remote hearings provide physical and emotional safety for survivors by removing the element of being side by side with their abuser in a courtroom.⁹⁴ It is imperative to seize this moment in history and utilize the temporary departure from traditional courtroom practices to effectuate permanent change for domestic violence survivors in civil protection order proceedings.

VII. Legal Background

When the framers drafted the Constitution by the light of kerosene lamps, feathered quill in hand, they could not have imagined that 234 years later, the majority of Americans would have access to videoconferencing platforms. Nor could the framers have contemplated that citizens could use these platforms to appear in court remotely. They could not have envisioned

87. *How to Get a Temporary Restraining Order in California*, HER LAWYER (Nov. 16, 2020), <https://herlawyer.com/how-to-get-a-temporary-restraining-order-california/>.

88. *Frequently Asked Questions*, SUPERIOR CT. OF CAL. (Feb. 18, 2022, 11:05 AM), <https://www.saccourt.ca.gov/restraining-orders/faqs.aspx>.

89. House Civil Rights & Judiciary Committee, *supra* note 41.

90. Teresa M. Garvey, *Witness Intimidation: Meeting the Challenge*, EQUITAS (2013), <https://aequitasresource.org/wp-content/uploads/2018/09/Witness-Intimidation-Meeting-the-Challenge.pdf>.

91. *Id.*

92. *Id.*

93. Ashley Carter and Richard Kelley, *Remote Court Procedures Can Help Domestic Abuse Victims*, LAW360 (Oct. 18, 2020), <https://www.law360.com/articles/1315788/remote-court-procedures-can-help-domestic-abuse-victims>.

94. *Id.*

Delicia Harris, a survivor of domestic violence, accessing life-saving services from the safety of her living room. Fortunately, the Constitution is a living document. It has weathered the test of time and its meaning has adapted and changed as the United States has transformed and grown throughout the years. Three years ago, none of us could have imagined that a global pandemic would shut down the courts, leading judges, attorneys, and litigants to adapt to a fully remote legal landscape. As this new technological frontier emerged in the courtrooms, survivors and advocates began pushing for a permanent form of remote testimony to remain in place post-pandemic. The path to reform of civil protection order procedures may be wrought with due process objections. Alleged abusers will question whether remote testimony qualifies as confrontation and satisfies cross-examination requirements. Remote testimony satisfies due process by allowing alleged abusers to confront and cross examine their accusers face-to-face.

A. Procedural Due Process Requirements in the Civil Setting

The constitutionality of permitting domestic violence survivors to testify remotely should be analyzed under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Due Process Clause states that “no state...shall deprive any person of life, liberty, or property, without due process of the law.”⁹⁵ The intended purpose of the Due Process Clause is to prevent unjust deprivations.⁹⁶ The required procedures vary based on the nature of the case and the interests at stake.⁹⁷ Under the Due Process Clause, the central requirements are the opportunity to be heard in a meaningful time and manner, with adequate notice and a hearing before an impartial tribunal.⁹⁸ These due process procedures include: 1) the right to cross-examine and confront adverse witnesses; 2) the right to present evidence and call witnesses; 3) the right to observe opposing evidence, a decision based exclusively on the evidence presented; 4) an opportunity to be represented by counsel; 5) the requirement that the tribunal prepares a record of the evidence presented, and; 6) the requirement that the tribunal prepares written findings of fact and reasons for its decision.⁹⁹ However, due process does not “guarantee to the citizen of a state any

95. U.S. CONST. amend. VI.

96. *Procedural Due Process*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/procedural_due_process (last visited Mar. 13, 2021).

97. Nick Klenow, *Due Process: Protecting the Confrontation Right in Civil Cases*, U. MICH. L. REV. 1, 6-9 (2015).

98. *How the Judicial Branch Kept Courthouses Open*, *supra* note 63.

99. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

particular form or method of procedure.”¹⁰⁰ The *Mathews v. Eldridge* test should be used to determine what process is due to alleged abusers in civil protection order proceedings.¹⁰¹ The United States Supreme Court stated in *Mathews v. Eldridge* that “due process...is flexible and calls for such procedural protections as the particular situation demands.”¹⁰² The Court balances three factors in this determination: 1) the private interest impacted by the government action; 2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and; 3) the government interest including the additional burden that added procedural safeguards would entail.¹⁰³

The question of whether remote testimony violates an alleged abuser’s due process rights turns on the issue of whether limited confrontation and cross-examination rights are required in civil protection order proceedings. Additionally, the assessment must address whether confrontation and cross-examination are required and whether remote testimony satisfies those requirements. The Supreme Court examined the issue of when due process requires an opportunity to confront and cross-examine witnesses in *Goldberg v. Kelly*, finding that these requirements must be satisfied “in almost every setting where important decisions turn on questions of fact.”¹⁰⁴ The severity and significance of the deprivation determine how strictly the court requires confrontation and cross-examination.¹⁰⁵ There are situations in the civil setting where the court has found it appropriate to deny direct confrontation.¹⁰⁶ As we will see below, the three *Mathews v. Eldridge* factors balanced together likely weigh against an alleged abuser in a civil protection order proceeding, indicating that traditional direct confrontation is not necessarily required.

VIII. Arguments

Delicia Harris’ empowering remote testimony experience provides a glimpse into the overarching experience of survivors nationwide. Her story illustrates a compelling foundation in public policy for permanent remote testimony options in civil protection order proceedings. Moreover, permanent remote testimony options for survivors are doctrinally and

100. *People v. Nelson*, 209 Cal.App.4th 712, 713 (2012).

101. *J.D. v. M.D.F.*, 207 N.J. 458, 478 (2011) (holding that ordinary due process protections apply in the domestic violence setting).

102. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

103. *Mathews v. Eldridge*, 424 U.S. at 334.

104. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

105. Klenow, *supra* note 97.

106. *Id.*

constitutionally sound because the procedural due process requirements in the civil setting are highly flexible.¹⁰⁷ Implementing permanent remote testimony options for domestic violence survivors in civil protection order hearings would not violate procedural due process requirements under the *Matthews v. Eldridge* balancing test. Even if cross-examination and limited confrontation are required in civil protection order hearings, these procedures are satisfied through the use of remote testimony. The current legal structure that forces survivors of domestic violence to testify against their abuser face-to-face leads to survivors' failure to appear at their protective order proceedings due to fear, intimidation, or access issues resulting in dismissal.¹⁰⁸ If courts offered a less direct form of confrontation, advocates postulate that survivors would be more willing to testify.¹⁰⁹ Fewer dismissals of protective order proceedings, would lead to more significant safeguards for survivors.

IX. Remote Testimony Options for Domestic Violence Survivors in Civil Protection Order Proceedings are Constitutional Under the *Matthews v. Eldridge* Balancing Test.

When analyzing whether remote testimony in civil protection order proceedings is constitutional, an alleged abuser's procedural due process rights must be considered. These rights are at issue for alleged abusers in civil protection order proceedings because they turn on questions of fact regarding the abuse.¹¹⁰ Civil protection order state statutes afford alleged abusers many of the critical procedural due process rights.¹¹¹ The *Matthews v. Eldridge* framework has been utilized to determine what process is due in civil commitment proceedings, juvenile delinquency proceedings, situations involving the right to custody of children, relocation of foster children, child abuse cases, and in the state of Washington a restraining order proceeding.¹¹²

Criminal defendants are afforded a full panoply of due process rights including proper notice and hearing, the opportunity to confront and cross-examine adverse witnesses, a mandated standard of proof beyond a reasonable doubt or clear and convincing evidence, and appointment of counsel. Additionally criminal defendants are afforded freedom from compulsory self-incrimination, the right to be present at any hearing, the right to the exclusion of hearsay and other reliable evidence, the right to a

107. *How the Judicial Branch Kept Courthouses Open*, *supra* note 63.

108. Bryen, *supra* note 42.

109. Shore, *supra* note 2.

110. U.S. CONST. amend. XIV.

111. *Aiken v. Aiken*, 191 Wash.App. 1009 (2015) (unpublished).

112. Klenow, *supra* note 97.

jury trial, and the right on appeal to a transcript of the record at the state's expense if indigent.¹¹³ The wide range of due process rights applicable in the criminal setting has been applied in specific civil contexts, including civil commitment proceedings and juvenile delinquency hearings. The party whose interests are at stake is situated similarly to a criminal defendant.¹¹⁴ The Supreme Court first held that all of the due process requirements under the Fourteenth Amendment afforded to criminal defendants should also be applied to juvenile delinquency proceedings in *In re Gault*.¹¹⁵ In *Heryford v. Parker*, the court established that all Fourteenth Amendment due process protection should also be required in civil commitment cases.¹¹⁶ These civil settings illustrate some of the most severe deprivations of liberty and property interests. The level of deprivation of personal freedom is akin to imprisonment resulting from criminal proceedings. In these cases, rather than applying due process requirements based on civil or criminal settings, the courts focused on the fundamental liberty interests at stake.¹¹⁷ In proceedings where the interest at stake is less severe than interests like loss of personal freedom, looser variations of due process procedural requirements have been applied. Less stringent due process procedures are applied in proceedings that affect an individual's right to work or right to their children.¹¹⁸ These situations are considered less severe deprivations because the party whose interests are at stake does not face punishment or imprisonment for an extended period of time. As a general rule, courts often require some form of confrontation and cross-examination in domestic violence cases.¹¹⁹ For instance, in juvenile dependency proceedings, a parent has a right to confront and cross-examine witnesses.¹²⁰ However, these rights do not require full-fledged confrontation and cross-examination.¹²¹ The procedures must comport with fundamental principles of fairness and decency.¹²² In juvenile dependency litigation, the focus concerning parents' due process rights is the right to notice and the right to be heard.¹²³ Parents in dependency hearings are not afforded the full panoply of due process

113. Klenow, *supra* note 97.

114. *Id.*

115. *In re Gault*, 287 U.S. 1, 71 (1967).

116. *Heryford v. Parker*, 396 F.2d 393, 396 (1968).

117. Susan G. Haines & John J. Campbell (2000) *Defects, Due Process, and Protective Proceedings*, 2 MARQUETTE ELDER'S ADVISOR 13 (2000).

118. Klenow, *supra* note 97.

119. *Id.*

120. *In re Josiah S.*, 102 Cal.App.4th 403, 412 (2002).

121. *In re Jeanette V.*, 68 Cal.App.4th 811, 817 (1998).

122. *People v. Bona*, 15 Cal.App.5th 511, 520 (2017).

123. *In re Matthew P.*, 71 Cal.App.4th 841, 851 (1999).

rights that a criminal defendant receives because they do not risk the same loss of their liberty.¹²⁴

Consequently, in civil proceedings, where the deprivation of the individual's interest is less severe, courts have the discretion to deny direct confrontation or cross-examination if good cause exists.¹²⁵ For instance, good cause may exist where witnesses may fear retribution. In *Ohio Association of Public School Employees v. Lakewood*, due process requirements were met when the employee's attorney confronted and cross-examined the witness while the employee could only see the witness through a closed-circuit television.¹²⁶ When a court denies direct confrontation in favor of another form of cross-examination, the individual whose interests are at stake must be notified beforehand.¹²⁷ An alleged abuser's private interests in a civil protection order proceeding likely do not require the strict application of the due process clause's confrontation and cross-examination elements. As we will see below, if alleged abusers are given proper notice and the opportunity to cross-examine the survivor over remote videoconferencing platforms, the practice would likely satisfy due process requirements.

A. An Alleged Abuser's Private Interests Impacted by Civil Protection Order Proceedings Weigh in Their Favor Under the *Matthews v. Eldridge* Test.

Under the first factor of the *Matthews v. Eldridge* test, the court analyzes the private interest impacted by the government action. In civil protection order proceedings, the private interest at stake varies depending on the facts of the case. The consequences of having a court order issued against the restrained party can be severe. The private interest at stake can include child support obligations, custody and parenting time determinations, and prohibitions from carrying and owning weapons that were legally procured. Additionally, the individual may have limited or no access to one's home or personal-property, may be denied immigration status, and may have to go to jail, pay a fine or both if he or she violates the restraining order.¹²⁸ Alleged abusers may argue that their personal freedom

124. Klenow, *supra* note 97.

125. See *E.J.S. v. State Dep't of Health & Social Services* 754 P.2d 749, 752 (1988) (in a hearing terminating father's parental rights, the court found that his due process rights were not violated when he could only appear by telephone because his counsel was present in the room and effectively cross-examined the witnesses).

126. Klenow, *supra* note 97.

127. *In re Danielle D.*, 257 Neb. 198, 206 (1999).

128. Lindsay A. Heller, *Due Process for Domestic Violence Defendants*, FOX ROTHSCHILD LLP (Dec. 4, 2018), <https://njfamilylaw.foxrothschild.com/?s=Due+Process+for+Domestic+Violence+Defendants>.

is at risk during civil protection order proceedings. The flaw in that argument is that the proceeding itself does not result directly in the deprivation of their personal freedom; only their wrongful actions do. Unlike civil commitment proceedings or juvenile delinquency proceedings, an alleged abuser's personal interest is not at stake as a direct result of the proceedings, but rather as a result of their violation of a civil protection order. Additionally, an undocumented alleged abuser is not automatically deported as a result of the restraining order proceedings, but rather may be deported on the basis of violating the restraining order.¹²⁹ The inability to own a gun, maintain access to property, and the care and custody of one's child are important interests. However, even in situations where those rights are at stake, direct confrontation is not absolute and may be denied if good cause exists. Family courts should find that good cause exists in restraining order hearings because of the trauma survivors face in the courtroom and the elevated risk of witness intimidation. Since fundamental liberty and property interests are at stake for alleged abusers in many civil protection order proceedings, the first *Matthews v. Eldridge* factor likely weighs in favor of alleged abusers needing greater due process protections. However, without the risk of deprivation of personal freedom, a more flexible application of due process may be applied. Due process in civil protection order proceedings is satisfied without confrontation since the alleged abuser is given notice, an opportunity to be heard in front of an impartial tribunal, and many other statutory safeguards.

B. The Risk of Erroneous Deprivation of an Alleged Abuser's Interests Through the Use of Remote Testimony in Civil Protection Order Proceedings is Low and Weighs Against Them Under the *Matthews v. Eldridge* Balancing Test.

Under the second *Matthews v. Eldridge* factor, the risk that remote testimony will cause erroneous deprivation of an alleged abuser's private interests is low if the court ensures proper safeguards for survivors' use of remote testimony. Alleged abusers will argue that remote testimony does not provide sufficient procedural safeguards because the witness may be less likely to truthfully describe the abuse in the absence of face-to-face direct confrontation in a courtroom.¹³⁰ Opponents of remote testimony argue that there is a risk that witnesses may be coached or manipulated outside of the

129. *Criminal Defense of Immigrants*, <https://nortontooby.com/node/17388> (last visited Feb. 13, 2022) (Congress limited the deportation ground triggered by a court finding of a violation of a domestic violence protective order, under INA 237(a)(2)(E)(ii), 8 U.S.C. 1227(a)(2)(E)(ii), to protective orders against "credible threats of violence, repeated harassment [etc.]," as opposed to just protective orders against "threats of violence and harassment").

130. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (2002) (statements of Scalia, J.).

watchful eye of the court and that judges may have a challenging time making credibility judgments regarding survivor's testimony.¹³¹

In a remote proceeding, an alleged abuser is still heard in a meaningful time and manner. The same rules regarding notice will apply whether the survivor testifies live or remotely. Most statutes that establish the procedures for restraining orders build in due process safeguards for alleged abusers. California Code of Civil Procedure section 527.6 provides that a judge will receive any relevant testimony and make an independent inquiry regarding whether there is clear and convincing evidence of unlawful harassment.¹³² The statute requires notice and sets the limit that the order may last no more than five years.¹³³ The accused and the judge can see and communicate with the survivor face-to-face through the use of videoconferencing.

The traditional civil protection order system already disadvantages survivors and increases the likelihood of improper decisions regarding whether a restraining order should be granted. The current system endangers survivors. Traditional civil protective order procedures do not put alleged abusers' interests at risk of erroneous deprivation. When survivors tell their stories of abuse in the courtroom, they are often doubted and discredited.¹³⁴ The courts often incorrectly judge survivors' demeanor in part due to a failure to consider the science behind domestic abuse.¹³⁵ Domestic violence survivors have often suffered extreme neurological and psychological trauma.¹³⁶ This phenomenon affects their memory and comprehension, leading many judges to find that their stories have gaps, holes, and chronological issues.¹³⁷ This physical phenomenon, along with societal stereotypes about "battered" women and claims that women use domestic violence accusations to gain custody, makes many judges suspicious of survivors.¹³⁸ Traditional live testimony procedures prioritize abusers and cause judges to make incorrect judgments about survivors due to their trauma reactions. Judges also frequently make incorrect judgments regarding survivors' demeanor due to preconceived notions of how a survivor should act.¹³⁹ A survivor may fare more favorably in a setting

131. *The Pros and Cons of Zoom Hearings*, 14 NAT'L L. REV. 289 (2020).

132. 7 Cal. Civ. Proc. Code § 527.6 (2020).

133. *Id.*

134. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399 (2019).

135. *Id.*

136. Epstein, *supra* note 134, at 407-12.

137. *Id.* at 411.

138. *Id.* at 425.

139. Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 742 (2003).

without the heated emotion and triggering nature of the live courtroom. The risk that a judge will erroneously deprive an alleged abuser of his interests is considerably lower in a remote setting, bearing in mind that the justice system already discredits and disfavors survivors.

Some judges have argued that through remote testimony during COVID-19, they have made stronger credibility judgments due to the extended periods of closeup eye contact with the witness over Zoom.¹⁴⁰ Additionally, the traditional notion of the court's truth-telling function does not consider the effect that being in the same room as their abuser has on survivors. In *Aiken v. Aiken*, the Washington Supreme Court analyzed what process was due to an alleged abuser in a civil protection order hearing utilizing the *Matthews v. Eldridge* balancing test.¹⁴¹ The court determined that "the nature and purpose of witness examination is to elicit honest testimony, not fearful responses, and to procure the truth, not cause intimidation."¹⁴² Domestic violence survivors are more likely to tell the truth testifying from a remote location outside of the clutches of fear and coercion standing next to their abuser. Encouraging truthfulness in these proceedings upholds the purpose of the judicial process. Courts can ensure that appropriate safeguards are implemented so that survivors will not be coached during remote testimony. Courts can require survivors to testify from a victims' services center or another courthouse and to scan the room to ensure no one else in the room. Courts may also remind survivors that there is a penalty of perjury for lying under oath.

C. The Government's Interest in Protecting Domestic Violence Survivors and Mitigating Witness Intimidation Weighs Against the Accused.

The government has a compelling interest in protecting victims and preventing further domestic violence or fatal incidents as well as an interest in protecting a respondent's private interests. The government also has an interest in the mitigation of witness intimidation and encouragement of witness participation to ensure the judicial process's proper functioning. In civil commitment cases, such as *In re Gault*, the government's interest in protecting society from dangerous individuals was deemed an extremely compelling interest.¹⁴³ The same reasoning should be applied to restraining order proceedings. The legal system and society at large often have greater sympathy and understanding for survivors of crimes perpetrated by

140. *In re Gault* 387 U.S. 1 (1967).

141. *Aiken*, 191 Wash.App. (2015) (unpublished).

142. *Id.*

143. *In re Gault* 387 U.S. 1 (1967).

strangers.¹⁴⁴ A Baltimore study found “crimes involving persons known to the offender to be regarded as less serious than crimes committed against strangers.”¹⁴⁵ The existence of a standing social relationship between the victim and the offender further reduced the perceived wrongfulness of criminal acts.¹⁴⁶ However, this line of reasoning is flawed. Intimate partner violence is far more dangerous because abusers control countless aspects of the survivor’s life and have continuous access to them. This factor weighs against the accused.

Applying the *Matthews v. Eldridge* factors discussed above, denying an alleged abuser the opportunity to confront the witness directly and replacing direct confrontation with remote testimony would not violate an alleged abuser’s procedural due process rights in a civil protection order proceeding. Alleged abusers are guaranteed a wide array of basic due process rights and they are afforded proper cross-examination rights. The right to confrontation likely does not, at its core, mean the right to stand side-by-side in a room with your accuser. The right to confrontation at its core encompasses the right to know who your accuser is, the right to have the ability to cross-examine your accuser to test the strength of their accusations, and remote testimony allows the accused to do exactly that.

D. Even if Civil Protection Order Proceedings Require Confrontation and Cross-Examination, Remote Testimony Satisfies Both Requirements.

Remote testimony through two-way videoconferencing likely satisfies the Due Process right to limited confrontation and cross-examination in the civil setting. Remote testimony likely fails to satisfy stricter confrontation requirements under the Sixth Amendment when considering the severity of the deprivation of one’s personal freedom in the criminal arena. The issue of the constitutionality of remote testimony has yet to be decided by the Supreme Court.¹⁴⁷ Whether remote testimony satisfies confrontation requirements depends on one’s understanding of the true meaning of confrontation. Opponents of remote testimony, like Justice Antonin Scalia, believe that confrontation requires that the accused be face-to-face with their accuser in the same courtroom.¹⁴⁸ Advocates of remote testimony options argue that the medium satisfies confrontation requirements. They argue that the goals of confrontation are: first to afford the defendant the opportunity to

144. MARK WARR, UNDERSTANDING AND PREVENTING VIOLENCE, VOLUME 4: CONSEQUENCES AND CONTROL 46 (Albert J. Reiss et al. eds., 1994).

145. *Id.*

146. Warr, *supra* note 144, at 46.

147. Will Resnik, *Get with the Times: Why the Use of Live Two-Way Video Testimony Does Not Violate the Confrontation Clause* 45 AM. J. CRIM. L. 461 (2019).

148. Resnik, *supra* note 147.

receive accusations directly from the mouth of his accuser; second to prevent false accusations against the defendant by those unwilling to state such allegations to the defendant's face; and third to allow the judge and jury to view the demeanor of the witnesses testifying.¹⁴⁹ Remote testimony fulfills all three goals. Alleged abusers have the opportunity to hear accusations against them directly from the survivor over a remote platform. Remote testimony allows survivors to tell the truth outside of the coercive control of their abuser. It allows a judge to look closely at a survivor and make stronger demeanor judgments since the survivor is not suffering from Post-Traumatic Stress Disorder ("PTSD") and trauma in the courtroom beside her abuser. Even if civil protection order proceedings require both confrontation and cross-examination, remote testimony meets this burden.

E. Applying the Principles of Forfeiture by Wrongdoing in the Civil Setting.

Applying the central principles of the doctrine of forfeiture by wrongdoing to the context of civil protection order proceedings justifies a more limited form of confrontation under the Due Process Clause. The doctrine of forfeiture by wrongdoing is an exception to the Confrontation Clause which states that an accused cannot "complain that his right to confront a witness is violated if his own acts, or acquiescence in some act, are what made the witness unavailable in the first place."¹⁵⁰ The justification for this exception is that defendants would have an "incentive to bribe, intimidate, or even kill witnesses against them" without it.¹⁵¹ The core principle of the doctrine of forfeiture by wrongdoing is that the defendant should not benefit from his own wrongful actions.¹⁵²

In the criminal setting, the prosecution may bring in hearsay statements in place of the witness's testimony if the defendant wrongfully obtained the witness's absence. In *People v. Peterson*, the court stated in *dicta* that for forfeiture by wrongdoing to apply, the accused's intent to cause the witness's unavailability does not need to be in reference to a criminal proceeding but could refer to intent to prevent a witness from testifying in a civil proceeding, such as a divorce or custody matter.¹⁵³

The reasoning utilized under the doctrine of forfeiture by wrongdoing should be applied to instances of witness intimidation in civil protection order proceedings. If an alleged abuser attempts to intimidate a survivor

149. Hadley Perry, *Notes & Comments, Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Testimony*, 13 ROGER WILLIAMS U.L. REV. 565, 566 (2008).

150. *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

151. *Giles v. California*, 554 U.S. 353, 365 (2008).

152. *Giles*, 554 U.S. at 365.

153. *People v. Peterson*, 106 N.E.3d 944 (Ill. 2017).

from appearing in court for their protective order proceeding he should forfeit his full-fledged right to direct confrontation in exchange for virtual confrontation. Additionally, I would urge the courts, attorneys, and victims' advocates to further investigate and follow up with survivors who fail to appear at civil protection order proceedings to determine whether witness intimidation is at play. If witness intimidation is at play, the court should automatically allow a survivor to testify remotely even at the risk of slightly abridging an alleged abuser's direct confrontation right should she choose to file for an order of protection again.

X. Courts Should Permit and Encourage Domestic Violence Survivors to Petition For Civil Protection Orders Through E-Filing and Testify Remotely to Increase Access For Survivors.

A. E-filing for Civil Protection Orders Benefits Domestic Violence Survivors.

Delicia Harris, a survivor navigator, describes the process of requesting a restraining order as "something you cannot do in an hour. You cannot just take your lunch break at 12 pm and be done by 1 pm."¹⁵⁴ Survivors sit in the courthouse for hours or an entire day to get the little piece of paper that ensures their safety. Survivors and advocates push for increased access to e-filing systems because the traditional system is ineffective, time-consuming, and forces many survivors to simply give up and accept their situation rather than obtain an order of protection.¹⁵⁵ The Alliance for Hope piloted a fax-filing program in San Diego, California in 2003.¹⁵⁶ Fax-filing, the predecessor of e-filing, offered survivors a different path to gain protection. Strack noted that more survivors came forward once they knew that they did not have to enter the courtroom and miss work.¹⁵⁷ The Alliance for Hope believes that e-filing and remote testimony will have a similar effect bringing forward more survivors who lack transportation, come from a rural area, and have been too afraid to walk through the doors of a courthouse.¹⁵⁸

E-filing makes the process of obtaining protection orders quicker and more efficient and remedies access issues like childcare, transportation, and absence from work that prevent many survivors from obtaining the services that they need. The traditional practice of requiring survivors to file for their restraining orders in court, consuming hours, or days of their time, makes them choose between their safety, childcare, or their livelihood. Advocates

154. Harris, *supra* note 1.

155. Shore, *supra* note 2.

156. *Id.*

157. *Id.*

158. Shore, *supra* note 2.

at Safe Horizon, a victims' assistance program, described pre-COVID restraining order procedures as inefficient and harmful to survivors.¹⁵⁹ The traditional court procedures forced survivors to wait in the courthouse for hours after filing until their case was called.¹⁶⁰ In comparison, during the COVID-19 pandemic, petitions are filed electronically, the litigant appears before a judge by phone within about an hour, and their order of protection is emailed to them in thirty minutes to an hour.¹⁶¹ E-filing allows survivors to access the protection order they need without taking hours or a day away from their daily obligations.

Delicia Harris described a trauma-informed collaborative response that addresses the needs of survivors. Family Justice Centers are multi-agency, multi-disciplinary service centers that provide services to victims of intimate partner violence. These Centers aim to reduce the number of times a victim must narrate their story, consolidate the amount of places the victim must go to seek assistance, and provide services for survivors and their children.¹⁶² At a family justice center, if a survivor needs an order of protection, the center will call the clerk on the phone and will submit the paperwork to the clerk's office. The clerk tells the center when the judge will call back, sometimes a few hours later. The survivor may have to wait until the judge calls back to review the order. However, Family Justice Centers have triage rooms, unlike the courthouse. There are counseling rooms, play areas for children, a quiet space, and a therapy dog. Survivors filing for an order of protection must specifically recount and recall their abuse, which can be extremely triggering. In a family justice center, counseling, mental health resources, and providers who address substance abuse are all at a survivor's disposal as she embarks on her journey to seek protection.¹⁶³ The contrast between a survivor sitting in a courthouse all day versus accessing protection orders surrounded by trauma-informed services illustrates that survivors need e-filing options permanently.

Many abusers employ different tactics to isolate and intimidate survivors before civil protection order proceedings.¹⁶⁴ Abusers often request continuances as a tactic to force survivors to make multiple trips to court and

159. *Id.*

160. *Id.*

161. Allie Reed, *Virtual Hearings Put Children, Abuse Victims at Ease in Court*, BLOOMBERG L. (July 23, 2020, 1:45 AM), <https://news.bloomberglaw.com/us-law-week/virtual-hearings-put-children-abuse-victims-at-ease-in-court>.

162. *About Family Justice Centers*, ALLIANCE FOR HOPE, <https://www.familyjusticecenter.org/affiliated-centers/family-justice-centers-2/> (last visited Feb. 16, 2022).

163. Harris, *supra* note 1.

164. House Civil Rights & Judiciary Committee, *supra* note 41.

intimidate them.¹⁶⁵ Gael Strack, the CEO of Alliance for Hope, described a claustrophobic scene of a family courtroom with narrow hallways and one elevator to get in and out.¹⁶⁶ Strack said that she “witnessed a tremendous amount of witness intimidation right outside of the courtroom, and the court was not even aware of it.”¹⁶⁷ She and other survivors’ advocates noted that they had observed more intimidation in civil courtrooms than in criminal courtrooms because abusers do not have to face severe long-term consequences in the civil setting.¹⁶⁸ One survivor noted that while she waits in the same courthouse as her abuser, he repeatedly bangs his head against the wall and stares at her in a clear attempt to make her feel afraid.¹⁶⁹ Additionally, when a survivor is seeking a restraining order they have often made the decision to permanently leave their abuser, which is the most dangerous time period during the survivors’ separation from their abuser.¹⁷⁰

E-filing systems protect survivors from harm and intimidation at the hands of their abusers in and around the courtroom. By removing these obstacles, survivors are able to file from the safety of their home or a family justice center. In the public hearing for Washington Senate Bill 1320, Angela Rockness, an attorney, described the story of a client whom she worked with in the summer of 2020 during COVID-19 restrictions.¹⁷¹ Rockness stated that, her client was renewing her protective order for the sixth time. When I was helping her fill out the paperwork and filing over the phone, she started to cry because she was so thankful that this time she did not have to come to the courthouse. When she got her first protection order six years ago after it was granted, she was assaulted in the rotunda by her abuser. Every time she comes to the courthouse, not only is she standing up to her abuser again, but she is also confronting the trauma that happened at the courthouse.¹⁷²

Rockness’ client’s experience demonstrates the flaws in the traditional procedures to obtain an order of protection. The structure of the courthouse itself opens up survivors to harm at the hands of their abusers. There is no protection beyond the doors of the courtroom. Recounting abusive incidents in front of an abuser often enrages him, especially if the judge supports and

165. Klein, *supra* note 78.

166. *E-Filings and Virtual Hearings: Providing Easier Access to the Justice Process Webinar*, ALLIANCE FOR HOPE INT’L (Nov. 12, 2020), <https://www.youtube.com/watch?v=oCg9jIQ56Bo>.

167. *Id.*

168. *Id.*

169. Klein, *supra* note 78.

170. Shelley Flannery, *Virtual Court Hearings Make Testifying Safer* (May 5, 2021), https://www.domesticshelters.org/articles/legal/virtual-court-hearings-make-testifying-safer?color=c0249a&widget_name=article_library&width=300px.

171. House Civil Rights & Judiciary Committee, *supra* note 41.

172. House Civil Rights & Judiciary Committee, *supra* note 41.

believes a survivor. Allowing a survivor and an abuser to be in two separate locations takes some of the heat of the emotion out of the process. A survivor can confidently tell her story apart from the fear of the consequences of what could come after. It is time for the legal community to listen to the collective experiences of many survivors during COVID-19 and devise a permanent solution that would allow them to access services remotely.

The use of e-filing systems and remote testimony may help break down barriers to access that prevent systemically marginalized populations from requesting protection orders. Going to court can be an even more traumatic and difficult experience for survivors who are a part of marginalized and underrepresented populations. Survivors who are Black, indigenous, or people of color often distrust law enforcement and the courts because of the history and current climate of racism and classism in the United States.¹⁷³ Pioneering scholar on civil rights and critical race theory, Kimberle Crenshaw, articulates that women of color are reluctant to call the police for many reasons, including the fear of subjecting their private home to the racist assaults of the police.¹⁷⁴ Women of color are often reluctant to report domestic violence because they fear it perpetuates stereotypes about domestic violence within their communities. In particular, Black survivors face an impossible choice with the knowledge on their shoulders that they could be putting their abuser's life at risk due to police brutality by seeking help.¹⁷⁵ Even if Black survivors take this risk, they are routinely revictimized and frequently wrongfully arrested during domestic violence police intervention.¹⁷⁶ Racist police officers disregard who the aggressor is and arrest many Black survivors who may be doing nothing more than acting in self-defense.¹⁷⁷ These issues act as a deterrent for Black survivors seeking legal protection. Entering a courthouse can be a traumatic experience for Black survivors who fear contact with law enforcement. Survivors walking through the scanners face security officers with visible guns, see police officers walking through the halls of a courthouse, and bailiffs inside the courtroom. All of these encounters deter and exclude survivors who have been revictimized by institutionally racist law enforcement agencies. The measures the judicial system instituted to ensure safety for judges, attorneys, and litigants make many survivors feel unsafe.¹⁷⁸

173. Women of Color Inc., *supra* note 37.

174. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 124, 1257 (1991).

175. Women of Color Inc., *supra* note 37.

176. *Id.* at 178.

177. Women of Color Inc., *supra* note 37.

178. *Id.*

In the Latinx community, the fear of deportation prevents many undocumented survivors from seeking legal services.¹⁷⁹ Abusers often manipulate undocumented survivors and convince them that the court will take away their children and deport them.¹⁸⁰ These unique barriers could be addressed through culturally sensitive services and less contact with the court and law enforcement. Lisbet Perez, a survivor and victims' advocate, discussed the fears she faced in the courtroom as an undocumented survivor, not knowing whether filing a restraining order petition could trigger her removal by Immigration and Customs Enforcement.¹⁸¹ Perez noted that undocumented survivors are afraid to come to court to petition for protection orders. Perez stated, "[E-filing] is saving the lives of undocumented victims. [Implementing e-filing systems] is the ethical thing to do."¹⁸²

While other strategies must be considered to include marginalized survivors in the civil protection system, e-filing from family justice centers and remote testimony options are positive steps forward. The modernization of civil protection order procedures would allow survivors in marginalized communities to avoid contact with law enforcement in the courthouse. Additionally, e-filings and remote testimony options would take away some of the intimidation and fear that survivors who are part of marginalized communities feel in the courtroom. Access to these services in family justice centers could allow culturally specific services to mitigate language barriers and distrust of the judicial process.

B. Offering Domestic Violence Survivors Opportunities to Testify Remotely is Grounded in Strong Public Policy Justifications.

For most survivors, a courtroom is a place of fear. After a survivor finally leaves an abusive relationship, abusers are aware that the courtroom is the only way that they will be able to see and talk to them. Remote testimony options increase survivors' willingness to participate in protective order hearings and mitigate the risk of coercion and witness intimidation in this courtroom. The Office for Victims of Crime a unit of the Office of Justice Programs identifies a trauma-informed environment as one that, "realizes the widespread impact of trauma on victims and understands potential paths for healing."¹⁸³ Such an environment "recognizes the signs and symptoms of trauma in staff, clients, and others involved within the

179. *Id.*

180. *Id.*

181. *E-filings and Virtual Hearings: Providing Easier Access to the Criminal Justice Process Webinar*, ALLIANCE FOR HOPE INT'L (Nov. 12, 2020), <https://www.youtube.com/watch?v=oCg9jIQ56Bo>.

182. *Id.*

183. Carter, *supra* note 93.

system and responds by integrating knowledge about trauma into policies, procedures, practices, and settings, including prioritizing the victim's safety and security and on safeguarding against policies and practices that may inadvertently traumatize victims.¹⁸⁴ Allowing survivors to be physically removed from the dangerous environment of a courtroom next to their abuser mitigates trauma. Megan Rogue, a survivor, spoke out in support of remote testimony at the public hearing for Washington Senate Bill 1320 recounting her story with bravery, "I remember being a few feet away from my abuser and his family for several hours over many court dates even though the last place in the world I wanted to be was in the same room as him it was overwhelming and intimidating."¹⁸⁵ Advocates, judges, and attorneys began to realize during COVID-19 that the departure from open court testimony and the shift to remote testimony put survivors of domestic violence at ease.¹⁸⁶ During the public hearing for Washington Senate Bill 1320, Sarah Mooney identified major gaps in the system.¹⁸⁷ She described not only the fact that survivors stand "just feet away from their abuser," but also that they must "testify in detail about humiliating painful experiences none of us would want to share in front of judges who have had no meaningful training on trauma, abuse, domestic violence, or sexual assault."¹⁸⁸ When survivors give their testimony remotely from their home or at a family justice center they feel safer and can easily access mental health professionals. In this way, remote testimony mitigates retraumatization and the triggering of PTSD that many survivors experience in court.

Remote testimony mitigates litigation abuse and reduces witness intimidation. A Kentucky Judge, Peter Macdonald recalls informing an imprisoned abuser who had been repeatedly filing motions to harass the victim that the next hearing could be held by video.¹⁸⁹ The abuser stopped making petitions because his only goal was to be in the room with his victim.¹⁹⁰ Many victims' advocates, including Delicia Harris, are outspoken about the empowering effects of remote testimony options. Delicia described her experience of watching a fellow survivor do well in the remote environment and succeed in obtaining her temporary order of protection. However, since the courts in her state are not currently permitting survivors to obtain their permanent orders virtually, the survivor changed her mind

184. *Id.*

185. House Civil Rights & Judiciary Committee, *supra* note 41.

186. *Id.*

187. *Id.*

188. *Id.*

189. Klein, *supra* note 78.

190. *Id.*

when she arrived at the court.¹⁹¹ Delicia noted, “I know that it was because he had gotten to her. He had had friends and family members calling her, and if it had been a virtual experience for her, she would have felt a lot safer. She changed her mind, and I understood exactly how she felt.”¹⁹² Allowing a survivor to testify remotely mitigates the fear that she experiences in the courtroom.

C. The Obstacles Posed by Remote Testimony are Surmountable.

A victim and an abuser appeared for a remote zoom hearing from different corners of the same apartment. The judge, prosecutors, and defense were unaware. This startling scene emerged in the remote setting of a Michigan court during a two-way videoconferencing domestic assault hearing. An astute prosecutor noticed that the victim appeared to be taking cues and presenting body language that indicated she was afraid. Someone nearby was intimidating her off-screen.¹⁹³ The prosecutor believed that the abuser was in the victim’s home intimidating her off-screen.¹⁹⁴ The police were quickly sent to the victim’s home and the abuser was found in the apartment. The abuser was apprehended for obstruction of justice and violating a criminal protective order.¹⁹⁵ This instance illustrates exactly what many opponents of remote testimony fear. Opponents of remote testimony worry about victims’ privacy and safety.¹⁹⁶ For instance, how candidly will survivors speak if there are parties to a dispute standing off-camera? Will abusers harm survivors who might unintentionally give clues as to their location on screen? Will survivors be safe without courthouse security measures? Who is really watching the proceedings? These questions are all vital to remote testimony being a success. Courts can address these concerns and learn from remote testimony successes and failures during COVID-19 by collecting quantitative and qualitative data.

During the COVID-19 pandemic, courts in San Diego, California provided explicit safety guidelines for survivors testifying remotely to mitigate some of the safety concerns connected to remote testimony.¹⁹⁷ In

191. Harris, *supra* note 1.

192. *Id.*

193. Colin Kalmbacher, ‘We May Need to Adjourn’: Zoom Assault Hearing Goes Off the Rails After Court Discovers Alleged Abuser is in the Same Apartment as the Victim, LAW & CRIME (Mar. 6, 2021), <https://lawandcrime.com/crime/we-may-need-to-adjourn-zoom-assault-hearing-goes-off-the-rails-after-court-discovers-alleged-abuser-in-the-same-apartment-as-alleged-victim-watch/>.

194. *Id.*

195. *Id.*

196. The Pros and Cons of Zoom Hearings, *supra* note 131.

197. *Family Law and Domestic Violence Restraining Orders Virtual Hearings* (Feb. 23, 2021), http://www.sdcourt.ca.gov/portal/page?_pageid=55,2059755&_dad=portal&_schema=PORTAL.

Washington Senate Bill 1320, which has been enacted, the legislature establishes procedures for remote civil protection order proceedings, including safety requirements.¹⁹⁸ The bill states, “to help ensure that remote access does not undermine personal safety or privacy, or introduce other risks, courts should protect the privacy of telephone numbers, emails, and other contact information for parties and witnesses and inform parties and witnesses of these safety considerations. Materials available to parties and witnesses appearing remotely should include warnings not to state their addresses or telephone numbers at the hearing and that they may use virtual backgrounds to help ensure that their backgrounds do not reveal their location.”¹⁹⁹ Additionally, courts should establish partnerships with women’s centers, shelters, and victims’ service centers to provide safe spaces where survivors can testify remotely if they cannot testify from their home or are uncomfortable testifying in court. During COVID-19, many women’s shelters established areas for survivors to testify remotely to access their protective orders. In the Michigan case discussed above, the judge asked the victim to scan the room to show her surroundings to indicate whether someone was intimidating her offscreen.²⁰⁰ This practice should be utilized before any remote domestic violence hearing begins because of the high-risk of witness intimidation. While the concerns surrounding remote testimony for domestic violence survivors are valid, with research and careful preparation, remote testimony can and should become as commonplace as testifying in a courtroom.

XI. Pathways to Implement Remote Testimony Options in Civil Protection Order Proceedings

As we can see, the traditional court procedures that domestic violence survivors must navigate to obtain an order of protection are outdated, unsafe, and impossible for many women who cannot get away from work. State legislatures and state courts should consider innovative strategies to implement remote testimony and e-filing. Washington and California lead the charge towards permanent remote testimony. Both states have passed legislation to permanently instate remote testimony options for survivors of domestic violence.

California Senator Rubio introduced Senate Bill 538 in February after seeing the positive impacts remote testimony had on survivor attendance at

198. H.R. 1320 Reg. Sess. (Wash. 2020).

199. H.R. 1320 Reg. Sess. (Wash. 2020).

200. Kalmbacher, *supra* note 193.

restraining order hearings in San Diego.²⁰¹ The City Attorney and Mayor of San Diego were staunch supporters of the bill after seeing the positive impacts remote testimony had on survivors in their city during the pandemic.²⁰² San Diego Mayor Todd Gloria stated, “this is essential legislation that will ensure additional harm is not caused to victims of domestic violence while providing them with the necessary access to justice.”²⁰³ The bill was passed into law modifying the California Family Code to allow survivors to permanently testify remotely and file their petitions electronically.²⁰⁴

State legislatures should consider modeling their legislation after Washington Senate Bill 1320 an even more comprehensive piece of legislation than California’s Senate Bill 538. Washington Senate Bill 1320 was signed into law in 2021. Washington Senate Bill 1320 addresses these vital issues considering scientific data, the voices of survivors and advocates, and by examining the constitutionality of remote testimony options.²⁰⁵ The bill aims to modernize civil protection order procedures and integrate more technology into proceedings which could save survivors’ lives.²⁰⁶ Washington Senate Bill 1320 makes the Governor’s Emergency Proclamation that made protection orders accessible virtually when COVID-19 prevented physical access to the courts permanent.²⁰⁷ Section 14 of Senate Bill 1320 states, “Courts in all counties must permit petitions for protection orders and all other filings in connection with the petition to be filed either in person or remotely through an electronic filing system.”²⁰⁸ Additionally, Section 25 of Senate Bill 1320 states, “Hearings on protection orders, including hearings concerning temporary protection orders, full protection orders, compliance, reissuance, renewal, modification, or termination, may be conducted in person or remotely in order to enhance access for all parties... the court shall grant any request for a remote appearance unless the court finds good cause to require in-person attendance.”²⁰⁹ The Washington legislature has found that remote testimony and e-filing systems do not violate respondents’ procedural due process

201. CITY NEWS SERV., *Gloria Elliot Back Bill Letting Domestic Violence Victims Do Virtual Testimony*, TIMES OF SAN DIEGO (June 11, 2021), <https://timesofsandiego.com/crime/2021/06/11/gloria-elliott-back-bill-letting-domestic-violence-victims-do-virtual-testimony/>.

202. *Id.*

203. *Id.*

204. California Family Code §§6307. 6308.

205. S.B. 1320 Reg. Sess. (Wash. 2020).

206. *Id.*

207. *Id.*

208. S.B. 1320 Reg. Sess. (Wash. 2020).

209. *Id.* at 46.

rights.²¹⁰ If legislation such as this existed in every state, survivors would be able to obtain protection orders quickly and safely, and their failure to appear in court due to access issues and fear or intimidation tactics would plummet.

Another pathway that courts could consider when implementing remote testimony is expanded use of the good cause exceptions to live testimony. State and federal civil court rules favor live testimony over remote testimony. However, the courts may exercise discretion to allow remote testimony through good cause exceptions. Most state court rules regarding remote testimony options are modeled after Rule 43 of the Federal Rules of Civil Procedure (“FRCP”). State courts should utilize the same test and reasoning carved into the FRCP 43(a) good cause exception to the live testimony requirement in determining whether to use their discretion to permit remote testimony options for survivors of domestic violence.

Rule 43 of the Federal Rules of Civil Procedure covers the procedures for taking testimony in civil matters.²¹¹ Under Rule 43(a), there is a presumption “against testimony... by contemporaneous transmission from a different location.”²¹² However, Rule 43(a) contains a three-part test that gives courts discretion to admit remote testimony upon a showing of good cause under compelling circumstances if the proponent can ensure appropriate safeguards.²¹³ The three-part exception to Rule 43 offers a potential pathway for remote testimony in civil protection order proceedings. Rule 3.670 of the California Rules of Court (“CRC”) has a parallel provision to FRCP 43(a), governing remote court appearances, for instance.²¹⁴ Rule 3.670 of the CRC allows parties to appear over teleconferencing platforms in civil proceedings “to improve access to the courts and reduce litigation costs.”²¹⁵ The rule allows parties to teleconference into court proceedings except for in matters that require personal appearances.²¹⁶ Personal appearances are required for proceedings at which witnesses are expected to testify and in temporary restraining order proceedings.²¹⁷ However, the court has discretion to modify the rule and permit a party to appear remotely in proceedings that require personal appearances if good cause exists as in the FRCP 43(a) exception.²¹⁸ In state and federal court, the party appearing

210. *Id.* at 227.

211. Fed. R. Civ. P. 43(a).

212. *Taking Testimony*, LEGAL INFO. INST., https://www.law.cornell.edu/rules/frcp/rule_43.

213. Fed. R. Civ. P. 43(a).

214. Cal. Civ. Prac. Procedure § 14:21.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

remotely must give notice to the opposing party prior to the proceeding.²¹⁹ Courts should utilize the following line of reasoning to justify remote testimony options for survivors of domestic violence in restraining order hearings under the good cause exception to live testimony.

Protection of the witness and prevention of the triggering of survivors' PTSD on the stand should qualify as good cause and compelling circumstances to testify remotely. Courts should use this rule to allow survivors of domestic violence to testify remotely with the proper safeguards to ensure that the testimony is reliable. Survivors of domestic violence fear taking the stand in civil protection order hearings and face high rates of witness intimidation. Survivors also often experience PTSD and retraumatization, recounting their abuse face-to-face with their abuser. In determining whether there is good cause and compelling circumstances for permitting contemporaneous transmission of trial testimony, courts should consider control exerted over the witness by the defendant, and the complex, multiparty, multistate nature of the litigation. Courts should additionally consider the apparent tactical advantage, as opposed to any genuine inconvenience to the witness, a lack of any actual prejudice to the defendant, and the flexibility needed to manage complex multidistrict litigation.²²⁰

The Advisory Committee notes for Rule 43 do not establish what constitutes good cause in compelling circumstances. However, it identifies situations that ordinarily do not establish good cause, such as mere inconvenience or foreseeable circumstances. As mentioned above, courts should emphasize the alleged abuser's "control exerted over the witness" in determining whether good cause exists in civil protection order proceedings for survivors to testify remotely. Additionally, courts have sometimes allowed witnesses to testify remotely to protect the witness from threats or distress associated with appearing in person.²²¹ For example, courts sometimes have allowed child-abuse survivors to testify by remote transmission to shield them from the emotional distress of being in the presence of the alleged assailant.²²² In *Humbert v. O'Malley*, good cause was found where an assault victim asserted that traveling from out-of-state to return to the place of the assault would cause emotional distress.²²³ Inconvenience due to travel generally does not qualify as a good cause.

219. Cal. Civ. Prac. Procedure § 14:21.

220. ALEXA L. ASHWORTH ET. AL., 33A FED. PROC., L. ED. § 80:59, *Testimony by video or audio teleconferencing*, (2019).

221. ASHWORTH ET. AL., *supra* note 220.

222. See *Parkhurst v. Belt*, 567 F.3d 995, 1002 (8th Cir. 2009) (protection of alleged child abuse victim qualified as a compelling circumstance to allow her to testify by closed-circuit television).

223. See Ashworth, *supra* note 220. See also *Humbert v. O'Malley*, 303 F.R.D. 461, 465 (D. Md. 2014) (noting that the concern was really about the destination rather than the travel itself).

However, the triggering of emotional distress in *Humbert* edges the facts towards a good cause. Scholars have posited that “triggering a rape victim’s PTSD symptoms should constitute good cause in any court.”²²⁴ The court in *Humbert* found good cause under the circumstances because other courts had permitted remote testimony when the survivor would be subject to extreme discomfort by being forced to testify in open court.²²⁵ The court determined that sufficient safeguards existed to ensure the judicial process’s integrity. The survivor would be sworn under oath, she would be subject to cross-examination, and the jury would be able to evaluate her demeanor and credibility.²²⁶ The same line of reasoning should be applied to survivors of domestic violence. Recounting their abuse in front of their abuser in a courtroom can cause extreme discomfort and fear, and for many, it can trigger their PTSD. The courts can set sufficient procedural safeguards to ensure that survivors’ remote testimony is reliable.

The Advisory Committee to the 1996 Amendments to FRCP 43(a) states, “the very ceremony of trial and the presence of the fact-finder may exert a powerful force for truth-telling,” and “the opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.”²²⁷ While this reasoning may be compelling with regard to average parties in court, it is not very convincing when the parties include a survivor and their alleged abuser. Survivors of domestic abuse are less likely to be honest about the actions of their abuser in his presence, knowing the high likelihood of retribution that will follow.²²⁸ The intimate and unique relationship between a survivor of domestic violence and her abuser fosters the perfect storm for recanting testimony or lies on the stand to appease the abuser and prevent harm to themselves, their children, or loved ones. The traditional notion that one needs to be face-to-face to be able to make demeanor judgments about witnesses has been disproven during COVID-19, as discussed earlier.²²⁹ The reasoning behind face-to-face testimony is inapplicable to survivors of domestic violence on the stand. If the courts want the truth rather than a coerced, potentially fabricated recitation of the situation, it is time to let survivors appear from a safe, remote location.

224. DAVID F. HERR ET. AL., 30 No. 3 Fed. Litigator NL 13, *Witnesses- Remote Testimony* (2015).

225. *Id.*

226. HERR, *supra* note 224, at 13.

227. *Tharpe v. Lawidjaja*, 2013 WL 5939702, at 2 (W.D. Va. Nov. 5, 2013).

228. *These women survived domestic violence. Now they’re taking a stand to help others*, AMENSTY INT’L (Feb. 18, 2019), <https://www.amnesty.org/en/latest/news/2019/10/gun-violence-report/>.

229. *The Pros and Cons of Zoom Hearings*, *supra* note 131.

XII. Conclusion

Most survivors do not see their abuser as the malevolent figure that Delicia Harris described until after they are safe, and he is out of their life. Before civil protection order proceedings, he uses his wit and manipulation abilities to convince a survivor that he still loves her and blocks her from accessing the protection that she needs. Abusers parade around in the disguise of a loved one. When manipulation fails, abusers use scare tactics and intimidation to convince survivors not to come to court and give them a second chance. Being in a remote location participating from behind the screen helps survivors see him for who and what he is. His access to her affection and fears is virtually cut off, allowing her to advocate for herself and her needs.

Remote testimony is constitutionally sound and does not violate an alleged abuser's due process rights. Moreover, remote testimony does not deprive an abuser of his limited confrontation right pursuant to the *Matthews v. Eldridge* balancing test. The reasoning utilized under the doctrine of forfeiture by wrongdoing in criminal cases should be applied to instances of witness intimidation in civil protection order proceedings to allow survivors to testify remotely. From a public policy perspective, courts should permit and encourage survivors of domestic violence to petition for civil protection orders through e-filing and testify remotely to increase access for survivors, especially survivors with marginalized identities. The severe trauma that survivors experience in the courtroom outweighs any benefit that their live presence provides.

I urge state legislators and members of the judiciary to bring the process of obtaining a restraining order into the 21st century and look towards innovative leaders like legislators in the states of Washington and California, who are laying the groundwork for the future of domestic violence legislation.

Often, no one knows the struggles that a survivor faces in her home until she tragically loses her life at the hands of her abuser. Survivors like Delicia walk among us every day, fighting an invisible battle. She is your neighbor, your teacher, your friend, your co-worker, the stranger with whom you exchange smiles with on the street. She could be anybody. Survivors are telling us that remote testimony is what they want and what they need. It is time for the legal community to listen.
