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Can We Forgive Those Who Batter? Proposing an End to the Collateral Consequences of Civil Domestic Violence Cases

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CAN WE FORGIVE THOSE WHO BATTER? PROPOSING AN END TO THE COLLATERAL CONSEQUENCES OF CIVIL DOMESTIC VIOLENCE CASES

BY JOANN SAHL*

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I. INTRODUCTION

Domestic violence is the most common tort committed in our country, involving nearly 1.3 million victims.¹ When a domestic violence incident occurs, the press regularly reports it.² Highlighted in these articles is the name of the perpetrator.³

Perpetrators identified as committing an act of domestic violence face public outrage, contempt, and stigma.⁴ This is particularly true if a court determines that the act of domestic violence necessitates a civil protection order (CPO) that

1. "Domestic violence is commonly defined as an actual or threatened criminal offense against an intimate partner or family member." Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1043 (2014). "[A]n incident of domestic violence occurs every nine seconds in this country." Diana E. Garrett & Shannon Fuller, *Orders of Protection Myths Dispelled; Practical Tips for All Montana Lawyers*, MONT. LAW., May 2015, at 6, 6. "Each year, approximately 1.3 million women and 835,000 men are assaulted by an intimate partner." Hannah Brenner, *Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 303 (2013). Domestic violence "is more frequent than the combined number of automobile accidents, muggings, and stranger rapes [that women] experience." Stoever, *supra*, at 1057. Seventy-one percent of Americans have reported they know someone who has been the victim of domestic violence. See Brenner, *supra*, at 303. Thirty million children each year are exposed to some type of family violence. See U.S. Dep't of Health and Hum. Services, Children's Bureau, *Domestic Violence and the Child Welfare System* (2014), <https://www.childwelfare.gov/pubs/factsheets/domestic-violence/> [<https://perma.cc/B9J7-C8ZP>].

2. In the last six months of 2016, 215 newspaper articles reported an arrest for an incident of domestic violence. Westlaw search: advanced: DA(aft 06-28-2016 & bef 01-01-2017) & TI(Domestic /3 violence) & GEO-SMART("1US73") à Search Within: "arrested."

3. Of the 215 articles reporting an arrest, 171 named the alleged perpetrator. *Id.*

4. See *Hamilton ex rel. Lethem v. Lethem*, 193 P.3d 839, 846 (Haw. 2008). The stigma associated with the label of a "batterer" or "wife beater" is not new. At the beginning of the century, "wife beating was viewed as disgraceful," and perpetrators would go to great lengths to avoid the stigma. Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & L. 379, 381 (2015). This included bribing a judge to prevent newspaper coverage of the case, and filing a libel action against a newspaper that called them "wife beater." *Id.* at 381. Some perpetrators even committed suicide. See *id.* at 382.

bars the perpetrator from having any contact with the victim.⁵ Nearly 1.2 million people receive a CPO each year.⁶ More people use this civil remedy than those who seek a tort remedy, or those who are involved with the criminal justice system.⁷

The CPO process, and its related orders, produces real and lasting “prejudicial collateral legal consequences” that extend past the life of the CPO.⁸ These consequences can include preventing the perpetrator from finding or keeping employment, obtaining a professional license, or being admitted to an

5. See Jessica Miles, *We Are Never Ever Getting Back Together: Domestic Violence Victims, Defendants, and Due Process*, 35 CARDOZO L. REV. 141, 148–49 (2013) (“Generally, a victim obtains a temporary CPO by filing a petition at the courthouse or at a police station when the court is closed, on an ex parte basis. In most states, the victim must allege (1) a relationship with the defendant and (2) recent violence or threats creating an imminent risk of future violence. A temporary CPO will remain in effect for a relatively short time period (typically one to two weeks) during which time the victim will try to obtain service of process on the defendant via law enforcement or other means, depending on the jurisdiction. . . . Once the defendant is served with the temporary CPO, the parties return to court for a hearing on the issue of entry of a final CPO. . . . At the final hearing, a victim bears the burden of proof, generally with a preponderance of the evidence standard.”).

6. See Maureen Sheeran & Emilie Meyer, *Civil Protection Orders: A Guide for Improving Practice*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES 1, 3 (2010), http://www.ncjfcj.org/sites/default/files/cpo_guide.pdf [<https://perma.cc/7Y56-A79K>]; Patricia Tjaden & Nancy Thoennes, Nat’l Inst. of Justice & The Centers For Disease Control & Prevention, *Extent, Nature, And Consequences Of Intimate Partner Violence: Findings From The National Violence Against Women Survey* 1, 54 (2000), <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> [<https://perma.cc/PXU8-BTLZ>] (noting “1,131,999 victims of intimate partner rape, physical assault, and stalking obtain protective or restraining orders against their attackers annually”). While this article discusses the number of CPOs granted each year, it will not discuss the overall number of filings each year. This is because many states do not capture the filing data. Two states and the District of Columbia collect data on the number of CPO filings. This data gives some idea of the number of CPO cases filed each year. Ohio had 17,019 filings in 2014. The Supreme Court of Ohio & The Ohio Judicial System, CIVIL DOMESTIC VIOLENCE CASE STATISTICS <http://www.sconet.state.oh.us/jcs/domesticviolence/resources/data.asp> [<https://perma.cc/X779-MN9Y>] (last visited Feb. 7, 2017). The District of Columbia had 5,005 in 2013. DC Coalition Against Domestic Violence, *Domestic Violence in the District of Columbia* (2014), <http://www.dccadv.org/img/fck/file/2013%20DC%20DV%20Statistics%20One%20Page.pdf> [<https://perma.cc/7R4J-G3CJ>]. Maryland had 24,315 in 2014. Maryland Judiciary, *Annual Statistical Abstract* (2014), http://mnadv.org/_mnadvWeb/wp-content/uploads/2011/07/MD-Judiciary-Statistical-Abstract-FY2014-DV.pdf [<https://perma.cc/428Y-Z2L7>].

7. See Stoeber, *supra* note 1, at 1019.

8. Putman v. Kennedy, 900 A.2d 1256, 1263 (Conn. 2006).

academic institution.⁹ The prejudicial legal consequences arise because information about the perpetrator's involvement in a CPO case is not confidential.¹⁰ At least twenty-seven states, Guam and Puerto Rico allow public access to protection order files.¹¹

This continuing public access to CPO cases, even when there is no active order,¹² means the former batterer is subjected to perpetual prejudicial consequences from the CPO case. To end these ongoing consequences, the courts should allow perpetrators to seal inactive CPO cases from public view. This sealing remedy is necessary to ameliorate the significant economic impact of those consequences.

Most CPO perpetrators suffer these consequences because they are not considered rich or famous enough to avert the eventual consequences through power structures that protect them or their image. The best example of this protective power structure can be seen with professional athletes who have committed an act of domestic violence with little or no consequence to their careers.¹³ Their fame and wealth allows them to escape the consequences and gives them a second chance. But it should not be just the rich and famous who are forgiven and given a second chance. Every person deserves a second chance and an opportunity to support their families and be contributing members of their communities. A sealing remedy for inactive CPO cases would ensure such an even-handed result.

Proposing a remedy to help those once labeled a batterer may ignite controversy. As one author has noted, "[w]orking to improve the conditions abusers face has long been considered taboo in the battered women's movement."¹⁴ However, the sealing remedy proposed by this article is not at odds with the

9. This Article is focused on the collateral consequences that flow from a CPO issued by a civil court. It will not discuss the collateral consequences that occur if the perpetrator is convicted in criminal court for domestic violence. For a further discussion of the civil collateral consequences that flow from a criminal conviction, see Sahl, *infra* note 16, at 31–47.

10. U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice, *Survey of State Criminal History Information Systems, 2012, A Criminal Justice Information Policy Report* 1, 5–6 (2014), <http://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> [<https://perma.cc/36KC-RECY>].

11. *Id.* at Table 7a. These states include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, and Washington. *Id.*

12. See *infra* Part III.

13. For a discussion of the specific athletes, see *infra* notes 207–09.

14. Deborah Epstein, *Procedural Justice, Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1848 (2002).

CPO process and its underlying rationale. A CPO is to provide “a simple, immediate remedy to increase the safety of victims.”¹⁵ Once the court, or the victim, determines that the CPO is no longer necessary for the victim’s safety, the CPO has achieved its purpose, so the collateral consequences related to the CPO should end as well.

Part II of this Article discusses the prejudicial legal consequences—collateral consequences—stemming from CPO cases. It is going to detail how collateral consequences, once recognized primarily in criminal cases, now plague those involved in all stages of a civil domestic violence case.¹⁶

Part III of this Article examines the reach of collateral consequences arising from CPO cases, particularly those CPO cases where the order has expired or has been dismissed. There are millions of people in this country each day that battle the collateral consequences of their expired or dismissed orders.¹⁷ Each year courts issue 1.2 million CPO orders, and most of those orders expire in one to two years.¹⁸

Additionally, victims—and the courts—dismiss a large number of CPO cases where an order has been issued.¹⁹ In some jurisdictions, the dismissals equal the number of cases that result in a final order.²⁰ Even though the orders

15. Peter Finn & Sara Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, NAT’L INST. JUST. ISSUES AND PRACTICES 4 (1990), <http://www.ncjrs.gov/pdffiles1/Digitization/123263NCJRS.pdf> [<https://perma.cc/XG6J-3YJ5>].

16. Collateral consequences that arise after a conviction in a criminal case have been well documented and widely discussed. See Joann Sahl, *Battling Collateral Consequences: The Long Road to Redemption*, 49 CRIM. L. BULL. 383 (2013); see also Rebecca Vallas, Melissa Boteach, Rachel West & Jackie Odum, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children, A Two-Generation Approach*, CENT. FOR AM. PROGRESS 1, 5 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf> [<https://perma.cc/E9Y5-N96A>]. As one recent study concluded, “having even a minor criminal record can be a life sentence to poverty, presenting obstacles to employment, housing, education and training, public assistance, financial empowerment, and more.” *Id.* at 1. The study estimates that nearly half of the children in the U.S. have one parent with a criminal record. *Id.*

17. This Article is not going to focus on the collateral consequences that arise for the 1.2 million people who are subject to an ongoing CPO, because these consequences are to be expected. The CPO court only issues an order if it concludes the perpetrator committed the act of domestic violence after conducting a full court hearing that gave the perpetrator an opportunity to rebut the allegations. The court’s issuance of a CPO means that the perpetrator committed the act, and his behavior requires monitoring during the life of the order. This active order naturally gives rise to prejudicial consequences because the CPO should give pause to those who seek to employ or to house a perpetrator subject to an ongoing order.

18. For a chart detailing the periods permitted by the statute in each state, see Stoever, *supra* note 1, at 1093–98.

19. 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, 205 (2008).

20. *Id.* at 205 n.65.

have been dismissed, the stigma of being a “batterer” remains.²¹ This is true even if the only order issued in the case was an interim order issued after an ex parte proceeding.²²

As Part III will discuss, although a CPO order has expired or has been dismissed, it results in significant collateral consequences.²³ These collateral consequences require a means to ameliorate their impact. Part IV addresses this issue by articulating a judicial sealing remedy that all courts should adopt to seal inactive CPO cases from public view.

II. THE COLLATERAL CONSEQUENCES OF A CIVIL PROTECTION ORDER

Every state in this country has a civil remedy to protect domestic violence victims.²⁴ This remedy, identified in this article as a CPO, has been widely available since 1993.²⁵

21. Courts recognize reputational harm as an impactful collateral consequence in CPO cases. *See infra* notes 67–72.

22. Once a victim files a CPO case, she may appear before the judge in an ex parte proceeding to get a temporary no contact order. *See Miles, supra* note 5, at 149. The efficacy of the ex parte order has been well documented. “Emergency ex parte relief is an effective weapon in the arsenal available to combat domestic violence. By affording a victim the opportunity to obtain judicial relief without notice, that person can seek to extricate herself from the circumstance of violence, free from fear that further violence would be precipitated by notice to the abuser. When an actual victim of domestic violence seeks ex parte relief, the propriety of this remedy is unassailable.” David H. Taylor, Maria V. Stoilkov & Daniel J. Greco, *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL’Y 83, 85 (2008). The Family Violence Model Code suggests that states issue the ex parte order for no more than seventy-two hours. *See Family Violence: A Model State Code*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES 26 (1994), https://www.ncjfcj.org/sites/default/files/modecode_fin_printable.pdf [<https://perma.cc/RWU4-ZYL7>] [hereinafter *Family Violence: A Model State Code*]. For a state-by-state survey of the time limits of the ex parte protection order, see Stoever, *supra* note 1, at 1093–98. Every state must give full faith and credit to protection orders issued in another state. *See Violence Against Women Act*, 18 U.S.C. § 2265 (2012).

23. *See, e.g., Wilder v. Perna*, 883 N.E.2d 1095, 1099 (Ohio Ct. App. 2007) (“The threat of reputation harm is particularly significant in this context because domestic violence restraining orders will not issue in the absence of the showing of a threat of violence * * *. Thus, inasmuch as we previously have recognized the importance of reputation damage as a collateral consequence in other contexts, we see no reason not to do so here, for being the subject of a court order intended to prevent or stop domestic violence may well cause harm to the reputation and legal record of the defendant.”).

24. *See Stoever, supra* note 1, at 1042–43.

25. *See Brenner, supra* note 1, at 316–17. For a list of civil protection orders by state, see American Bar Association Commission on Domestic Violence, *Domestic Violence Civil Protection Orders (CPOs) By State* (2009), http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/dv_cpo_chart.authcheckdam.pdf [<https://perma.cc/J5VP-KK6Q>]. For a thorough discussion of the history of domestic violence laws, see Epstein, *supra* note 14, at 1849–56. “Today, the legal system offers a fairly comprehensive response that has been constructed around the idea that

The CPO is the “cornerstone of the movement to address domestic violence,”²⁶ “cast[ing] a far wider net over abusive behavior than criminal law does.”²⁷ It addresses the “vital issue of safety for victims of domestic or family violence and other family or household members.”²⁸ The National Council of Juvenile and Family Court judges concluded that there are clear and articulable purposes for the CPO remedy that include “all the relief necessary to curtail access by a perpetrator.”²⁹

A CPO has proven benefits. It reduces subsequent violent abuse and psychological abuse.³⁰ It increases prompt police response to post-CPO incidents of domestic violence.³¹ A CPO allows victims to access much needed services.³² Victims report a high level of satisfaction with the CPO process and result.³³

The civil protection remedy is separate and supplemental to any criminal prosecution.³⁴ A CPO case requires a lower standard of proof than that of a criminal case. Victims need only prove their entitlement to a CPO by a preponderance of the evidence.³⁵

domestic violence is a critical social problem requiring a shift from considering it a private family matter and that victims are often uncooperative in the role they play as part of the broader system.” Brenner, *supra* note 1, at 315–16; *see also* Stoeber, *supra* note 1, at 1042–43.

26. Brenner, *supra* note 1, at 339.

27. 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, 1509 (2008).

28. *Family Violence: A Model State Code*, *supra* note 22, at 24.

29. *Id.* at 26.

30. *See* Miles, *supra* note 5, at 147.

31. *See id.* at 147.

32. *See* Goldfarb, *supra* note 27, at 1509 (“A major advantage of civil protection orders is that they bring the domestic violence victim into contact with the legal system, which in turn opens the door to other community resources, such as social services agencies and battered women’s support groups.”).

33. *See id.* at 1510.

34. There are “[f]undamental distinctions between the overall goals of the criminal system and the civil system Because protection orders are civil, private rights of action, victims who file protection orders must by definition be afforded greater autonomy of decision-making than victims who are witnesses in criminal cases. The victim, not the state, is the ‘prosecuting’ party. The petitioner seeks a specific remedy, tailored to her unique needs and circumstances, without regard for whether the CPO will deter or punish the batterer - goals of the criminal justice system, and decidedly not goals of a civil injunction.” 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, 88 (2007).

35. “The standard of proof to obtain a civil protection order is lower than the ‘beyond a reasonable doubt’ standard that prevails in criminal cases. Most state statutes that address the issue apply a preponderance of the evidence standard to civil protection order proceedings.” Goldfarb, *supra* note

States intend for civil protection regimes to provide an easily accessible, free-standing civil cause of action for a victim to obtain immediate, temporary, injunctive relief from physical violence. These statutes aspire to provide victims with safety, space, time and the wherewithal to escape and to establish themselves independently and safely.³⁶

Others have commented that the CPO accomplishes the most important goal for the domestic violence, victim-empowerment.³⁷

Not contained in any of these laudable goals is the idea that the CPO is to impose a permanent and prejudicial economic burden on the perpetrator. Its impact should continue only as long as the court feels the order is necessary to protect the victim.³⁸ Professor Jane K. Stoever, a noted expert in the CPO area, reconfirms this point.³⁹ She writes that a “civil protection order remedy should be flexible enough to provide an abuse victim with tailored long-term protection while also allowing for modification or termination by the respondent if the order becomes unnecessary.”⁴⁰

Once the victim-centered purpose of the order becomes unnecessary, its impact, including the prejudicial collateral consequences, should end. After all,

27, at 1509 n.136; see also Helen Eigenberg et al., *Protective Order Legislation: Trends in State Statutes*, 31 J. CRIM. JUST. 411, 415–16 (2003).

36. Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 38–39 (2008); see also 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, 1052 (1993) (recognizing the “intent of the civil protection order statute of offering victims swift and immediate protection”).

37. See Linda G. Mills, Commentary, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 577 (1999) (“Empowerment provides a space for the battered women to decide how to proceed in the healing process. This kind of empowerment does not imply that she is obligated to choose among options; rather, it suggests the need for those involved in the healing process to present options and relevant data, encouraging the survivor to choose the path with which she is most comfortable.”).

38. The National Council of Juvenile and Family Court judges recognized that the risk to victims is “not time limited or certain,” and the victim should be protected “for as long as that protection is required, which should be determined by the court after hearing.” *Family Violence: A Model State Code*, *supra* note 22, at 28. A court also has limited jurisdiction over the issues it can consider when presented with a request for a civil protection order. In addition to the protection order, courts may issue custody and visitation orders. See Klein & Orloff, *supra* note 36, at 886.

39. Stoever, *supra* note 1, at 1090–91.

40. *Id.* at 1091. The author discusses this proposition in the context of permanent protection orders. Questioning these orders, she states, “given that there is potential criminal liability for the violation of certain provisions of the remedial order, there are legitimate questions about the length of state involvement and the state’s role in ordering relationships that advise against making all protection orders permanent.” *Id.*

a CPO is a *civil* remedy that “governs the future of the *private* relationship between those two parties.”⁴¹ The CPO, like other civil remedies, is generally intended to end once the threatened harm has ended.⁴² But its impact does not end when the case ends. Although there may no longer be an active CPO, collateral consequences still flow from the CPO case.

Collateral consequences, first recognized in criminal cases, have been defined as civil disabilities that arise from a criminal conviction.⁴³ A recent American Bar Association national survey identified approximately 45,000 collateral consequences.⁴⁴ The chair of the American Bar Association Criminal Justice Section succinctly summarized the impact of these consequences during committee testimony before the House of Representatives: “As the laws restricting convicted persons in their ordinary life activities have multiplied, they have discouraged rehabilitation of offenders and created a class of people who live permanently at the margin of the law.”⁴⁵

41. Kohn, *supra* note 19, at 233 (emphasis added).

42. *Id.* at 234.

43. “When a person is convicted of a crime, that person becomes subject to a host of legal disabilities and penalties under state and federal law. These so-called collateral consequences of conviction may continue long after the court-imposed sentence has been fully served.” MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE ix (2006); *see also Collateral Consequences*, SENT’G PROJECT, <http://www.sentencingproject.org/issues/collateral-consequences> [<https://perma.cc/7CPB-3JB5>]. “Collateral consequences are distinct from direct consequences of convictions in that they are not formally part of punishment or sentencing, and are triggered outside the jurisdiction of the criminal courts” Matthew T. Mangino, *Advising Clients of the Collateral Consequences of Conviction*, THE LEGAL INTELLIGENCER (Oct. 7, 2014), <http://www.thelegalintelligencer.com/id=1202672318644?keywords=Advising+Clients+of+the+Collateral+Consequences+of+Conviction&publication=The+Legal+Intelligencer> [<https://perma.cc/HFS5-CJAP>]. “Every sentence, unless it is death or life without parole, will have a beginning and an end. Collateral penalties have the capacity to go on forever.” *Id.*

44. *See Collateral Consequences: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. 22 (2014) (prepared statement of Mathias H. Heck Jr., Montgomery County Prosecuting Attorney, Montgomery County, Dayton, Ohio) [hereinafter Heck]. The National Institute of Justice funded the Collateral Consequences of Conviction Project. *Id.* The Project developed a “state-by-state database of all collateral consequences of criminal convictions that exist in every jurisdiction’s code of laws and regulations.” *Id.* The project resulted in an online searchable database. National Inventory of Collateral Consequences of Conviction, *ABA Collateral Consequences of Criminal Convictions* (2013), <http://www.abacollateralconsequences.org/> [<https://perma.cc/WU4G-WWYC>]. Ohio also has a searchable collateral consequences database. *See* CIVICC, <http://civiccOhio.org> [<https://perma.cc/S5M5-M3GT>] (last visited Feb. 7, 2017). This database has identified over 700 collateral consequences contained in Ohio law. *See* OHIO JUSTICE & POLICY CTR., THE OHIO CIVICC DATABASE (2005), <http://hirenetwork.org/sites/default/files/CIVICC-1page.pdf> [<https://perma.cc/H98A-TSG7>].

45. Heck, *supra* note 44, at 18.

The ABA national survey has captured the magnitude of the collateral consequences' problem, and it reflects a bitter reality for those convicted of a criminal offense.⁴⁶ Even after serving their time, those offenders face potentially lifelong civil disabilities imposed by law. There is extensive academic literature dedicated to the collateral consequences' problem arising from criminal cases and the potential solutions to ameliorate their impact.⁴⁷

Unfortunately, collateral consequences are no longer neatly confined to criminal convictions. The disabilities once experienced by those with criminal convictions now reach a completely new class of people, specifically those subject to a CPO.⁴⁸ The collateral consequences flowing from a CPO have a "harsh" impact,⁴⁹ and have "discouraged rehabilitation" resulting in "a class of people who live permanently at the margin of the law."⁵⁰

The first consequence former CPO perpetrators face is reputational harm. The stigma from a CPO case is significant.⁵¹ "[I]n the sensitive and often explosively litigated context of family dysfunction and dissolution, there is a reasonable possibility that a domestic violence restraining order will have prejudicial collateral legal consequences for its subject, even after its expiration."⁵²

The CPO related stigma burdens the perpetrator's ability to find employment.⁵³ Once a perpetrator is subject to an order, he may face permanent dis-

46. *Id.* at 23–24.

47. See MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE (2013 ed.); see also Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. OF CRIM. L. & CRIMINOLOGY 1213, 1214–16 (2010); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 979–80 (2013); Sahl, *supra* note 16.

48. See Miles, *supra* note 5, at 151–52.

49. *M. B. v. H. B.*, No. 02-34530, 2003 Del. Fam. Ct., LEXIS 15, at *12 (Del. Fam. Ct. May 2, 2003).

50. Heck, *supra* note 44, at 18.

51. Courts recognize the reputational harm of a CPO. See *Putman v. Kennedy*, 900 A.2d 1256, 1262–63 (Conn. 2006); see also *Wilder v. Perna*, 883 N.E.2d 1095, 1099 (Ohio Ct. App. 2007); see also *Putman*, 900 A.2d, at 1262–63 (“[I]nasmuch as we previously have recognized the importance of reputation damage as a collateral consequence in other contexts, we see no reason not to do so here, for being the subject of a court order intended to prevent or stop domestic violence may well cause harm to the reputation and legal record of the defendant.”); *James v. Hubbard*, 21 S.W.3d 558, 560 (Tex. App. 2000) (“Although expired temporary protective orders and restraining orders have been considered moot, none of these cases has carried the same social stigma as a protective order granted based on a finding of family violence.”).

52. *Putman*, 900 A.2d at 1263.

53. See Zachary C. Howenstine, Note, *Conforming Doctrine to Practice: Making Room for Collateral Consequences in the Missouri Mootness Analysis*, 73 MO. L. REV. 859, 861–62 (2008); see

qualification from certain jobs. Federal law prohibits someone subject to a protection order from receiving, possessing, or transporting any firearms or ammunition as part of his employment.⁵⁴ A protection order may prevent any opportunities in teaching, law enforcement, or day care.⁵⁵ It may also result in the denial of a professional license, a government position, or admission to an academic institution.⁵⁶ The CPO may also limit the person's ability to travel.⁵⁷ Even if the alleged perpetrator has current employment, his label as a batterer may influence the continuation of that employment.⁵⁸

The collateral consequences that operate as a bar to employment can have a direct impact on whether the perpetrator commits another act of domestic violence because there is a link between unemployment and incidents of domestic

also *Piper v. Layman*, 726 A.2d 887, 891 (Md. Ct. Spec. App. 1999). See generally *D.R. v. J.R.*, No. 26743, 2013 WL 3486845, at *2 (Ohio Ct. App. July 10, 2013); *Cauwenbergh v. Cauwenbergh*, No. 2006-A-0008, 2007 WL 726951, at *2 (Ohio Ct. App. Mar. 9, 2007); *Glover v. Michaud*, 222 S.W.3d 347, 351 (Mo. Ct. App. 2007); *Smith v. Smith*, 549 S.E.2d 912, 914 (N.C. Ct. App. 2001). Those with criminal convictions suffer greatly in the search for employment. "The unemployment rate of formerly incarcerated offenders one year after release is estimated to be near 60 percent . . ." Mangino, *supra* note 43, at 2. "[S]tates with high rates of unemployment, as well as high rates of single-parent headed families, have higher rates of returns to prison." Tracy Sohoni, *The Effect of Collateral Consequence Laws on State Rates of Returns to Prison*, 82-83 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/247569.pdf> [<https://perma.cc/AM9X-XZKY>] (unpublished Ph.D. dissertation, University of Maryland, College Park).

54. 18 U.S.C. § 922(h) (2012) ("It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment—(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or (2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."). The reach and impact of this statute has the potential to be far ranging. A person could not work in a "firearm retail store, weapons manufacturing facility, or a shooting range." Peter Slocum, Comment, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 SETON HALL L. REV. 639, 658 (2010). The author also discusses less obvious employment restrictions including a professional trucker driver who needs to deliver sealed crates of guns or ammunition, an employee in a retail store with a sporting goods section that carries guns, and a server in a bar where his boss has a loaded firearm. See *id.* at 658-59. In *Hayford v. Hayford*, 760 N.W.2d 503, 505 (Mich. Ct. App. 2008), the court recognized that the alleged perpetrator had earned his living by building firearms and the order could result in his losing his livelihood.

55. See Miles, *supra* note 5, at 151 n.55.

56. See *Smith*, 549 S.E.2d at 914; see also *Piper*, 726 A.2d at 891; *Hamilton ex rel. Lethem v. Lethem*, 193 P.3d 839, 846 (Haw. 2008). "[Sixty-six] percent of colleges and universities use background checks in the admissions process." Vallas et al., *supra* note 16, at 8.

57. See *M. B. v. H. B.*, No. 02-34530, 2003 Del. Fam. Ct., LEXIS 15, at *11 (Del. Fam. Ct. May 2, 2003).

58. A "CPO may lead a defendant's current employer to deny him a promotion, demote him, or terminate his employment." Miles, *supra* note 5, at 151. An employer may also ask an applicant to disclose any issued orders. See Howenstine, *supra* note 53, at 877.

violence. Those who commit incidents of domestic violence are usually unemployed or underemployed.⁵⁹ One study identified an increase in the violence during a period of unemployment.⁶⁰ “Concentrated disadvantage, employment instability, and subjective financial strain . . . continue to have significant effects on the likelihood of violence against women. This result confirms the importance of both neighborhood socioeconomic disadvantage and individual-level economic distress for the problem of violence against women.”⁶¹

The perpetrator’s unemployment particularly affects his children. “When parents face challenges in securing employment or accessing basic income support to help meet basic needs, children suffer both short- and long-term negative consequences.”⁶² These include developing their vocabulary at a slower rate, having more limited language skills, and lower educational attainment.⁶³ Having an unemployed parent with a lower level of education diminishes the child’s

59. See Catherine Elizabeth Kaukinen & Ráchael A. Powers, *The Role of Economic Factors on Women’s Risk for Intimate Partner Violence: A Cross-National Comparison of Canada and the United States*, 21 VIOLENCE AGAINST WOMEN 229, 242 (2014). Less than full-time employment is a predictor of renewed abuse after the victim initiates the protection order proceedings. See Christopher T. Benitez, Dale E. McNiel, & Renee L. Binder, *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHIATRY & L. 376, 383 (2010). The “risk of intimate partner violence is highest among couples when the man is unemployed.” Catherine Kaukinen, *Status Compatibility, Physical Violence, and Emotional Abuse in Intimate Relationships*, 66 J. MARRIAGE & FAM. 452, 456 (2004); see also EVE S. BUZAWA & CARL G. BUZAWA, *DO ARRESTS & RESTRAINING ORDERS WORK* 49 (1996) (citing to a number of studies to conclude, “[a]rrest reduces domestic violence among employed people but increases it among unemployed people”); Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence*, 36 AM. BEHAV. SCIENTIST 601, 603 (1993). These employment statistics are consistent with research concentrating on criminal behavior. The “research demonstrates that individuals who are unemployed are more likely than those who are employed to engage in criminal behavior and that individuals with a criminal record have poorer employment prospects than those without a record.” SCOTT H. DECKER ET AL., NAT’L. INST. JUSTICE, *CRIMINAL STIGMA, RACE, GENDER AND EMPLOYMENT: AN EXPANDED ASSESSMENT OF THE CONSEQUENCES OF IMPRISONMENT FOR EMPLOYMENT* 11 (2013). “Having any lifetime arrest dims the employment prospects more than any other employment-related characteristic.” *Id.* at 52; see also Michael L. Benson & Greer L. Fox, *Concentrated Disadvantage, Economic Distress, and Violence Against Women in Intimate Relationships*, II-3-3 (2004), <http://www.ncjrs.gov/pdffiles1/nij/199709.pdf>. [<https://perma.cc/SWC4-YJ6T>] (“Although intimate violence is found among all social classes, rates tend to be higher in families of lower socioeconomic status who are experiencing underemployment or unemployment.”).

60. See Benson & Fox, *supra* note 59, at II-3-5 (“[T]he rate of violence increases as the number of periods of male unemployment increases.”).

61. *Id.* at II-3-7. Studies have shown “elevated intimate partner violence rates in urban neighborhoods characterized by poverty/low income.” Amy E. Bonomi, Britton Trabert, Melissa L. Anderson, Mary A. Kernic, & Victoria L. Holt, *Intimate Partner Violence and Neighborhood Income: A Longitudinal Analysis*, 20 VIOLENCE AGAINST WOMEN 42, 43 (2014).

62. Vallas et al., *supra* note 16, at 5.

63. See *id.*

future employment prospects.⁶⁴

The collateral consequences attached to a CPO case are pervasive and prejudicial. There is no escape for those who have been assigned the “batterer” label.

III. EXAMINING THE REACH OF COLLATERAL CONSEQUENCES IN CPO CASES

It is no surprise that perpetrators subject to a CPO experience prejudicial consequences. After all, a court has determined that their behavior is an immediate threat requiring court intervention and monitoring. Unfortunately, even if a court’s interest in the perpetrator may have ended through termination of the CPO case, it does not end the perpetrator’s legal consequences.

A. Collateral Consequences of Expired CPOs

CPO cases terminate naturally when the issued CPO reaches the end of its time-limited order.⁶⁵ Even though the order has expired, prejudicial consequences continue to plague the person once subject to the CPO.

Most courts addressing this issue confirm this principle.⁶⁶ Twelve states and the U.S. Virgin Islands acknowledge that expired CPOs carry significant

64. See *id.* at 9 (“[B]arriers to education and training associated with having a criminal record not only hold parents back from climbing the career ladder but can hamper children’s educational and employment prospects as well.”).

65. See Stoeve, *supra* note 1, at 1050.

66. Courts typically address this argument as part of a mootness analysis. In *Carafas v. LaVallee*, 391 U.S. 234 (1968), the United States Supreme Court recognized a “collateral consequence” exception to the mootness doctrine. The Court stated:

It is clear that petitioner’s cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these “disabilities or burdens [which] may flow from” petitioner’s conviction, he has “a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. On account of these “collateral consequences,” the case is not moot.

Id. at 237 (quoting *Ginsberg v. New York*, 390 U.S. 629, 633–34 n.2 (1968); *Fiswick v. United States*, 329 U.S. 211, 222 (1946)); *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (recognizing collateral consequence where there is “some concrete and continuing injury other than the now-ended incarceration or parole”). “An appeal may be heard which might otherwise be dismissed as moot where leaving the judgment undisturbed might lead to negative collateral consequences.” *Roark v. Roark*, 551 N.E.2d 865, 867 (Ind. Ct. App. 1990); *In re Marriage of Stariha*, 509 N.E.2d 1117, 1123 (Ind. Ct. App. 1987). The reasoning behind this exception is that “it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time” *Sibron v. New York*, 392 U.S. 40, 57 (1968).

collateral consequences.⁶⁷ Each of these courts recognizes the reputational harm that accompanies the expired CPO order.⁶⁸ As the Connecticut Supreme Court acknowledged, the “threat of reputation harm is particularly significant in this context because domestic violence restraining orders will not issue in the absence of the showing of a threat of violence, specifically a ‘continuous threat of present physical pain or physical injury’ to the applicant.”⁶⁹ An expired order carries “legitimate public contempt for abusers,”⁷⁰ and the “inherent reputational harm and stigma associated with a finding that one has committed [an act of] domestic violence.”⁷¹ The reputational harm is significant. It “can have a self-fulfilling criminogenic effect, predisposing individuals to become the deviants they were branded to be.”⁷²

67. Arizona (*Cardoso v. Soldo*, 277 P.3d 811, 814 (Ariz. Ct. App. 2012) (expired order)); Connecticut (*see generally Putman v. Kennedy*, 900 A.2d 1256, 1265 (Conn. 2006) (expired CPO)); Florida (*see generally Pryor v. Pryor*, 141 So. 3d 1279, 1280 (Fla. Dist. Ct. App. 2014) (expired temporary injunction)); Hawaii (*see generally Hamilton ex rel. Lethem v. Lethem*, 193 P.3d 839, 847–48 (Haw. 2008)); Iowa (*see generally Siemonsma v. Siemonsma*, No. 01-0247, 2002 WL 1331870, at *1 (Iowa Ct. App. June 19, 2002) (expired temporary order)); Ohio (*see generally Wilder v. Perna*, 883 N.E.2d 1095, 1099 (Ohio Ct. App. 2007) (expired order); *Cauwenbergh v. Cauwenbergh*, No. 2006-A-0008, 2007 WL 726951, at *2 (Ohio Ct. App. Mar. 9, 2007) (expired order); *D.R. v. J.R.*, No. 26743, 2013 WL 3486845, at *2 (Ohio Ct. App. July 10, 2013) (expired order)); Maryland (*see generally Piper v. Layman*, 726 A.2d 887, 891 (Md. Ct. Spec. App. 1999) (expired order)); Massachusetts (*see Wooldridge v. Hickey*, 700 N.E.2d 296, 298 (Mass. App. Ct. 1999) (expired order)); Michigan (*see generally Hayford v. Hayford*, 760 N.W.2d 503, 505 (Mich. Ct. App. 2008) (expired order)); Minnesota (*see generally Pechovnik v. Pechovnik*, 765 N.W.2d 94, 96 (Minn. Ct. App. 2009) (expired order)); New Jersey (*see generally Shah v. Shah*, 875 A.2d 931, 940 (N.J. 2005) (ex parte order with no further legal proceedings)); Wisconsin (*see generally In Interest of H.Q.*, 152 Wis. 2d 701, 449 N.W.2d 75, 77–78 (Ct. App. 1989) (expired order)); U.S. Virgin Islands (*see generally Vazquez v. Vazquez*, 54 V.I. 485, 492, (V.I. 2010) (expired order)).

68. *See generally Cardoso*, 277 P.3d at 816; *Putman*, 900 A.2d, at 1265; *Hamilton*, 193 P.3d at 849; *Vazquez*, 54 V.I. at 492.

69. *Putman*, 900 A.2d, at 1262. The court also recognized the widespread impact of the order since it is disseminated to multiple law enforcement agencies. *Id.*; *see also Hamilton*, 193 P.3d at 84 (Hawaii court acknowledging the “enhanced technology for information dissemination”); *Vazquez*, 54 V.I. at 492.

70. *Hawaii (Hamilton)*, 193 P.3d, at 846).

71. *Vazquez*, 54 V.I. at 492; *see also Hamilton*, 193 P.3d, at 846 (recognizing the “‘social stigma’ of a ‘protective order granted based on a finding of family violence’”); *James v. Hubbard*, 21 S.W.3d 558, 560 (Tex. App. 2000) (civil protection order “carries a significant stigma in our society”). The court also acknowledged that the order “prevented appellant from worshiping at what could have been his preferred place and time of worship for a year.” *Id.* at 560–61; *see also Wooldridge*, 700 N.E.2d at 298 (expired order carries stigma for his name and record); *State v. S. T. S.*, 238 P.3d 53, 56 (Or. Ct. App. 2010) (recognizing a “social stigma associated with a finding that father perpetrated domestic violence”). *See generally Smith v. Smith*, 549 S.E.2d 912, 914 (N.C. Ct. App. 2001) (expired order carries stigma); *Piper*, 726 A.2d at 891 (stigma “is likely to attach to a person judicially determined to have committed abuse subject to protection under the Domestic Violence Act”).

72. Wayne A. Logan, Essay, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1107

Another weighty collateral consequence the courts recognize is that the CPO, although expired, can affect the future legal rights of the perpetrator.⁷³ It can be used by “agencies investigating future allegations involving the same family,”⁷⁴ including a subsequent finding of violence necessitating a protection order.⁷⁵ It may also be a factor a trial court considers in a divorce,⁷⁶ or in making a custody determination.⁷⁷ In addition, if the perpetrator is charged with another incident of domestic violence, the court will consider the expired order in determining a sentence, including whether the perpetrator may receive a deferred sentence.⁷⁸ The expired CPO may also affect court decisions in “future bail proceedings, . . . future presentence investigations, [and] in-court impeachments.”⁷⁹

Courts also acknowledge that the expired CPO will negatively affect the perpetrator’s personal life, including “association[s] with neighbors, and choice of housing.”⁸⁰ It can reduce the perpetrator’s credit rating.⁸¹ The expired CPO may also interfere with the perpetrator’s ability to have certain employment.⁸²

Although there are a significant number of courts that recognize the prejudicial consequences of expired orders, not all courts agree with this conclusion. As one court stated,

[w]hile restrictions of certain constitutional rights may be

(2013).

73. See *Putman*, 900 A.2d, at 1262–63; see also *Hamilton*, 193 P.3d, at 846; *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. Ct. App. 2009); *In Interest of H.Q.*, 152 Wis. 2d 701, 449 N.W.2d 75, 78 (Ct. App. 1989); *Vazquez*, 54 V.I. at 492. See generally *Cardoso v. Soldo*, 277 P.3d 811, 814 (Ariz. Ct. App. 2012).

74. *Putman*, 900 A.2d, at 1263.

75. See *Pechovnik*, 765 N.W.2d at 98. See generally *Piper*, 726 A.2d at 891.

76. See *In Interest of H.Q.*, 152 Wis. 2d at 707. See generally *Pechovnik*, 765 N.W.2d at 94.

77. See *Putman*, 900 A.2d at 1263; see also *Pechovnik*, 765 N.W.2d at 98; *Vazquez*, 54 V.I. at 492; *In Interest of H.Q.*, 152 Wis. 2d at 707–08; *Smith v. Smith*, 549 S.E.2d 912, 914 (N.C. Ct. App. 2001). “All states at least require the court to consider evidence of domestic violence when determining child custody, and many states have a rebuttable presumption against the abusive parent receiving custody.” Stoever, *supra* note 1, at 1077.

78. See *Vazquez*, 54 V.I. at 493.

79. *Hamilton ex rel. Lethem v. Lethem*, 193 P.3d 839, 846 (Haw. 2008); accord *Wooldridge v. Hickey*, 700 N.E.2d 296, 298 (Mass. App. Ct. 1999).

80. *Hamilton*, 193 P.3d, at 848. Landlords do use background checks to screen tenants. “An estimated four out of five landlords employ background checks to screen out prospective tenants with criminal records.” Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out*, CTR. FOR AM. PROGRESS 19 (2014).

81. *Cauwenbergh v. Cauwenbergh*, No 2006-A-0008, 2007 WL 726951, at *2 (Ohio Ct. App. Mar. 9, 2007); see also *D.R. v. J.R.*, No. 26743, 2013 WL 3486845, at *2 (Ohio Ct. App. July 10, 2013) (recognizing perpetrator may not drive school bus).

82. *Cauwenbergh*, 2007 WL 726951, at *2. See *D.R.*, 2013 WL 3486845, at *2.

among the consequences of an entry of a DVPO [Domestic Violence Protection Order], such restrictions exist only for the limited duration of the DVPO. In this sense, the restrictions are more like direct consequences, rather than collateral consequences, because they do not outlive the DVPO's expiration.⁸³

Ten states refuse to recognize that expired orders carry serious collateral consequences.⁸⁴ In *J.S. v. D.C.*,⁸⁵ the alleged perpetrator argued that because of an expired CPO he would "be subjected to 'a potential present and future negative background check' which could lead to 'the denial of employment, loans, and ability to buy or rent a dwelling.'"⁸⁶ The court rejected this argument finding that he "merely conclude[d]" that he might face collateral consequences, but did not show that he had actually been "subjected to significant collateral consequences."⁸⁷

Although the issue of whether collateral consequences survive the end of a CPO case divides the courts, the better position is that the collateral consequences are real and debilitating, and it is important to end the reach of these consequences for expired CPOs.

B. Collateral Consequences of CPO Case Terminations—Dismissals and Expired Ex Parte Orders

Those once subject to a CPO case experience prejudicial consequences

83. *T.A.M. v. C.M.K.*, No. 12–0544, 2013 WL 5508282, at *3 (W. Va. Oct. 4, 2013).

84. Iowa (*see generally* *Siemonsma v. Siemonsma*, No. 01–0247, 2002 WL 1331870, at *1 (Iowa Ct. App. June 19, 2002) (Since the protection order expired, "case no longer presents a justiciable controversy.")); Maine (*see generally* *Young v. Young*, 810 A.2d 418, 421 (Me. 2002) ("Because the parental rights and responsibilities provision in the October 18 protection from abuse order is no longer operative, there are no practical effects that will flow to either party from our determination of this appeal.")); Missouri (*see generally* *J.S. v. D.C.*, 368 S.W.3d 289, 292–93 (Mo. Ct. App. 2012)); New Mexico (*see generally* *Lucero v. Pino*, 946 P.2d 232, 235 (N.M. Ct. App. 1997) (protection order did not have "any legal impact on the adoption or upon the current custody situation")); Vermont (*see generally* *State v. Mott*, 692 A.2d 360, 367 (Vt. 1997) (expired order had no impact on the criminal conviction)); New York (*see generally* *Noor v. Noor*, 15 A.D.3d 788, 790 (N.Y. App. Div. 2005) (challenge to expired order is moot)); Nebraska (*see generally* *Gernstein v. Allen*, 630 N.W.2d 672, 677 (Neb. Ct. App. 2001) ("[R]ecord is devoid of any evidence in the present case to show that Allen was criminally convicted of any crime resulting from the issuance of the protection order, or that any other rights or liabilities were actually affected by its issuance.")); Pennsylvania (*see generally* *Snyder v. Snyder*, 629 A.2d 977, 980 n.1 (Pa. Super. Ct. 1993) (Court not "totally persuaded" that expired order "could impact on the way a trial court views the equities in a divorce or child custody proceeding.")); Utah (*see generally* *Barnett v. Adams*, 273 P.3d 378, 381 (Utah Ct. App. 2012) (Collateral consequences involving foster, adopting or working with children "merely speculative.")).

85. 368 S.W.3d at 293.

86. *Id.*

87. *Id.* at 292–93.

even if the victim or the court voluntarily ends the case. This case termination can occur when a court or victim dismisses the case—either before or after any order has issued in the case.⁸⁸ It may also occur if the victim chooses not to pursue the case after receiving an ex parte stay-away order from the court.⁸⁹ The court issues an ex parte order in a CPO case once it has found that there is “recent violence or threats creating an imminent risk of future violence.”⁹⁰ This finding is devastating to the perpetrator’s future opportunities—even if the court takes no further action in the case.⁹¹ This is because the court has added its imprimatur that the perpetrator committed an act of domestic violence. Being labelled as a “batterer,” even in a case resulting in termination, results in stigma and reputational harm for the identified perpetrator.⁹²

The depth of the collateral consequences problem for terminated cases is reflected in the sheer number of CPO cases with this result. Victims—and the courts—dismiss a significant number of filed CPO cases. Some jurisdictions have case dismissal rates that equal the number of cases resulting in a final order.⁹³ For example, Ohio trial courts resolved 114,724 CPO cases from 2002–2013.⁹⁴ Of those, the courts dismissed 50,313 cases, or 43% of the cases.⁹⁵ Similarly, parties filed 40,499 protection order cases in Missouri in 2007.⁹⁶ Of those cases filed, the parties or the court dismissed 63% of the

88. CPO cases are dismissed for any number of reasons. Victims might choose not to pursue the case. See Kohn, *supra* note 19, at 205–06 (“Dismissing dozens of cases weekly for petitioner’s failure to appear, judges cannot help but notice victims’ tenuous relationships with the system. Even victims who pursue their protection orders often return to court later to vacate those orders.”). “Petitioners frequently ‘drop’ cases or request that the court dismiss the case because of respondents’ threats of increased violence.” Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 334–35 (2011). “In addition, petitions are regularly dismissed because of the inability to serve a respondent.” *Id.* at 336.

89. See *id.* at 321.

90. Miles, *supra* note 5, at 148.

91. See *Wooldridge v. Hickey*, 700 N.E.2d 296, 298 (Mass. App. Ct.1999) (expired order carries stigma for name and record).

92. For a discussion of the reputational harm in CPO cases, see *Putman v. Kennedy*, 900 A.2d 1256, 1262–63 (Conn. 2006).

93. See Kohn, *supra* note 19, at 205 n.65.

94. See The Supreme Court of Ohio & The Ohio Judicial System, CIVIL DOMESTIC VIOLENCE CASE STATISTICS, <https://www.supremecourtfohio.gov/jcs/domesticviolence/resources/data.asp> [<https://perma.cc/B9AL-SV4L>] (last visited Feb. 7, 2017).

95. *Id.*

96. SEE COMMUNICATING WITH PRISONERS, RESTRAINING ORDERS AND DOMESTIC VIOLENCE BY U.S. STATES, PUBLIC INTEREST ANALYSIS, <http://acrosswalls.org/datasets/punishment-us-dv-states/?otxkey=datasets-punishment-us-dv-states> [<https://perma.cc/B9AL-SV4L>] [hereinafter COMMUNICATING WITH PRISONERS].

cases.⁹⁷ The North Carolina courts granted 22,044 CPO petitions from 1999–2001, but dismissed 56% of the filed cases.⁹⁸ The parties filed 90,534 petitions from 2010–2012 in Washington, and the courts denied or dismissed nearly 20% of the cases.⁹⁹

Dismissals also occur with great frequency after the victim has received an ex parte order from the court. Courts grant ex parte requests at high rate—“in some jurisdictions, nearly one hundred percent.”¹⁰⁰ The reason is “societal pressures might make it an unrealistic expectation that judges are able to sort out the justified [allegations] from the unjustified, and caution can tip the balance in favor of granting the ex parte order.”¹⁰¹

Many of those who receive an ex parte order fail to follow through with the case to get a full order. By some measures, nearly 50% of those receiving an ex parte order do not pursue the full order.¹⁰² One study found that “[w]hile 99% of women obtained the first stage or ex parte order,” only 41% received the full protection order, and 30% did not go back for the CPO hearing.¹⁰³

A review of the statistics available from several jurisdictions supports this precipitous drop. The courts in Kentucky granted 71,199 temporary orders from 2009–2011, but only 31,070, or 43% of the cases, resulted in a final order.¹⁰⁴ New Hampshire courts had 4,616 domestic violence filings in 2011, and 3,637, or 78%, received a temporary ex parte order.¹⁰⁵ Just 45% then received a full order.¹⁰⁶ In Pennsylvania 88% of those who filed for a CPO from 2009–2011 received an ex parte order, but only 33% of all cases filed resulted in a full order.¹⁰⁷

There are reasons why a victim may end the case after receiving an ex parte order. The victims recognize it as a successful form of relief.¹⁰⁸ Many victims

97. *See id.*

98. *See id.*

99. *See id.*

100. Taylor et al., *supra* note 22, at 86.

101. *Id.* at 93.

102. Kohn, *supra* note 19, at 205 n.65.

103. Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protected Battered Women*, 11 J. GENDER, SOC. POL'Y & L. 499, 508–09 (2003).

104. *See* COMMUNICATING WITH PRISONERS, *supra* note 96.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See* Susan L. Keilitz, Paula L. Hannaford & Hillery S. Efkenman, National Center for State Courts, *Civil Protection Orders, The Benefits and Limitations for Victims of Domestic Violence*, 4–5 (1997), <https://www.ncjrs.gov/pdffiles1/Digitization/164866NCJRS.pdf> [<https://perma.cc/WF34-UA5N>].

go no further with their CPO case because they conclude that the ex parte order achieves their goals.¹⁰⁹

In general, courts take a cautious approach to dismissal requests from a victim seeking to end a CPO case.¹¹⁰ For example,

New Jersey permits the court to dismiss a civil protection order upon motion only if the court has a full record in front of it. The Idaho statute allows for court modification of a civil protection order if the petitioner, voluntarily and without duress, consents to the waiver of any part of the order. Maine, Minnesota, and Nevada require notice to the petitioner and a hearing before the respondent may dismiss a protection order.¹¹¹

The National Council of Juvenile and Family Court Judges also advises courts to “[e]xplain to a petitioner who wishes to withdraw her petition that she is always welcome to seek a new order if the violence or threat of violence resumes after dismissal, modification, or termination of the order.”¹¹²

This process-oriented approach to dismissing CPO cases stands in stark contrast to the process in any other civil case. In other civil cases, a court normally will grant any good faith request to vacate an order.¹¹³ This process, unlike CPO cases, does not require the additional step of a court hearing where the party must attest that they truly want to dismiss the case.¹¹⁴

The literature supports the victim’s choice to end the CPO case. “[V]ictims are generally the best predictors of their own risk of being seriously injured. Victims have a unique ability to predict the violence and anticipate the degree of violence.”¹¹⁵ Research has also shown that “women who experience intimate

109. See Murphy, *supra* note 103, at 513 (providing list of comments from CPO recipients on the benefits of an ex parte order alone).

110. Klein & Orloff, *supra* note 36, at 1068; see also Kohn, *supra* note 19, at 225 (noting that judges have shifted from a pro forma grant of motions to vacate to denying the motions).

111. Klein & Orloff, *supra* note 36, at 1068. National Council of Juvenile and Family Court Judges has stated that courts should “[d]iscourage written and unwritten policies that penalize victims for seeking to modify or terminate orders to permit contact or reconciliation with the perpetrator.” Sheeran & Meyer *supra* note 6, at 16.

112. Sheeran & Meyer, *supra* note 6, at 8.

113. See Kohn, *supra* note 19, at 234; Michael E. Solimine & Amy E. Lippert, *Deregulating Voluntary Dismissals*, 36 U. MICH. J.L. REFORM 367, 383 (2003) (“[D]ismissals are sought or obtained with some frequency in both federal and state courts.”).

114. See Kohn, *supra* note 19, at 232.

115. Camille Carey & Robert A. Solomon, *Impossible Choices: Balancing Safety and Security in Domestic Violence Representation*, 21 CLINICAL L. REV. 201, 249 (2014). “Victims who were at greatest risk of future harm were those who felt somewhat safe and therefore did not take proactive action to seek safety, such as separating from the abuser or safety planning.” *Id.* at 251; see also Mills, *supra* note 37, at 605; Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal*

partner abuse often decrease their exposure to violence when they exercise their own agency.”¹¹⁶

CPO dismissals occur, in part, because the filing alone may accomplish the victim’s goal. “[S]tudies suggest that civil protection orders are effective because the victim seeks the protection in the first place. By petitioning for an order, the victim shifts the power dynamic in her relationship, signaling to her abuser that she demands liberation and inviting public scrutiny of her plight.”¹¹⁷ Concomitantly, studies show that while receiving an order of protection reduces the risk of future violence,¹¹⁸ retention of the order does not impact re-abuse rates.¹¹⁹ Other studies have indicated that seeking the protection order is pivotal to decreasing the violence.¹²⁰ “Our results agree with those of others reporting significantly lower levels of violence experienced by women seeking assistance from the justice system, irrespective of the justice system outcome.”¹²¹ Moreover, it is the short-term impact of that order that is most meaningful—most violations of the protection order occur in the first three months after the court issues the order.¹²²

Women seek a CPO “to regain some measure of control in their lives by making the abuse public,”¹²³ and by using it “as a ‘loudspeaker’ to notify the

Movement: From Safety to Security, 60 VILL. L. REV. 145, 150 (2015).

116. Johnson, *supra* note 115, at 178. “The victim-empowerment model is widely held by domestic violence experts to be the approach that best addresses the needs of battered women and men.” Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 169 (2003).

117. Baker, *supra* note 36, at 36.

118. See Judith McFarlane et al., *Abused Women with Children Who Are First-Time Users of a Shelter or Applicants for a Protection Order: Entry Data of a 7-Year Prospective Analysis*, 21 VIOLENCE AGAINST WOMEN 249, 252 (2014).

119. See *id.* One author has noted that for those domestic violence cases resulting in a criminal prosecution, “recidivism was unaffected by whether a case was dropped, dismissed, or prosecuted.” Mills, *supra* note 37, at 567–68.

120. Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. PUB. HEALTH 614, 616–17 (2004). “Our findings of significant reductions in violence scores over time among all of our participants, regardless of receipt or nonreceipt of the protection order, are consistent with abuse intervention findings reported by social and health researchers.” *Id.* at 616. “This study clearly demonstrates that, irrespective of whether or not a 2-year protection order was granted, abused women who sought a protection order reported significantly lower threats of abuse, physical abuse, stalking, work harassment, and risk factors for femicide at 3, 6, 12, and 18 months after their initial contact with the justice system.” *Id.* at 617.

121. *Id.* at 616.

122. See Benitez et al., *supra* note 59, at 382.

123. McFarlane et al., *supra* note 120, at 617.

abuser that the law knew about his behavior.”¹²⁴ In short, the CPO “becomes an announcement that the abused woman refuses to ‘take it’ anymore and is acting on her own behalf.”¹²⁵

Filing a CPO case has true benefits for the victim, but once the victim decides she has no need to pursue the case, she can choose to dismiss it. Unfortunately, even though the victim or court has decided to end official intervention in the perpetrator’s life by terminating the case, the collateral consequences of the CPO case continue to haunt the perpetrator by effectively precluding him from becoming a contributing member of society.

IV. A REMEDY TO ADDRESS THE COLLATERAL CONSEQUENCES: JUDICIAL SEALING

There is an urgent need to ameliorate the impact of collateral consequences for the millions of people once subject to a CPO case. We must relieve the economic burden of these consequences to allow them to support their families and to be contributing members of their communities. The best way to achieve this result is to limit public access to CPO cases that no longer have an active order.

The collateral consequences of CPO cases arise because the public can access those cases.¹²⁶ Anyone can visit the courthouse to review a CPO file and its content.¹²⁷ Some states also allow limited online access to CPO cases.¹²⁸

124. *Id.* The study concluded that the women “viewed the legal system as a force larger than themselves and as having power over the abuser that they themselves had lost as a result of the abuse. Moreover, they felt a need to have the legal system both approve and reinforce their decision to leave the abuser.” *Id.*

125. *Id.*

126. See Rebecca Hulse, *Privacy and Domestic Violence in Court*, 16 WM. & MARY J. WOMEN & L. 237, 261 (2010). “[P]roceedings and records of cases containing criminal and civil direct domestic violence matters are public in the vast majority of states.” *Id.* (discussing a wide range of privacy issues attendant to domestic violence cases).

127. “State courts have long recognized the public’s right of access to court records and allowed physical access to paper records housed in individual courthouses.” D.R. Jones, *Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records*, 61 DRAKE L. REV. 375, 383 (2013). “[P]roceedings and records of cases containing criminal and civil direct domestic violence matters are public in the vast majority of states.” Hulse, *supra* note 126, at 261. Records that are only accessible at the courthouse have been termed to be cloaked in “political obscurity.” This term was “developed to describe privacy protections built into pre-Internet court records systems by virtue of the practical difficulty of accessing paper court records.” Rebecca Green, *Petitions, Privacy, and Political Obscurity*, 85 TEMP. L. REV. 367, 372 (2013).

128. “In general, state courts have proceeded very cautiously when considering which records to place online.” Hulse, *supra* note 126, at 263. Online access to CPO files is controlled by each court, and its interpretation of the Violence Against Women Act (VAWA). 18 U.S.C. § 2265 (2012). VAWA limits what information from a CPO case a court may place online, and it prohibits online access to

This information might include the name of the parties, filing and hearing dates.¹²⁹

Courthouse access alone does not really offer any real obstacle to online dissemination of information contained in the CPO file. It will “not stop enterprising data-gatherers, who, through the use of readily available technology, can circumvent any protection that limiting access to the courthouse otherwise offers.”¹³⁰ Moreover, “those with the resources or determination can digitize print records for their own use.”¹³¹

There are additional ways the public may be able to access CPO case information without ever visiting the courthouse or accessing the court record online. Each time a court issues a CPO order, it is entered into the Protection Order File of the National Criminal Information Center (NCIC).¹³² At any given time, the NCIC file contains nearly one and one-half million civil protection orders.¹³³ In addition to this national file, forty states maintain their own protection order files containing 1.8 million records.¹³⁴ A majority of states allow public access to their protection order files.¹³⁵

Furthermore, many states, upon request, will conduct noncriminal background checks.¹³⁶ The number of noncriminal background requests performed

any information that “would be likely to publicly reveal the identity or location of the party protected under the order.” 18 U.S.C. § 2265(d)(3). This provision in VAWA is intended to provide for the safety of the victim by limiting the victim’s personal information available on the internet. It restricts this information so a potential perpetrator cannot locate the victim. VAWA does not restrict what perpetrator information may be placed on an online docket.

129. See Hulse, *supra* note 126, at 267. For example, in Maryland, a court will not allow remote access of the victim’s name, address, telephone number, date of birth, e-mail address and place of employment. MD. RULES, Rule 16-1008.1.

130. Jones, *supra* note 127, at 394.

131. *Id.* at 395.

132. The Federal Bureau of Investigation maintains the National Crime Information Center (NCIC). NATIONAL CRIME INFORMATION CENTER, <https://www.fbi.gov/services/cjis/ncic> [<https://perma.cc/5B36-ALKH>] (last visited Feb. 7, 2017). It is a “collection of FBI intelligence databases that provide support to federal, state and local law enforcement agencies.” JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 18 (2015).

133. On December 31, 2015, NCIC had 1,639,206 active Protection Order records—both permanent and temporary orders. January 11, 2016, e-mail from Stephen G. Fischer Jr., Chief, Multimedia Productions, FBI - CJIS Division. (E-mail on file with author); *see also Survey of State Criminal History Information Systems*, *supra* note 11, at Table 4.

134. *See Survey of State Criminal History Information Systems*, *supra* note 11, at Table 4.

135. *See id.* at Table 7a. The National Domestic Violence Registry also maintains a searchable database of convictions for domestic violence and domestic violence-related offenses that the public can access. *See* THE NATIONAL DOMESTIC VIOLENCE REGISTRY, INC., <http://www.domesticviolence-database.net/> [<https://perma.cc/WNW5-VGRZ>] (2012).

136. *See* Jacobs, *supra* note 132, at 51 (“[A]ll states authorize their criminal records repositories

in this country is staggering. In 2012, 39 states received over 20 million name-based noncriminal justice background requests.¹³⁷ They included requests for people who were seeking positions as schoolteachers, prospective adoptive and foster parents, day care providers, nonteaching school personnel including volunteers, nurses and residential caregivers, volunteers working with children and hazardous material licensees.¹³⁸ Ten states who received such a request included the protection order information in their response.¹³⁹

Once the public has access to information that a person has been named in a CPO case as a “batterer,” it leads to the corresponding collateral consequences.¹⁴⁰ The only way to ameliorate the impact of these consequences is to seal from public view CPO cases where no active order exists.

Civil sealing is a well-established concept in our justice system.¹⁴¹ Courts have the inherent authority to seal civil cases.¹⁴² In *Nixon v. Warner Communications*, the United States Supreme Court stated, “the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”¹⁴³ One of the “improper purposes” cited by the court was to use records “‘to gratify private spite or promote public scandal’ through the publication of ‘the painful and sometimes disgusting details of a divorce case.’”¹⁴⁴

to provide certain private sector employers and not-for-profit organizations with rap sheet information.”). Congress has also authorized the FBI to conduct noncriminal background checks. See FBI IDENTITY HISTORY SUMMARY CHECKS, <https://www.fbi.gov/services/cjis/identity-history-summary-checks> [<https://perma.cc/F94Q-EMSK>] (last visited Feb. 7, 2017). For a discussion of the parameters of the FBI’s authority and the nature of the background checks, see Jacobs, *supra* note 132, at 43.

137. See *Survey of State Criminal History Information Systems*, *supra* note 11, Table 19.

138. See *id.* at 11.

139. See *id.* at Table 7a, Table 14, and Table 19a.

140. See *supra* Part II.

141. For a thorough discussion of the constitutional and common law underpinnings of the sealing remedy see Honorable T.S. Ellis, III, *Sealing, Judicial Transparency and Judicial Independence*, 53 VILL. L. REV. 939, 943–44 (2008) (arguing that no basis exists to support permanent sealing of civil and criminal cases). See also Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHICAGO-KENT L. REV. 375, 383–88 (2006) (discussing whether discovery should be subject to public access).

142. “In the majority of states and districts, the rules governing sealing of judicial information come from judicial doctrine as opposed to rules of procedure.” Goldstein, *supra* note 141, at 385.

143. *Nixon v. Warner Commc’ns*, 435 U.S. 589, 598 (1978).

144. *Id.* These cases have included Clarence Clemons, the saxophonist in the E Street Band; rock guitarist Rick Derringer; Robert Selander, former chief executive officer of MasterCard; Paul Allair, former CEO of Xerox; Peter Bijur, former chairman of Texaco; and Vincent Camuto, founder of Nine West. See Eric Rich & Dave Altmari, *Elite Enjoy ‘Secret File’ Lawsuits*, HARTFORD COURANT (Feb. 9, 2003), <http://www.courant.com/hc-secrecy-0209-story.html> [<https://perma.cc/4HLR-3TLB>].

Courts have been quite willing to seal the divorce cases of the rich and famous.¹⁴⁵ Some of those who have had their civil cases sealed include Secretary of State John Kerry, and members of the Hearst family.¹⁴⁶ For those cases involving the rich and famous, there is a “very real trend toward litigants and courts acting as though the dissemination of basic, official information about a legal proceeding is an inherent evil that must be prevented.”¹⁴⁷ In addition, courts have sealed cases when “disclosure of such cases poses a greater risk to people of prominence than it would to others—their careers and incomes, and ultimately their families, could suffer.”¹⁴⁸

A 2008 survey conducted by the Federal Judicial Center of the Judicial Conference of the United States provides insight into the frequency of sealings in federal cases.¹⁴⁹ For the orders and decisions issued by the judges, the court permanently sealed 0.2% of the civil cases and 1.6% of the criminal cases.¹⁵⁰ The study found that civil cases were sealed for “one of two reasons: either they are qui tam actions filed under the False Claims Act, which requires that the cases be filed under seal, or they are sealed because one or both sides of the litigation want to keep facts in the case private.”¹⁵¹ The study also cited to one case where the federal court sealed the case to protect a party’s reputation.¹⁵²

Courts have historically recognized the sensitive nature of domestic cases, and the need to limit access to those cases. Until the early 1990s, most courts considered divorce cases private and the information in the case was “beyond the legitimate interests of the public.”¹⁵³ Some have argued that divorce files should be “presumptively private” and the person or entity seeking access

145. See *id.*

146. See Daniel Lombard, Comment, *Top Secret: A Constitutional Look at the Procedural Problems Inherent in Sealing Civil Court Documents*, 55 DEPAUL L. REV. 1067, 1067 (2006). The author notes, “‘the influential and connected are well represented among the beneficiaries’ of sealed court files.” *Id.* at 1091.

147. Theodore J. Boutros, Jr. & Michael H. Dore, *Celebrity Justice: A New Double Standard*, 22 COMM. LAW. 3 (2014).

148. Rich & Altmari, *supra* note 144.

149. See Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA’s Secret Docket*, 6 HARV. L. & POL’Y REV. 313, 316 (2012).

150. See *id.* at 316–17.

151. TIM REAGAN & GEORGE CORT, FEDERAL JUDICIAL CENTER, SEALED CASES IN FEDERAL COURTS, 30 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/\\$file/sealcafc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/$file/sealcafc.pdf) [<https://perma.cc/UGC7-DTCP>].

152. See *id.* at 9. The court sealed a malpractice case pending discovery to protect a doctor’s reputation. The study stated that “[a]lthough the judge is generally opposed to sealing cases, he saw no reason for these mere allegations to be public.” *Id.*

153. Laura W. Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Records Online*, 17 J. AM. ACAD. MATRIM. L. 45, 55 (2001).

should have the burden to show the necessity of the access.¹⁵⁴ This is because “unrestricted public access . . . could constitute a devastating intrusion on one’s personal right of privacy and possibly irreparable loss of reputation and status.”¹⁵⁵ While the public is entitled to know that their courts are fairly executing their judicial duties, “no legitimate purpose can be served by broadcasting the intimate details of a soured marital relationship.”¹⁵⁶ New York courts seal their divorce records for 100 years.¹⁵⁷ Parties in Virginia can file a request to seal their divorce records.¹⁵⁸

A. *The Proposed Sealing Remedy*

Judges decide seal to civil cases using one of three tests. The first test considers whether “a compelling interest” justifies the sealing and would be narrowly tailored.¹⁵⁹ In the second test, the court engages in a weighing process where it balances “the public interest in access against countervailing interests in privacy”¹⁶⁰ In the final test, a court may grant the sealing request if the requesting party makes “a showing of ‘good cause’”¹⁶¹

A recent CPO sealing case from the Ohio Supreme Court, *Schussheim v. Schussheim*,¹⁶² incorporates all of these tests and is a model that courts can adopt to seal CPO cases. The *Schussheim* court found that “a trial court has the inherent authority to grant an application to expunge and seal a record pertaining to a dissolved CPO in an adult proceeding when unusual and exceptional circumstances exist,” and when “the interests of the applicant outweigh the legitimate interest of the government to maintain the record.”¹⁶³

To fashion this remedy, the Ohio Supreme Court adopted a sealing remedy previously used in Ohio criminal cases.¹⁶⁴ It did so because “[t]he inherent

154. *Id.* at 63.

155. *Id.* at 54.

156. *Id.* at 55.

157. N.Y. DOM. REL. LAW § 235:4 (McKinney 2010).

158. See VA. CODE ANN. § 20-124 (2016).

159. Goldstein, *supra* note 141, at 385–86.

160. *Id.* at 386.

161. *Id.*

162. 998 N.E.2d 446, 447 (Ohio 2013). The *Schussheim* case involved a CPO order that the parties and court dismissed.

163. *Id.* at 447, 449.

164. “In *Pepper Pike*, 66 Ohio St.2d at 376–377, 421 N.E.2d 1303, we recognized that courts have inherent authority to expunge and seal criminal records in ‘unusual and exceptional circumstances’ and noted that the basis for the authority is the constitutional right to privacy.” *Schussheim*, 998 N.E.2d at 448. Ohio, twenty-eight other states, and Puerto Rico offer a judicial process to seal or expunge criminal convictions. OHIO REV. CODE ANN. §§ 2953.31 et seq (2010); ARK.

authority of a court to expunge and seal a record does not turn on whether a proceeding is criminal or civil.”¹⁶⁵

Similar to Ohio, a California court also applied a remedy typically used in California criminal cases to seal a CPO case.¹⁶⁶ In that case, a person sought the sealing by using California’s Petition for Factual Innocence.¹⁶⁷ The court had granted the petition in the criminal case where the person had been arrested for domestic violence, but never charged.¹⁶⁸ The civil court relied on the granting of the criminal petition to seal and destroy the CPO file, including the restraining order.¹⁶⁹

CODE ANN. §§ 16-90-1401 et seq. (2006); COLO. REV. STAT. § 24-72-308.8 (2016) (repealed in part); DEL. CODE ANN. tit. 11, § 4373 (2015); D.C. CODE ANN. §§ 16-803, 16-806 (West 2016); 20 ILL. COMP. STAT. 2630/5.2c (2014); IND. CODE ANN. §§ 35-38-9-5, 35-38-9-6 (West 2016); KAN. STAT. ANN. § 21-6614 (2015); KY. REV. STAT. ANN. §§ 431.078, 533.250–533.262 (LexisNexis 2010); LA. CODE CRIM. PROC. ANN. art. 971 (2016); MD. CODE ANN. CRIM. PROC. §§ 10-301 et seq. (LexisNexis 2015); MASS. GEN. LAWS ch. 276, § 100A; ch. 140, §122 (2014); MINN. STAT. § 609A.02 (2015); MISS. CODE ANN. § 99-19-71 (West 2015); NEV. REV. STAT. ANN. §§ 179.245, 179.285, 179.301 (LexisNexis 2011); N.H. REV. STAT. ANN. § 651:5 (2016); N.J. STAT. ANN. §§ 2C:52-1 et seq. (2005); N.M. STAT. ANN. § 30-31-28(D) (West 2016); N.Y. CRIM. PROC. LAW §§ 160.58, 216.00 et seq. (McKinney 2004); N.C. GEN. STAT. §§ 15A-145.5 (2015); N.D. CENT. CODE § 19-03.1-23(9) (2015); OKLA. STAT. tit. 22 § 18(10) (2016); 18 PA. CONS. STAT. § 9122 (2016); 234 PA. CODE §§ 490, 790 (2016); P.R. LAWS ANN. tit. 34, §§ 1725a-1 et seq. (2004); 12 R.I. GEN. LAWS §§ 12-1.3-1 et seq. (2015); S.C. CODE ANN. § 22-5-920(B) (2015); S.D. CODIFIED LAWS § 23-6-8.1 (2014); TENN. CODE ANN. § 40-32-101 (2016). For an excellent compilation of judicial expungement or sealing remedies available in the United States, see Margaret Colgate Love, *Resource Center: Restoration of Rights Project*, NAT’L ASSOC. CRIM. DEF. L. (2016), <http://www.nacdl.org/rightsrestoration/> [https://perma.cc/CLR2-WNRL]; see also Sahl, *supra* note 16.

165. *Schussheim*, 998 N.E.2d at 449. Since the *Schussheim* decision, two Ohio courts have addressed CPO sealing requests. In *Wetz v. Pomeroy*, No. CA2014-03-039, 2014 WL 6158910, at *1 (Ohio Ct. App., Nov. 17, 2014), the petitioner sought to seal three civil protection orders that had been dismissed at the request of the alleged victim. The court refused to seal the dismissals because the alleged victim did not support the dismissal and the perpetrator faced criminal charges. See *id.* at *2, at *3. In *Balsley v. Balsley*, No. CT2014-0009, 2014 WL 4629672 (Ohio Ct. App., Sept. 15, 2014), the petitioner requested that the court seal a dissolved ex parte CPO. The case was one of five cases the petitioner had filed requesting that the order be sealed. The court found no unusual or exceptional circumstances to warrant the sealing because the petitioner had been involved in five domestic violence cases in ten months, although none resulted in an order. The court decided that the conduct was relevant for future proceedings. See *id.*, at *2. Other state courts recognize their inherent authority to seal criminal records. These states include Alaska (*Farmer v. State*, 235 P.3d 1012, 1014 (Alaska 2010)), New York (*Barker v. Binninger*, 14 N.Y. 270, 278 (N.Y. 1856)); *Vanderbilt v. Schreyer*, 91 N.Y. 646, 648 (N.Y. 1880)), Minnesota (*State v. M.D.T.*, 831 N.W.2d 276, 279 (Minn. 2013)), and Pennsylvania (*Commonwealth v. Malone*, 366 A.2d 584, 589 (Pa. Super. Ct. 1976)).

166. See Brian Dinday, *You CAN Expunge a Civil Court Restraining Order Docket in California* (2008), <http://www.avvo.com/legal-guides/ugc/you-can-expunge-a-civil-court-restraining-order-docket-in-california> [https://perma.cc/X74G-JJ5V].

167. See *id.*

168. See *id.*

169. See *id.* The only other jurisdiction that discusses a remedy is Massachusetts. It has a court

The New Jersey courts, facing the same question, have reached a different conclusion. In the *Matter of M.D.Z.*,¹⁷⁰ the Superior Court of New Jersey considered whether to expunge records related to a domestic violence incident.¹⁷¹ It had resulted in Mr. Z's arrest, criminal charges, a civil restraining order, and a divorce action.¹⁷² The parties eventually reconciled and all of the cases were dismissed.¹⁷³

The trial court granted Mr. Z's expungement as to the criminal charges but not as to his civil actions.¹⁷⁴ While the appellate court agreed, it recognized that the trial court's order resulted in the "dichotomous treatment of criminal and civil records."¹⁷⁵ It also recognized that Mr. Z. might suffer stigma due to the domestic violence allegations.¹⁷⁶ Notwithstanding all of this, the court refused to expunge the civil domestic violence cases because the legislature had not permitted the remedy by statute.¹⁷⁷

This decision highlights the need to have courts acknowledge and use their inherent authority to seal CPO cases. Although the New Jersey court recognized that Mr. Z suffered collateral consequences from both his criminal and civil cases, it felt constrained to act in the civil case because the legislature had not spoken. The better result would have been for the New Jersey court to adopt the *Schussheim* weighing test to determine "whether 'unusual and exceptional circumstances' exist[ed] and whether the interests of the applicant outweigh[ed] the legitimate interest of the government to maintain the record."¹⁷⁸ It is very likely the court would have sealed the CPO case using the *Schussheim* rule.

B. Benefits of the Sealing Remedy

The sealing remedy recommended in this article, and its attendant weighing process, is a narrow remedy that allows the courts to treat each case on an

rule that allows impoundment of cases, including those with domestic violence orders. See *Boston Herald, Inc. v. Sharpe*, 737 N.E.2d 859, 870 (Mass. 2000) (reporting a court initially impounding domestic violence file but later vacating the order when the perpetrator faced criminal charges for killing his wife, and the information in the file already had been disclosed to the public).

170. 668 A.2d 423, 423 (N.J. Super. Ct. App. Div. 1995).

171. *Id.* at 423–24.

172. See *id.* at 424.

173. See *id.*

174. *Id.*

175. *Id.* at 425.

176. See *id.* at 426.

177. See *id.*

178. *Schussheim v. Schussheim*, 998 N.E.2d 446, 449 (Ohio 2013).

individual basis. It gives a court the opportunity to examine an individual perpetrator's need to have the case sealed. Providing process and a remedy to the perpetrator is not antithetical to the CPO process. As one author has noted,

[c]onsidering the interests of defendants is critical for victim advocates. Legal arguments that do not adequately address defendants' rights may reflect a view initially promoted by the battered women's movement, which often portrayed batterers as "villains." However, caricatured depictions of perpetrators of abuse do not correspond with either social science research indicating several different types of abusers or with the observations of abusers by other actors within the legal system, including judges.¹⁷⁹

The sealing remedy, with its case-by-case evaluation, allows the court to balance the perpetrator's need for the remedy with society's corresponding need, if any, to keep the case public.¹⁸⁰

The sealing remedy has another benefit that is unrelated to the perpetrator. The domestic violence victim may have a CPO order issued against her as well. This "mutual order" requires that both parties stay away from each other.¹⁸¹ As one author has noted, many victims do not oppose the mutual protection orders

179. Jessica Miles, *We Are Never Ever Getting Back Together : Domestic Violence Victims, Defendants, & Due Process*, 35 Cardozo L. Rev. 141, 197 (2013).

180. Miles, *supra* note 5, at 198. The *Schussheim* case is a perfect example to demonstrate the individualized approach and that not all cases will result in sealing. Upon remand, the trial court found Schussheim should not have his case sealed. *Schussheim v Schussheim*, No. CA2014-03-042, 2015 WL 1005340, at *1 (Ohio Ct. App. Mar. 9, 2015). The trial court concluded the state's interest in maintaining the record outweighed Schussheim's interest in having it sealed. The decision was driven by the fact that Schussheim had engaged in another incident with his daughter and his ex-wife no longer supported the sealing. *See id.* at *2.

181. "Mutual protection orders are civil protection orders that are entered against both parties." Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not*, 67 IND. L.J. 1039, 1053 (1992). Mutual protection orders arise because the perpetrator may argue that he was subject to domestic violence. There are strong reasons to issue mutual protection orders in only rare cases. *See id.* at 1060. "Victims often find the issuance of mutual protection orders humiliating and may believe they are being blamed for the violence." *Id.* at 1058. There are a number of reasons why respondents may request their own order. "Batterers may seek orders of protection in response to their victims' petitions for orders, with the hope that this will lead the judge to deny both petitions. They may seek orders to gain leverage over partners who are attempting to leave and obtain sole custody of the children. Or, in a race to the courthouse, batterers engaged in custody or divorce battles with their victims may attempt to obtain protection orders before their victims do in an effort to strengthen their own cases. Batterers who are facing criminal domestic violence charges may try to seek such orders in the hope that this will benefit their criminal defense." Emily J. Sack, *Battered Women & the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1682 (2004).

because the victims “may want to expedite the process, cooperate with the lawyer and the judge, and avoid violent reactions from their abusers.”¹⁸² Judges may also issue a mutual protection order even when the defendant does not request it.¹⁸³

Victims who are on the receiving end of a mutual CPO suffer the same lasting negative consequences as the perpetrators.¹⁸⁴ The CPO “prejudices the victim in future [civil protection order] proceedings.”¹⁸⁵ In addition, it “can be used in divorce proceedings, civil proceedings on domestic violence, and criminal proceedings against the abuser.”¹⁸⁶ The mutual CPO also affects custody and visitation issues.¹⁸⁷

The sealing remedy has another added benefit, it may encourage more victims to file CPO cases. Victims choose not to file CPOs for a number of reasons.¹⁸⁸ They involve some of the same reasons why victims do not call the police when an act of domestic violence occurs. Twenty-two states and the District of Columbia require the responding police officer to arrest the primary aggressor.¹⁸⁹ There is ongoing debate about the value of mandatory arrest policies for perpetrators of domestic violence.¹⁹⁰ One of the leveled criticisms is

182. Topliffe, *supra* note 180, at 1055.

183. *See id.* “The VAWA of 1994 [18 USCS § 2265(c) (1994)] contains a provision specifically denying mutual orders full faith and credit by other states if there has been no cross-petition or counterpetition filed by the respondent, or if such a petition has been filed, but the judge has not made specific findings that each party is entitled to an order. Despite this provision, state judges have persisted in issuing these mutual orders without meeting the federal full faith and credit requirements.” Sack, *supra* note 180, at 1683.

184. Topliffe, *supra* note 180, at 1062.

185. *Id.* at 1061.

186. *Id.* at 1062.

187. *See id.*; *see also* Sack, *supra* note 180, at 1683.

188. These reasons may be tied to their desire to continue to maintain the relationship with the perpetrator and include “safety, children, religion, economics, immigration status, community support and love.” Leigh Goodmark, *Healthy Alternatives to Prosecution Can Help Victims*, N.Y. TIMES (Sept. 11, 2014), <http://www.nytimes.com/roomfordebate/2014/09/10/going-after-abusers-like-nfl-player-ray-rice/healthy-alternatives-to-prosecution-can-help-victims> [<https://perma.cc/5TPK-XX6Y>].

189. Johnson, *supra* note 115, at 158.

190. *See* Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 VIOLENCE AGAINST WOMEN 65, 67 (2014).

Proponents of mandatory policies argue that mandatory policies are necessary because they require otherwise reluctant prosecutors to follow through with prosecution; ensure uniform treatment of domestic violence crimes even when the victim does not cooperate or want the criminal case to proceed; remove the burden of choosing whether to prosecute from the victim; and reduce racial discrimination in the criminal justice system by seeking to ensure that all perpetrators, regardless of race, are treated similarly.

that “victims hesitate reporting their abuse because of perceived pressures by the legal system for victims to leave their significant other and to support prosecution.”¹⁹¹

There may be racial issues as well. Mandatory arrest involves more people from “lower-income and minority-group households.”¹⁹² For a woman of color, calling 911 for help may mean exposing the perpetrator to what is seen as a “racist penal system.”¹⁹³ The women “perceive that reporting violence in the African-American community is an opportunity for the public to use the information to reinforce negative stereotypes of the African-American community.”¹⁹⁴

A victim may be more willing to report an incident of domestic violence if she knew the perpetrator could seal the CPO case at its conclusion to avoid the “negative stereotypes.”¹⁹⁵

Even victims who want to seal their filed CPO case do not find an easy path. Rebecca Hulse surveyed courts in Arizona, Colorado, Washington D.C., Illinois, New York, and Rhode Island to determine the efficacy of the sealing process for the victim.¹⁹⁶ Although the courts surveyed allowed victims to file

Carey & Solomon, *supra* note 115, at 222. By contrast, opponents of the mandatory arrest believe that these policies do not serve the larger goal of ending domestic violence, deny the needs of individual victims, and even replace the control of the abuser with the control of the state. Opponents are concerned that these universally applied strategies do not account for the reasons women stay in abusive relationships; ignore superseding financial, cultural, or emotional issues; force a decision on victims without taking into account their individual needs; and disempower victims and strip them of their autonomy.

Id. Studies also show that “revictimization is a widely documented result of forced victim participation.” Han, *supra* note 116, at 184.

191. Novisky & Peralta, *supra* note 189, at 67. This study also found that those victims who contacted the police to report the domestic violence were more likely to have a perpetrator who used drugs or alcohol. *Id.* at 77. Studies also show that married victims who live with their spouse are unlikely to report the abuse. See Jeffrey Ackerman & Tony P. Love, *Ethnic Group Differences in Police Notification About Intimate Partner Violence*, 20 VIOLENCE AGAINST WOMEN 162, 177 (2014).

192. Schmidt & Sherman, *supra* note 59, at 602. See Buzawa & Buzawa *supra* note 59, at 125 (Raising three critiques of mandatory arrest policy; it does not work, it is inhumane, and the very people who it is trying to protect, do not want it.).

193. Johnson, *supra* note 115, at 165.

194. Lisa M. Martinson, Comment, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN’S L.J. 259, 264 (2001). The author also notes the other issues that women of color consider before reporting an incident of domestic violence including “the African-American race image as a whole, the position of African-American men, the view of African-American families, their economic situation, and the system’s responsiveness if they do make a call for help.” *Id.* at 263.

195. *Id.* at 264.

196. The specific courts surveyed were as follows: Pinal County, Arizona; Denver County, Colorado; Washington, D.C.; Cook County, Illinois; Brooklyn, New York; and the Rhode Island Family

a motion to seal, Hulse found that it was very difficult for the victim to secure the order to seal.¹⁹⁷ This was particularly true if there was an accompanying criminal case.¹⁹⁸

Victims, like the perpetrators, could benefit from a clear and articulable test that would allow them to seal cases.¹⁹⁹ The *Schussheim* test provides sufficient guidance to courts and encompasses a straightforward standard that allows the court to engage in a thoughtful weighing process that considers the interest of the victim and the perpetrator.²⁰⁰

This Article's sealing remedy would only apply to those cases where there is no longer an active order—either a once-issued order that has expired, or a case has been terminated by either the victim or the court. If the CPO case has no active order, there is no legitimate purpose for the public to have access to it.

It is important to note that the sealing remedy urged in this article need not be irrevocable. There may be cases where the court or law enforcement may need access to the sealed order. For example, if there were another domestic violence incident it would be important for a court to have access to the information.²⁰¹ The sealing remedy proposed in this article is based on a trial court's inherent authority to apply this remedy. This same inherent authority would

Court. See Hulse, *supra* note 126, at 273, n.216.

197. See *id.* at 274.

198. See *id.*

199. In *Schussheim*, the Court found the victim's support of the sealing request gave rise to the "unusual and exceptional circumstances." *Schussheim v. Schussheim*, 998 N.E.2d 446, 447 (Ohio 2013).

200. The *Schussheim* case is a perfect example of this individualized assessment, and that not all cases should be sealed. Upon remand the trial court found *Schussheim* should not have his case sealed. See *Schussheim v. Schussheim*, No. CA2014-03-042, 2015 WL 1005340, at *1 (Ohio Ct. App. Mar. 9, 2015). The trial court concluded the state's interest in maintaining the record outweighed *Schussheim*'s interest in having it sealed. The decision was driven by the fact that *Schussheim* had engaged in another incident with his daughter and his ex-wife no longer supported the sealing. See *id.* at *2.

201. Courts considering whether to grant a CPO commonly admit evidence of prior abuse between the parties. See Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 415 (2015). The courts may also use this evidence for visitation or custody decisions. See Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 58 (2000). It would be easy for the petitioner to alert the court to a sealed order. "Many protection order statutes, for example, include a directive to the petitioner to include the incidents of past abuse." *Id.* At 57. In Ohio, the civil protection order application asks the petitioner to disclose any known court cases involving the respondent—including civil protection order cases. See The Supreme Court of Ohio & The Ohio Judicial System, DOMESTIC VIOLENCE PROTECTION ORDER FORMS, http://www.supremecourt.ohio.gov/JCS/domesticViolence/protection_forms/DVForms/default.asp [<https://perma.cc/9ZK6-VP7N>] (last visited Feb. 7, 2017).

give the court the power to unseal a case if circumstances warranted it.

There are other process-laden reasons to adopt the sealing remedy, particularly for those cases where only an ex parte order once existed. The court issues an ex parte order in a proceeding where the perpetrator does not appear to defend the allegations.²⁰² There are other areas of the law where allegations, unproven in trial, remain sealed from public view.

Most states seal arrest records that did not result in a conviction.²⁰³ These states recognize that an arrest, without a conviction, can result in harmful collateral consequences to the individual involved.²⁰⁴ Similarly, courts shield testimony given in a grand jury proceeding.²⁰⁵ They do so because of the concern that unproven accusations before the grand jury may become public to the detriment of the accused.²⁰⁶

A sealing remedy is the most effective way to address the collateral consequences faced by all of those once subject to a CPO. They are not fortunate enough to be one of the celebrities in this country who seem to be immune to the scourge of collateral consequences stemming from an incident of domestic violence.²⁰⁷ No one exemplifies this immunity more than professional athletes do.

There have been numerous professional athletes who have been accused of

202. See Stoeve, *supra* note 1, at 1073.

203. See Fruzan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 32 (2008). These states include: Alaska, Arkansas, California, Colorado, Connecticut, D.C., Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wyoming. See *id.* At 32, n.142.

204. *Id.* at 32.

205. See Lombard, *supra* note 146, at 1092.

206. *Id.* “[B]y preserving the secrecy of the [grand jury] proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.” *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 (1979).

207. See Boutrous & Dore, *supra* note 147, at 3. (“The symbolic figure of Blind Justice presides over courthouses throughout the country. Inside the courtroom, however, there is a growing trend to apply two different standards of justice: one for celebrities and one for everybody else.”).

committing an act of domestic violence.²⁰⁸ Some have suffered either no professional consequences,²⁰⁹ or limited consequences.²¹⁰ Most have been able to

208. In the five-year period, January 1989 to 1994, fifty-six current or former professional football players were accused of domestic violence. See Brant Webb, *Unsportsmanlike Conduct: Curbing the Trend of Domestic Violence in the National Football League and Major League Baseball*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 741, 742–43 (2012); see also, e.g., The Associated Press, *NHL: Kings Goalie Prospect Faces Domestic Violence Charges*, HAIDA GWAII OBSERVER (Nov. 18, 2015), <http://www.haidagwaiobserver.com/national/sport/351510231.html?mobile=true> [<https://perma.cc/V8TP-NH5J>]; Sneha Shankar, *Ronda Rousey Takes a Dig at Floyd Mayweather's Domestic Violence Record at ESPY Awards*, IB TIMES, (July 16, 2015), <http://www.ibtimes.com/ronda-rousey-takes-dig-floyd-mayweathers-domestic-violence-record-espys-awards-2011340> [<https://perma.cc/9YY8-5BBP>]; Associated Press, *Shock's Johnson Pleads Not Guilty in Domestic Violence Case*, USA TODAY (July 15, 2015), <http://www.usatoday.com/story/sports/wnba/2015/07/15/shocks-johnson-pleads-not-guilty-in-domestic-violence-case/30197675/> [<https://perma.cc/B7M5-LMKL>]; Tribune Wire Reports, *Ex-Bear Ray McDonald Charged with Domestic Violence*, CHICAGO TRIBUNE (July 9, 2015), <http://www.chicagotribune.com/sports/football/bears/ct-ray-mcdonald-charged-20150709-story.html> [<https://perma.cc/7EXU-A2FU>]; L.A. Kings' Slava Voynov Pleads No Contest in Domestic Violence Case, REUTERS (July 2, 2015), <http://ca.reuters.com/article/sportsnews/idcackn0pc2n220150702> [<https://perma.cc/25NK-XZJX>]; Josh Peter, *Hope Solo's Domestic Violence Case Reinstated*, USA TODAY (Oct. 2, 2015), <http://www.usatoday.com/story/sports/soccer/2015/10/02/hope-solo-domestic-violence-case-reinstated/73218200/#> [<https://perma.cc/Q2JV-BLGC>]; Kyle Fredrickson, *Former Cowboy Tyreek Hill Receives New Legal Representation in Domestic Violence Trial*, THE OKLAHOMAN (July 17, 2015), <http://newsok.com/article/5434485> [<https://perma.cc/YT75-SE4U>]; *Glory Johnson Pleads Not Guilty in Domestic Violence Case Involving Ex-Brittney Griner*, N.Y. DAILY NEWS (July 15, 2015), <http://www.nydailynews.com/sports/basketball/glory-johnson-pleads-not-guilty-domestic-violence-case-article-1.2293307> [<https://perma.cc/MGJ9-SGBB>]; Matt Bonesteel, *Horrific Details Emerge from Greg Hardy's Domestic-Violence Case*, WASH. POST (Nov. 6, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/11/06/horrific-details-emerge-from-greg-hardys-domestic-violence-case/> [<https://perma.cc/J354-LFJG>]; Rich Hammond, *Kings Suspend Prospect Bartosak After Domestic-Violence Charges*, ORANGE COUNTY REG. (Nov. 15, 2015), <http://www.ocregister.com/articles/kings-692637-prospect-domestic.html> [<https://perma.cc/T5YR-9YSJ>]; Ryan Grenoble, Ryan Grenoble, *NFL Won't Discipline Johnny Manziel In Domestic Violence Case*, HUFFINGTON POST (Nov. 18, 2015), http://www.huffingtonpost.com/entry/johnny-manziel-nfl-domestic-violence-discipline_us_564bb0ace4b045bf3df19643 [<https://perma.cc/CRY8-99T7>]; Jade Walker, *Rockies Shortstop Jose Reyes Arrested for Domestic Violence*, HUFFINGTON POST (Nov. 10, 2015), http://www.huffingtonpost.com/entry/jose-reyes-arrest-domestic-violence_us_56418ac1e4b0307f2caecfd3 [<https://perma.cc/E9D8-MHBC>]; Mike Bates, *Jose Reyes' Arrest For Domestic Violence Puts MLB In The Spotlight*, NPR (Nov. 11, 2015), <http://www.npr.org/2015/11/11/455657466/jose-reyes-arrest-for-domestic-violence-puts-mlb-in-the-spotlight> [<https://perma.cc/73AZ-SCEY>]; Christine Brennan, *Ray Rice Deserves Second Chance in NFL*, USA TODAY (Aug. 5, 2015), <http://www.usatoday.com/story/sports/nfl/2015/08/05/ray-rice-domestic-abuse-video-espn-free-agent/31191227/> [<https://perma.cc/6XW9-ZAA8>].

209. The players include the following: Harvey Armstrong, Scott Davis, Mark Gastineau, Vance Johnson, Clarence Kay, Lorenzo Lynch, Warren Moon, Freddie Joe Nunn, Gerald Perry, Aaron Wallace, Dan Wilkinson, Otis Wilson, and John Stephens. See Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS AND ENT. L. 146, 171–72 (2010). Other athletes include: boxer Mike Tyson (see Associated Press, *Robin Took Best Punch, Tyson Says in Biography*, L.A. TIMES (June 23, 1989), <http://articles.latimes.com/1989-06->

23/sports/sp-2706_1_tyson-s-managers-tyson-friend-jose-torres-robin-givens [https://perma.cc/5Y6N-AV6F]); baseball player Francisco Rodriguez (see Chuck Schilken, *Francisco Rodriguez Arrested for Domestic Violence Last Month*, L.A. TIMES (Oct. 13, 2012), <http://articles.latimes.com/2012/oct/13/sports/la-sp-sn-francisco-rodriguez-krod-20121013> [https://perma.cc/3N8Q-F5BJ]); basketball player Lance Stephenson (see John Lauinger, *Lance Stephenson, Indiana Pacers NBA player, Arrested for Pushing His Girlfriend Down the Stairs*, N.Y. DAILY NEWS (Aug. 16, 2010), <http://www.nydailynews.com/news/crime/lance-stephenson-indiana-pacers-nba-player-arrested-pushing-girlfriend-stairs-article-1.204174> [https://perma.cc/KW4P-KJW3]; see also Tom Ziller, *The NBA's Domestic Violence Policy Must Improve*, SB NATION (Nov. 21, 2014), <http://www.sbnation.com/nba/2014/11/21/7258891/nba-domestic-violence-jeff-taylor-michele-rob-erts> [https://perma.cc/G46F-T372]); football player Mark Fields (see Jackee Coe, *Former NFL player Mark Fields arrested in Goodyear*, AZ REPUBLIC (Aug. 11, 2010), <http://archive.azcentral.com/news/articles/2010/08/10/20100810goodyear-mark-fields-arrested.html> [https://perma.cc/6DMP-KHSC]); football player Phillip Merling (Steve Eder, *Tackling the Story of Domestic Abuse and the N.F.L.*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes.com/times-insider/2014/11/21/tackling-the-story-of-domestic-abuse-and-the-n-f-l/?_r=0 [https://perma.cc/YUA3-JBLL]); basketball player Jason Kidd (see Withers, *supra* note 208, at 167); football player Greg Hardy (see Michael Gordon, Joseph Person & Jonathan Jones, *Panthers Greg Hardy Guilty of Assaulting Female, Communicating Threats*, CHARLOTTE OBSERVER (July 15, 2014), <http://www.charlotteobserver.com/news/local/crime/article9140591.html> [https://perma.cc/J6W9-RUV5]); boxer Floyd Mayweather (see Tony Manfred, *Floyd Mayweather Has a Disturbing History of Domestic Violence*, BUS. INSIDER (Apr. 25, 2014), <http://www.businessinsider.com/floyd-mayweather-domestic-violence-history-2015-4> [https://perma.cc/P7NV-6ARX]); hockey player Semyon Varlamov (see Jordan Steffen, *Avs' Semyon Varlamov's Ex-Girlfriend Claims Years of Abuse in Lawsuit*, DENVER POST (Oct. 27, 2014), http://www.denverpost.com/news/ci_26809855/avs-semyon-varlamovs-ex-girlfriend-claims-years-abuse [https://perma.cc/2ZFA-DGEQ]); baseball player Brett Myers (see Webb, *supra* note 207, at 749–51 (Myers “was treated as a celebrity by court officers, who shook his hand and patted him on the back”)); baseball player Elijah Dukes (see Withers, *supra* note 194, at 162–63); baseball player Milton Bradley (see Tessa Berenson, *MLB Player's Violent Marriage Sheds Light on Domestic Abuse*, TIME (Apr. 9, 2015), <http://time.com/3815728/milton-bradley-domestic-violence/> [https://perma.cc/M4LY-JDB2]); and basketball player Lance Stephenson (see Larry Celona & Christina Carrega, *Former HS Hoops Star Busted for Allegedly Pushing Baby Mama Down Stairs*, N.Y. POST (Aug. 16, 2010), <http://nypost.com/2010/08/16/former-hs-hoops-star-busted-for-allegedly-pushing-baby-mama-down-stairs/> [https://perma.cc/643J-3L84]).

210. The players include the following: football player Ray Rice (see Justin Worland, *Roger Goodell Defends Ray Rice's 2-Game Suspension*, TIME (Aug. 1, 2014), <http://time.com/3072840/roger-goodell-ray-rice-suspension-nfl/> [https://perma.cc/NY29-D2ZH] (suspended two games)); hockey player Slava Voynov (see Nathan Fenno, *Kings' Slava Voynov Pleads No Contest in Deal in Domestic Violence Case*, L.A. TIMES (July 2, 2015), <http://www.latimes.com/sports/sportsnow/la-sp-sn-slava-voynov-pleads-no-contest-domestic-violence-case-20150702-story.html> [https://perma.cc/5FR2-D8XR]) (indefinitely suspended but still receiving his salary after assaulting his wife)); basketball player Jared Sullinger (see David Abel & John R. Ellement, *Jared Sullinger Domestic Violence Charges Dismissed; Woman Refused to Testify Against Celtics Player*, BOSTON GLOBE (Oct. 28, 2013), <http://www.boston.com/2013/10/28/domestic-violence-charges-against-boston-celtics-player-jared-sullinger-dismissed-woman-refused-testify-against-him/mq6ofnF7f99ckEmwIJQypI/story.html> [https://perma.cc/JD6G-L9QW]) (suspended one game after pushing his girlfriend)); basketball player Ron Artest, (suspended for seven games after assaulting his wife; see Withers, *supra* note 208, at 167; Associated Press, *Artest is Allowed to Return to the Kings*, L.A. TIMES (Mar. 11, 2007), <http://articles.latimes.com/2007/mar/11/sports/sp-nbarep11> [https://perma.cc/6LX2-7G7C]); and Dallas Cowboys defensive end Greg Hardy described as

continue with their professional careers as if the act of domestic violence had not occurred. Most recently, the National Football League faced intense criticism over its handling of a domestic violence incident involving Ray Rice.²¹¹ Notwithstanding his act of domestic violence, Ray Rice was reinstated to play football just one year after his act was captured on camera and viewed by millions of people.²¹²

Even the Ohio Supreme Court's decision in *Schussheim* hints at the caste system of collateral consequences. Schussheim described himself as an "upstanding citizen" with "an unblemished criminal record."²¹³ Schussheim explained in his court documents that he was a manager for a Fortune 500 company.²¹⁴ Would the Ohio Supreme Court have reached the same conclusion and sealed his dismissed CPO if he had not been such a powerful and prominent citizen? The answer to this question might lie in a case the Ohio Supreme Court decided in the same term as the *Schussheim* case.

In *State v. Boykin*,²¹⁵ the Ohio Supreme Court had to decide if it would apply the sealing remedy—the same as it had applied in *Schussheim*—to someone who had received a full and unconditional gubernatorial pardon of her criminal convictions.²¹⁶ Boykin sought a pardon, and the subsequent sealing, to assist her with the collateral consequences of her convictions.²¹⁷ The governor granted her a full and unconditional pardon of her convictions in November 2009.²¹⁸ This pardon, under Ohio law, "releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent on his conviction."²¹⁹

Armed with this information, Boykin sought to seal her convictions using

"woman-beating abuser." Justin Block, *Greg Hardy's Domestic Violence Record Expunged by Judge*, HUFFINGTON POST (Nov. 11, 2015), http://www.huffingtonpost.com/entry/greg-hardy-domestic-violence-expunged_us_563cb211e4b0411d307098d2 [https://perma.cc/QWN6-YAGP].

211. See Ray Sanchez, *NFL's Goodell: I'm Staying: 'We will get our house in order' on Domestic Violence*, CNN (Sept. 19, 2014), <http://www.cnn.com/2014/09/19/us/goodell-domestic-violence/index.html> [https://perma.cc/DQH3-GP6D].

212. See Tom Goldman, *NFL's Effort to Combat Domestic Violence May Go For the Long Game*, NPR (Aug. 12, 2015), <http://www.npr.org/2015/08/12/431567185/nfls-effort-to-combat-domestic-violence-may-go-for-the-long-game> [https://perma.cc/2NB9-YU78].

213. See *Schussheim v. Schussheim*, No. CA2014-03-042, 2015 WL 1005340, at *1 (Ohio Ct. App. Mar. 9, 2015).

214. Trial court documents in *Schussheim v. Schussheim*, on file with author.

215. 4 N.E.3d 980, 980 (Ohio 2013). The author represented Boykin in her Ohio Supreme Court case.

216. See *id.* at 981.

217. See *id.*

218. See *id.*

219. *Id.* at 984.

the sealing remedy recognized and used by the Ohio Supreme Court in the *Schussheim* case.²²⁰ The Ohio Supreme Court rejected Boykin's argument that the pardon should lead to an automatic sealing of her pardoned convictions.²²¹ The court rejected the argument, in large measure, because the Ohio legislature had not created a statutory remedy for pardoned convictions.²²²

The Ohio Supreme Court found no such obstacle in the *Schussheim* case. The court acknowledged that the Ohio legislature had not adopted a sealing remedy for CPO cases.²²³ However, unlike *Boykin*, the *Schussheim* court did not use the lack of legislative will to prevent it from constructing a sealing remedy; instead, the court decided that a trial court could use its inherent authority to seal a dismissed CPO case.²²⁴

Was Boykin's argument so different from *Schussheim*'s that it merited a different result? Conversely, was the fact that *Schussheim* was a prominent citizen with "no criminal record" the real difference? Boykin had certainly committed her criminal offenses, but she had received a gubernatorial pardon for those convictions. It could be that the Ohio Supreme Court's decision was based on the divergent paths *Schussheim* and *Boykin* travelled to the courthouse steps.

Whatever motivated the court's decisions, both cases highlight how hard it is for a perpetrator to get past what he or she has done, whether it is a criminal offense or an act of domestic violence. The collateral consequences continue to plague the perpetrator.

V. CONCLUSION

Civil domestic violence filings generate over a million CPOs each year.²²⁵ Even when the CPO case is no longer active, the perpetrator continues to suffer stigma and prejudicial legal consequences.²²⁶ Courts need to adopt a sealing remedy to end these collateral consequences.

Suggesting a sealing remedy is not without controversy. It may raise concern that domestic violence victims and their experiences are unimportant. But

220. *See id.* at 985.

221. *See id.* at 985, 988.

222. *See id.* at 988 ("It is within the purview of the General Assembly to provide that automatic entitlement to sealing of a criminal record is a consequence of a pardon. But in the absence of such a provision, we hold that a gubernatorial pardon does not automatically entitle the recipient to have the record of the pardoned conviction sealed.").

223. *Schussheim v. Schussheim*, 998 N.E.2d 446, 449 (Ohio 2013).

224. *Id.* at 449.

225. *See Sheeran & Meyer, supra* note 6, at 3.

226. *See supra* Part III.B.

this article is not about forgetting the victims of the domestic violence. Rather, it recognizes that a sealing remedy may be beneficial to perpetrators and to victims. For those victims who have chosen to end a case, or to allow an order to expire, the collateral consequences of that order should end as well.

The sealing remedy allows those perpetrators who want to have a chance to be contributing members of their communities. “People grow and change, and disclosures of information from their past can inhibit their ability to reform their behavior, to have a second chance, or to alter their life’s direction.”²²⁷

This is particularly true for those CPO perpetrators who seek employment. Without income, the perpetrator cannot support his family and provide stability to them, even if he is living separately from his family. Children greatly suffer the effects of the unemployment. “When it comes to family stability—regardless of whether the parents are married, cohabitating, single, or in another type of family arrangement—children whose families experience unemployment are more likely to face a destabilizing change”²²⁸ This is important because research suggests that “instability seems to matter more than family structure for [children’s] cognitive and health outcomes”²²⁹ A sealing remedy for inactive CPO cases is a step to provide that stability.²³⁰

It has been difficult in our society to offer true forgiveness to those who have committed acts condemned by society. Nevertheless, there is great power and redemption in forgiveness. The greatest example is the church shootings that occurred in Charleston, South Carolina on July 6, 2015.²³¹ The gunman, a self-proclaimed white racist, took aim at a black church, Emmanuel African Episcopal Methodist, murdering nine parishioners.²³² At the time of the shootings, the families of those victims responded not with anger and vengeance, but mercy. As one of the newspapers reported, a “daughter of one victim told an interviewer that everyone, including the killer, deserves a ‘second chance.’”²³³ The reporter further noted that this forgiveness is “a contrast to our political culture.”²³⁴

227. Jones, *supra* note 127, at 408–09.

228. Vallas et al., *supra* note 16, at 13.

229. *Id.* “Policies that help adults as both parents and workers can have a profound effect on a child’s long-term outlook and well-being.” *Id.* at 15.

230. See Sahl, *supra* note 16, at 433. See Vallas et al., *supra* note 16, at 14.

231. See Karen Workman & Andrea Kannapell, *The Charleston Shooting: What Happened*, N.Y. TIMES (June 18, 2015), http://www.nytimes.com/2015/06/18/us/the-charleston-shooting-what-happened.html?_r=0 [https://perma.cc/KCZ9-ZKG4].

232. See *id.*

233. Michael Gerson, *The Power of Forgiveness in Charleston*, WASH. POST (June 22, 2015), http://www.washingtonpost.com/opinions/the-power-of-forgiveness/2015/06/22/a331c77e-190d-11e5-bd7f-4611a60dd8e5_story.html [https://perma.cc/E229-DE9Q].

234. *Id.*

It is time to give a second chance to domestic violence perpetrators. This second chance will occur only if a remedy exists to seal CPO cases.