
Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law

Margaret E. Johnson*

Civil domestic violence laws do not effectively address and redress the harms suffered by women subjected to domestic violence. The Civil Protective Order (“CPO”) laws should offer a remedy for all domestic abuse with an understanding that domestic violence subordinates women. These laws should not remedy only physical violence or criminal acts. All forms of abuse — psychological, emotional, economic, and physical — are interrelated. Not only do these abuses cause severe emotional distress, physical harm, isolation, sustained fear, intimidation, poverty, degradation, humiliation, and coerced loss of autonomy, but, as researchers have demonstrated, most domestic violence is the fundamental operation of systemic oppression through the exertion of power and control. Because CPOs are effective in rebalancing the power in a relationship and decreasing abuse, this remedy should be available to all women subjected to all forms of domestic violence. This Article proposes recrafting the civil law to provide a remedy for all harms of domestic violence and its operation of systemic power and control over women. Re-

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centering the narrative of domestic violence on this oppression rather than merely physical violence and criminal acts underscores the critical role of women's agency and autonomy in legally remedying domestic violence. Too often, outside actors choose to save women's lives to the exclusion of effectuating women's choices about their abusive relationships.

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VANESSA

Mark restricts Vanessa’s access to money and employment. At home, Mark keeps all household supplies and toiletries under lock and key. If Vanessa or her three children need anything they must prove it is necessary; and only then will he unlock a cabinet and provide them with it. This includes tooth paste. Tampons. Laundry detergent. At dinner, Mark tells the children to ignore their mother because Vanessa is too stupid to be able to understand their conversations. Instead, Mark tells them she is there simply to make the food and serve it. Privately, Mark often tells Vanessa that if they ever separated, the children would never choose to live with her because they do not respect her.¹

KIM

For years, Eddie has subjected Kim to name calling and degrading insults on a daily basis. “Kim says she has often wished it would get so bad that Eddie would turn physically violent — so she’d have ‘a reason to get out.’”²

SUSAN

*Susan stands at attention. Her husband Ulner reclines in a living room chair. Ulner has ordered their son to videotape the entire encounter. Ulner tells Susan, “Look at me bitch. You play those stupid games with me, I’ll knock your teeth outta your face. You act like a **** in front of the kids. You little slut. If I see a dog chewing your ass up I won’t stop it. I won’t stop it. I don’t want to see your stupid ass crooked self. You stupid*

¹ Vanessa is a fictional name but her experiences are based on real women I have represented.

² The Oprah Winfrey Show, Emotional Torture, http://www.oprah.com/tows/slide/200410/20041005/slide_20041005_101.jhtml (last visited July 22, 2008).

ass heifer.” He directs his son, “Zoom in on that heifer. Zoom in. Do you see a tear?” Ulner then yells at Susan, “You don’t know what to do. Look at your stupid ****. Look at the way you look!” What prompted Ulner to say these things? Susan had come in to ask Ulner what he wanted for lunch and Ulner accused Susan of provoking him. Later, he threw her on the bed in their room and slapped, hit, and attempted to strangle her while still demanding their son to videotape.³

INTRODUCTION

Vanessa, Kim, and Susan were all subjected to domestic violence, including systematic hitting, degradation, humiliation, threats, coercion, and financial deprivation. Nonetheless, the law fails to recognize much of the brutality of their experiences. As a result, women like these often will not seek a legal remedy.⁴ Kim believes there is no remedy for Eddie’s emotional abuse without physical violence. And without a civil remedy, Mark’s control over the monetary resources and his control of Vanessa’s ability to seek

³ Kristin Pisarcik, *Behind Closed Doors, Abuse Caught on Tape*, ABC NEWS, July 31, 2007, <http://abcnews.go.com/Primetime/story?id=2608738&page=1> (language excluded from original source). On October 26, 2006, the ABC News show 20/20 originally aired Susan’s story. 20/20 reported that for years, a 47-year-old woman identified only as Susan had been subjected to abuse by her husband, Ulner, with whom she had three children. *Id.* In the videotape Ulner forced his son to film, Ulner engaged in “verbal flogging” of Susan for a prolonged period of time. ABC News obtained this videotape and showed it on the air along with interviews of Susan. For perhaps the first time, systematic emotional and psychological abuse were seen and undeniable to the American public. And although Ulner had also subjected Susan to physical abuse, Susan only told the authorities about all of the abuse to which Ulner subjected her after this videotaping incident because he had involved the children in his humiliation of her. See also notes regarding the posted video of the original broadcasted story (on file with author).

⁴ This paper focuses on women subjected to male-perpetrated domestic violence because the research shows that it is the most prevalent type of domestic violence. See Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 481-82 (2008) (identifying women more often harmed than men by “Coercive Controlling Violence,” which is physical and emotional violence characterized by power and control). This focus should not serve to ignore the fact that women also perpetrate domestic violence and that domestic violence occurs in same-sex relationships. *Id.* In addition, this Article draws on early feminist thought regarding domestic violence. The inclusion of this theory is intended to highlight the broad theories of subordination and not to maintain an essentialist view of women as white, middleclass, and straight. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

employment will continue, further entrenching Vanessa's economic dependence on him. In addition, Mark will continue to alienate the children from their mother. In most states, only Susan has legal systematic recourse under the civil domestic violence laws, known as civil protective order ("CPO") laws. While Susan may obtain a CPO for the physical abuse to which she is subjected, in most jurisdictions Susan will have no remedy for the emotional and psychological abuse. She cannot obtain an order requiring the return of the videotape, enjoining the name calling, degradation, and future video recordings, nor receive other relief necessary to address the wide range of her husband's abusive behavior. A comprehensive civil legal system that tackles the fundamental harms of domestic violence must provide Vanessa, Kim, and Susan with equal access to the potential benefits of the CPO laws to address serious multifaceted abuse.

CPO laws, which exist in all fifty states and the District of Columbia, permit petitioners to obtain orders addressing the abuse in their relationships.⁵ These statutes provide expedited hearings and relief.⁶ The relief available includes injunctive relief, such as ordering the cessation of abuse, counseling, or limitations on physical or other contact between the parties; family relief, such as custody and child support; and monetary relief, including compensation for resulting medical or psychological treatment.⁷ CPO hearings also aid women simply as a forum where women may hold their abusers accountable.⁸ In addition, CPOs can provide evidence for legal actions seeking more permanent relief, such as permanent custody and visitation.⁹ In addition to actually decreasing abuse, studies have shown that women believe protective orders are effective tools in their relationships.¹⁰ The civil system thus enables the petitioner to rearrange her relationship with the person abusing her.¹¹ That rearrangement has

⁵ The CPO laws are discussed in more depth *infra* Part I.D. Although individual state laws differ, generally all contain a definition for actionable domestic violence or abuse and provide various remedies to address the abuse. *Id.*

⁶ See *infra* text accompanying notes 106-13.

⁷ The remedies available under CPOs are explained at length *infra* text accompanying notes 111-13.

⁸ See *infra* Part I.C.

⁹ See *infra* Part II.C.

¹⁰ See, e.g., Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 J. GENDER, SOC. POL'Y & L. 499, 513 (2003) (noting protective order petitioners cite satisfaction with temporary protective orders); *infra* Part I.C.

¹¹ PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 33 (1990) (stating that judges find CPOs effective

legal authority and legal ramifications if disobeyed. This allows the woman to avoid the harm of abuse while deciding whether and how to maintain her relationship with her abuser.

Unfortunately, two-thirds of the states limit CPO remedies to those who are subjected to physical violence¹² or other criminal acts under state law. This narrow view of actionable domestic violence deprives women like Vanessa and Kim of a remedy. Although they were subjected to serious nonphysical abuse,¹³ including psychological, emotional, and economic abuse, the laws generally make a meaningful civil remedy unavailable to them.¹⁴

The law's narrow focus on physical violence even deprives women subjected to comparatively nonsevere physical abuse of a remedy. For example, women like Susan, who have a legal remedy for their physical abuse under the plain language of the statute, may be de facto excluded from relief because the court does not classify the domestic violence as life threatening.¹⁵ If physical violence is not considered severe enough, some courts are wary to provide any remedy at all, preferring not to meddle in private relationships.¹⁶ The courts'

if order includes all statutorily permitted relief petitioner needs to protect against future abuse given her particular situation).

¹² For a discussion of the CPO laws' fixation on physical violence, see Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 8, 43-44 (2008).

¹³ Rather than using the term "battered women" or "abused women," I am using the construction "women subjected to abuse" which I take from Ann Shalleck's important work, Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1023-28 (1997). As Shalleck discusses, labeling any woman who has been abused as a "battered woman" reduces her to a unidimensional view, defined by what happened to her. *Id.* at 1023. The same is true for the terms "abuser" or "batterer" that reduce that person to what he did alone. These labels remove the complexities of their relationship, of which the violence and abuse may be a large or small part — a constant background or an intermittent piece. With a narrow focus, the solutions or remedies for the harms resulting from the abuse are driven only by that focus rather than the broader reality of the woman's life.

¹⁴ This Article discusses and critiques the current regime of CPO laws in the 50 states and the District of Columbia and their underinclusion of the types of domestic violence that should be actionable.

¹⁵ See *infra* Part II.B.3. In a related discussion of courts acting based on their own assumptions about violence, see Tamara L. Kuennen, "No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims, 16 UCLA WOMEN'S L.J. 39, 65 (2007) (discussing how courts deny women petitioners' motions to vacate protective orders thus treating them wholly differently from other civil injunction matters due to courts' assumptions and biases about violence and their focus on saving lives).

¹⁶ See, e.g., Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner*

reluctance to pry and limited remedies mean that courts often will refuse to hear testimony of the full context of abuse, including nonsevere physical abuse, psychological abuse, emotional abuse, and economic abuse.

If the CPO system allowed them, however, women like Vanessa and Kim, who are subjected to exclusively psychological, emotional, and economic abuse, and like Susan, who are subjected to all forms of abuse, might satisfactorily address their complex abuse. Research shows that the systematic operation of power and control is at the center of most abuse and that all forms of abuse are interrelated.¹⁷ CPO laws provide an important offset to an abuser's power with injunctive relief. Injunctions are court remedies intended to reorder "a relationship in conflict" in which the authority and power of the court are placed at the service of the *victim* to compel someone else — the violator — to respect the victim's rights.¹⁸ Accordingly, when allowed, women subjected to abuse have used CPOs to satisfactorily decrease their physical, psychological, and emotional abuse.¹⁹

Decreasing psychological abuse is important for two reasons. First, research shows that women who are abused find psychological abuse more painful than physical abuse.²⁰ Second, some research has shown that psychological abuse, when effectuated by a controlling partner, often leads to physical abuse.²¹ Because CPOs are potentially effective in decreasing nonphysical abuse, CPOs can also potentially change the dangerous power dynamics of a relationship before physical abuse is inflicted. As a result, women subjected to the fundamental harms of psychological, emotional, and economic abuse should be able to seek a CPO.

The current CPO laws are particularly well situated to permit petitioners to construct a remedy that redefines a relationship that is tainted by abuse but nonetheless is meaningful — connected by

Violence: Toward a New Conceptualization, 52 *SEX ROLES* 743, 754 (2005) (arguing for psychological research to study domestic violence as coercion and thereby to move beyond "accounting of specific assaultive acts"); *infra* Part II.B.

¹⁷ See *infra* Part I.A.

¹⁸ Kuennen, *supra* note 15, at 54-55 (citing Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 *TEX. L. REV.* 1101, 1101 (1986)) (emphasis added).

¹⁹ Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, 4 *WOMEN & POL.* 13, 19, 21-25 (1984).

²⁰ ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 66 (2000) (noting women "frequently describe the threats and verbal abuse as more devastating than the physical"); LENORE WALKER, *THE BATTERED WOMAN* 34 (2d ed. 2000).

²¹ See Kelly & Johnson, *supra* note 4, at 483.

children, economics, emotional, and psychological ties.²² Accordingly, CPO laws should provide for remedies that permit a multidimensional reordering of the relationship, from the terms of the legal relationship to a recalibration of the power dynamic.²³ Permitting women to reconstruct relationships in which there is multifaceted abuse fulfills the goal of decreasing abuse by advancing women's ability to self-direct and self-define, otherwise known as their agency or autonomy.²⁴ By exerting agency, women subjected to abuse rebalance the power in their relationship and decrease future abuse.²⁵

Accordingly, CPO laws should provide redress for all forms of domestic abuse to attack the oppression of women. This Article expands on existing scholarly assessment of the law's influence on domestic violence.²⁶ This Article focuses on the need for the civil law

²² See ALYCE D. LAVIOLETTE & OLA W. BARNETT, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 145 (2d ed. 2000); NAT'L DOMESTIC VIOLENCE HOTLINE, *DECADE FOR CHANGE REPORT* 8, 15 (2007); SCHNEIDER, *supra* note 20, at 77-78; Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 *CARDOZO L. REV.* 1487, 1489, 1501 n.83 (2008) (noting women subjected to abuse "want the relationship to continue but the violence to stop" (citing ANN JONES, *NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT* 203 (2000))); David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 *OHIO ST. L.J.* 1153, 1161 n.42 (1995).

²³ See Baker, *supra* note 12, at 57 (explaining that studies show "civil protection regimes generate relief to violence victims by affording them a lever to demand or regain power or to be liberated from coercive oppression, by communicating defiance, by seizing a power greater than the abuser's in the law and by exposing her oppression publicly"); Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 *TEMP. POL. & CIV. RTS. L. REV.* 557, 565-66 (2006) (focusing on only physical violence, Professor Balos states that CPO remedies support women's autonomy in decisionmaking about children and otherwise provide structure and organization to family relationships while addressing safety for plaintiff and her family).

²⁴ See generally Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 112-14 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing agency as "capacity for self-definition and self-direction" despite subordination based on gender); Goldfarb, *supra* note 22, at 1501-02, 1523 (stating CPOs that permit woman to continue relationship with someone while addressing abuse is valuable to woman's autonomy within relationship).

²⁵ Baker, *supra* note 12, at 57.

²⁶ See generally EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* (2007) (examining coercive control involved in domestic violence); Baker, *supra* note 12 (arguing that CPO laws should enjoin coercion); Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 *GEO. WASH. L. REV.* 552 (2007) (proposing coercive domestic violence criminal law statute); Goldfarb, *supra* note 22 (exploring dual CPO goals of safety and autonomy); Leigh Goodmark, *Law Is the Answer? Do We Know That For Sure? Questioning The Efficacy of Legal Interventions for Battered Women*, 23 *ST. LOUIS U. PUB. L. REV.* 7 (2004)

to go beyond remedying physical abuse and crimes,²⁷ beyond recognizing only discrete acts of violence, and beyond approaching domestic violence from the system actor's goals rather than the woman's goals. A broader approach will allow the CPO laws to better assist women seeking to change abusive relationships.

Part I of this Article identifies how women experience the harms of domestic violence and how the CPO laws designed to address and redress domestic violence fail to address some of its most fundamental harms. Part II examines how a limited recognition of selected harms as domestic violence hurts women subjected to abuse and underscores the importance of redefining domestic violence in CPO laws to best address women's goals in addressing the abuse. Part III proposes guidelines for how states can reform their CPO laws to address and redress all forms of domestic violence. In discussing this proposal, Part III explores both concerns and benefits of the proposal while maintaining a focus on the critical role of women's agency and autonomy in legally remedying domestic violence.

I. CIVIL DOMESTIC VIOLENCE LAW'S GENERAL FAILURE TO REMEDY THE FAR-REACHING HARMS OF ABUSE

Women experience domestic violence in a variety of forms, including physical violence, psychological abuse, emotional abuse, and economic abuse. These forms of abuse inflict enormous harm. Despite these fundamental harms, the nation's CPO laws largely fail to provide a remedy to all of them.

A. *Domestic Violence as Experienced by Women*

Various researchers, advocates, and theorists who have studied and worked with women subjected to abuse have catalogued the many types of abuse.²⁸ Social science research recognizes that women are

(analyzing limitations of legal responses to domestic violence); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2 (2007) (examining resulting challenges from courts considering coercion); Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004) (arguing that criminal law needs to define domestic violence crimes as not merely transactions of physical violence but also as pattern of power and control being exerted).

²⁷ Jeannie Suk's article, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006), provides an interesting discussion and critique of the criminal law overreaching by criminally prohibiting intimate relationships in the home.

²⁸ See *infra* Part I.A.

subjected to domestic violence that is complex and multifaceted. In social work scholarship, domestic violence is defined as

a pattern of behavior in a relationship by which the batterer attempts to control his victim through a variety of tactics These tactics may include fear and intimidation, physical and/or sexual abuse, psychological and emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles.²⁹

Tactics that qualify as psychological and emotional abuse as well as economic abuse include

sabotag[ing] a woman's efforts to find a job or attend a job training . . . [by] turning off her alarm clock so she will be late for work, cutting off her hair to cause her great embarrassment, inflicting visible injuries or creating conflicts before crucial events, and hiding or destroying her books, homework, or clothing.³⁰ Once employed, the abuse may continue with the abuser "disrupting her transportation or child care arrangements or harassing her at work."³¹

²⁹ Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 *AFFILIA* 244, 245 (2000); see also LENORE E. A. WALKER, *ABUSED WOMEN AND SURVIVOR THERAPY: A PRACTICAL GUIDE FOR THE PSYCHOTHERAPIST* 56 (1994); Dutton & Goodman, *supra* note 16, at 743. It should be noted, however, that such broad notions of domestic violence did not always exist. Traditionally, although feminists had a broad view of domestic violence that included all forms of abuse, social scientists defined domestic violence as only physical violence. SCHNEIDER, *supra* note 20, at 65. More social science research today, however, reflects an increasingly complex view of domestic abuse that looks at multifaceted methods of control. Nonetheless, Drs. Dutton, Goodman, and Walker, among others, have recently critiqued the psychology research for having failed to research adequately the emotional abuse, psychological abuse, and coercive control. WALKER, *supra* note 20, at 34 (noting that psychologists have never effectively quantifiably measured psychological abuse); Dutton & Goodman, *supra* note 16, at 743 (noting lack of empiricism regarding coercive control).

³⁰ Postmus, *supra* note 29, at 246.

³¹ *Id.* See generally Diane R. Follingstad et al., *Lay Persons Versus Psychologists Judgments of Psychologically Aggressive Actions by a Husband and Wife*, 19 *J. INTERPERS. VIOLENCE* 916, 924-25 (2004) (using Follingstad and DeHart Psychological Abuse Survey (2000), authors studied perceptions of following categories of psychological abuse: "(a) treatment as inferior, humiliation/degradation; (b) isolation, restriction, or monopolization of mobility, information, or social activity; (c) emotional or sexual withdrawal or blackmail; (d) verbal attacks/criticism; (e) economic deprivation; (f) threats of physical harm or to physical health; (g) destabilizing the woman's perception of reality; (h) use of male privilege and/or rigid gender role; (i) control of

Social science researchers Joan Kelly and Michael Johnson identify “coercive controlling violence”³² as the use of patterned power and control including the tactics identified in the social work literature.³³ As they state,

Abusers do not necessarily use all of these tactics, but they do use a combination of the ones that they feel are most likely to work for them. Because these nonviolent control tactics may be effective without the use of violence (especially if there has been a history of violence in the past), controlling violence does not necessarily manifest itself in high levels of violence.³⁴

Psychologists have also catalogued many forms of abuse. One study utilized various scales and other measurement tools to determine whether women were subjected to domestic abuse.³⁵ That study covered physical, psychological, emotional, and economic abuse.³⁶ Its researchers used two scales of psychological abuse: dominance-isolation and emotional-verbal to measure its prevalence and effect on women.³⁷ They used scales to measure the harm of stalking and job

personal behavior; (j) jealousy/suspicion; (k) intimidation or harassment; (l) failure to live up to role expectations”); Felicity W. K. Harper et al., *The Role of Shame, Anger and Affect Regulation in Men’s Perpetration of Psychological Abuse in Dating Relationships*, 20 J. INTERPERS. VIOLENCE 1648, 1651-53 (2005) (studying role of anger, shame, and affect regulation in psychological abuse, defined pursuant to Psychological Maltreatment of Women Inventory (“PMWI”)); Vivian Zayas & Yuichi Shoda, *Predicting Preferences for Dating Partners from Past Experiences of Psychological Abuse: Identifying the Psychological Ingredients of Situations*, 33 PERSONALITY SOC. PSYCHOL. BULL. 123, 123-24 (2007) (exploring relationship between past abuse and preferences for dating partners).

³² Another scholar argues that the interrelationship of the emotional, psychological, economic, and physical abuse discussed by scholars and activists when addressing domestic violence can be encapsulated in the term “coercive control.” Baker, *supra* note 12, at 58-60. Yet another scholar discusses at length the failure of the legal system to agree on a definition of “coercive control,” thereby causing further harm. Kuennen, *supra* note 26, at 2. Because this paper argues that psychological, emotional, and economic abuse need to be surfaced, acknowledged, and remedied by the civil law, a global term, such as “coercive control,” is not used herein.

³³ See Kelly & Johnson, *supra* note 4, at 481.

³⁴ See *id.*

³⁵ MARY ANN DUTTON ET AL., *ECOLOGICAL MODEL OF BATTERED WOMEN’S EXPERIENCE OVER TIME*, FINAL REPORT TO NATIONAL INSTITUTE OF JUSTICE 19-20 (2005).

³⁶ *Id.* Recently, researchers published a Scale of Economic Abuse. Adrienne E. Adams et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 569 (2008). The researchers found that economic abuse is a “significant component of the broad system of tactics used by abusive men to gain power and maintain control over their partners.” *Id.* at 580.

³⁷ DUTTON, *supra* note 35, at 19-20. The Tolman PMWI (1995) “asks whether

interference, as well as threats and danger of fatality.³⁸ Psychologists have found these scales to be successful measures to identify battered women, as opposed to women not subjected to abuse.³⁹ Accordingly, these scales can distinguish domestic abuse from mere nagging or unpleasantness.

In related work, Drs. Mary Ann Dutton and Lisa Goodman explore the role of coercion in domestic violence.⁴⁰ They define coercion as “a dynamic process linking a demand with a credible threatened negative consequence for noncompliance.”⁴¹ They studied nine areas of control in which the agent (person causing the abuse) made demands on the target (the person subjected to abuse): “[P]ersonal activities/appearance,” “support/social life/family,” “household,” “work/economic/resources,” “health,” “intimate relationship,” “legal,” “immigration,” and “children.”⁴² The abuser followed up his demands with a credible threat to induce compliance. The credible threats included threat of physical injury, removing the children, interfering with immigration applications, revealing private information, embarrassing the target, and having sex with another person.⁴³ They found that while all of the coercion was psychologically harmful, only some was physically harmful.⁴⁴

Dr. Lenore Walker measures the following as components of psychological abuse: harassment, controlling the woman’s life, controlling how she spends her time, questioning her, keeping her under surveillance, depriving her of sleep at night by making demands, and issuing orders.⁴⁵ Recently, Walker has drawn parallels between Amnesty International’s definition of psychological torture

participants have experienced a variety of acts of forms of psychological abuse, ranging from ‘he swore at me’ to ‘he watched over my activities and insisted I tell him where I was at all times.’”

³⁸ DUTTON, *supra* note 35, at 20-21 (citing Tjaden & Thoennes Survey (2000); The Job Interference Scale, stating that scale was based in part on work by Jody Raphael (1996) and Raphael and Tolman (1997), which measured employment interferences among welfare recipients and others; Threat Appraisal, stating that this scale, which measures violent and nonviolent threats, was based on batterer-generated risks developed by Jill Davies and others, Davies, Lynn, and Monti-Catania (1998); and Danger Assessment Scale, developed by Dr. Jacquelyn Campbell (1995)).

³⁹ *Id.* at 20 (identifying that PMWI Scale can identify battered women).

⁴⁰ Dutton & Goodman, *supra* note 16, at 743-44; *see also* MARY ANN DUTTON ET AL., DEVELOPMENT AND VALIDATION OF A COERCIVE CONTROL MEASURE FOR INTIMATE PARTNER VIOLENCE: FINAL TECHNICAL REPORT 15-16 (2005) (on file with author).

⁴¹ Dutton & Goodman, *supra* note 16, at 746-47.

⁴² *Id.* at 747.

⁴³ *Id.*

⁴⁴ *Id.* at 748.

⁴⁵ WALKER, *supra* note 29, at 58-59.

and domestic violence.⁴⁶ Under Amnesty International's definition, there are eight areas of abuse: (1) "isolation of the victims;" (2) "induced debility producing exhaustion such as limited food or interrupted sleep patterns;" (3) "monopolization of perception including obsessiveness and possessiveness;" (4) "threats such as death of self, death of family and friends, sham executions, and other indirect threats;" (5) "degradation including humiliation, denial of victim's powers, and verbal name calling;" (6) "drug or alcohol administration;" (7) "altered states of consciousness produced through hypnotic states;" and (8) "occasional indulgences which, when they occur at random and variable times, keep hope alive that the torture will cease."⁴⁷

Walker shows how these forms of psychological torture apply to battered women.⁴⁸ For instance, batterers consciously isolate women from others; women also withdraw from society to protect others from harm and themselves from embarrassment.⁴⁹ Three times as many battered women as nonbattered women are isolated financially because they have "no access to cash."⁵⁰ And twenty-two percent of women in abusive relationships (versus only thirteen percent in nonabusive relationships) have no access to a car.⁵¹ Regarding other controlling behaviors, Walker states that whereas battered women were not permitted to go places three-quarters of the time, nonbattered women were not permitted to go places only one-quarter of the time.⁵² Also, batterers, unlike nonabusive partners, knew where their victims were at almost all times.⁵³

A broad view of the violence to which women are subjected is consistent with the advocacy against domestic violence as well. The "power and control wheel" is almost a required text for service providers who work with women who are subjected to abuse.⁵⁴ The wheel identifies domestic violence as the exercise of power and control through the "interrelated dimensions of physical abuse, economic abuse, coercion and threats, intimidation, emotional abuse (using isolation, minimizing, denying, and blaming), and abusing

⁴⁶ WALKER, *supra* note 20, at 35.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 36.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ STARK, *supra* note 26, at 13.

male privilege.”⁵⁵ Therefore, when advocates work with women who are abused, a discussion of the various forms of abuse helps the women identify if and how they have been abused. That assessment is also part of the process of continuing self-empowerment.

Moreover, the advocacy community similarly has translated the theory of power and control into the concrete actions and behaviors that result in oppression. For example, one advocacy group’s website identifies domestic violence as “a pattern of abusive behavior which keeps one partner in a position of power over the other partner through the use of fear, intimidation and control.”⁵⁶ This advocacy group’s website is similar to many others.⁵⁷ The group identifies the following forms of abuse: physical, sexual, economic, emotional, and psychological.⁵⁸ The group defines physical abuse as “[g]rabbing, pinching, shoving, slapping, hitting, hair pulling, biting, etc. Denying medical care or forcing alcohol and/or drug use.”⁵⁹ It defines sexual abuse as “[c]oercing or attempting to coerce any sexual contact without consent, e.g., marital rape, forcing sex after physical beating, attacks on sexual parts of the body or treating another in a sexually demeaning manner.”⁶⁰ The group defines economic abuse as “[m]aking or attempting to make a person financially dependent, e.g., maintaining total control over financial resources, withholding access to money, forbidding attendance at school or employment.”⁶¹ It

⁵⁵ SCHNEIDER, *supra* note 20, at 12.

⁵⁶ WomensLaw.org, What is Domestic Violence?, http://www.womenslaw.org/simple.php?sitemap_id=39 (last visited Mar. 26, 2009).

⁵⁷ See, e.g., House of Ruth, Domestic Violence Dynamics, <http://www.hruth.org/domestic-violence-dynamics.asp> (last visited Mar. 26, 2009) (providing depiction of power and control wheel, which shows power and control in hub; emotional abuse, economic abuse, sexual abuse, intimidation, using children, using male privilege, threats and isolation in spokes; and physical abuse on rim); Iowa Commission Against Domestic Violence, Questions About Domestic Violence, <http://www.icadv.org/faq.asp> (last visited Mar. 26, 2009) (“Domestic violence is not an isolated, individual event, but rather a pattern of repeated behaviors These assaults occur in different forms: physical, sexual, psychological.”); North Carolina Coalition Against Domestic Violence, Domestic Violence Information, http://www.nccadv.org/domestic_violence_info.htm#Definition%20of%20Domestic%20Violence (last visited Mar. 26, 2009) (“Domestic Violence is when two people get into an intimate relationship and one person uses a pattern of coercion and control against the other person during the relationship and/or after the relationship has terminated. It often includes physical, sexual, emotional, or economic abuse.”); Ohio Domestic Violence Network, Power & Control, <http://www.erie-county-ohio.net/victim/pdf/wheel.pdf> (last visited Mar. 26, 2009).

⁵⁸ WomensLaw.org, *supra* note 56.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

defines emotional abuse as “[u]ndermining a person’s sense of self-worth, e.g., constant criticism, belittling one’s abilities, name calling, damaging a partner’s relationship with the children.”⁶² Finally, the group defines psychological abuse as “[c]ausing fear by intimidation, threatening physical harm to self, partner or children, destruction of pets and property, mind games or forcing isolation from friends, family, school and/or work.”⁶³

The notion of domestic violence as the operation of power and control has largely become part of mainstream consciousness.⁶⁴ Contemporary theorists and battered women’s advocates underscore the fact that power and control can be exercised not only by a pattern of physical violence, but also through a pattern of psychological, economic, sexual, and other abusive acts.⁶⁵ Physical violence may not even be the most significant form of abuse.⁶⁶ Rather, a woman in a relationship marked by serious power imbalances and a dangerously controlling partner is “subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a

⁶² *Id.*

⁶³ *Id.* To identify emotional abuse, the National Domestic Violence Hotline asks whether the partner does the following things:

Calls you names, insults you or continually criticizes you. Does not trust you and acts jealous or possessive. Tries to isolate you from family or friends. Monitors where you go, who you call and who you spend time with. Does not want you to work. Controls finances or refuses to share money. Punishes you by withholding affection. Expects you to ask permission. Threatens to hurt you, the children, your family or your pets. Humiliates you in any way.

National Domestic Violence Hotline, What is Domestic Violence?, <http://www.ndvh.org/get-educated/what-is-domestic-violence> (last visited Mar. 26, 2009).

⁶⁴ Gael Strack & Eugene Hyman, *Your Patient. My Client. Her Safety: A Physician’s Guide to Avoiding the Courtroom While Helping Victims of Domestic Violence*, 11 DEPAUL J. HEALTH CARE L. 33, 35 (2007). For provocative and well-documented articles discussing the significant problems with a monolithic and stark view of the operation of power and control on women subjected to abuse, see Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L & SOC. CHANGE 191, 198 (2008) and Kuennen, *supra* note 26, at 2.

⁶⁵ Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 57 (1999) (noting batterers’ behavior includes physical violence, emotional abuse, psychological abuse, economic coercion, and other controlling actions); Rhonda L. Lenton, *Power Versus Feminist Theories of Wife Abuse*, 37 CAN. J. CRIMINOLOGY 305, 310-12 (1995).

⁶⁶ Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995) [hereinafter, Stark, *Re-Presenting Woman Battering*]. Evan Stark’s book, COERCIVE CONTROL, *supra* note 26, provides an extensive exploration of coercive control.

woman's life, including sexuality; material necessities; relations with family, children, and friends; and work. Sporadic, even severe, violence makes this strategy of control effective."⁶⁷ The woman's experience of domestic violence is defined by the coercion and deprivation of liberty as much as it is by the violence.⁶⁸

In the current legal theory literature, commentators also have highlighted the breadth of abuse that constitutes domestic violence as well as the importance of contextualizing incidents within the broader dynamic of systemic coercive and abusive conduct. For instance, one scholar asserts that although explanations for domestic violence are divergent, empirical data supports the common explanation "that abuse is a method of gaining and exercising power and control over a partner."⁶⁹ This theory about domestic violence is rooted in systemic and political issues of gender subordination and coercive control.⁷⁰ Accordingly, many legal commentators argue that it is the operation of power and control that must define the domestic violence rather than any specific incidents of physical violence.⁷¹ The physical,

⁶⁷ Stark, *Re-Presenting Woman Battering*, *supra* note 66, at 986; *see also* Coker, *supra* note 65, at 57 (defining domestic violence as pattern of behavior to control victim).

⁶⁸ Stark, *Re-Presenting Woman Battering*, *supra* note 66, at 986.

⁶⁹ Goldfarb, *supra* note 22, at 1493.

⁷⁰ SCHNEIDER, *supra* note 20, at 5.

⁷¹ Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 695 (1998) (arguing exertion of power should be focus of domestic violence study rather than number of physically violent episodes (citing Joan S. Meier, *Notes from the Underground, Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1318 (1993))); Sharon Stapel, *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence*, 52 N.Y.L. SCH. L. REV. 247, 255 (2007-08) (acknowledging that communities of same sex and opposite sex couples similarly define domestic violence as one partner coercing, dominating, or isolating other partner). Stapel states that

[i]t is the exertion of any form of power that is used to maintain control in a relationship. The violence can be physical, emotional, sexual, psychological, or economic. Same-sex batterers use tactics of abuse similar to those of heterosexual batterers. However, some forms of battering are unique to the LGBT communities . . . Same-sex batterers are able to successfully exploit their victims' internalized, or the community's externalized, homophobia, biphobia, or transphobia, simply by threatening to "out" their partners' sexual orientation or gender identity to family, friends, employers, landlords, or other community members.

Id. at 255; *see* Baker, *supra* note 12, at 58-60; Kuennen, *supra* note 26, at 2; Strack & Hyman, *supra* note 64, at 33 (stating domestic violence includes emotional, sexual, economic, and physical abuse).

psychological,⁷² emotional, or economic⁷³ acts are merely the tools that manifest the dynamics of power and control that are present in domestic violence. Domestic violence “exists along a continuum that includes emotional, financial, physical, and sexual violence. The continuum of violence is unique to each person. To some, emotional abuse is more severe than sexual abuse. To others, sexual abuse is the ultimate human violation.”⁷⁴ Given the legal theory’s understanding of the dynamics of power and control in domestic violence, criminal justice scholars recently have argued to expand the criminal law’s definition of domestic violence to incorporate such dynamics.⁷⁵

As seen above, social scientists, advocates, and legal theorists increasingly have recognized the many harms of domestic violence. Social science catalogues the concrete harms resulting from domestic violence. In addition to the physical injuries that can result from physical assaults, psychological abuse influences mental health, with increased depression, suicide ideation, post-traumatic stress disorder, and a decreased sense of power and self-esteem. Psychological abuse also affects physical health, with increased substance use and increased susceptibility to long-term diseases.⁷⁶ Economic abuse often results in economic dependence, lack of resources, uncertain economic future, poverty, homelessness, and decreased physical and mental health.⁷⁷

⁷² Similar to the other disciplines discussed above, the legal theory discusses psychological abuse as including threats, humiliation, destruction of property and pets, harassment, and forced confinement in the home. See, e.g., Goldfarb, *supra* note 22, at 1492 (discussing various forms of harm from domestic violence).

⁷³ *Id.* (stating domestic violence includes economic abuse as well (citing Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER & SOC. POL’Y & L. 367, 368 (2003))).

⁷⁴ LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 23 (2003). Mills further states that each person needs to be reflective in identifying what forms of behavior are playful and which are coercive. *Id.* In addition, Mills exhorts society to learn about each person’s individual experience of interconnected acts of violence so that society does not continue to misperceive behaviors out of context. *Id.*

⁷⁵ Burke, *supra* note 26, at 556 (building on Tuerkheimer’s work and arguing for domestic violence criminal statute that would prohibit defendant engaging “in a pattern of domestic violence with the intent to gain power or control over the victim”); Tuerkheimer, *supra* note 26, at 960-62 (arguing that criminal law needs to define domestic violence crimes as not merely transactions of physical violence but pattern of power and control being exerted). For a response to Burke’s proposal, see Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613, 616-25 (2007).

⁷⁶ Adams, *supra* note 36, at 563-64.

⁷⁷ *Id.* at 568.

With this understanding of the actual scope of domestic violence, it is clear that Vanessa, Kim, and Susan have all been subjected to domestic violence. Mark has subjected Vanessa to coercive economic abuse by precluding her from access to financial resources. Mark has also emotionally abused Vanessa by systematically belittling and degrading her in front of her children. Eddie has subjected Kim to emotional abuse by daily degrading, insulting, and calling her names. And Ulner subjected his wife Susan to many forms of abuse designed to control Susan through fear, intimidation, and denial of her own power. Ulner's pattern of abuse included subjecting Susan to physical abuse, when he hit, choked, and slapped her; emotional abuse, when he engaged in a pattern of undermining Susan's self-worth by constantly criticizing her, belittling her, calling her names, and damaging her relationship with her son; and psychological abuse, when he intimidated Susan, threatened her with physical harm, and isolated her.⁷⁸

B. *The Importance of Women's Agency in Responding to Domestic Violence*

Throughout all the domestic violence research discussed above, there is a consistent narrative that domestic violence is the operation of power and control, manifested in various forms of abuse. In the late 1960s, the United States movement against domestic violence organized around this same principle: the connection between domestic violence and women's societal subordination.⁷⁹ Feminists saw domestic abuse as part of a social order organized around male privilege.⁸⁰ Feminists saw "[b]attering . . . [as] an integral part of women's oppression; women's liberation its solution."⁸¹

⁷⁸ See *supra* note 3 and accompanying text.

⁷⁹ Goldfarb, *supra* note 22, at 1496; Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993).

⁸⁰ Linda Gordon, *Women's Agency, Social Control, and the Construction of 'Rights' by Battered Women*, in NEGOTIATING AT THE MARGINS 122 (Sue Fisher & Kathy Davis eds., 1993); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 254 (2005). In fact, for the prior two centuries, feminists had been arguing that "women's legally sanctioned subordination with the family denied them equality and citizenship." Gordon, *supra* at 4.

⁸¹ SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 34 (1982); see also SCHNEIDER, *supra* note 20, at 87. As Susan Schechter wrote:

In their campaign to attack domestic violence, feminists highlighted the broad range of violence against women.⁸² Feminists sought eradication of not merely discrete acts of physical violence but also of sexual, emotional, and economic abuse. These acts, which are ultimately about the abuser's power and control, systemically oppressed women.⁸³

Accordingly, feminists saw women's exertion of their autonomy as the best response to the domestic violence. The battered women's movement in the early 1970s created resources to address the systemic subordination of women.⁸⁴ Feminists, including formerly abused women, founded shelters focused on "egalitarianism, autonomy and self-determination."⁸⁵ The shelters valued and respected women's choices.⁸⁶ The principle that women "need to be free to make choices without coercion or undue persuasion by anyone" is central to the feminist abuse treatment philosophy.⁸⁷ Feminists clung to these foundational principles because they believed the shelters should remedy any harm, including the loss of autonomy that results from

All men learn to dominate women, but only some men batter them. Violence is only one of the many ways in which men express their socially structured right to control and chastise In . . . other cases men may not need to use violence to dominate. Verbal abuse, withholding affection, or withdrawing resources may suffice.

SCHECHTER, *supra* at 219. Schechter further stated, "Since male supremacy is the historical source of battering, and class domination perpetuates male privilege, a long-range plan to end abuse includes a total restructuring of society that is feminist, anti-racist, and socialist." *Id.* at 238. Put another way, Professor Elizabeth Schneider states: "Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economical isolation of women, is also common." SCHNEIDER, *supra* note 20, at 4. It should be noted as seen throughout this discussion that all of the terms "domestic violence," "intimate partner violence," "battering," and "abuse" are imperfect and do not provide one unified definition. For purposes of this Article, the terms "domestic violence" and "abuse" are used interchangeably.

⁸² WALKER, *supra* note 29, at 56 ("The goal of woman abuse is usually to exert power and control over the victim. Most physical and sexual abuse is accompanied by psychological intimidation and bullying behavior used to maintain power and control over the woman. The pattern of abuse usually has an obsessional quality to it rather than a lack of control by the batterer.")

⁸³ Kuennen, *supra* note 26, at 2 (citing, among others, Stark, *Re-Presenting Woman Battering*, *supra* note 66, at 973-74).

⁸⁴ Miccio, *supra* note 80, at 257.

⁸⁵ *Id.* at 286.

⁸⁶ *Id.*

⁸⁷ Angela Moe Wan, *Battered Women in the Restraining Order Process: Observations in a Court Advocacy Program*, 6 VIOLENCE AGAINST WOMEN 606, 611 (2000).

abuse.⁸⁸ A study supporting this treatment approach shows that women who received autonomy-respecting “support and assistance” during a CPO proceeding “thought more positively about the proceedings” and reported “having good social support networks, fewer feelings of isolation, and better access to child care after receiving assistance.”⁸⁹

Current-day feminists and battered women’s advocates continue to identify domestic violence as the exercise of power and control in a relationship by one intimate or formerly intimate partner against another.⁹⁰ Knowing how domestic violence operates is important in understanding how women might succeed in decreasing it. Because domestic violence is the operation of power and control over the woman, it makes sense that the woman’s ability to exercise agency and autonomy within the abusive situation is related to her ability to address the abuse. Feminist scholarship demonstrates that women subjected to domestic violence are capable of making decisions for themselves. Because they are in the best position to determine their goals and the options to obtain those goals, their decisions are critical to responding to the abuse.⁹¹ This theme is addressed most

⁸⁸ Miccio, *supra* note 80, at 286.

⁸⁹ Wan, *supra* note 87, at 611.

⁹⁰ Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 958 (2004) (noting that if partner not “sufficiently solicitous, obedient, loyal or compliant,” perpetrator uses pattern of abuse to gain such compliance (citing David Adams, *Treatment Program for Batterers*, 5 CLINICS FAM. PRAC. 159 (2003))); Dutton & Goodman, *supra* note 16, at 743 (stating that “[f]or decades now, battered women’s advocates have placed the notion of coercive control squarely at the center of their analysis of intimate partner violence Violence is simply a tool, within this framework, that the perpetrator uses to gain greater power in the relationship to deter or trigger specific behaviors, win arguments, or demonstrate dominance. Other tools might include isolation, intimidation, threats, withholding of necessary resources such as money or transportation, and abuse of the children, other relatives or even pets”) (citation omitted).

⁹¹ Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 19-21 (1991) (analyzing decision of leaving as being complicated by multiple goals of battered women and their experiences of violence). For instance, even if the woman’s sole goal is to not be subjected to violence, she may appropriately remain in the relationship because battered women experience leaving as the most violent and dangerous time. Yet battered women also have multiple goals beyond merely avoiding the violence, and that is economic security for themselves and their children, love for their partner, lack of available options once they leave the relationship, and perhaps a sense that the outside world is more violent than the relationship itself. As an example, Professor Laurie Kohn states, “While a woman may not want to be hit, she may want and need the abusive partner to remain at home to assist with child care” Kohn, *supra* note 64, at 216.

consistently in the discourse regarding whether or not a battered woman should be forced, persuaded, or steered toward leaving her abusive partner. The early battered women's movement literature discusses the importance of focusing not on what society thinks is best for the woman (usually exiting the violent relationship) but instead on what the woman thinks is best given her situation:

The advocate should not decide for a woman whether she should leave or whether she should return to her batterer. Only a victim herself can reach a decision on custody or on trying counseling. Your demonstrated belief that she is responsible, that she can work to change her own circumstances, not merely benefit from your work, combined with your legal skills, will help her more than will your imposing your beliefs, desires, or schedule upon her.⁹²

The emphasis on recognizing that the woman is the decisionmaker, based on her own goals, is important because research shows women are best able to determine the safest course of action for them.⁹³ For instance, the research on separation assault shows women subjected to abuse may be physically safer living with the abuser because leaving may increase stalking, harassment, and may decrease the woman's ability to influence him.⁹⁴ The important component in addressing

⁹² NAT'L CTR. IN WOMEN AND FAMILY LAW, INC., LEGAL ADVOCACY FOR BATTERED WOMEN 9 (1982).

⁹³ *Id.* at 6 (noting women hope or believe that their partner, who often apologizes and promises to change, will in fact stop abuse; are willing to endure abuse to preserve relationship; believe that their children's ability to maintain relationship with their father is more important than abuse; feel or believe that they are to blame for abuse and believe that they need to care for their partner to help end abuse; feel frustrated with their attempts to find service providers who will assist their partner in addressing abuse and, therefore, believe there is no alternative to continuing being subjected to abuse; find relocating away from their partner to be financially and logistically impossible; fear being subjected to heightened violence if they leave based on their prior attempts to leave; fear that they would not be able to manage their lives without their partner); Goldfarb, *supra* note 22, at 1499 (citing that "[w]omen have many reasons for staying with or returning to violent partners, including financial dependency, fear of retaliation, social isolation, community pressure and concern about losing custody of children . . . a deep emotional bond with her partner and want[ing] to preserve and improve the relationship"). And some women do not believe the violence inside the relationship is any worse or more dangerous than the systemic violence against women in the broader society. Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1288 (1992).

⁹⁴ WALKER, *supra* note 29, at 55.

abuse, then, appears to be the autonomy and agency of women subjected to abuse.

C. *The Benefits of CPO Laws*

Choosing to petition or not to petition for a CPO is an act of agency by women subjected to abuse. Social science research indicates that CPOs can be beneficial to women seeking to address domestic violence in their relationships. Studies show that seeking a CPO often helps to decrease subsequent violence.⁹⁵ One study shows that many women who obtain CPOs are more successful in preventing subsequent psychological and emotional abuse.⁹⁶ That study shows that women with no injuries or nonsevere injuries who obtained CPOs believed they were effective in decreasing abuse and curtailing verbal abuse, harassment, and physical violence.⁹⁷ Yet while CPOs might be most effective in dealing with psychological and emotional abuse, few CPO laws address those aspects of abuse. Other studies show that a CPO is an effective remedy in addressing the physical violence that courts permit petitioners to address.⁹⁸ Studies show that when courts failed to grant valid requests for CPOs, those women were subjected to more abuse and threats of abuse than women who received CPOs. Still, the women whose valid requests for CPOs were denied experienced less subsequent abuse than those women who did not seek CPOs at all.⁹⁹

⁹⁵ Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women?*, 15 AM. J. FAM. L. 59, 67 (2001); Carol E. Jordan, *Intimate Partner Violence and the Justice System*, 19 J. OF INTERPERS. VIOLENCE 1412, 1425 (2004); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18 Month Study of 150 Black, Hispanic and White Women*, 94 AM. J. OF PUB. HEALTH 613, 617 (2000). *But see* Jordan, *supra* at 1425.

⁹⁶ Grau, *supra* note 19, at 21-25. It should be noted that there are some research limitations with the studies on CPO effectiveness and therefore, any generalizations are undertaken cautiously. McFarlane, *supra* note 95, at 613.

⁹⁷ Grau, *supra* note 19, at 24.

⁹⁸ Balos, *supra* note 23, at 566 (citing study showing that women reported decrease in violence for two years following obtainment of CPO); Gist, *supra* note 95, at 67; McFarlane, *supra* note 95, at 617 (noting that after women applied and qualified for CPO, “a rapid and significant decline in violence occurred”); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER, SOC. POL’Y & LAW 501, 513 (2003) (finding that women determined that temporary protective order met some of their goals in addressing abuse to which they were subjected by “getting the abuser to stay away, stopping the violence, or making a reconciliation possible”).

⁹⁹ Gist, *supra* note 95, at 67-68.

A CPO proceeding also benefits women subjected to abuse by providing a forum to tell their stories, telling the abuser they object to the abuse, making a public record of the abuse, and regaining some control over their lives.¹⁰⁰ Women experience healing, validation, and empowerment from having a forum to air the abuse.¹⁰¹ Whereas before her abusive partner defined her relationship, the CPO process provides the woman with an opportunity to restructure how the couple interacts between themselves and with their children, and how they maintain their real and personal property, thereby changing the power dynamics.¹⁰²

D. Overview of CPO Laws¹⁰³

As discussed above, domestic violence is the use of patterned power and control through many forms of abuse. It is important for women to be able to exercise their autonomy in responding to domestic violence, whether or not that includes seeking a CPO. For those women who choose to obtain a CPO, there are benefits to having the CPOs address all of these forms of abuse. Yet, as discussed below, the vast majority of jurisdictions' CPO laws do not remedy domestic violence unless it is physically abusive or a criminal act. Moreover, most states do not address domestic violence as the operation of coercive control or oppression, focusing instead on discrete acts.

¹⁰⁰ Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 56 (2000) (citing Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 420-23 (1995)).

¹⁰¹ See, e.g., Buel, *supra* note 90, at 996-97 (explaining system that permits women subjected to abuse to tell their stories and to witness abusers being found responsible offers healing); Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 756-57 (2005) (discussing benefits of women's narratives, including fact that one woman subjected to abuse stated that being able to tell her story literally saved her life).

¹⁰² Karla Fischer & Mary Rose, *When "Enough Is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 425 (1995).

¹⁰³ It should be noted that states provide CPOs under various names, such as final protective orders, civil protection orders, and injunctions. For ease of reference, I will refer to all such orders as "civil protective orders" or "CPOs." Similarly, almost all states identify domestic violence as the ground for CPOs, but sometimes call domestic violence by other names such as domestic abuse, family violence, dating violence, and interfamily offense. Again, for ease of reference, I refer to this ground as "domestic violence" although domestic abuse is perhaps a better, more inclusive term.

1. Common Features

A woman subjected to abuse can petition the court for an expedited order addressing the abuse in her relationship.¹⁰⁴ Most states permit an ex parte hearing for a temporary CPO, which remains in force for only a few weeks until the final protective order hearing.¹⁰⁵ If a final CPO is issued, it usually is also of limited duration, such as one year.¹⁰⁶ But to qualify for a protective order, the petitioner usually needs to show that she is in a qualifying relationship,¹⁰⁷ subjected to abuse,¹⁰⁸ and what remedies would best address the abuse in the relationship.¹⁰⁹

¹⁰⁴ See, e.g., D.C. CODE § 16-1005(c)(10) (2008) (providing that relief ordered by Court may include “directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter”).

¹⁰⁵ Klein & Orloff, *supra* note 79, at 1031-42; see, e.g., D.C. CODE § 16-1004(d)(1) (2008) (providing for 14-day ex parte temporary protective order if court finds “the safety or welfare of a family member is immediately endangered by the respondent”); MD. CODE ANN., FAM. LAW § 4-505(a)(1) (West 2008) (stating if “a judge finds that there are reasonable grounds to believe that a person eligible for relief has been abused, the judge may enter a temporary protective order to protect any person eligible for relief from abuse”). The order can last for seven days after service. *Id.* § 4-505(c)(1).

¹⁰⁶ See Klein & Orloff, *supra* note 79, at 1085-88 (identifying duration of different states’ CPOs, including several that permit orders to last indefinitely, few that last three years, couple that last for two years, and over half lasting for year).

¹⁰⁷ Such qualifying relationships may include a relationship by marriage, blood, adoption, and cohabitation. See Klein & Orloff, *supra* note 79, at 814-42; see, e.g., D.C. CODE § 16-1001(6)(A)-(D) (2008) (defining qualifying present or past relationship as one by “blood, legal custody, marriage, domestic partnership, having a child in common, or with whom the offender shares or has shared a mutual residence”). In addition, if jurisdictional requirements are met, the relationship may also be or have been “a romantic relationship.” And finally, if the person is stalked by the offender, even without one of the above relationships, the person may qualify. MD. CODE ANN., FAM. LAW § 4-501(l) (West 2007) (defining qualifying relationship as “(1) the current or former spouse of the respondent; (2) a cohabitant of the respondent; (3) a person related to the respondent by blood, marriage, or adoption; (4) a parent, stepparent, child, or stepchild of the respondent or the person eligible for relief who resides or resided with the respondent or person eligible for relief for at least 90 days within 1 year before the filing of the petition; (5) a vulnerable adult; or (6) an individual who has a child in common with the respondent”).

¹⁰⁸ See Klein & Orloff, *supra* note 79, at 845-76 (itemizing various criminal acts, sexual assaults, interferences with personal liberty, threats, attempts to harm, harassment, emotional abuse, damage to property, and stalking that constituted domestic violence for purposes of differing states’ CPOs as of 1993); see, e.g., D.C. CODE § 16-1001(5) (stating domestic violence, called intrafamily offense, includes any act punishable as criminal offense); MD. CODE ANN., FAMILY LAW § 4-501(b)(1) (stating “abuse” includes: “(i) an act that causes serious bodily harm; (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm; (iii) assault in any degree; (iv) rape or sexual offense . . . or attempted rape or sexual offense in

As discussed in detail below, states differ as to how they define abuse warranting a protective order.¹¹⁰ The various remedies available also vary by state and may include an order that the respondent not further abuse or threaten to abuse the petitioner; the respondent stay away from the petitioner and/or her residence, school, and place of employment; the respondent not contact or attempt to contact the petitioner; the respondent vacate a joint residence with the petitioner; the respondent and/or petitioner participate in certain counseling or domestic violence programs; the respondent pay for any medical expenses resulting from the abuse; detailing safe custody and visitation arrangements for any minor children in common; the respondent pay any necessary child or spousal support to the petitioner; awarding use and possession of jointly owned vehicles and/or other personal property; the respondent surrender any firearms; the respondent pay any necessary filing fees or court costs; and granting any other relief that would address the domestic violence.¹¹¹ If the respondent violates the orders, the petitioner may ask the court to find the respondent in criminal or civil contempt.¹¹² In addition, many jurisdictions make the violation of a CPO itself a crime.¹¹³

2. All States Remedy Physical Violence and Most States Remedy Criminal Acts

All of the states have statutes that provide for a CPO as a remedy for domestic violence that involves a battery, assault, bodily injury, threat of bodily injury, or placing a person in fear of physical injury.¹¹⁴ Most

any degree; (v) false imprisonment; or (vi) stalking"). For a full 50-state survey of the definition of domestic violence in CPO laws, see *infra* Part I.D.

¹⁰⁹ See, e.g., Klein & Orloff, *supra* note 79, at 910-1006 (describing remedies available under state CPO laws).

¹¹⁰ See *infra* Part I.D.

¹¹¹ See, e.g., D.C. CODE § 16-1005(c) (2008) (providing multiple CPO remedies, including catch-all remedy "directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter"); MD. CODE ANN., FAM. LAW § 4-506(d) (West 2007) (providing several CPO remedies but not including catch-all remedy).

¹¹² Klein & Orloff, *supra* note 79, at 1101-06; see, e.g., D.C. CODE § 16-1005(f) (mandating violation of protective order is subject to contempt); MD. CODE ANN., FAM. LAW § 4-508(b) (West 2007) (same).

¹¹³ Klein & Orloff, *supra* note 79, at 1142; see, e.g., D.C. CODE § 16-1005(g) (mandating violation of protective order shall be chargeable with misdemeanor crime); MD. CODE ANN., FAM. LAW § 4-508(a) (mandating violation of protective order may result in criminal prosecution).

¹¹⁴ ALA. CODE § 30-5-2 (2008); ALASKA STAT. § 18.66.990(3) (2008); ARIZ. REV.

state statutes explicitly cross-reference the criminal code to define these physically violent acts and other acts, like sexual assault, as constituting actionable domestic violence.¹¹⁵ Others reference acts that constitute crimes, without explicitly cross-referencing the criminal statutes.¹¹⁶ In general, these states offer the CPO as a remedy for such acts whether or not there is coercive control or oppression.

STAT. ANN. § 13-3601 (2008); ARK. CODE ANN. § 9-4-102(3) (2008); CAL. FAM. CODE § 6203(a) (West 2008); COLO. REV. STAT. § 13-14-101(2) (2008); CONN. GEN. STAT. § 46b-38a (2008); DEL. CODE ANN. tit. 10, § 1041(1) (2007); D.C. CODE § 16-1001(5) (2008); FLA. STAT. § 741.28 (2008); GA. CODE ANN. § 19-13-4 (2008); HAW. REV. STAT. § 586-1 (2008); IDAHO CODE ANN. § 39-6303(1) (2008); 750 ILL. COMP. STAT. 60/103 (2009); IND. CODE § 31-9-2-42 (2008); IOWA CODE ANN. § 236.2 (2008); KAN. STAT. ANN. § 60-3102(a) (2007); KY. REV. STAT. ANN. § 403.720 (West 2007); LA. REV. STAT. ANN. § 2132(3) (2008); 19-A ME. REV. STAT. ANN. § 4002(1) (2008); MD. CODE ANN., FAM. LAW § 4-501 (West 2007); MASS. GEN. LAWS ch. 209A, § 1 (2007); MICH. COMP. LAWS § 600.2950(1) (2007); MINN. STAT. § 518B.01(a) (2008); MISS. CODE ANN. § 93-21-3(a) (2008); MO. REV. STAT. § 455.010(1) (2009); MONT. CODE ANN. § 40-15-102 (2007); NEB. REV. STAT. § 42-903(1) (2009); NEV. REV. STAT. § 33.018 (2009); N.H. REV. STAT. ANN. § 173-B:1(I) (2009); N.J. STAT. ANN. § 2C:25-19(a) (2005); N.M. STAT. § 40-13-2(C) (2008); N.Y. FAM. CT. ACT § 821(1) (2009); N.C. GEN. STAT. § 50B-1(a) (2009); N.D. CENT. CODE § 14-07.1-01(2) (2009); OHIO REV. CODE ANN. § 3113.31(A)(1) (West 2007); OKLA. STAT. tit. 22, § 60.1(1) (2008); OR. REV. STAT. § 107.705(1) (2007); 23 PA. CONS. STAT. ANN. § 6102(a) (2008); R.I. GEN. LAWS § 15-15-1(2) (2009); S.C. CODE ANN. § 20-4-20(a) (2007); S.D. CODIFIED LAWS § 25-10-1(1) (2007); TENN. CODE ANN. § 36-3-601(1) (2009); TEX. FAM. CODE ANN. § 81.001 (2009); UTAH CODE ANN. § 30-6-1(1) (2007); VT. STAT. ANN. tit. 15, § 1101(1) (2007); VA. CODE ANN. § 16.1-228 (2009); WASH. REV. CODE § 26.50.010(1) (2009); W. VA. CODE § 48-27-202 (2008); WIS. STAT. § 813.12(am) (2008); WYO. STAT. ANN. § 35-21-102(a)(iii) (2008).

¹¹⁵ ALA. CODE § 30-5-2; ALASKA STAT. § 18.66.990(3); ARIZ. REV. STAT. ANN. § 13-3601; COLO. REV. STAT. § 13-14-101(2); DEL. CODE ANN. tit. 10, § 1041(1); D.C. CODE § 16-1001(5); GA. CODE ANN. § 19-13-1; HAW. REV. STAT. § 586-1; IND. CODE § 31-9-2-42; IOWA CODE ANN. § 236.2; LA. REV. STAT. ANN. § 2132(3); 19-A ME. REV. ST. ANN. § 4002(1); MD. CODE ANN., FAM. LAW § 4-501; MINN. STAT. § 518B.01(a); MISS. CODE ANN. § 93-21-3(a); MONT. CODE ANN. § 40-15-102; NEB. REV. STAT. § 42-903(1); N.H. REV. STAT. ANN. § 173-B:1(I); N.J. STAT. ANN. § 2C:25-19(a); N.C. GEN. STAT. § 50B-1(a); OHIO REV. CODE ANN. § 3113.31(A)(1); 23 PA. CONS. STAT. ANN. § 6102(a); S.C. CODE ANN. § 20-4-20(a); S.D. CODIFIED LAWS § 25-10-1(1); VT. STAT. ANN. tit. 15, § 1101(1); WASH. REV. CODE § 26.50.010(1); W. VA. CODE § 48-27-202; WIS. STAT. § 813.12(am).

¹¹⁶ CONN. GEN. ST. § 46b-38a; FLA. STAT. § 741.28(2); MO. REV. STAT. § 455.010(1); NEV. REV. STAT. § 33.018; N.Y. FAM. CT. ACT § 821(1); N.D. CENT. CODE § 14-07.1-01(2); TEX. FAM. CODE ANN. § 71.004.

3. Only One-Third of the States Remedy Coercive Control, False Imprisonment, or Restraint on Liberty

Only sixteen states recognize coercive behavior, false imprisonment, or interference with personal liberty as abuse.¹¹⁷ These states, however, differ in whether they remedy coercive control if there is no physical violence or a threat of physical violence. For instance, in Nevada and Missouri, the laws require that coercion must result from force or a threat of force to qualify as abusive coercion.¹¹⁸ In Alabama,

¹¹⁷ ALA. CODE § 30-5-2(a)(1)(d) (recognizing criminal coercion); DEL. CODE ANN. tit. 10, § 1041(1)(g) (recognizing false imprisonment and coercion, defined as compelling or inducing person to engage in or abstain from conduct which victim has legal right to abstain or engage in by instilling fear of physical injury, property damage, criminal conduct, accusation of having committed crime, subjecting person to hatred, contempt or ridicule, participating or not in legal claim or defense, interfering with person's official duties as public servant, or intending to harm another person materially regarding person's health, safety, business, calling, career, financial condition, reputation, or personal relationships); *Id.* tit. 11, §§ 791-92 (2007); FLA. STAT. § 741.28(2) (recognizing false imprisonment); IDAHO CODE ANN. § 39-6303(1) (recognizing forced imprisonment); 750 ILL. COMP. ST. 60/103(9) (recognizing "[i]nterference with personal liberty' means committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage"); IND. CODE § 34-6-2-34.5 (2008) (coercion actionable when intended through beating, mutilating, torturing, or killing of vertebrate animal); 19-A ME. REV. ST. ANN. § 4002(1)(C), (D) (recognizing "compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage . . . knowingly restricting substantially the movements of another person without that person's consent or other lawful authority"); MD. CODE ANN., FAM. LAW § 4-501(b)(1)(v) (recognizing false imprisonment); MO. REV. STAT. § 455.010(1)(C) (defining coercion as "compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage"); MONT. CODE ANN. § 40-15-102(1)(b)(ix) (recognizing unlawful restraint); NEV. REV. STAT. § 33.018(1)(c), (f) (recognizing "[c]ompelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform" and "false imprisonment"); N.H. REV. STAT. ANN. § 173-B:1(1)(d) (recognizing interference with freedom); N.J. STAT. ANN. § 2C:25-19(a)(6) (recognizing false imprisonment); 23 PA. CONS. STAT. ANN. § 6102(a)(3) (same); VA. CODE ANN. § 16.1-228 (recognizing forced detention); W. VA. CODE § 48-27-202(5) ("Holding, confining, detaining or abducting another person against that person's will."); *see also* COLO. REV. STAT. § 18-6-800.3(1) (2007) (defining domestic violence as including coercion for legislative declaration purposes but not including coercion as ground for relief).

¹¹⁸ MO. REV. STAT. § 455.010(1)(C) (defining coercion as "compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage"); NEV. REV. STAT. § 33.018(1)(c) ("Compelling the other by force or threat of force to

the law permits a remedy only for criminal coercion.¹¹⁹ The laws of Indiana and New Hampshire permit coercive control to be actionable without physical violence to the petitioner only when there is the torturing, mutilating, or killing of animals — actions that convey a strong message of control and inflict emotional distress.¹²⁰ Finally, many states permit petitioners to obtain a protective order on the grounds of restraint of physical liberty, false imprisonment, or interference with freedom.¹²¹ This demonstrates that some states do recognize that coercive domestic violence should be remedied. Yet, these states by and large do not remedy coercion that is linked to a “credible threatened negative consequence” that is psychologically harmful but not physically harmful such as removing children, interfering with immigration applications, revealing private information, or humiliation.¹²²

4. Only One-Third of the States Remedy Psychological, Emotional, or Economic Abuse

Only one state, Michigan, provides a civil law remedy for economic abuse.¹²³ Seventeen other jurisdictions (sixteen states and the District of Columbia) provide a remedy for domestic violence that is composed of psychological or emotional abuse other than fear of physical injury; those states’ remedies fall into a few different categories.¹²⁴ Some of the laws limit the nonphysical abuse that can be

perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform.”).

¹¹⁹ ALA. CODE § 30-5-2(a)(1) (stating that abuse includes criminal coercion, which is defined as threats to “confine, restrain, or to cause physical injury to the threatened person or another, or to damage the property or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an unlawful act or refrain from doing a lawful act.” (quoting ALA. CODE § 13A-6-25(a) (2008))).

¹²⁰ IND. CODE § 34-6-2-34.5 (2008); N.H. REV. STAT. ANN. § 633:3-a (2008).

¹²¹ See *supra* note 118.

¹²² See *supra* text accompanying notes 118-22. But see 750 ILL. COMP. ST. 60/103(9).

¹²³ MICH. COMP. LAWS § 600.2950(1) (2007).

¹²⁴ ALASKA STAT. § 18.66.990(3) (2009) (including harassment, defined under ALASKA STAT. § 11.61.120(a)(2)-(4) (2009)); CAL. FAM. CODE § 6203(a) (West 2008) (including harassment, which is defined in CAL. PENAL CODE § 646.9(e) (West 2008)); DEL. CODE tit. 10, § 1041(1)(d) (2007); D.C. CODE § 16-1001(5) (2008) (including stalking, which is defined under D.C. CODE § 22-404(b) (2008)); FLA. STAT. § 741.28 (2009) (identifying stalking, which is defined under FLA. STAT. § 784.048 (2009)); HAW. REV. STAT. § 586-1 (2008); 750 ILL. COMP. STAT. 60/103(7) (2009); IND. CODE § 31-9-2-42(4) (2008) (including harassment, defined under IND. CODE § 35-45-2-2

remedied to acts governed by criminal law.¹²⁵ Under three of the statutes, repeated acts, identified under the law as a “course of conduct,” are not required.¹²⁶ In those states, conduct that objectively

(2008)); MICH. COMP. LAWS § 600.2950(1) (2008) (including prohibiting impairment of petitioner’s employment and education and stalking, which is defined under MICH. COMP. LAWS § 750.411h (2008)); MO. REV. STAT. § 455.010(1)(d) (2009); NEV. REV. STAT. § 33.018(1)(e) (2009) (course of conduct intended to harass); N.J. STAT. ANN. § 2C:33-4 (2005); N.M. STAT. § 40-13-2(C)(2) (2008); N.Y. FAM. CT. ACT § 821(1) (2008) (including harassment, defined under N.Y. PENAL LAW § 240.25 (McKinney 2008)); N.C. GEN. STAT. § 50B-1(a) (2009); N.C. GEN. STAT. § 14-277.3(c) (2009); OHIO REV. CODE ANN. § 2903.211(A)(1) (West 2007); R.I. GEN. LAWS § 15-15-1(8) (2009); VT. STAT. ANN. tit. 12, § 5131(6) (2007). Interestingly, Oklahoma makes stalking and harassment actionable grounds for a CPO but explicitly carves them out from its definition of domestic violence. OKLA. STAT. tit. 22, § 60.1 (2008). Under the Oklahoma statute, stalking requires fear of death or great bodily injury. *Id.* But harassment does not require physical violence. If there is a “knowing and willful course or pattern of conduct” that “seriously alarms or annoys the [targeted] person, and which serves no legitimate purpose” then the act constitutes actionable harassment if the targeted person both objectively and subjectively suffers “substantial emotional distress.” *Id.*

One state, Colorado, officially recognizes that domestic violence manifests in various types of control but fails to provide a remedy for nonviolent abuse. The Colorado General Assembly as recently as 2007 amended its CPO statute to include a legislative declaration that “Domestic violence is not limited to physical threats of violence and harm but includes financial control, document control, property control and other types of control that make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs.” COLO. REV. STAT. § 13-14-102 1(b)(1) (2008). Unfortunately, the legislature did not amend the “domestic abuse” definition of its CPO statute to make actionable these forms of domestic violence. *Id.* § 13-14-101(2) (2008). Rather, the Colorado law limits “domestic abuse” to “any act or threatened act of violence.” *Id.*

¹²⁵ For instance, under the CPO statute in the District of Columbia, domestic violence is any act punishable as a criminal offense. D.C. CODE § 16-1001(5). Such criminal offenses include stalking, which is engaging on more than one occasion “in conduct with the intent to cause emotional distress to another person . . . by . . . harassing that person.” *Id.* § 22-404(b). And harassing is defined as “engaging in a course of conduct either in person, by telephone, or in writing, directed at a specific person, which seriously alarms, annoys, frightens, or torments the person or . . . would cause a reasonable person to be seriously alarmed, annoyed, frightened or tormented.” *Id.* § 22-404(e); see *Richardson v. Easterling*, 878 A.2d 1212, 1217 (D.C. 2005) (defining actionable stalking as domestic violence for CPO purposes). Similarly, Maine includes a stalking-like ground for a CPO but does not require fear of serious bodily injury or emotional harm. 19-A ME. REV. STAT. ANN. § 4002(1)(F) (2008).

¹²⁶ See, e.g., 750 ILL. COMP. STAT. 60/103(7)(i) (creating disturbance at petitioner’s employment or school is enough to constitute harassment); see *Shields v. Fry*, 703 N.E.2d 921, 923 (Ill. App. Ct. 1998) (upholding CPO grounds of harassment because respondent’s acts caused petitioner emotional distress by making her uncomfortable, upset, and angry); see also ALASKA STAT. § 18.66.990(3)(H) (including harassment, defined under ALASKA STAT. § 11.61.120(a)(2)-(4) (2008)); IND. CODE § 31-9-2-42(4)

and subjectively causes emotional distress is actionable under the civil laws remedying domestic violence.¹²⁷ The rest of the states that remedy nonphysical domestic violence require a course of conduct, but make different types of conduct actionable. For instance, eight states remedy domestic violence that actually results in emotional distress.¹²⁸ Three states require that the domestic violence both subjectively and objectively result in emotional harm.¹²⁹ The District

(including harassment, defined under IND. CODE § 35-45-2-2 (2008)).

¹²⁷ 750 ILL. COMP. ST. 60/103(7) (stating that “knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner” constitutes form of domestic violence worthy of CPO); see *Shields*, 703 N.E.2d at 922-23.

¹²⁸ See, e.g., N.M. STAT. § 40-13-2(C)(2) (2008) (stating that domestic violence includes acts causing “severe emotional distress”); N.C. GEN. STAT. § 50B-1(a) (2009) (“[C]ontinued harassment . . . that rises to such a level as to inflict substantial emotional distress” constitutes domestic violence). Further, under the North Carolina law, harassment is conduct “directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.” *Id.* § 14-277.3(c) (2009); see *Wornstaff v. Wornstaff*, 634 S.E.2d 567, 569-70 (N.C. 2006) (upholding CPO on basis of harassment, including banging of stapler, throwing water bottle, and refusal to leave, which caused substantial emotional distress). Causing mental distress is sometimes included in the scope of domestic violence. OHIO REV. CODE ANN. § 2903.211(A)(1) (stating that “pattern of conduct [that] knowingly cause[s] . . . mental distress” meets definition of domestic violence as well); see *Dunkin v. Ireland*, No. 04AP-1175, 2005 Ohio App. LEXIS 3110, at *14-15, *17 (Ct. App. June 30, 2005) (upholding CPO on grounds of stalking when appellant threatened appellee she would lose kids, took photos of her house, and sorted through her trash, because he had engaged in pattern of conduct that caused appellee mental distress); see also CAL. FAM. CODE § 6203(a) (including harassment, which is defined in CAL. PENAL CODE § 646.9(e) (West 2008)); FLA. STAT. § 741.28 (identifying stalking, which is defined under FLA. STAT. § 784.048 (2008)); N.Y. FAM. CT. ACT § 821(1) (including harassment, defined under N.Y. PENAL LAW § 240.25 (McKinney 2008)). In Rhode Island, cyberstalking that results in emotional distress is grounds for a CPO as it is domestic violence. R.I. GEN. LAWS § 15-15-1(7). Under Rhode Island law, “‘cyberstalking’ means transmitting any communication by computer to any person or causing any person to be contacted for the sole purpose of harassing that person or his or her family.” *Id.* And in Vermont, stalking that results in substantial emotional distress constitutes domestic violence for CPO purposes. VT. STAT. ANN. tit. 12, § 5131(6) (stating domestic violence includes stalking, which is course of conduct of “following or lying in wait for a person, or threatening behavior directed at a specific person . . . [and] would cause a reasonable person to fear for his or her safety or would cause a reasonable person substantial emotional distress”).

¹²⁹ Hawaii makes actionable “extreme psychological abuse” as a form of domestic violence, and defines it as a course of conduct that both subjectively and objectively results in emotional distress. HAW. REV. ST. § 586-1. The statute defines “extreme psychological abuse” as “an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the

of Columbia permits the course of conduct to result in either subjective or objective emotional harm.¹³⁰ New Jersey provides a remedy for domestic violence that either causes or is intended to cause emotional distress.¹³¹ And Delaware remedies conduct that is likely to lead to emotional harm, regardless of whether the conduct actually results in such harm.¹³² Therefore, while sixteen states and D.C. provide a cause of action for emotional and psychological harm, there is little consistency as to what is actually required to obtain a remedy. Moreover, the statutes' definitions of emotional and psychological

individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress." *Id.*; see *Kie v. McMahl*, 984 P.2d 1264, 1266-67 (Haw. Ct. App. 1999) (upholding CPO, with minimal analysis, on basis of extreme psychological abuse). Michigan and Missouri also remedy a course of conduct that results in subjective and objective emotional distress. MICH. COMP. LAWS § 750.411h(1)(c) (2007) (defining domestic violence to include "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress"). In addition, under the Michigan civil domestic violence law, "[e]motional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." *Id.* § 750.411h(1)(b); MO. REV. STAT. § 455.010(1)(d) (stating that domestic violence includes "engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to another . . . and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable adult to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner"); see *Beckers v. Seck*, 14 S.W.3d 139, 145 (Mo. 2000) (upholding renewal of CPO based on respondent's actions that led to plaintiff's substantial emotional distress).

¹³⁰ In the District of Columbia, the CPO law permits a CPO to be granted when there is a course of conduct that results in either subjective or objective emotional harm if it meets the criminal definition of stalking. D.C. CODE §§ 16-1001(5), 22-404(b), (e).

¹³¹ N.J. STAT. ANN. § 2C:33-4 (2006) (stating actionable domestic violence includes communication or alarming course of conduct causing or with purpose of causing annoyance or alarm, or subjects other to offensive touching); see, e.g., *D.V. v. A.H.*, 926 A.2d 887, 890 (N.J. Super. Ct. Ch. Div. 2007) (granting CPO for harassment caused by offensively coarse language in phone calls at inconvenient times causing petitioner alarm); *Tribuzio v. Roder*, 813 A.2d 1210, 1215 (N.J. Super. Ct. Ch. Div. 2003) (upholding CPO on grounds of harassment and stalking for defendant's repeated approaching of plaintiff, yelling at her, insistence on communication, and blocking in her car).

¹³² Delaware's CPO remedies a course of "alarming or distressing conduct . . . which is likely to cause fear or emotional distress" but does not require actual emotional distress. DEL. CODE tit. 10, § 1041(1)(d) (2005); see *M.B. v. H.B.*, CS02-04668, 2003 Del. Fam. Ct. LEXIS 15, at *5-6 (Fam. Ct. May 2, 2003) (discussing this statutory provision).

harm are not explicitly linked to the previously cited domestic violence theories of coercive control and oppression.

5. Summary of the CPO Remedy

All states recognize crimes such as assault and acts resulting in bodily harm as domestic violence and provide a corresponding remedy. Most state laws recognize threats of bodily harm as domestic violence as well. But only one-third of the states recognize emotional, psychological, or economic abuse without a threat of physical violence as domestic violence worthy of a civil law remedy.¹³³ Indeed, Connecticut's civil law explicitly requires physical violence and threat of physical violence for actionable domestic violence, stating that "[v]erbal abuse or argument shall not constitute family violence unless there is present danger and the likelihood that physical violence will occur."¹³⁴

II. HOW A LIMITED DEFINITION OF DOMESTIC VIOLENCE HARMS WOMEN

There are three broad categories of negative consequences that result from the failure of the civil laws to remedy all fundamental harms of domestic violence. The first is the most obvious. With a limited view of domestic violence, anyone who has been subjected to various forms of domestic violence not covered under the CPO statutory definition of domestic violence cannot file a cause of action or obtain a remedy. Women suffer great harm from psychological, emotional, and economic abuse. These harms include severe emotional distress, physical harm, isolation, sustained fear, intimidation, poverty, degradation, humiliation, and coerced loss of autonomy.¹³⁵ And CPOs have successfully decreased abuse and attacked power imbalances.¹³⁶ Therefore, a CPO could potentially remediate the harms of emotional, psychological, and economic abuse. Moreover, given the research that psychological and emotional abuse can lead to physical abuse, providing a CPO remedy before this

¹³³ Indeed, under Connecticut's civil law, it explicitly requires physical violence and threat of physical abuse for actionable domestic violence when it states that "[v]erbal abuse or argument shall not constitute family violence unless there is present danger and the likelihood that physical violence will occur." CONN. GEN. ST. § 46b-38a(1) (2008).

¹³⁴ *Id.*

¹³⁵ Adams, *supra* note 36, at 563-68.

¹³⁶ See *supra* Part I.C.

happens may also prevent physical abuse.¹³⁷ The second broad category of the consequences of the law's failure to remedy domestic violence is the loss of the woman's agency in decisionmaking about how best to address the abuse in her relationship. Because increased autonomy is linked with a decrease in abuse, loss of agency is detrimental to women.¹³⁸ The third category is the limit on women's ability to obtain other remedies because certain civil laws are linked to actionable domestic violence under CPO laws. Each of these consequences are discussed below.

A. Some Women Subjected to Domestic Violence Have No CPO Remedy

Due to the states' failure to remedy all forms of domestic violence, Vanessa and Kim are not able to bring a claim or obtain a remedy in two-thirds of all states. And while Susan would have an action in all jurisdictions for the physical abuse to which Ulner subjected her, she would not be eligible for a remedy in most states for the other acts Ulner committed, including the act that caused her the most pain — Ulner's demand that their son videotape Ulner's degradation and humiliation of her. If Susan does not have a cause of action for certain forms of abuse, she might be unable to remedy them. For instance, she may want Ulner to turn over all copies of the videotape, but if the taping is not seen as part of the domestic violence, this relief might be denied. Many states have included in their legislative histories the goal of attacking the type of oppressive power and control demonstrated by Ulner even without physical abuse.¹³⁹ But amending the CPO statutes to reflect this goal is the only way women can be ensured a forum to air their abuse and to seek a remedy for it. Research shows that the mere act of petitioning for a CPO can decrease subsequent violence.¹⁴⁰ Accordingly, if CPO laws were to recognize all of the fundamental harms of domestic violence, more women could file petitions and perhaps experience a decrease in abuse.

¹³⁷ See *supra* Part I.C.

¹³⁸ See *supra* Part I.C.

¹³⁹ See, e.g., *Murphy v. Okeke*, 951 A.2d 783, 790 (D.C. 2008) (stating CPO statute was intended to "counteract the abuse and exploitation of women").

¹⁴⁰ McFarlane, *supra* note 95, at 616.

B. *Women Are Often Deprived of Autonomy in the Decisionmaking Regarding a CPO Remedy*

As identified above, all legislatures have enacted CPO laws that focus on physical violence and most have enacted CPO laws that primarily redress domestic violence that is an explicit criminal act.¹⁴¹ An early reason for linking the civil domestic violence definition to crimes, in part, was that activists for battered women saw the CPO laws as a response to the failings of the criminal justice system to protect women subjected to abuse.¹⁴² Some legal commentators have classified the CPO as a hybrid between civil and criminal laws, which further blurs the line between the two systems.¹⁴³ Many system actors, such as judges, clerks, and lawyers, therefore, believe that all domestic violence should be interchangeable with their understanding of criminal acts.¹⁴⁴ As a result, even petitioners can become confused about the differences between the civil legal system and the criminal justice system.¹⁴⁵ Yet the civil system is available to private parties with a dispute while the criminal system is reserved for the state to enforce the criminal laws. When the line is blurred between these two systems, women subjected to abuse can suffer numerous negative consequences within the civil legal system. As a result, when domestic violence law remedies only

¹⁴¹ See *supra* text accompanying notes 114-15.

¹⁴² Balos, *supra* note 23, at 564.

¹⁴³ In part, this characterization results from the fact that CPO violations can be criminally enforced through criminal contempt or prosecution of a misdemeanor crime. See 17 AM. JUR. 2D *Contempt* §§ 147-48 (2008) (stating criminal contempt is available for many violations of civil court orders); Waul, *supra* note 100, at 54; see also Goldfarb, *supra* note 22, at 1509 (citing Waul, *supra* note 100, at 53 (calling CPO “criminal justice system interventions”)); Klein & Orloff, *supra* note 79, at 1102-20, 1142-48.

¹⁴⁴ See FINN & COLSON, *supra* note 11, at 10 (stating that domestic violence is crime that needs CPOs because criminal justice system is not always best system in which to address domestic violence).

¹⁴⁵ Many petitioners seek a CPO because when the police responded to their 911 call, the police told them to go to court and file a “CPO.” See, e.g., Metropolitan Police Report, *The Police Can Help in Domestic Violence Situations*, <http://mpdc.dc.gov/mpdc/cwp/view,a,1232,q,541117.asp> (last visited Mar. 26, 2009) (stating police responding to 911 call can make referrals to CPO proceedings). Accordingly, because a criminal justice system actor is telling them to file for an order, petitioners often think that the CPO process is related to the criminal justice system. Unified intake centers, where petitioners meet with prosecutors and civil advocates and attorneys in the same physical location, and unified courts that handle both criminal and civil domestic violence cases in the same unit may heighten this confusion. See generally Thomas F. Capshew & C. Aaron McNeece, *Empirical Studies of Civil Protection Orders in Intimate Violence: A Review of the Literature*, 6 CRISIS INTERVENTION AND TIME-LIMITED TREATMENT 151, 163 (2000) (stating that women who participated in civil legal system found it to be intertwined with criminal justice system).

physical violence, women suffer additional negative consequences. These consequences are discussed below.

1. Psychological, Emotional, and Economic Abuse Are Not Addressed or Redressed

When the civil system is deeply intertwined with the criminal justice system, it tends to restrict the domestic violence narrative to criminal acts and physical violence. Psychological, emotional, and economic abuses are not addressed nor listened to unless they somehow meet the definition of a crime that is recognized by the court.¹⁴⁶ Accordingly, society tells women like Kim¹⁴⁷ that nonphysical violence is unworthy of a response or remedy. Many legal theorists have written about the importance of “giving a name” to domestic violence.¹⁴⁸ One commentator states, “[t]he development of legal process can shape social consciousness by identifying and redefining harm, breaking down the public-private dichotomy, and legitimizing the seriousness of the problem.”¹⁴⁹ Feminists similarly believe that individual experience influenced and was influenced by the collective.¹⁵⁰ That is to say that the individual woman’s ability to name the domestic violence impacts society’s broader understanding of the systemic nature and influence of the power and oppression that is domestic violence.¹⁵¹ Therefore, while it is important to label domestic violence as criminal and physical violence, it is equally important that domestic violence also include the labels of emotional, psychological, and economic abuse as manifestations of the oppression.¹⁵² As one study shows, the

CPO process was a means for creating a public record of the abuse [women] had experienced. It was a way for them to break their silence and send a message to the batterer that his behavior would not be tolerated. Several women also

¹⁴⁶ Burke, *supra* note 26, at 570.

¹⁴⁷ See *supra* note 2 and accompanying text.

¹⁴⁸ SCHNEIDER, *supra* note 20, at 46; Miccio, *supra* note 80, at 288.

¹⁴⁹ SCHNEIDER, *supra* note 20, at 46.

¹⁵⁰ Miccio, *supra* note 80, at 301.

¹⁵¹ *Id.*

¹⁵² *Id.* at 288 (“Adrienne Rich understood the power of naming. She recognized that empowerment of a people is derived, in part, through the act of naming — naming the source of oppression and the site of pain. The power of naming gives voice to social phenomenon, while making visible the invisible. And it constructs how we interpret certain experiences.”).

indicated that filing a protective order allowed them to take some initial steps toward regaining control of their lives.¹⁵³

Accordingly, the naming and narrative of domestic violence is unjustly constrained when co-opted as criminal law or physical violence alone. This constraint ignores many of the harms to women subjected to abuse.

2. The Quasi-Criminal Nature of the CPO Undermines Women's Own Goals

Negative consequences also result from the fact that the criminal justice system has different goals than the civil system. In the criminal justice system, states, not private parties, are the actors entitled to a remedy. That remedy is driven by the states' view of justice. When the civil legal system is seen as quasi-criminal, however, there is a risk that outside actors' views (such as those of the courts and petitioners' attorneys) regarding the relevant harm and remedy will control, rather than the CPO petitioners' view of the relevant harm and remedy. The criminal justice system is focused primarily on the protection from and eradication of severe physical violence for the benefit of society, while the civil system's goal is to provide the petitioner with a remedy that addresses her harms from domestic violence.¹⁵⁴ As a result, when judges, clerks, advocates, or lawyers blur the lines between the civil and criminal justice systems, they often fail to permit the petitioner to include her entire experience of the violence as it exists within her relationship.¹⁵⁵

¹⁵³ Fischer & Rose, *supra* note 102, at 414.

¹⁵⁴ Shazia Choudhry, *Righting Domestic Violence*, 20 INT'L J. L. POL'Y & FAM. 95, 96 (2006) (discussing state's interest and its interventionist strategy as opposed to woman's privacy interest).

¹⁵⁵ It should be noted that certain jurisdictions do permit the court to inquire into the entire "mosaic" of the violence in CPO proceedings. See *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991). However, even in those jurisdictions, the ability to explore the mosaic does not actually permit the addressing of the fundamental harms of psychological, emotional, and economic abuse. This is because courts do not explore the mosaic unless the petitioner states an actionable claim of domestic violence based on the statute's definition. *Id.* Therefore, for women who suffer nonphysical violence, courts cannot address their abuse if the statutes only permit physical abuse to be addressed. In addition, the exploration of the mosaic is intended to permit past acts of actionable violence to be included to help corroborate the current act of violence. See *id.* (arguing mosaic of past violent conduct should be explored to help predict future conduct). There is no remedy offered for the violence included in the mosaic, and what is permissible as mosaic information is also shaped by the statute's definition of domestic violence. Finally, for women like Kim (discussed at the beginning of this Article) who do not know that they can seek a

Instead, system actors often limit testimony to their own view of the most worthy criminal act. Courts often view crimes through a hierarchical lens. For that reason, courts sometimes convey that a CPO should be sought only for a “worthy” incident of physical violence, one where the court can feel it is actually saving a life, such as an assault or battery. Courts often place crimes such as stalking and harassment, which are crimes that sometimes address psychological abuse, at the bottom of their hierarchical ranking. As a result, courts are less inclined to grant a CPO based on these crimes because courts do not perceive them as worthy enough. For example, one judge denied a CPO for cyberstalking, despite the fact that the CPO law included cyberstalking in the definition of domestic violence. In denying the CPO, the trial judge stated:

In this domestic violence area, there are many crimes. At the top of the line is assault. Then there is threat of serious bodily injury. There is stalking, which is above harassment. Stalking is a course of repeated conduct that places the plaintiff in reasonable fear of bodily injury to plaintiff or a third person. Here, the course of conduct includes repeated calls that involve vulgarity or intent to upset another person, in addition to a threat to injure plaintiff and plaintiff's car. There is evidence of an extensive course of such conduct, but no one got hurt. Twelve years ago [before enactment of the stalking criminal law],¹⁵⁶ the court could not intervene in people's lives, where they go and how they contact others. Courts should be reluctant to do so unless the plaintiff can meet the burden of proof. I wish you had worked this out by yourselves. The court is powerless to do anything meaningful except to make this worse. A protection order wouldn't protect anyone. The only protection would be against insults. My responsibility is to protect lives. Therefore, I am denying plaintiff's protection order.¹⁵⁷

remedy for the harms to which they are subjected, there is a great benefit and power when they can name domestic violence under the statutes, making it clear that their abuse is illegal and they are entitled to a remedy. *See supra* note 2 and accompanying text (stating Kim did not know domestic violence could include nonphysical abuse).

¹⁵⁶ Note that Maryland only recently added stalking as an actionable form of abuse under the CPO law, on October 1, 2005. *See Effect of Amendments*, MD. CODE ANN., FAM. LAW § 4-501 (West 2007).

¹⁵⁷ This is a slightly modified version of a Maryland court ruling in a 2007 domestic violence CPO case, altered slightly to focus on the most relevant issues to this Article. It is an approximation rather than a transcription because it is based on

As seen above, despite the statute, the court saw the CPO as only necessary to save lives. Because the alleged acts of domestic violence, cyberstalking, were not life-threatening, the court refused to grant the CPO. Such a limited view of a CPO's goals hurts women by excluding those who suffer abuse that is not life threatening but is still extremely harmful and in need of a legal remedy.

3. Desensitization to Other Forms of Domestic Violence

When CPO statutes rely on criminal law and severe physical violence to define what is actionable domestic violence, judges and other system actors, such as clerks, attorneys and advocates, may become desensitized to all forms of domestic violence except those involving extreme criminal battery.¹⁵⁸ Therefore, the narrative becomes more restricted. The discourse of domestic violence excludes even that domestic violence that is actionable under the CPO laws but does not involve severe physical violence.

For example, there is a range of intentional, offensive touching that can meet the criminal act of assault. Yet despite a CPO law's inclusion of any assault as domestic violence, many courts will discount acts that do not result in severe physical injury or that they do not see as seriously violent. In a troubling illustration of this, a husband hit his wife with an electrical cord on numerous occasions and locked her in a closet for several hours. When the wife requested a police escort at the end of her CPO hearing to retrieve her personal belongings from their joint residence, the judge refused and stated: "This is pretty trivial . . . This court has a lot more serious matters to contend with. We're doing a terrible disservice to the taxpayers here. You want to gnaw on her and she on you, fine, but let's not do it at the taxpayer's expense."¹⁵⁹

The courts' desensitization to domestic violence is also seen in those jurisdictions where the CPO laws encompass threats of violence and nonviolent crimes, such as harassment and stalking. For instance, even when the CPO statute permits threats as actionable domestic violence,

Some judges are reluctant to exercise their authority to issue an order when threats are alleged but no actual battery has

my notes rather than the hearing transcript. See notes on file with author.

¹⁵⁸ See Wan, *supra* note 87, at 623.

¹⁵⁹ Buel, *supra* note 90, at 968 (citing Joan Meier, *Battered Justice*, WASH. MONTHLY, May 1987, at 38).

occurred. For example a judge in a state that authorizes protective orders on the basis of threats grants orders only if there have been several threats and the abuser has the ability to carry out his menaces.¹⁶⁰

Therefore, judges are not exercising their full statutory authority in addressing as broad a spectrum of domestic violence as is permitted under their existing CPO laws. Rather, courts and others tend to credit only extreme criminal physical violence and discount comparatively minor physical abuse or other domestic violence.

4. Women's Stories of Abuse Are Limited

When courts limit actionable domestic violence to decontextualized criminal events of severe physical abuse, courts and other system actors alter or silence women's stories of domestic violence told in public court proceedings. When judges minimize or justify such forms of abuse, women are even more reluctant to use the civil legal system to address their needs.¹⁶¹ Women's ability to have a public forum to air the abuse to which they have been subjected can offer healing, validation, and empowerment.¹⁶² When advocates, lawyers, and courts limit women's ability to have this necessary and appropriate public forum to address serious harms, they negatively affect women subjected to abuse. One study shows that the failure of courts to grant CPOs to qualified women subjected to abuse harms them further because they are subsequently subjected to more abuse and threats of abuse than women who were qualified for CPOs and received them.¹⁶³ To avoid this harm, the law and the courts need to permit women to seek CPOs for all forms of abuse. This will empower women subjected to abuse to address their abuse effectively.¹⁶⁴

¹⁶⁰ FINN & COLSON, *supra* note 11, at 11. The authors do not know why the judges fail to do so but posit that perhaps they are uncertain about whether the threats met the additional requirements of the stalking statute. *Id.* at 10-11. Although unclear, this tends to indicate that any CPO law amendments need to be specific about the criteria so that judges do not add extra elements unintended by the statute.

¹⁶¹ See Buel, *supra* note 90, at 968.

¹⁶² See, e.g., *id.* at 996-97 (noting that when prevented from telling their stories, women subjected to abuse are precluded from opportunity for healing and witnessing offenders be held accountable); Goodmark, *Telling Stories, Saving Lives*, *supra* note 101, at 756-57 (sharing narratives of women who are abused offers validation and increases system actors' empathetic understanding).

¹⁶³ Gist, *supra* note 95, at 67-68.

¹⁶⁴ Buel, *supra* note 90, at 1020 (arguing for new tort of domestic violence to offer credibility and empowerment to victims of domestic violence).

It is important to note that it is not only courts that preclude women who are abused from seeking a remedy, even though they are otherwise qualified under the CPO statute. Silencing by other actors was documented by a commentator who observed the domestic violence intake center in the District of Columbia. She found that when resources were limited, petitioner's attorneys decided that "only the most *severe* cases are assigned an attorney."¹⁶⁵ Therefore, qualified petitioners only received the assistance of an attorney if they were subjected to severe physical abuse, thus perpetuating the misperception of domestic violence. Linda Mills asserts that "mainstream feminists exert power by defining who women in abusive relationships are and therefore what they should do about the violence in their lives."¹⁶⁶ It is important that feminists, along with other advocates, lawyers, and courts, critically analyze the stories of domestic violence that we have constructed and examine why they focus on physical violence and exclude the other fundamental harms of domestic violence.

It is common, of course, to equate domestic violence with physical violence. When women are killed, newspapers publicize the stories of courts failing to help these women. The more gruesome the violence, the more prominent the story. These stories should be front-page news and should be greeted with public outrage and sadness. Yet other women's stories also need to be heard. By excluding the fundamental harms of psychological, emotional, and economic abuse and focusing on physical abuse, we exclude many women who want to seek legal redress but cannot, or do seek legal redress but are denied.

For instance, twenty-year-old Anna Bergman sought a CPO in Catonsville, Maryland, on Friday, July 27, 2007.¹⁶⁷ When Bergman went to court seeking a protective order, she was concerned because Ryan Butler, her ex-partner and the father of her children, had threatened to harm her new boyfriend.¹⁶⁸ A court commissioner explained later that Bergman was unsuccessful in seeking a protective

¹⁶⁵ Waul, *supra* note 100, at 64 (emphasis added). Of course, such a decision is even more problematic in its determination of who is worthy of a valuable resource. Given the fact that the legal system expects to grant CPOs to women who are subjected to severe physical abuse, women subjected to abuse that does not fit the court's assumptions about "real" abuse might actually have a greater need for an attorney to be successful in their claim.

¹⁶⁶ MILLS, *supra* note 74, at 50.

¹⁶⁷ Suzanne Collins, *Family: Murdered Mom Was Denied Protective Order*, WJZ (Catonsville, Md.), Aug. 1, 2007, available at <http://wjz.com/topstories/Anna.Bergman.murder.2.429044.html>.

¹⁶⁸ *Id.*

order because she only described a threat against her boyfriend but said nothing about threats against herself.¹⁶⁹ Bergman most likely perceived the threat against her boyfriend as a threat against herself. Nonetheless, she left the courthouse without any court-ordered relief.¹⁷⁰ Three days later, Bergman was murdered by Butler, who also abducted their three-year-old son.¹⁷¹ This brutal murder made the news, which is how everyone learned about what Ms. Bergman had experienced in the court three days earlier.

After Bergman's horrific murder, the press blamed clerks' offices and judges for their failure to encourage victims of domestic violence to fill out detailed forms asking about the history of abuse, including stalking and harassment.¹⁷² Experts justifiably criticized clerks, commissioners, and judges for not asking enough questions to learn about the prior physical abuse between Bergman and Butler.¹⁷³ Critics asked why the system failed to explore the entire context of Ms. Bergman's relationship with Mr. Butler. The answer may be that the questions were not asked because society has limited the scope of domestic violence in the legal system so that few ever ask these questions or try to learn the full story. In fact, when legally relevant information is included, clerks or judges often state that only the most important and egregious crimes should warrant a CPO remedy. A judge in Wisconsin expressed his disdain for actionable but nonphysical domestic violence by stating,

These cases aren't anything compared to how it used to be. I've been here in family court for over 30 years and I never used to see this kind of crap . . . women used to come in with real abuse cases . . . broken arms and bloody noses.¹⁷⁴

Because so many judges and courts have decided that severe physical violence is the most important, often the only actionable goal in court is saving lives. Any other goal, such as the broader goal of trying to rearrange one's relationship with the abuser to remediate the

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (citing Dorothy Lennig, Legal Dir., House of Ruth, who stated, "Clearly she was afraid of something and as it turns out she had a real reason to be afraid. Had the commissioner listened to her testify and read her petition, it may have shown a different story").

¹⁷³ *Id.*

¹⁷⁴ Wan, *supra* note 87, at 623.

multifaceted abuse and harms thereto, is more often than not precluded from being aired and litigated.

For example, Ms. Bergman unsuccessfully sought a remedy for the threat against her boyfriend. Ms. Bergman's goal, which the court understood as protecting her boyfriend from a threat without any prior physical harm toward him, was inconsistent with the court's goal of saving her from physical harm. Yet, Ms. Bergman's testimony, in fact, was enough to state a claim under the Maryland statute because the threat was really aimed at her. Her testimony was sufficient to begin a conversation with the court about domestic violence. Broadly defined, domestic violence included her ex-husband's exercise of power and control that led to various forms of physical, emotional, psychological, and economic abuse. No court will pursue these important inquiries, however, until judges start looking beyond incidents of crimes and severe physical violence and "saving" women's lives.

In Ms. Bergman's case, the court should have responded to her claim with inquiries of how her ex-husband was exerting power and control over her and how she wished to reorganize her relationship with him to address the oppressive control. The court could then have explored whether and how her ex-husband attempted to control and intimidate Ms. Bergman in a patterned and oppressive way, such as the presence of physical violence, other threats of physical violence, any economic coercion, and any and all patterns of derogatory behavior, isolation, humiliation, or other psychological or emotional abuse. This would have allowed Ms. Bergman to share her experience of abuse and would have contextualized the threat against Ms. Bergman's boyfriend. Research shows that such an approach by the court improves the woman's satisfaction with the legal process and permits the woman to exert her autonomy, thus best redressing the violence in her life.¹⁷⁵

5. State Becomes De Facto Decisionmaker, Which Undermines Women's Agency

In the criminal justice system, the state, through the prosecutor and the court, is the decisionmaker as to how the criminal case will proceed by determining what charges to bring, what plea to accept, and what to

¹⁷⁵ See *id.* at 615-31 (describing Wan's various typologies based on similar ones created by James Ptacek); see also James Ptacek, *Disorder in the Courts: Judicial Demeanor and Women's Experience Seeking Restraining Orders* (1995) (unpublished Ph.D. dissertation, Brandeis University) (on file with author). In Wan's typology, "good-natured" system actors who understood their role as permitting the autonomy of the petitioner provided women better experience and greater autonomy. Wan, *supra* note 87, at 615.

try.¹⁷⁶ Because courts often view CPOs as quasi-criminal, judges may take a “more interventionist, rather than deferential, approach.”¹⁷⁷ For instance, judges presiding over CPO hearings much more frequently intervene and deny petitioners’ motions to vacate than judges who decide plaintiffs’ motions to dismiss in other civil litigation.¹⁷⁸ As a result, CPO judges often “are substituting their judgment for that of the victims who are seeking assistance in their courtrooms.”¹⁷⁹ The judges end up controlling the woman through their official power. In effect, the legal system allows the state and other outside actors to be the decisionmakers to save the woman because the system actors believe she is ill-suited to address the abuse.¹⁸⁰ However, since the petitioner brings a civil CPO case, it should be governed by her judgments and goals, not those of the judges.

By depriving a woman subjected to abuse of her decisionmaking role, the civil legal system undermines her ability to self-direct and define how best to address the abuse in her relationship.¹⁸¹ Hence, the legal system inhibits her agency.¹⁸² Many women subjected to abuse are skeptical of resolution through the criminal justice system because mandatory arrest¹⁸³ and no-drop prosecution¹⁸⁴ policies have resulted in a system that overrides victims’ interest for society’s interest.¹⁸⁵

¹⁷⁶ Miccio, *supra* note 80, at 266 (discussing marginalization of women subjected to abuse in criminal justice system and specifically in no-drop prosecution jurisdictions).

¹⁷⁷ Kuennen, *supra* note 15, at 44-46 (discussing failure of judges to treat CPO cases as they treat other civil injunction cases).

¹⁷⁸ Kohn, *supra* note 64, at 234.

¹⁷⁹ LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 81 (2008).

¹⁸⁰ *Id.* at 82-83.

¹⁸¹ MILLS, *supra* note 74, at 31 (“[T]he idea that intimate violence is best addressed by silencing the victim and letting the state take the initiative against the batterer, ignores the significance of a woman’s agency when she is threatened by intimate violence.”); Goldfarb, *supra* note 22, at 1510, 1514-15.

¹⁸² See Goldfarb, *supra* note 22, at 1499; Kohn, *supra* note 64, at 244-45 (stating research shows that women subjected to abuse are in best position to predict future violence and that criminal justice systems that exclude such women from decisionmaking fail to enhance their safety).

¹⁸³ Miccio, *supra* note 80, at 265, 278-79 (noting by 1994 most states incorporated mandatory arrest policies, requiring police to arrest someone in response to any 911 domestic-violence-related call).

¹⁸⁴ *Id.* at 265-66 (discussing no-drop prosecution policies that require prosecutors to pursue prosecution of domestic violence related crimes even if victim fails to cooperate in prosecution).

¹⁸⁵ Kohn, *supra* note 64, at 202-03 n.53. For other reasons why women are skeptical of the criminal justice system, see Deborah M. Weissman, *The Personal Is*

Because most CPO laws rely on criminal statutes to define domestic violence, many women believe that the CPO system will treat them in the same manner as the criminal justice system. As a result, these women often believe that once they file a civil case, they will lose control over the outcome as they would in a criminal matter.¹⁸⁶ Sadly, that belief is supportable. In addition to the courts' refusal to grant women's motions to dismiss, a 1990 U.S. Department of Justice report on CPOs underscores the common view that CPOs are for judges' use, not women's, to address domestic violence. The report states, "Civil protection orders . . . offer *judges* a unique additional tool for responding to the special difficulties of domestic violence cases."¹⁸⁷

Women lose their control as a party to the litigation when the judge and other system actors view the case as one controlled solely by the legal system. If, for instance, the woman's goal for the CPO is to continue her relationship with the abuser with an injunction against future abuse but the judge's goal is to separate the woman from her abuser, the judge may be contemptuous of the woman and of the judge's role in sanctioning her decisionmaking. One Wisconsin judge stated derisively, "My job is to hand out [CPOs] to women and then watch couples kiss and make up."¹⁸⁸ That comment reveals a belief that women should not be able to make decisions because they are not making the right decisions, despite the research on separation assault.¹⁸⁹ Alternatively, when women subjected to abuse make their own decisions regarding how to address the abuse in their life, it provides greater empowerment and prevention against future domestic violence.¹⁹⁰

Political — and Economic: Rethinking Domestic Violence, 2007 BYU L. REV. 387, 401. The study is consistent with the experience of a client of one of my clinic students. The client had been subjected to abuse, and wanted to hold her husband accountable, but did not want to involve the police in such a way as to trigger mandatory arrest and no-drop prosecution. Therefore, rather than calling the 911 number for emergencies, she called 311, which was the nonemergency police telephone number in the District of Columbia. See notes from clinic supervision session on file with author.

¹⁸⁶ Waul, *supra* note 100, at 53.

¹⁸⁷ FINN & COLSON, *supra* note 11, at 1 (emphasis added). *But see* Kuennen, *supra* note 15, at 67 (citing New Jersey court decision in which court acknowledged that criminal and civil legal systems are different and that, therefore, petitioners should have "complete autonomy of decisionmaking" in civil cases) (internal citation omitted).

¹⁸⁸ Wan, *supra* note 87, at 623.

¹⁸⁹ WALKER, *supra* note 29, at 55-56.

¹⁹⁰ See *supra* Part I.B; see also Deborah Epstein, Margaret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER, SOC.

When courts override women's decisions in a civil proceeding as to how to address the abuse in their relationship, the result is problematic. "[A]n important element of responding to the problem [of domestic violence] is to restore a victim's fundamental rights of freedom, choice and autonomy."¹⁹¹ Expanding options for women subjected to abuse, including civil legal options that such women can control, can promote women's agency. By expanding the recognition of all harmful domestic violence in CPO statutes, women subjected to multifaceted abuse are able to enter a courthouse and seek a legally enforceable redefinition of their relationship with the person perpetrating the abuse. Studies confirm that when women subjected to abuse encounter system actors who "listen, consider and respond to their needs," the women are less at risk of re-assault.¹⁹²

Unsurprisingly, the importance of autonomy and agency is almost self-evident once we return to a definition of domestic violence that is based on a series of actions taken to dominate another and to eradicate one's agency.¹⁹³ As Professor Martha Fineman has written, "we must begin to think of autonomy as possible only in conjunction with the meaningful and widespread attainment of equality."¹⁹⁴ The civil legal system should strive to provide a forum for women seeking equality. One study shows that women sought CPOs to regain control in their lives and equality in the relationship, by making the abuse public and placing the abuser on notice that the behavior was under public scrutiny.¹⁹⁵ According to that study, women turned to the legal system to regain some of the power they felt they had lost as a result of the abuse.¹⁹⁶

POL'Y & L. 465, 469 (2003); GERALD T. HOTALING & EVE S. BUZAWA, VICTIM SATISFACTION WITH CRIMINAL JUSTICE CASE PROCESSING IN A MODEL COURT SETTING 32 (Apr. 2003) (noting whether or not women were satisfied with domestic violence criminal justice system depended on control: control over criminal justice system; batterer and what he would do in future; and stopping violence when it happened)); Waul, *supra* note 100, at 65 (finding that women "use the CPO process to send a message to the offender that his behavior will not be tolerated").

¹⁹¹ Kuennen, *supra* note 26, at 30.

¹⁹² Kuennen, *supra* note 15, at 43.

¹⁹³ Goldfarb, *supra* note 22, at 1494 ("In order to counteract the harm of domestic violence, the law's response should focus on shifting power and control back to the victim." (citing Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 597-609 (1999))).

¹⁹⁴ MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 29 (2004).

¹⁹⁵ Strack & Hyman, *supra* note 64, at 42.

¹⁹⁶ *Id.* ("The protection order becomes an announcement that the abused woman refuses to "take it" anymore and is acting on her own behalf.") (internal citation omitted).

If, however, domestic violence is defined as only physical harm or crimes, then domestic violence is firmly situated in a realm where society is satisfied with a societal interventionist approach, dictated by society's goals and values rather than the women's. In the early battered women's movement, advocates believed that

[b]attered women's rights to self-determination, including the decision to leave or stay with their husbands, were to be respected; if sexism robbed women of control over their lives, Women's Advocates[, an early shelter in St. Paul, MN,] would work on methods for returning it, even if no one quite knew how.¹⁹⁷

This ultimate goal of empowerment was needed to counteract the undermining of agency that is at the core of all domestic violence. The original drafters of CPO laws intended to provide vehicles that would promote victim autonomy.¹⁹⁸ And although commentators have stated that CPO laws "have proven to be tools that can significantly facilitate the achievement of the [goal of autonomy],"¹⁹⁹ as discussed above, this goal is often undermined by the failure to recognize all forms of abuse to which women are subjected.

Accordingly, by recognizing domestic violence as including all forms of abuse as part of the complex dynamics of intimate relationships, the civil legal system may be able to address more fully the entire spectrum of domestic violence and provide a remedy to all women subjected to it.

C. *Women Subjected to Abuse Are Excluded from Other Legal Remedies*

The third broad category of negative consequences from the narrow CPO recognition of domestic violence is the domino effect it has in the area of other civil laws. The misperception that domestic violence is limited to severe, physically violent crimes has been adopted by other civil laws that reference CPO laws. The incorporation of CPO law extends the exclusion of legal recognition of all fundamental domestic violence harms. As discussed above, the CPO domestic violence definition fails to remedy all forms of domestic violence. As a result, women who are subjected to abuse that falls outside the statutory definition or are otherwise excluded from seeking a remedy are unable to seek and/or obtain a CPO. Without the CPO, these same women

¹⁹⁷ SCHECHTER, *supra* note 81, at 63.

¹⁹⁸ Kuennen, *supra* note 26, at 7 n.30.

¹⁹⁹ *Id.*

can be denied other forms of legal relief affecting their family status, immigration status, and welfare status, among other effects. This is because some civil laws that address domestic violence simply cross-reference the protective order statute to define domestic violence or rely upon the CPO itself to prove domestic violence.²⁰⁰

For instance, many states consider domestic violence as a factor in custody and visitation determinations.²⁰¹ In the District of Columbia, for example, there is a rebuttable presumption that joint custody is not in the best interest of the child if a court finds that domestic violence, as defined in the CPO statute, has occurred.²⁰² Also, in making certain custody or visitation determinations, the court is required to make written findings related to the allegations of domestic violence.²⁰³ If the court finds that one parent has committed domestic violence, a court may only grant custody or visitation to the abusive parent with specific, written findings.²⁰⁴ And the court may only award visitation to the abusive parent if the court finds that the child and other parent will be protected from harm.²⁰⁵ The abusive parent must prove that visitation will not harm the child.²⁰⁶ But whether there was domestic violence in the relationship rests upon the CPO's definition of domestic violence. Looping back to the civil law is common and makes the CPO laws' view of actionable domestic violence even more influential. Although many states follow the District of Columbia and appropriately consider domestic violence in custody determinations, only a limited strand of domestic violence is usually taken into account. This, of course, undermines the purpose of considering the domestic violence in the first place.

Other civil laws may provide their own definition of domestic violence, but allow evidence of a CPO to prove the necessary domestic violence. Therefore, a CPO can also control a plaintiff's ability to meet her burden of proof under such laws.²⁰⁷

²⁰⁰ See, e.g., D.C. CODE § 32-131.01(1) (2008) (providing use of accrued leave for domestic-violence-related leave cross-references CPO law for definition of domestic violence).

²⁰¹ See Klein & Orloff, *supra* note 79, at 954.

²⁰² D.C. CODE § 16-914(a)(2) (2007) (labeling domestic violence as "intrafamily offense").

²⁰³ *Id.* § 16-914(a-1).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See, e.g., 8 C.F.R. § 204.2(c)(2)(iv) (2007) (providing that in immigration self-petition cases, CPO is helpful evidence of necessary domestic violence).

III. PROVIDING A REMEDY TO WOMEN SUBJECTED TO ALL FUNDAMENTAL HARMS OF DOMESTIC VIOLENCE

To limit the negative consequences to women, states need to reform their CPO laws to address all forms of domestic violence. This Part discusses guidelines for how states can make such reforms, including models that exist in other laws addressing a broader range of domestic violence. This Part also addresses concerns about providing a CPO cause of action for women subjected to all forms of abuse.

A. *Recognizing All Fundamental Domestic Violence Harms*

The CPO laws should be amended to address systemic oppression of women through the use of power and control that includes physical violence, sexual abuse, psychological abuse, emotional abuse, and economic abuse. Once the laws adequately provide a cause of action for all forms of abuse, the laws also need to provide a range of remedies that the petitioner can craft to address the abuse in the specific context of the petitioner and respondent's relationship.

As stated earlier, scholars have argued recently for certain amendments to the criminal law and the civil law.²⁰⁸ Those suggested amendments address the need for the law to recognize the pattern of violence, the context of domestic violence, the intent of power and control behind the domestic violence, and coercive control as a unique form of domestic violence. The proposals, however, fall short in providing legal recognition and a cause of action for those persons who are not subjected to physical violence or a crime, such as stalking or harassment, and yet are subjected to the fundamental harms of oppression through psychological, emotional, and/or economic means alone.

The current failings of CPO laws could be addressed by defining abuse as physical, sexual, psychological, emotional, and/or economic abuse. The laws could then incorporate some of the various tactics of abuse as explored in psychological scales and measurements²⁰⁹ and by advocates in their screening for domestic violence.²¹⁰ For instance, examples of qualifying psychological abuse could include repeated acts of intimidation; threats of physical harm to self, partner or

²⁰⁸ See generally Baker, *supra* note 12 (proposing new CPO statutory language that includes coercive control); Burke, *supra* note 26, at 555-56 (addressing need for criminal law to require showing of power and control in criminal law); Tuerkheimer, *supra* note 26, at 959-63 (discussing new domestic violence crime that considers pattern of violence within relationship).

²⁰⁹ See *supra* notes 35-53 and accompanying text.

²¹⁰ See *supra* notes 56-63 and accompanying text.

children; withdrawal of immigration application; destruction of pets and property; forced isolation from friends, family, school, and/or work; sleep interruption; limiting food; controlling petitioner's movement because of obsessiveness and possessiveness; degradation through humiliation; and repeated name-calling.²¹¹ In addition, statutes should make clear that domestic violence involving nonsevere physical violence and crimes such as harassment and stalking should be taken as seriously as domestic violence that includes severe physical violence and crimes of battery. The same type of targeted remedy should be available for all forms of domestic violence. Moreover, as discussed below, states can look to other civil laws that recognize psychological, emotional, and economic abuse and use those domestic violence definitions, such as extreme cruelty or excessively vicious conduct, as models.²¹² In addition, the statutory language, and not just legislative intent, should identify that the law is aimed at abusive behavior that keeps one person in a position of power over the other person through the use of control, intimidation, or fear.

In terms of remedy, the CPO statutes need to provide additional remedies that are targeted at the petitioner's actual experience of multifaceted abuse in her life. For instance, monetary damages should be available for the injuries to which women are subjected from their abuse.²¹³ Such monetary damages are not only important for the resulting harm from physical injuries and the emotional and psychological abuse, but also can be tailored to address the harm from economic abuse, which should include preclusion from seeking employment, as in Vanessa's case.

It is also important to provide a range of CPO remedies so that they can be context specific. CPO laws will offer the greatest benefit, therefore, if they provide a remedy that includes a catch-all phrase, such as "any other relief that would address the domestic violence," that permits the woman to seek a remedy crafted to her particular

²¹¹ See *supra* notes 40-63 and accompanying text.

²¹² See *infra* Part III.B.

²¹³ Joan Zorza, *Using the Law to Protect Battered Women and Their Children*, 27 CLEARINGHOUSE REV. 1, 52-53 (1994) ("The average monthly cost to New York City domestic violence victims in just medical, counseling and legal expenses was \$575. New York City spends at least \$500 million annually as a result of domestic violence — half of the cost born by New York City employers from reduced work productivity, greater absenteeism, and high turnover. The average employed battered woman misses work 18 full days per year and is late for work 60 days a year because of the violence . . .").

situation, her knowledge of the abuse, and her understanding of the best way to address it.²¹⁴

B. *Models from Other Civil Laws*

Protective orders are not the only civil laws that deal with domestic violence; a sampling of some other laws follows. Immigration, welfare, tort, and divorce laws recognize domestic violence that is broader than only severe physical violence and crimes. Many of these laws recognize that domestic violence is usually situated in a relationship permeated with oppressive power and the exercise of control. These laws do provide civil remedies for domestic violence that occurs within a relationship and is comprised of any combination of psychological, emotional, economic, sexual, and/or physical abuse. This demonstrates that it is therefore possible to reframe our understanding and remedying of domestic violence in the legal system.

These laws, however, are applicable in only very discrete areas and provide targeted relief toward that area, such as immigration or welfare. They do not provide the same type of expedited and flexible injunctive, family, and monetary relief that CPOs are intended to provide. Accordingly, this section discusses these other laws as examples of broader standards that can be imported into CPO laws so that all women subjected to domestic abuse are able to obtain a comprehensive and expedited CPO remedy to assist in rearranging relationships that contain abuse.

1. Immigration and Welfare

The Violence Against Women Act (“VAWA”),²¹⁵ enacted in 1994, is federal legislation that addresses violence against women in a large spectrum of areas. One of the provisions focusing on immigrant women is the self-petition mechanism that provides an alternative to the more common family-based, spouse-sponsored petition to become a legal permanent resident.²¹⁶ The self-petition process permits a spouse of a U.S. citizen or lawful permanent resident to petition without a sponsoring spouse if she can demonstrate that she has been subjected to domestic violence.²¹⁷ This process implicitly recognizes

²¹⁴ Klein & Orloff, *supra* note 79, at 912-14 (discussing catch-all provisions in CPO statutes).

²¹⁵ VAWA of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

²¹⁶ 8 U.S.C. § 1154(a)(1)(A)(iii)(I) (2008); *id.* § 1154(a)(1)(B)(ii)(I).

²¹⁷ *Id.* § 1154(a)(1)(A)(iii)(I)(bb).

the need to provide autonomy to such spouses due to the power and controlling nature of domestic violence.²¹⁸ To qualify for self-petition, one needs to show that she is the spouse of a U.S. citizen or lawful permanent resident and “has been battered or has been the subject of extreme cruelty perpetrated by the spouse.”²¹⁹ “Extreme cruelty” has been interpreted through regulations, decisions by the Board of Immigration Appeals, and the federal courts as including psychological abuse.²²⁰

Similar to the self-petition immigration law, federal welfare law has included various waivers to certain eligibility requirements if an individual can show that she was subjected to domestic violence. For instance, under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, “states [may] adopt the Family Violence Option (FVO), which would allow them to exempt a family from the act’s sixty-month cap on state benefits ‘if the family involves an individual who has been battered or subjected to extreme cruelty.’”²²¹ In Maryland, for example, the domestic violence necessary for the FVO includes mental abuse.²²² Accordingly, using the language of

²¹⁸ See Kelly, *supra* note 71, at 695 (stating that VAWA fundamentally recognizes that domestic violence is about control and therefore battered immigrant women need petitioning power to escape control).

²¹⁹ 8 U.S.C. § 1154(a)(1)(A)(iii)(I); *id.* § 1154(a)(1)(B)(ii)(I); 8 C.F.R. § 204.2(c)(1)(i)(E) (2008); *id.* § 204.2(c)(1)(vi).

²²⁰ *Hernandez v. Ashcroft*, 345 F.3d 824, 839 (9th Cir. 2003) (noting that “extreme cruelty” encompasses acts that may not appear violent but are nonetheless part of pattern of domestic violence, such as husband’s continued pattern of controlling behavior by promising to seek marriage counseling and to end violence and pleading for her to leave her safe haven in United States); BIA decision, Case No. A75900716 (Jan. 20, 2006) (on file with author) (discussing and adopting “extreme cruelty” standard under self-petition law as meaning extreme mental cruelty despite case being cancellation of removal under 8 U.S.C. § 1229(b)(2)). Prior to such interpretations, it is important to note that early critics of VAWA were concerned that “in qualifying for VAWA, public record evidence of physical abuse is recognized as the most credible documentation.” Further, early critics noted that “[w]hile VAWA allows a battered woman to seek relief based on ‘mental cruelty,’ there is no articulation in the regulations as to what evidence or standard will support a ‘mental cruelty’ claim. Such an omission compounds the risk of limiting VAWA to claims of physical abuse.” Kelly, *supra* note 71, at 695. It is important to note that the regulations indicate that CPOs constitute helpful evidence in proving the domestic violence. 8 C.F.R. § 204.2(c)(2)(iv). Accordingly, as noted earlier, this is another place in which the narrow definition of domestic violence in CPO laws circumscribes women subjected to domestic violence in accessing other legal remedies.

²²¹ SCHNEIDER, *supra* note 20, at 198 n.67 (citing 42 U.S.C. §608(a)(7)(C)(i) (1996)).

²²² COMAR 07.03.03.02(17) (2008) (defining domestic violence to include “mental abuse”).

extreme cruelty, immigration and welfare laws provide women subjected to abuse a possibility of a remedy for nonphysical abuse in these very specific legal areas.

2. Tort

Tort law also recognizes a remedy for the broad spectrum of domestic violence, including physical harm, battery, threat of physical harm, and assault, as well as emotional harm, such as intentional infliction of emotional distress.²²³ Courts, under equitable powers, have ordered injunctions against harassing, molesting, assaulting, battering, embarrassing, and/or humiliating behavior between intimate partners.²²⁴ Abusive actions do not need to rise to the level of criminal activity or physical harm for a court to take jurisdiction over a restraining order case resting on tort.²²⁵ Even the Restatement (Second) of Torts recognizes that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”²²⁶ Yet even though tort law recognizes the broad spectrum of

²²³ DAN B. DOBBS, *THE LAW OF TORTS* § 302, at 821 (2000) (“Courts have long recognized that tortfeasors should be responsible for causing distress, emotional harm, anxiety, diminished enjoyment, losses of autonomy, and similar intangible harms.”).

²²⁴ ANN MARIE BOYLAN & NADINE TAUB, *ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES* pt. 2, at 5 (Wash., D.C., Legal Servs. Corp. Research Inst. Sept. 1981) (citing study that documented these court actions).

²²⁵ *Id.* at 7 (citing *Galella v. Onassis*, 353 F. Supp. 196, 226-27 (S.D.N.Y. 1972)) (internal citations omitted). For general discussions about intentional infliction of emotional distress cases between spouses, see Brandi Monger, Case Note, *Family Law — Wyoming’s Adoption of Intentional Infliction of Emotional Distress in the Marital Context*, *McCulloh v. Drake*, 24 P.3d 1162 (Wyo. 2001), 2 WYO. L. REV. 563, 571-75 (2002); Tiffany Oliver, Note and Comment, *Intentional Infliction of Emotional Distress Between Spouses: New Mexico’s Excessively High Threshold for Outrageous Conduct*, 33 N.M. L. REV. 381, 384-86 (2003); Meredith Taylor, Comment, *North Carolina’s Recognition of Tort Liability for the Intentional Infliction of Emotional Distress During Marriage*, 32 WAKE FOREST L. REV. 1261, 1267 (1997).

²²⁶ RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The tentative draft for the *Restatement (Third) of Torts* keeps this language. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 45 (Tentative Draft 2007) (stating in its tentative draft that “[a]n actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance and, if the emotional disturbance causes bodily harm, also for the bodily harm”). In addition, the *Restatement (Third) of Torts* further evidences the modern trend to remedy emotional harm, even absent physical harm, by stating that

abuse as actionable and compensable, there are difficulties in bringing these claims, making it all the more important that the CPO law recognize all forms of abuse.²²⁷

3. Divorce

Traditional divorce laws, with their fault grounds of cruelty and excessively vicious conduct, also provide a helpful model of laws that recognize the multifaceted nature of domestic violence.²²⁸ For

[a]n actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct: (a) places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; or (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.

Id. § 46.

²²⁷ See Buel, *supra* note 90, at 945-46, 982-93. It should be noted that there are some reforms being enacted that provide greater hope for the tort cause of action. *Id.* at 1023. Specifically, in California the legislature found that there should be tort liability and the full panoply of legal and equitable remedies for abuse perpetrated by a domestic partner. *Id.* Similarly, the Illinois Gender Violence Act, which includes physical aggression, sexual assault, and threats, provides a civil cause of action and relief against a perpetrator. *Id.* at 1023-24.

²²⁸ See, e.g., MD. CODE ANN., FAM. LAW § 7-103(a)(7), (8) (West 2007). For an amicus brief that was cited favorably by the Ninth Circuit in *Hernandez v. Ashcroft*, see Brief for National Immigration Project, NOW Legal Defense and Education Fund, and Family Violence Prevention Fund as Amici Curiae Supporting Appellants, *Luis-Hernandez v. Immigration and Naturalization Service*, 345 F.3d 824 (9th Cir. 2003) (No. 02-70988), available at http://www.nationalimmigrationproject.org/DVPage/Laura_Hernandez_9th_Cir_extreme_cruelty_2002.DOC (citing following examples of “extreme cruelty” as defined in divorce cases: *McFall v. McFall*, 136 P.2d 580, 582 (Cal. Ct. App. 1943) (social isolation as cruelty); *Veach v. Veach*, 392 P.2d 425, 429 (Idaho 1964) (domination as course of conduct as cruelty); *Christenson v. Christenson*, 472 N.W.2d 279, 280 (Iowa 1991) (high speed car chase is “domestic abuse”); *Perret v. Saacks*, 612 So. 2d 925, 926-27 (La. Ct. App. 1993) (alarming spouse by falsely reporting illness of family member); *Knuth v. Knuth*, 1992 Minn. App. LEXIS 696, at *2 (Ct. App. 1992) (stalking as cruelty); *Boniek v. Boniek*, 443 N.W.2d 196, 197-98 (Minn. Ct. App. 1989) (same); *Robinson v. Robinson*, 722 So. 2d 601, 603 (Miss. 1998) (limiting social interactions as cruelty); *Richard v. Richard*, 711 So. 2d 884, 886 (Miss. 1998) (untrue and insulting accusations as cruelty); *Muhammad v. Muhammad*, 622 So. 2d 1239, 1241-42, 1248-49 (Miss. 1993) (forcing religion on spouse as cruelty); *Keller v. Keller*, 763 So. 2d 902, 904 (Miss. Ct. App. 2000) (demanding custody of child as cruelty); *Rakestraw v. Rakestraw*, 717 So. 2d 1284, 1286 (Miss. Ct. App. 1998) (cruelty finding on basis of stalking behavior); *Gazzillo v. Gazzillo*, 379 A.2d 288, 291 (N.J. Sup. Ct. 1977) (limiting family interactions as extreme cruelty); *Pompa v. Pompa*, 259 A.D.2d 338, 338 (N.Y. App. Div. 1999) (untrue and insulting accusations as cruelty); *Fuchs v. Fuchs*, 216 A.D.2d

instance, one case stated that “‘cruelty’ . . . encompass[es] mental as well as physical abuse [and] . . . includes any conduct . . . which is calculated to seriously impair the health or permanently destroy the happiness of the other.”²²⁹ In *Das v. Das*, for example, the court found that the husband subjected the wife to cruelty when he made her stay up all night, controlled her, taunted her, isolated her from friends and family, and subjected her to physical violence.²³⁰ *Das* and other cruelty cases around the nation²³¹ show that courts in the divorce context are able to identify and remedy domestic violence in forms other than simply physical violence. Not all women who are abused, however, are married. Even if married, not all women who are abused seek a divorce. Therefore, divorce laws alone are insufficient; the CPO potentially provides an invaluable legal cause of action for all women subjected to abuse.

4. Summary of Other Civil Laws

As seen above, immigration, welfare, torts, and divorce laws recognize abuse other than physical abuse or crimes. By including a broad definition of domestic violence, these laws provide more women in varying types of abusive relationships with the ability to seek a civil remedy specific to their situation. They recognize that all forms of abuse are harmful to women and should be remedied. But none of these laws provide the expedited and targeted range of remedies that a CPO does to address abuse. As such, the laws described above provide useful models for how a broader definition of domestic

648, 648 (N.Y. App. Div. 1995) (stalking is cruelty); *Gascon v. Gascon*, 187 A.D.2d 955, 955 (N.Y. App. Div. 1992) (illegally monitoring spouse); *Richardson v. Richardson*, 186 A.D.2d 946 (N.Y. App. Div. 1992) (regularly prohibiting spouse to sleep with lengthy arguments as cruelty); *Harshbarger v. Harshbarger*, 1993 Ohio App. LEXIS 3125, at *3 (Ct. App. 1993) (isolating spouse by limiting telephone access part of cruelty finding); *Hybertson v. Hybertson*, 582 N.W.2d 402, 405 (S.D. 1998) (forcing religion on spouse as cruelty); *Osman v. Keating-Osman*, 521 N.W.2d 655, 657 (S.D. 1994) (breaching marriage contract and making false promises)); see also Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 463 n.99 (2008) (citing Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 911 ch. 4 (2000) (identifying that at least 32 states continue to have fault grounds, including cruelty)).

²²⁹ *Das v. Das*, 754 A.2d 441, 458-59 (Md. Ct. Spec. App. 2000) (citing Scheinen v. Scheinen, 89 A.2d 609, 612 (1952) (citations omitted)).

²³⁰ *Id.* at 461-62.

²³¹ See *supra* note 228.

violence in CPOs can be successful while underscoring the necessity of the CPO remedy.

C. *Confronting Concerns*

This Article has addressed how the narrow definition of domestic violence in CPO laws has perpetuated a narrative of domestic violence as only severe physical violence or crimes and how this limited narrative hurts women. Despite the fact that one-third of the state laws and other civil laws, like immigration, welfare, torts, and divorce, address broader forms of abuse, there are concerns about expanding the CPO domestic violence definition to include all women subjected to abuse.²³²

Perhaps the most pressing concern about expanding the civil legal recognition of domestic violence to include psychological, emotional, and economic abuse is that it might make actionable the nagging of one's partner.²³³ And because CPOs can be used as proof in divorce, custody, and visitation cases, there is a concern that abusive partners might bring unjustified nagging claims as a way to further control their spouses by obtaining custody of their children. This concern should be taken very seriously and should be appropriately addressed in the statutory language. It would disserve women to harm them further with a revision of the CPO law. The concern of nagging as actionable may be addressed, at least in part, by the success of psychological researchers in using scales and measurements to distinguish between women who are subjected to psychological abuse and those who are not.²³⁴ With those tools, legislatures can similarly craft statutes that exclude routine conflict while making the serious harms of psychological, emotional, and economic abuse actionable. In addition, it might be helpful if social science research could study whether and to what effect nagging-type claims are brought in those states where CPO laws cover some form of psychological or emotional abuse or where divorce laws include emotional abuse in a cruelty fault ground. Such research could actually inform a discussion of the risks of false claims from this Article's proposal.

In addition to the "actionable nagging" issue, there is a concern that batterers might further abuse women by obtaining unwarranted protective orders against victims with unsupported claims of

²³² Email discussion with various domestic violence advocates (on file with author).

²³³ *Id.*

²³⁴ *See supra* text accompanying note 39.

psychological, emotional, and economic abuse.²³⁵ As a result, victims would be revictimized by batterers and courts.²³⁶ This is a real concern. It is certainly possible that more women could be dragged to court by allegations of emotional or psychological abuse, with the risk of unwarranted CPOs being issued against them and possible arrests for CPO violations. An understanding of these risks could be enhanced with research about whether and how claims of psychological, emotional, and economic abuse are made in those jurisdictions where such claims are permitted. The prevalence of and reasons for any misuse of these causes of action that can be learned through research could then be weighed against the potential benefits of an expanded recognition of domestic violence. Currently, this information is not generally available in published caselaw.

Another concern is that broadening the definition of domestic violence might delegitimize or trivialize all forms of domestic violence.²³⁷ As discussed above, judges and other system actors already discount actionable forms of domestic violence and such discounting hurts women who suffer from domestic violence. Including additional forms of abuse that the courts do not want to hear about or that courts see as interference in private relationships could exacerbate this problem. One possible way to address this concern is to ensure that the new CPO laws explicitly address the equality of all forms of abuse, as they are all tools of the exerted power and control. Another way is to have the new laws clarify that because of the harmfulness of all forms of abuse, all types of domestic violence need to be remedied based on the woman's experience of the abuse. By recognizing and remedying all forms of domestic violence, a new discourse may emerge regarding the many interconnected fundamental harms of domestic violence and the importance of remedying all of them.

There is also a concern that state legislatures will be reluctant to pass new laws that fail to link domestic violence to crimes, physical harm, or fear of physical harm, believing it will lead to imaginary, but actionable, harms.²³⁸ It is true that physical violence, with its visible injuries, such as cuts, scrapes, wounds, and bruising, is more verifiable than emotional or psychological abuse, which tends to rely on either petitioner's word or respondent's. It is also true that going outside the

²³⁵ Email discussion, *supra* note 232.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

realm of crimes places the courts in the seemingly private realm of the family. Nonetheless, it is possible that by raising the issue in the legislature, society could begin an educational process about all fundamental harms of abuse, commit to redress its harms, and construct a new narrative about domestic violence.

As a whole, the concerns addressed above need to be weighed against the continuing negative consequences that occur from the current limited legal narrative of domestic violence. By maintaining a focus on severe physical violence alone, advocates, lawyers, and judges perpetuate the exclusionary narrative that prioritizes resources for victims of severe physical violence.²³⁹ More often than not, the severely beaten woman, as opposed to the emotionally abused woman, is seen as more worthy of time and effort, despite the real harm the latter also suffers.

Perhaps the continued narrative of severe physical violence feeds into our collective consciousness about the worthiness of saving the victims that society has defined as victims.²⁴⁰ Severe physical violence, underscored by bruises, cuts, and other injuries, seems undeniable and indisputable. In contrast, the legal system has historically discounted the credibility of psychological and emotional harm claims because “if we can’t see it, it can’t be true.” Society also feels more comfortable labeling physical violence as outside the permissible boundaries — clearly wrong and therefore “domestic violence.” On the other hand, we are uncomfortable drawing a line of impermissible emotional, psychological, and economic abuse because we fear labeling “good” citizens as perpetrators of domestic violence.²⁴¹ When we fear a broad legal recognition of domestic violence because it might create another tool for batterers and the courts to revictimize the victims, perhaps we construct a false sense of control over the phenomenon of domestic violence. That is, there is a sense that if we can rein in the definition of abuse, we can altogether eradicate the abuse. We might believe that controlling remote possibilities of battering is more important than providing a remedy for victims. Or perhaps we distrust the legislature and courts to draft and enforce legal standards that could be discriminating and keep out mere nagging complaints. In the end, the

²³⁹ In addition, Kohn has documented that service providers see a victim of domestic violence as worthy of services if she was a victim of a crime and cooperates in the system’s efforts to protect her. Kohn, *supra* note 64, at 203 n.55 (citing Renee Romkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 *YALE J.L. & FEMINISM* 265, 286 (2001)).

²⁴⁰ Goodmark, *supra* note 26, at 28-30.

²⁴¹ SCHNEIDER, *supra* note 20, at 65.

concerns about a broad recognition of domestic violence seem to be as related to how we as a society perpetuate the exclusion of women subjected to nonphysically violent abuse as they are to how we as a society might assist all women who suffer abuse.

CONCLUSION

Currently, the domestic violence civil legal system fails women subjected to certain forms of abuse. In general, the system has constricted its recognition to primarily crimes and severe physical abuse. As a result, many women have no CPO cause of action to address and seek redress for the real and harmful abuse to which they are subjected. Women like Kim do not believe they have any right to a remedy for emotional abuse because it differs from the physical abuse that is labeled “domestic violence.” Yet, social science research indicates that domestic violence is harmful in all of its many forms because it effectuates the abuser’s exertion of power and control. The forms may be physical, sexual, psychological, emotional, or economic. All of these should bear the name of domestic violence and should be remedied under the CPO laws.

A broader and more accurate definition of domestic violence would allow the civil legal system to be a better tool for fostering the agency of women subjected to abuse. Petitioners would be able to use the civil legal system to craft the best remedy to address the abuse in their relationship and counter the power and control of all forms of domestic violence. If the CPO laws were to effectuate women’s goals, the civil law and the legal system could assist women to cope with the domestic violence in their lives.²⁴² With reform, CPO laws’ purpose of addressing abuse and issues of equality might actually be fulfilled for all women subjected to abuse.

²⁴² GOODMAN & EPSTEIN, *supra* note 179, at 94-95 (“[P]articipants who reported feeling in control of the process of working with service providers were far more likely to rate the services they received as helpful and to use them again. (Zweig, Burt, & Van Ness, 2003). Similarly, a study within the criminal justice system found that victims who chose not to report recidivist abuse to officials were those who felt they had ‘no voice’ in a previous prosecution (Hotaling & Buzawa, 2003) Women . . . will be safer if given the opportunity to maximize their own agency”); *see also* Baker, *supra* note 12, at 50-57 (citing few studies showing CPOs’ effectiveness in decreasing physical abuse).