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Redefining Harm, Reimagining Remedies and Reclaiming Domestic Violence Law

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**REDEFINING HARM, REIMAGINING REMEDIES AND RECLAIMING
DOMESTIC VIOLENCE LAW**

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Abstract

Women subjected to domestic violence are disserved by the civil domestic violence laws that should effectively address and redress their harms. The Civil Protective Order [CPO] laws should remedy all domestic abuse and not solely physical violence or criminal acts. All forms of abuse, including psychological, emotional, economic and physical abuse, cause severe emotional distress, physical harm, isolation, sustained fear, intimidation, poverty, degradation, humiliation, and coerced loss of autonomy. Moreover, all abuse is interrelated, because, as researchers have demonstrated, most domestic violence is the fundamental operation of systemic oppression through the exertion of power and control. Given the effectiveness of CPOs in rebalancing the power in a relationship and decreasing abuse, this remedy should be available to all women subjected to domestic violence. This article proposes recrafting the civil law to provide a remedy for all harms of domestic violence and its operation of systemic power and control over women. Re-centering the narrative of domestic violence on this oppression rather than merely physical violence and criminal acts underscores the critical role of women's agency and autonomy in legally remedying domestic violence, a role that is too often ignored by outside actors who choose to "save" women's lives rather than effectuate women's choices around the abuse in their relationships.

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VANESSA

Mark restricted Vanessa's access to money and employment. At home, Mark kept all household supplies and toiletries under lock and key. If Vanessa or her three children needed anything they had to prove to him it was necessary and only then would he unlock a cabinet and provide them with it. This included tooth paste. Tampons. Laundry detergent. At dinner, Mark told the children to ignore their mother because Vanessa was too stupid to be able to understand their conversations. Instead, Mark told them she was there simply to make the food and serve it.¹

KIM

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

SUSAN

*Susan stands at attention. Her husband Ulner reclines in a living room chair. Ulner has ordered their son to videotape the entire encounter. Ulner tells Susan "Look at me bitch." "You play those stupid games with me, I'll knock your teeth outta your face." You act like a **** in front of the kids." "You little slut." "If I see a dog chewing your ass up I won't stop it. I won't stop it." "I don't want to see your stupid ass crooked self. You stupid ass heifer." He directs his son "Zoom in on that heifer. Zoom in. Do you see a tear?" Ulner then yells at Susan "You don't know what to do. Look at your stupid ****. Look at the way you look!" What prompted Ulner to say these things? Susan had come in to ask Ulner what he wanted for lunch and Ulner accused Susan of provoking him. Later, he threw her on the bed in their room and slapped, hit and attempted to strangle her while still demanding their son to videotape.³*

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

² http://www.oprah.com/tows/slide/200410/20041005/slide_20041005_101.jhtml (last visited 7/22/2008).

³ <http://abcnews.go.com/Primetime/story?id=2608738&page=1> (language excluded from original source). On October 26, 2006, the ABC news show 20/20 reported that for years, a 42-year old woman identified only as Susan had been subjected to abuse by her husband Ulner, with whom she had three children. <http://abcnews.go.com/Primetime/story?id=2608738&page=1> In the videotape Ulner forced his son to film, Ulner engaged in "verbal flogging" of Susan for a prolonged period

INTRODUCTION

Vanessa, Kim and Susan were subjected to domestic violence, including systematic hitting, degradation, humiliation, threats, coercion and financial deprivation. Nonetheless, much of the brutality of their experiences is unrecognized by the law and they may not seek protection from it.⁴ In most states, Vanessa and Kim have no legal systematic recourse under the civil domestic violence laws, known as civil protective order [CPO] laws, to address the serious abuse to which they are subjected. As Kim states, she believes there is no remedy without physical violence. Without a civil remedy, Mark's control over the monetary resources and Vanessa's ability to seek employment will continue, making Vanessa's economic dependence on him more entrenched. In addition, Mark will continue to alienate the children from their mother. Susan may obtain a CPO for the physical abuse to which she is subjected, but in most jurisdictions Susan will have no remedy for the emotional and psychological abuse. She will be ineligible for an order requiring the return of the videotape, enjoining the name calling, degradation, and future video recordings or other relief necessary to address the wide range of her husband's abusive behavior. In order to have a comprehensive civil legal system that tackles the fundamental harms of domestic violence, Vanessa, Kim and Susan should have equal access to the potential benefits of the CPO laws in order to address their serious multifaceted abuse.

of time. ABC News obtained this videotape and showed it on the air along with interviews of Susan. For perhaps the first time, systematic emotional and psychological abuse were seen and undeniable to the American public. Although Ulner had also subjected Susan to physical abuse, Susan told the authorities about Ulner's abuse after this videotaping incident because he had involved the children in his humiliation of her.

⁴ This paper focuses on women subjected to male-perpetrated domestic violence because the research shows that it is the most prevalent type of domestic violence. See Joan B. Kelly and Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 481-482 (2008) (identifying women more harmed than men by "Coercive Controlling Violence," physical and emotional violence characterized by power and control). This focus should not serve to ignore the fact that women perpetrate domestic violence and that domestic violence occurs in same sex relationships. *Id.* In addition, this article relies on early feminist thought regarding domestic violence. The inclusion of this theory is intended to highlight the broad theories of subordination and not to maintain an essentialist view of women as white, middleclass and straight. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

CPO laws, which exist in all fifty states and the District of Columbia, permit petitioners to obtain orders addressing the abuse in their intimate relationships.⁵ These statutes provide expedited hearings and relief.⁶ The relief available includes injunctive relief, such as ordering the cessation of abuse, counseling, or limitations on physical or other contact between the parties; family relief, such as custody and child support; and monetary relief, including compensation for resulting medical or psychological treatment.⁷ Women find CPO hearings to be a forum to hold the abuser accountable.⁸ In addition, CPOs can serve as necessary legal support for other more permanent relief, such as custody, child support and employment.⁹ Studies have shown that protective orders are effective in reducing the abuse and increasing the woman's satisfaction with her relationship.¹⁰ The civil system hence permits the petitioner to rearrange her relationship with the person abusing her.¹¹ Such a rearrangement has legal authority and legal ramifications if disobeyed. This is important because it enables the woman to avoid the harm of abuse while deciding whether and how to maintain her relationships.

Yet, in most states, the CPO remedies are available only to those who are subjected to physical violence¹² or other acts that would constitute a crime under state law. This is a narrow view of what constitutes actionable domestic violence, which deprives women, like Vanessa and Kim, of a remedy. Although they were subjected to serious non-physical abuse,¹³ including psychological, emotional and economic abuse, the laws

⁵ The civil protective order laws are discussed in more depth *infra* Part I.c. Although each state has a different law, in general each contains a definition for actionable domestic violence or abuse and provides various remedies to address the abuse. *Id.*

⁶ See *infra* text accompanying note 136.

⁷ The remedies available under CPOs are explained at length *infra* text accompanying notes 140-145.

⁸ See *infra* Part II.c.

⁹ See *infra* text accompanying notes

¹⁰ See e.g. Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 J. GENDER, SOC. POL'Y & LAW 501, 513 (2003) (protective order petitioners citing satisfaction with temporary protective orders) and *infra* Part I.b.

¹¹ PETER FINN AND SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 33 (1990) (stating that judges find a CPO to be effective if the order includes all the statutorily-permitted relief a petitioner needs in order to protect against future abuse given her particular situation).

¹² For a discussion of the civil protective order laws' fixation of physical violence see Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J. OF LAW AND FAMILY STUDIES (forthcoming Fall 2008) (manuscript on file with author).

¹³ Rather than using the term "battered women" or "abused women" I am using the

generally make a meaningful civil remedy unavailable.¹⁴ As a result, many women subjected to abuse are *de jure* excluded from relief despite their harm.

Ironically, the law's narrow focus on physical violence even deprives women subjected to comparatively non-severe physical abuse of a remedy. For example, women, like Susan, who have a legal remedy for their physical abuse under the plain language of the statute may be *de facto* excluded from relief because courts often only order a remedy for the domestic violence they view as necessitating the courts' "saving" of lives.¹⁵ Therefore, if the physical violence is not seen as severe enough, courts are wary to provide any remedy at all. As part of both the *de jure* and *de facto* exclusions, the courts often will refuse to hear testimony of the full context of abuse, including non-severe physical abuse, psychological abuse, emotional abuse and economic abuse, in order to avoid "meddling" in private relationships.¹⁶

Women like Vanessa and Kim, who are subjected to exclusively psychological, emotional and economic abuse, and like Susan, who are subjected to all forms of abuse, might satisfactorily address the complex abuse if permitted to under the civil protective order legal system. Research

term "women subjected to abuse" which I take from Ann Shalleck's important work: Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997). As Shalleck and others discuss, labeling any woman who has been abused as a "battered woman" or her partner an "abuser" or "batterer" reduces all parties to a unidimensional view, defined by what happened to them or what they did. *Id.* at 1023. What goes out of focus is the complexities of their relationship, of which the violence and abuse may be a large or small part; a constant background or an intermittent piece. With a narrow focus, the solutions or remedies for the harms resulting from the abuse are driven only by that focus rather than the broader reality of the woman's life.

¹⁴ This article discusses and critiques the current regime of Civil Protective Order laws in the 50 states and the District of Columbia due to their under-inclusion of the types of domestic violence that should be actionable.

¹⁵ See *infra* text accompanying note 208. In a related discussion of courts acting based on their own assumptions and biases about violence, see Tamara L. Kuennen, "No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims, 16 U.C.L.A. WOMEN'S L.J. 39, 65 (2007) [hereinafter Kuennen, "No-Drop"] (discussing how courts deny women petitioners' motions to vacate protective orders thus treating them wholly different from other civil injunction matters due to courts' assumptions and biases about violence and their belief about saving lives).

¹⁶ See *e.g. infra* text accompanying note 208. See *e.g.* Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743 (2005) (arguing for psychological research to study domestic violence as coercion and thereby to move beyond the "accounting of specific assaultive acts").

shows that the systematic operation of power and control is at the center of most forms of abuse and that all forms are interrelated. Civil protective order laws provide injunctive relief and injunctions are known as court remedies intended to reorder “‘a relationship in conflict’ in which the authority and power of the court are placed at the service of the victim to compel someone else – the violator – to respect the victim’s rights.”¹⁷ Accordingly, women subjected to abuse have used CPOs to satisfactorily decrease the physical, psychological and emotional abuse.¹⁸ And decreasing psychological abuse is important for two reasons. First, research shows that women who are abused identify psychological abuse as causing them more pain than physical abuse.¹⁹ Second, some research has shown that psychological abuse, when effectuated by a controlling partner, often leads to physical abuse.²⁰ Because CPOs have the potential of being effective for the decrease of nonphysical abuse, thereby potentially changing the dangerous power dynamics of a relationship before physical abuse is inflicted, women subjected to the fundamental harms of psychological, emotional and economic abuse should be able to seek a CPO.

The CPO laws are particularly well situated to permit petitioners to construct a remedy that redefines a relationship that is tainted by abuse but which may also be a relationship that continues to have meaning and may be connected by children, economics and emotional and psychological ties.²¹ Accordingly, civil protective order laws should provide for remedies that permit a multidimensional reordering of the relationship, from the

¹⁷ Kuennen, “No-Drop”, *supra* note 15 at 54-55 (citing Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101 (1986)).

¹⁸ Janice Grau, et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, 4 WOMEN & POL. 13, 25 (1984).

¹⁹ LENORE WALKER, *THE BATTERED WOMAN* 34 (2d ed. 2000) [hereinafter WALKER, *BATTERED WOMAN*]; ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 66 (2000) (women “frequently describe the threats and verbal abuse as more devastating than the physical”).

²⁰ See Kelly and Johnson, *supra* note 4 at 483.

²¹ See Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489, 1500 n.83 (2008) (women subjected to abuse “want the relationship to continue but the violence to stop”) (citing ANN JONES, *NEXT TIME, SHE’LL BE DEAD: BATTERING AND HOW TO STOP IT* 203 (2000); ALYCE D. LAVIOLETTE & OLA W. BARNETT, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 145 (2d ed. 2000); NAT’L DOMESTIC VIOLENCE HOTLINE, *DECADE FOR CHANGE REPORT* 8, 15 (2007); SCHNEIDER, *supra* note 19 at 77-78; David M. Zltonick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1161 n.42 (1995)).

terms of the legal relationship to a recalibration of the power dynamic.²² If the civil law were to permit women to reconstruct relationships in which there is multifaceted abuse, the law would fulfill the goal of decreasing abuse by advancing women's ability to self-direct and self-define, otherwise known as their agency or autonomy.²³ This is important because when women subjected to abuse exert autonomy they rebalance the power in the relationship and abuse often decreases.²⁴

Accordingly, CPO laws should provide redress for all forms of domestic abuse in order to attack the systemic oppression of women. This article expands upon existing scholarly assessment of the law's impact on domestic violence.²⁵ For instance, scholars have critiqued the criminal law's failure to expand its view of domestic violence beyond event-based

²² See Baker, *supra* note 12 (manuscript at 19, on file with author) (studies show that "civil protection regimes generate relief to violence victims by affording them a lever to demand or regain power or to be liberated from coercive oppression, by communicating defiance, by seizing a power greater than the abuser's in the law and by exposing her oppression publically.") (citing Judith McFarlane, et al. *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AMERICAN JOURNAL OF PUBLIC HEALTH 613, 617; Karla Fischer & Mary Rose, *When Enough is Enough: Battered Women's Decisionmaking Around Court Orders of Protection*, 41 CRIME & DELINQUENCY 414-29 (1995)). Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 565-66 (2006) (Although focusing on only physical violence, Professor Balos states that CPO remedies support women's autonomy in decision making about children and otherwise provide structure and organization to family relationships while addressing safety for the plaintiff and her family).

²³ See generally Goldfarb, *supra* note 21 at 1501-02, 1523 (CPOs that permit a woman to continue a relationship with someone while addressing the abuse is valuable to a woman's autonomy within the relationship). Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 112-114 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

²⁴ Baker, *supra* note 12 (manuscript at 4, on file with author).

²⁵ EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE (2007) [hereinafter STARK, COERCIVE CONTROL]; Leigh Goodmark, *Law Is The Answer? Do We Know That For Sure? Questioning The Efficacy Of Legal Interventions For Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004) [hereinafter Goodmark, *Law Is The Answer?*]; Goldfarb, *supra* note 21 at 1500; Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?*, 22 BERKELEY J. GENDER L. & J. 2 (2007) [hereinafter Kuennen, *Coercion*]; Baker, *supra* note 12 at (manuscript at 19, on file with author); Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004) (arguing that criminal law needs to define domestic violence crimes as not merely transactions of physical violence but a pattern of power and control being exerted); Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007).

acts of physical violence.²⁶ This paper focuses on the need for the civil law to go beyond remedying physical abuse and crimes²⁷ alone, beyond recognizing only discrete acts of violence, and beyond approaching domestic violence from the system actor's goals rather than the woman's goals. If achieved, the hope is that the CPO laws will be better able to assist women seeking to change relationships in which there is abuse to address past and eliminate future harm.

Part I of this article identifies how women experience the harms of domestic violence and how the CPO laws designed to address and redress domestic violence fail to address some of the most fundamental harms. Part II examines how society hurts women subjected to abuse by its continued limited recognition of only a few harms as domestic violence. This Part underscores the importance of redefining domestic violence in CPO laws to best address women's goals in addressing the abuse because the research shows that effectuating such goals leads to women's empowerment and increases their ability to cope with the domestic violence in their lives.²⁸ Part III proposes how states can reform their civil protective order laws in order to address and redress all forms of domestic violence. In discussing the proposal, this part explores both the concerns and benefits of it while maintaining a focus on the critical role of women's agency and autonomy in legally remedying domestic violence.

I. CIVIL DOMESTIC VIOLENCE LAW'S GENERAL FAILURE TO REMEDY THE FUNDAMENTAL HARMS OF PSYCHOLOGICAL, EMOTIONAL AND ECONOMIC ABUSE

Women experience domestic violence in a variety of forms, including

²⁶ Tuerkheimer, *supra* note 25 at 959 (arguing that criminal law needs to define domestic violence crimes as not merely transactions of physical violence but a pattern of power and control being exerted); Burke, *supra* note 25 at 552.

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

²⁸ LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 94-95 (2008) ("participants who reported feeling in control of the process of working with service providers were far more likely to rate the services they received as helpful and to use the services again. (Zweig, Burt, & Van Ness, 2003). Similarly a study within the criminal justice system found that victims who chose not to report recidivist abuse to officials were those who felt they had 'no voice' in a previous prosecution (Hotaling & Buzawa, 2003). . . . Women . . . will be safer if given the opportunity to maximize their own agency. . . .") See also Baker, *supra* note 12 (manuscript at 14-20, on file with author) (citing to a few studies showing CPOs effectiveness in decreasing physical abuse). See also *infra* Part I.b.

physical violence, psychological abuse, emotional abuse, and economic abuse. These forms of abuse inflict enormous harm on their own and when in concert. Despite these fundamental harms, the nation's CPO laws fail to provide a remedy to all of them. What results is an unjust civil law scheme that permits the continued systemic oppression of women through abusive power and control.

a. DOMESTIC VIOLENCE AS EXPERIENCED BY WOMEN

Since the early twentieth century in the United States, there has been a movement against domestic violence.²⁹ In the late 1960s, feminist activists and lawyers agitated to get the public to attend to domestic violence because of its connection to women's societal subordination.³⁰ Feminists saw domestic abuse as of a piece with the structure of social order that organized around male privilege.³¹ Feminists saw "[b]attering . . . [as] an integral part of women's oppression women's liberation its solution."³² As Susan Schechter wrote, "All men learn to dominate women, but only some men batter them. Violence is only one of the many ways in which men express their socially structured right to control and chastise. In . . . other cases men may not need to use violence to dominate. Verbal abuse, withholding affection, or withdrawing resources may suffice."³³ Put

²⁹ SCHNEIDER, *supra* note 19 at 42. In general, the argument against such violence was that it was unmanly because it was praying on vulnerable people, women. Linda Gordon, *Women's Agency, Social Control, and the Construction of 'Rights' by Battered Women*, in *NEGOTIATING AT THE MARGINS* 127 (Sue Fisher & Kathy Davis, eds., 1993) as cited in SCHNEIDER, *supra* note 19 at 43. There was also some discussion of "woman's ownership of her body, but not her right to freedom from violence." *Id.*

³⁰ Goldfarb, *supra* note 21 at 1496.

³¹ G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 *Hous. L. Rev.* 237, 254 (2005) [hereinafter Miccio, *House Divided*]. Gordon, *supra* note 29 at 127. In fact, for the prior two centuries, feminists had been arguing that "women's legally sanctioned subordination with the family denied them equality and citizenship." *Id.* at 4. 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, 810 (1993).

³² SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 34 (1982). See also SCHNEIDER, *supra* note 19 at 87 (2000). It should be noted as seen throughout this discussion that all of the terms "domestic violence," "intimate partner violence," "battering" and "abuse" are imperfect and do not provide one unified definition. For purposes of this article, the term domestic violence and abuse are used interchangeably.

³³ SCHECHTER, *supra* note 32 at 219. Schechter further stated "[s]ince male supremacy is the historical source of battering, and class domination perpetuates male privilege, a long-range plan to end abuse includes a total restructuring of society that is feminist, anti-racist, and socialist." *Id.* at 238.

another way, Professor Elizabeth Schneider states: “Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economical isolation of women, is also common.”³⁴ Accordingly, all forms of domestic violence, physical, sexual, emotional or economic abuse, are interrelated.³⁵ The spectrum of violence against women was seen as culturally sanctioned as part of the broader acts of subordination of women.³⁶ Therefore, feminists sought eradication of domestic violence, which was not seen as mere discrete acts of physical violence but the systemic operation of power and control oppressing women.³⁷

In their campaign to attack domestic violence, feminists highlighted the broad range of violence against women.³⁸ With this understanding of domestic abuse, the battered women’s movement in the early 1970s created resources to address the systematic subordination of women.³⁹ For instance, the battered women’s shelter movement framed their work by four principles:

(1) intimate violence was the confluence of male hegemony in the home and women’s subordination in the public sphere; (2) the violence was political and not a consequence of women’s personalities or families of origin; (3) male intimate violence was a potential in all women’s lives; and (4) women’s right to self-determination was significant.⁴⁰

Feminists, including formerly abused women, founded shelters

³⁴ SCHNEIDER, *supra* note 19 at 4.

³⁵ Joan Zorza, *Using the Law to Protect Battered Women and Their Children*, 27 CLEARINGHOUSE REV. 1, 1 (1994). SCHECHTER, *supra* note 32 at 219 (“[b]attering is one tool that enforces husbands’ authority over wives or simply reminds women that this authority exists.”). Kuennen, *Coercion*, *supra* note 25 at 8 (stating that battered women’s advocates have long recognized that battering involves more than just physical violence).

³⁶ SCHECHTER, *supra* note 32 at 215.

³⁷ Kuennen, *Coercion*, *supra* note 25 at 2 (citing to, among others, Evan Stark, *Re-Presenting Woman Battering from Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 973-74 (1995) [hereinafter Stark, *Re-Presenting Woman Battering*]).

³⁸ See LENORE E. A. WALKER, *ABUSED WOMEN AND SURVIVOR THERAPY: A PRACTICAL GUIDE FOR THE PSYCHOTHERAPIST* 56 (1994) [hereinafter WALKER, *ABUSED WOMEN*] (“The goal of woman abuse is usually to exert power and control over the victim. Most physical and sexual abuse is accompanied by psychological intimidation and bullying behavior used to maintain power and control over the woman. The pattern of abuse usually has an obsessional quality to it rather than a lack of control by the batterer.”)

³⁹ Miccio, *House Divided*, *supra* note 31 at 257.

⁴⁰ *Id.*

focused on “egalitarianism, autonomy and self-determination” and in which women’s choices were valued and respected.⁴¹ The principle that women “need to be free to make choices without coercion or undue persuasion by anyone” is central to the feminist abuse treatment philosophy.⁴² Feminists clung to these foundational principles because they believed the shelters should actually address and, if possible, remedy any harm, such as loss of autonomy, resulting from the abuse.⁴³ A study supporting this treatment approach shows that women who received “autonomy-respecting support and assistance” during a CPO proceeding “thought more positively about the proceedings” and reported “having good social support networks, fewer feelings of isolation, and better access to child care after receiving assistance.”⁴⁴

Current-day feminists and battered women’s advocates continue to identify domestic violence as primarily the exercise of power and control in a relationship by one intimate or formerly intimate partner against another.⁴⁵ This notion of domestic violence has to a large extent become part of mainstream consciousness.⁴⁶ Contemporary feminist and battered women’s advocates continue to underscore the fact that power and control can be exercised by a pattern of physical violence but also can be effectuated

⁴¹ *Id.* at 286.

⁴² Angela Moe Wan, *Battered Women in the Restraining Order Process: Observations in a Court Advocacy Program*, 6 VIOLENCE AGAINST WOMEN 606, 611 (2000).

⁴³ Miccio, *House Divided*, *supra* note 31 at 286.

⁴⁴ Wan, *supra* note 42 at 611.

⁴⁵ Dutton & Goodman, *supra* note 16 at 743 (stating that “For decades now, battered women’s advocates have placed the notion of coercive control squarely at the center of their analysis of intimate partner violence (IPV). . . . Violence is simply a tool, within this framework, that the perpetrator uses to gain greater power in the relationship to deter or trigger specific behaviors, win an argument, or demonstrate dominance (Dobash & Dobash, 1992). Other tools might include isolation, intimidation, threats, withholding of necessary resources such as money or transportation, and abuse of the children, other relatives or even pets.”). Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation against Domestic Violence Offenders*, 83 Or. L. Rev. 945, 958 (2004) (If partner not “sufficiently solicitous, obedient, loyal or compliant,” perpetrator uses a pattern of abuse to gain such compliance) (citing David Adams, *Treatment Program for Batterers*, 5 CLINICS FAM. PRAC. 159 (2003)).

⁴⁶ Gael Strack & Eugene Hyman, *Your Patient. My Client. Her Safety: A Physician’s Guide to Avoiding the Courtroom While Helping Victims of Domestic Violence*, 11 DEPAUL J. HEALTH CARE L. 33, 35 (2007). For provocative and well-documented articles discussing the significant problems with a monolithic and stark view of the operation of power and control on women subjected to abuse see Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, N.Y.U. REV. L & SOC. CHANGE (forthcoming 2008) (manuscript on file with author) and Kuennen, *Coercion*, *supra* note 25 at 2.

through a pattern of psychological, economic, sexual and other abusive acts.⁴⁷ Physical violence may not even be the most significant form of abuse.⁴⁸ Rather, a woman in a relationship marked by serious power imbalances and a dangerously controlling partner is:

subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children and friends; and work. Sporadic, even severe violence makes this strategy of control effective. But the unique profile of 'the battered woman' arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma.⁴⁹

Knowing how domestic violence operates is important in understanding how women succeed in decreasing it. Since domestic violence is the operation of power and control over the woman, it makes sense that the woman's ability to exercise agency and autonomy within the abusive situation is related to her ability to address the abuse. Feminist scholarship demonstrates that women subjected to domestic violence are fully capable of making decisions for themselves. Because they are in the best position to determine their goals and options to obtain those goals, their decisions are critical to decreasing the violence.⁵⁰ This theme perhaps is addressed most consistently in the discourse surrounding whether or not a

⁴⁷ Rhonda L. Lenton, *Power vs. Feminists Theories of Wife Abuse*, 44 *CAN. J. CRIMINOLOGY* 305, 310-12 (1995); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 *UCLA L. REV.* 1, 57 (1999) (batterers behavior includes physical violence, emotional abuse, psychological abuse, economic coercion and other controlling actions).

⁴⁸ Stark, *Re-Presenting Woman Battering*, *supra* note 37 at 986. For an extensive exploration of coercive control, see STARK, *COERCIVE CONTROL*, *supra* note 25.

⁴⁹ Stark, *Re-Presenting Woman Battering*, *supra* note 37 at 986 (1995). See also Coker, *supra* note 47 at 57 (defining domestic violence as a pattern of behavior to control victim).

⁵⁰ Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *MICH. L. REV.* 1 (1991) (analyzing the decision of leaving as being complicated by the multiple goals of battered women and their experiences of violence). For instance, even if the woman's sole goal is to not be subjected to violence, she may appropriately remain in the relationship because battered women experience leaving as the most violent and dangerous time. Yet battered women also have multiple goals beyond merely avoiding the violence and that is economic security for themselves and their children, love for their partner, lack of available options once they leave the relationship, perhaps a sense that the outside world is more violent than the relationship itself. As an example, Professor Laurie Kohn states, "While a woman may not want to be hit, she may want and need the abusive partner to remain at home to assist with child care . . ." Kohn, *supra* note 46 (manuscript at 33, on file with author).

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

The advocate should not decide for a woman whether she should leave or whether she should return to her batterer. Only a victim herself can reach a decision on custody or on trying counseling. Your demonstrated belief that she is responsible, that she can work to change her own circumstances, not merely benefit from your work, combined with your legal skills, will help her more than will your imposing your beliefs, desires, or schedule upon her.⁵¹

The emphasis on recognizing that the woman is the decisionmaker based on her goals is important because research shows women are the best able to determine what is the safest course of action for them.⁵² For instance, the research on separation assault shows women subjected to abuse may be physically safer living with the abuser because leaving may increase stalking, harassment and may decrease women's ability to influence him.⁵³ The important piece appears to be the autonomy and agency of women subjected to abuse.

⁵¹ NATIONAL CENTER IN WOMEN AND FAMILY LAW, INC., LEGAL ADVOCACY FOR BATTERED WOMEN 9 (1982).

⁵²Goldfarb, *supra* note 21 at 1499 (citing that "women have many reasons for staying with or returning to violent partners, including financial dependency, fear of retaliation, social isolation, community pressure and concerns about losing custody of children . . . a deep emotional bond with her partner and want[ing] to preserve and improve the relationship."); NATIONAL CENTER IN WOMEN AND FAMILY LAW, INC., *supra* note 51 at 6 (women hope or believe that their partner, who often apologizes and promises to change, will in fact stop the abuse; are willing to endure the abuse in order to preserve the relationship; believe that their children's ability to maintain a relationship with their father is more important than the abuse; feel or believe that they are to blame for the abuse and believe that they need to caretaker their partners' in order to help end the abuse; feel frustrated with their attempts to find service providers who will assist the women's partners' in addressing the abuse and therefore, believe there is no alternative to continuing being subjected to the abuse; find relocating away from their partner to be financially and logistically impossible; fear being subjected to heightened violence if she leaves based on her prior attempts to leave; fear that they would not be able to manage their lives without their partners). And some women do not believe the violence inside the relationship is any worse or more dangerous than the systemic violence against women in the broader society. Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1288 (1992).

⁵³ WALKER, ABUSED WOMEN, *supra* note 38 at 55.

In the social work scholarship, domestic violence is defined as “a pattern of behavior in a relationship by which the batterer attempts to control his victim through a variety of tactics. . . . These tactics may include fear and intimidation, physical and/or sexual abuse, psychological and emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles.”⁵⁴ Tactics that qualify as psychological and emotional abuse as well as economic abuse include “sabotaging a woman’s efforts to find a job or attend a job training . . . [by] turning off her alarm clock so she will be late for work, cutting off her hair to cause her great embarrassment, inflicting visible injuries or creating conflicts before crucial events, and hiding or destroying her books, homework, or clothing.”⁵⁵ Once employed the abuse may continue by the abuser “disrupting her transportation or child care arrangements or harassing her at work.”⁵⁶ Social science research also recognizes that domestic violence is complex and multifaceted. Professors Joan Kelly and Michael Johnson identify coercive controlling violence⁵⁷ as

⁵⁴ Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 245 (2000) (citing Barnett, Miller-Perrin, & Perrin, 1997; Bicehouse & Hawker, 1995; Geffner, 1997; Register, 1993; Tieszen-Gary, 1991; Worrell & Remer, 1992; Register, 1993; Shephard, 1991; Tolman, 1992). See also WALKER, ABUSED WOMEN, *supra* note 38 at 565 (1994); Dutton & Goodman, *supra* note 16 at 7434. Drs. Walker, Dutton and Goodman acknowledge that the social science research has failed to clearly research the power and control model or measure the impact of psychological, emotional, and other abuse. WALKER, BATTERED WOMAN, *supra* note 19 at 34 (noting that psychologists have never effectively quantifiably measured psychological abuse); Dutton & Goodman, *supra* note 16 at 7434 (noting the lack of empiricism regarding coercive control).

⁵⁵ Postmus, *supra* note 54 at 246 (citing Jody Raphael, *Prisoners of Abuse: Domestic violence and welfare receipt*. Chicago: Taylor Institute (1996)).

⁵⁶ *Id.* (citing Kenney & Brown, 1996; Raphael, 1996; Shephard & Pence, 1988). See generally Felicity W. K. Harper, et al., *The Role of Shame, Anger and Affect Regulation in Men’s Perpetration of Psychological Abuse in Dating Relationships*, 20 J. INTERPERSONAL VIOLENCE 1648 (2005); Vivian Zayas & Yuichi Shoda, *Predicting Preferences for Dating Partners from Past Experiences of Psychological Abuse: Identifying the Psychological Ingredients of Situations*, 33 PERSONALITY SOC. PSYCHOL. BULL. 123 (2007); Diane R. Follingstad, et al., *Lay Persons Versus Psychologists Judgments of Psychologically Aggressive Actions by a Husband and Wife*, 19 J. INTERPERSONAL VIOLENCE 916 (2004); Postmus, *supra* note 54 at 244.

⁵⁷ Another scholar argues that the interrelationship of the emotional, psychological, economic and physical abuse discussed by scholars and activists when addressing domestic violence can be encapsulated in the term “coercive control.” Baker, *supra* note 12 (manuscript at 11, on file with author). Yet another scholar discusses at length the failure of the legal system to agree on a definition of “coercive control” thereby causing harm because of that failure. Kuennen, *Coercion*, *supra* note 25 at 2. Because this paper argues that psychological, emotional and economic abuse need to be surfaced, acknowledged and remedied by the civil law, a global term, such as coercive control, is not used herein.

the use of patterned power and control including the tactics identified in the social work literature.⁵⁸ As they state, “Abusers do not necessarily use all of these tactics, but they do use a combination of the ones that they feel are most likely to work for them. Because these nonviolent control tactics may be effective without the use of violence (especially if there has been a history of violence in the past), controlling violence does not necessarily manifest itself in high levels of violence.”⁵⁹

Psychologists also catalogue these many forms of abuse.⁶⁰ In one study, Dr. Mary Ann Dutton with others utilized various scales and other measurement tools to best determine whether women were subjected to domestic abuse.⁶¹ This study covered physical, psychological, emotional and economic abuse.⁶² The psychologists identified specific behaviors that constitute domestic violence including dominance through isolation, emotional, verbal or psychological abuse in order to measure its prevalence and impact on women.⁶³ They used scales to measure stalking, job interference as well as threats and danger of fatality.⁶⁴ And psychologists

⁵⁸ See Kelly and Johnson, *supra* note 4 at 481.

⁵⁹ See *id.*

⁶⁰ It should be noted, however, that such broad notions of domestic violence did not always exist. Traditionally, although feminists had a broad view of domestic violence that included all forms of abuse, social scientists defined domestic violence as only physical violence. SCHNEIDER, *supra* note 19 at 65. More social science research today, however, reflects an increasingly complex view of domestic abuse that looks at multifaceted methods of control. Nonetheless, as seen above, Drs. Dutton, Goodman and Walker, among others, have recently critiqued the psychology research for having failed to adequately research the emotional abuse, psychological abuse and coercive control. WALKER, BATTERED WOMAN, *supra* note 19 at 34 (noting that psychologists have never effectively quantifiably measured psychological abuse); Dutton & Goodman, *supra* note 16 at 7434 (noting the lack of empiricism regarding coercive control).

⁶¹ MARY ANN DUTTON, ET AL., ECOLOGICAL MODEL OF BATTERED WOMEN’S EXPERIENCE OVER TIME, FINAL REPORT TO NATIONAL INSTITUTE OF JUSTICE at 20 (2005).

⁶² *Id.* Recently, researchers published a Scale of Economic Abuse. Adrienne E. Adams, et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563 (2008). The researchers found that economic abuse is a “significant component of the broad system of tactics used by abusive men to gain power and maintain control over their partners.” *Id.* at 580.

⁶³ *Id.* (citing the Tolman Psychological Maltreatment of Women Inventory (PMWI) (1995)). The PMWI “asks whether participants have experienced a variety of acts of forms of psychological abuse, ranging from ‘he swore at me’ to ‘he watched over my activities and insisted I tell him where I was at all times.’” *Id.* at 9.

⁶⁴ *Id.* at 20-21 (citing the Tjaden & Thoennes survey (2000); The Job Interference Scale, stating that the scale was based in part on work by Jody Raphael (1996) and Raphael and Tolman (1997), which measured employment interferences among welfare recipients and others; the Threat Scale, stating that this scale, which measures violent and non-violent threats, was based on the batterer-generated risks developed by Jill Davies and

have found these to be successful in identifying battered women, as opposed to women not subjected to abuse.⁶⁵

In related work, Drs. Dutton and Lisa Goodman explore the meaning of coercion in domestic violence.⁶⁶ They define coercion as “a dynamic process linking a demand with a credible threatened negative consequence for noncompliance.”⁶⁷ They studied the eight areas of control in which the agent made demands on the target – “personal activities/appearance,” “support/social life/family,” “household,” “work/economic/resources,” “health,” “intimate relationship,” “legal, immigration, and children.”⁶⁸ And then the demands were followed up with a credible threat in order to induce compliance with the demand. They found that all of the coercion was psychologically harmful, though only some was physically harmful.⁶⁹ The credible threats employed in coercion included threat of physical injury, removing the children, interfering with immigration applications, revealing private information, embarrassing the target and having sex with another person.⁷⁰ Accordingly, psychological researchers have created and used several measurements and models that identify the concrete acts and behavior that create the pattern of oppression society labels as domestic violence.

Dr. Lenore Walker also finds that “A battered woman is one who has been physically, sexually, or psychologically abused by a man . . . with whom she is in an intimate relationship.”⁷¹ In examining psychological abuse, she explains that there are multiple forms, including harassment, controlling the woman’s life, controlling how she spends her time, questioning her, keeping her under surveillance, depriving the woman of sleep at night by demanding things of the woman or ordering her what to do.⁷² Recently, Walker has drawn parallels between Amnesty

others, Davies, Lynn, and Monti-Catania (1998); and the Danger Assessment, developed by Dr. Jacquelyn Campbell (1995)).

⁶⁵ *Id.* at 20 (identifying that the PMWI scale can identify battered women).

⁶⁶ Dutton & Goodman, *supra* note 16. *See also* Mary Ann Dutton, et al., DEVELOPMENT AND VALIDATION OF A COERCIVE CONTROL MEASURE FOR INTIMATE PARTNER VIOLENCE. FINAL TECHNICAL REPORT (Dec. 20 2005) (on file with author).

⁶⁷ *Id.* at 747.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ WALKER, ABUSED WOMEN, *supra* note 38 at 56. Walker’s research shows that half of all women have experienced some form of “physical, sexual or psychological abuse.” *Id.*

⁷² *Id.* at 58-59.

International's definition of psychological torture and domestic violence.⁷³ Under Amnesty International's definition, there are eight areas of abuse: (1) "isolation of the victims;" (2) "induced debility producing exhaustion such as limited food or interrupted sleep patterns;" (3) "monopolization of perception including obsessiveness and possessiveness;" (4) "threats such as death of self, death of family and friends, sham executions, and other indirect threats;" (5) "degradation including humiliation, denial of victim's powers, and verbal name calling;" (6) "drug or alcohol administration;" (7) "altered states of consciousness produced through hypnotic states;" and (8) "occasional indulgences which, when they occur at random and variable times, keep hope alive that the torture will cease."⁷⁴

Walker shows how these forms of psychological torture apply to battered women.⁷⁵ For instance, batterers isolate women from others and also women withdraw because of the violence.⁷⁶ Three times as many battered women as non-battered women are isolated financially because they had "no access to cash with the batterer."⁷⁷ And 22% in battered relationship as opposed to 13% in non-battered relationship had no access to car.⁷⁸ Regarding other controlling behaviors, Walker states that whereas battered women were not permitted to go places three-quarters of the time, non-battered women were not permitted to go places only one-quarter of the time.⁷⁹ Also, batterers, unlike non-batterers, knew where the women were at almost all times.⁸⁰

A broad view of the violence to which women are subjected is consistent with the advocacy against domestic violence. The power and control wheel is almost a required text for service providers who work with women who are subjected to abuse.⁸¹ The wheel identifies domestic violence as the exercise of power and control through the "interrelated dimensions of physical abuse, economic abuse, coercion and threats, intimidation, emotional abuse (using isolation, minimizing, denying, and blaming), and abusing male privilege."⁸² Therefore, when advocates work with women who are abused they discuss all of the various forms of abuse

⁷³ WALKER, BATTERED WOMAN, *supra* note 19 at 35.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 36.

⁸⁰ *Id.*

⁸¹ EVAN STARK, COERCIVE CONTROL, *supra* note 25 at 13.

⁸² SCHNEIDER, *supra* note 19 at 12.

to help the women identify if and how they have been abused as part of the process of continuing self-empowerment.

Moreover, the advocacy community similarly has translated the theory of power and control into the concrete actions and behaviors that result in oppression. For example, one advocacy group's website identifies domestic violence as "a pattern of abusive behavior which keeps one partner in a position of power over the other partner through the use of fear, intimidation and control."⁸³ This advocacy group's website is similar to many others around the country.⁸⁴ The group identifies the following forms of abuse: physical abuse, sexual abuse, economic abuse, emotional abuse, and psychological abuse.⁸⁵ Physical abuse is defined as "[g]rabbing, pinching, shoving, slapping, hitting, hair pulling, biting, etc. Denying medical care or forcing alcohol and/or drug use."⁸⁶ Sexual abuse is defined as "[c]oercing or attempting to coerce any sexual contact without consent, e.g., marital rape, forcing sex after physical beating, attacks on sexual parts of the body or treating another in a sexually demeaning manner."⁸⁷ Economic abuse is defined as "[m]aking or attempting to make a person financially dependent, e.g., maintaining total control over financial resources, withholding access to money, forbidding attendance at school or employment."⁸⁸ Emotional abuse is defined as "[u]ndermining a person's sense of self-worth, e.g., constant criticism, belittling one's abilities, name calling, damaging a partner's relationship with the children."⁸⁹ And finally, psychological abuse is defined as "[c]ausing fear by intimidation, threatening physical harm to self, partner or children, destruction of pets

⁸³ http://www.womenslaw.org/simple.php?sitemap_id=39 (last visited 8/24/2008).

⁸⁴ E.g. http://www.nccadv.org/domestic_violence_info.htm#Definition%20of%20Domestic%20Violence (last visited on 8/24/2008) ("Domestic Violence is when two people get into an intimate relationship and one person uses a pattern of coercion and control against the other person during the relationship and/or after the relationship has terminated. It often includes physical, sexual, emotional, or economic abuse."); <http://www.icadv.org/faq.asp> (last visited 8/24/2008) ("Domestic violence is not an isolated, individual event, but rather a pattern of repeated behaviors. . . . These assaults occur in different forms: physical, sexual, psychological."); <http://www.hruth.org/domestic-violence-dynamics.asp> (last visited 8/24/2008) (providing a depiction of the power and control wheel, which shows power and control in the hub, emotional abuse, economic abuse, sexual abuse, intimidation, using children, using male privilege, threats and isolation in the spokes, and physical abuse on the rim); <http://www.erie-county-ohio.net/victim/pdf/wheel.pdf> (last visited on 8/24/2008) (providing similar power and control wheel).

⁸⁵ http://www.womenslaw.org/simple.php?sitemap_id=39 (last visited 8/24/2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

and property, mind games or forcing isolation from friends, family, school and/or work.”⁹⁰

In the current legal theory literature, commentators have highlighted the breadth of abuse that constitutes domestic violence as well as the importance of contextualizing incidents within the broader dynamic of systemic coercive and abusive conduct. For instance, one scholar asserts that although explanations for domestic violence are divergent, empirical data supports the common explanation “that abuse is a method of gaining and exercising power and control over a partner.”⁹¹ This theory about domestic violence is rooted in systemic and political issues of gender subordination and coercive control.⁹² Accordingly, many legal commentators argue that it is the operation of power and control that must define the domestic violence rather than any specific incidents of physical violence.⁹³ The physical, psychological,⁹⁴ emotional or economic⁹⁵ acts are

⁹⁰ *Id.* In order to identify emotional abuse, the National Domestic Violence Hotline asks whether the partner does the following things: “Calls you names, insults you or continually criticizes you. Does not trust you and acts jealous or possessive. Tries to isolate you from family or friends. Monitors where you go, who you call and who you spend time with. Does not want you to work. Controls finances or refuses to share money. Punishes you by withholding affection. Expects you to ask permission. Threatens to hurt you, the children, your family or your pets. Humiliates you in any way.” http://www.ndvh.org/educate/what_is_dv.html (last visited 8/24/2008).

⁹¹ Goldfarb, *supra* note 21 at 1493.

⁹² SCHNEIDER, *supra* note 19 at 5.

⁹³ Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 695 (1998) (the exertion of power should be the focus of domestic violence study rather than the number of physically violent episodes) (citing to Joan S. Meier, *Notes from the Underground, Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1318 (1993)); Sharon Stapel, *Falling To Pieces: New York State Civil Legal Remedies Available To Lesbian, Gay, Bisexual, And Transgender Survivors Of Domestic Violence*, 52 N.Y.L. SCH. L. REV. 247 (2007-2008) (acknowledging that communities of same sex and opposite sex couples similarly define domestic violence as one partner coercing, dominating, or isolating the other partner). Stapel states that “It is the exertion of any form of power that is used to maintain control in a relationship. The violence can be physical, emotional, sexual, psychological, or economic. Same-sex batterers use tactics of abuse similar to those of heterosexual batterers. However, some forms of battering are unique to the LGBT communities. . . . Same-sex batterers are able to successfully exploit their victims’ internalized, or the community’s externalized, homophobia, biphobia, or transphobia, simply by threatening to “out” their partners’ sexual orientation or gender identity to family, friends, employers, landlords, or other community members.” *Id.*); Kuennen, *Coercion*, *supra* note 25 at 2; Baker, *supra* note 12 (manuscript at 26-27, on file with author); Strack and Hyman, *supra* note 46 at 33 (domestic violence includes emotional, sexual, economic and physical abuse).

⁹⁴ Similar to the other disciplines discussed above, the legal theory discusses

merely the tools that manifest the power and control dynamics present in domestic violence. Linda Mills states that violence “exists along a continuum that includes emotional, financial, physical, and sexual violence. The continuum of violence is unique to each person. To some, emotional abuse is more severe than sexual abuse. To others, sexual abuse is the ultimate human violation.”⁹⁶ Given the legal theory’s understanding of dynamics of power and control in domestic violence, criminal justice scholars have argued to expand the criminal law’s definition of domestic violence to incorporate such dynamics.⁹⁷

As seen above, social scientists, advocates and legal theorists increasingly have recognized the many harms of domestic violence. And social science catalogues the concrete harms resulting from domestic violence. In addition to the physical injuries that can result from physical assaults, psychological abuse may result in a decrease of mental health, such as increased depression, suicide ideation and post-traumatic stress disorder and decreased sense of power, self-esteem, and physical health, including increased substance use and increased long-term diseases.⁹⁸ Economic abuse may result in economic dependence, lack of resources, uncertain economic future, poverty, homelessness and decreased physical and mental health.⁹⁹ Among these disciplines there is a consistent narrative that domestic violence is the operation of power and control, manifested in various forms of abuse and best remedied by women’s exertion of their autonomy and agency.

psychological abuse as including threats, humiliation, destruction of property and pets, harassment and forced confinement in the home. *See e.g.* Goldfarb, *supra* note 21 at 1492.

⁹⁵ Goldfarb, *supra* note 21 at 1492 (stating domestic violence includes economic abuse as well) (citing Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER & SOC. POL’Y & L. 367 (2003)).

⁹⁶ LINDA MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 23 (2003). Mills further states that each person needs to be reflective in identifying what forms of behavior are playful and which are coercive. *Id.* In addition, Mills exhorts society to learn about each person’s individual experience of interconnected acts of violence so that society does not continue to misperceive behaviors out of context. *Id.*

⁹⁷ Tuerkheimer, *supra* note 25 at 960-62 (arguing that criminal law needs to define domestic violence crimes as not merely transactions of physical violence but a pattern of power and control being exerted); Burke, *supra* note 25 at 556 (building on Tuerkheimer’s work and arguing for a domestic violence criminal statute that would prohibit defendant engaging “in a pattern of domestic violence with the intent to gain power or control over the victim”). For a response to Burke’s proposal, see Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613 (2007).

⁹⁸ Adams, *supra* note 62 at 563-564.

⁹⁹ *Id.* at 568.

Returning to Vanessa, Kim and Susan, who are highlighted at the beginning of this article, these women have all been subjected to domestic violence. Ulner subjected his wife Susan to many forms of abuse designed to control Susan through fear, intimidation and denial of her power. Ulner's pattern of abuse included subjecting Susan to physical abuse, when he hit, choked, and slapped her; emotional abuse, when he engaged in a pattern of undermining Susan's self-worth by constantly criticizing her, belittling her, calling her names, and damaging her relationship with her son; and psychological abuse, when he intimidated Susan, threatened her with physical harm, and isolated her.¹⁰⁰ Similarly, Eddie has subjected Kim to emotional abuse when he daily degraded, insulted and called her names. And Mark has subjected Vanessa to coercive economic abuse by precluding her from access to financial resources. Mark has also emotionally abused Vanessa by systematically belittling and degrading her in front of her children.

b. THE BENEFITS OF CPO LAWS AND HOW THEY DEVELOPED

Social science research indicates that CPOs can be beneficial to women seeking to address domestic violence in their relationships. Studies show that seeking a CPO helps to decrease subsequent violence.¹⁰¹ One study shows that many women who obtain CPOs are successful in preventing subsequent psychological and emotional abuse.¹⁰² The study shows that women with no injuries or non-severe injuries who obtained CPOs believed they were effective in decreasing abuse and curtailing verbal abuse, harassment and physical violence.¹⁰³ Therefore, one of the areas in which the CPO might be most effective, dealing with psychological and emotional abuse, is actually an area that few CPO laws address. Other studies show that the CPO is an effective remedy in addressing the violence that is permitted to be addressed.¹⁰⁴ Relatedly, when courts failed to grant CPOs

¹⁰⁰ See *supra* note 3 and text accompanying thereto.

¹⁰¹ McFarlane, *supra* note 22 at 617; Julia Henderson Gist, *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women?* 15 AM. J. FAM. L. 59, 67 (2001); Carol E. Jordan, *Intimate Partner Violence and the Justice System*, 19 J. OF INTERPERSONAL VIOLENCE 1412, 1425 (2004); *but see id.* at 1425.

¹⁰² Grau, *supra* note 18 at 25. It should be noted that there are some research limitations with the studies on CPO effectiveness and therefore, any generalizations are undertaken cautiously. McFarlane, *supra* note 22 at 613.

¹⁰³ *Id.* at 18.

¹⁰⁴ Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 J. GENDER, SOC. POL'Y & LAW 501, 513 (2003) (finding that women determined that the temporary protective order met some of their goals in addressing the abuse to which they were subjected by "getting the abuser to stay

to qualified women subjected to abuse, these women subsequently were subjected to more abuse and threats of abuse than women who received CPOs but still experienced less subsequent abuse than those women who did not seek CPOs at all.¹⁰⁵ Another benefit of the CPO proceeding is that it provides a forum in which the woman subjected to abuse is able to tell her story, tell the abuser she objects to the abuse, make a public record of the abuse and regain some control over her life.¹⁰⁶ Women experience healing, validation and empowerment from having a forum to air the abuse.¹⁰⁷ Whereas before her relationship was defined by her abusive partner, the CPO provides the woman with an opportunity to restructure how the couple interacts between themselves, with their children, and how they maintain their real and personal property thereby changing the power dynamics.¹⁰⁸

Given the potential benefits of CPOs, it is problematic that women who experience serious nonphysical abuse are excluded from obtaining a CPO. The history of the development of the civil protective order laws lays a foundation to reimagine domestic violence laws by providing an understanding of how the current day limitations of domestic violence came to be.

Prior to the 1960s, the law and society systematically failed to address domestic violence.¹⁰⁹ Therefore, the civil legal system (and the criminal justice system for that matter) had failed to attend to or respond to

away, stopping the violence, or making a reconciliation possible.”); McFarlane, *supra* note 22 at 617 (after women applied and qualified for CPO, “a rapid and significant decline in violence occurred.”); Balos, *supra* note 22 at 566 (citing to study showing that women reported a decrease in violence for two years following obtainment of a civil protective order. Gist, *supra* note 101 at 67).

¹⁰⁵ Gist, *supra* note 101 at 67-68.

¹⁰⁶ Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL’Y REV. 51, 56 (2000) (citing Karla Fischer & Mary Rose, *When Enough is Enough: Battered Women’s Decisionmaking Around Court Orders of Protection*, 41 CRIME & DELINQUENCY 414 (1995))

¹⁰⁷ See e.g. Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers’ Testimony Project, Women’s Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 756-757 (2005) [hereinafter Goodmark, *Telling Stories, Saving Lives*] (discussing the benefits of women’s narratives, including the fact that one woman subjected to abuse stated that being able to tell her story literally saved her life); Buel, *supra* note 45 at 996.

¹⁰⁸ Karla Fischer & Mary Rose, *When “Enough Is Enough”: Battered Women’s Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 425 (1995).

¹⁰⁹ See e.g. SCHNEIDER, *supra* note 19 at 87; Balos, *supra* note 22 at 563 (the courts saw domestic violence as a private matter and therefore, were reluctant to intervene); *but see* Zorza, *supra* note 35 at 7 (surveying law from colonial times and citing to certain states’ laws that precluded spousal violence).

domestic violence in a comprehensive and effective way.¹¹⁰

As discussed previously, the early advocates in the battered women's movement understood domestic violence in very broad terms which "attempt[ed] to capture interrelated aspects of coercion, power, and control and [was] not limited to physical abuse."¹¹¹ The inclusive understanding showed "physical violence within a larger social framework . . . [and that] physical violence was part of a larger process of threats, emotional humiliation, terrorism, and 'doing power.'"¹¹²

In the late 1960s,¹¹³ battered women's advocates pushed for and legislatures passed civil protective order statutes that could address society's and the early criminal justice system's failures at responding to domestic violence. Advocates intended for these laws to provide women subjected to abuse the autonomy necessary to pursue a much needed legal remedy for the abuse.¹¹⁴ However, not all women's experience of harmful abuse was included in the legislative reform. Battered women's activists often made strategic decisions to define domestic violence as only physical violence as opposed to including all of the forms of abuse understood as domestic violence.¹¹⁵ These decisions were based on the belief that the broad definition, though in line with the feminist vision of domestic violence, was complicated strategically.¹¹⁶ Feminists worried that if battering was acknowledged as a continuum of behavior, one that involved multiple forms of abuse to exercise power and control, society would be forced to "confront our fantasies of the family as a haven."¹¹⁷ As Professor Schneider states, "It is far easier to distance ourselves when the issue is one

¹¹⁰ MILLS, *supra* note 96 at 31.

¹¹¹ SCHNEIDER, *supra* note 19 at 46. *See also* Miccio, *House Divided*, *supra* note 31 at 248-250.

¹¹² SCHNEIDER, *supra* note 19 at 46 .

¹¹³ It appears that there were at least three state CPO laws prior to 1976. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 99-100 and notes 32-33 (2005). New York created its CPO law in the 1960s. *Id.* at n.19. The District of Columbia passed its CPO law, which did not require a divorce, in 1970. Kuennen, "No-Drop", *supra* note 15 at 47 n.26. SCHNEIDER, *supra* note 19 at 162 (citing Lisa Lerman, *State Legislation on Domestic Violence*, 4 RESPONSE 1, 2 (1981)). Delaware enacted its CPO statute in 1971. ANN MARIE BOYLAN & NADINE TAUB, ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES PART I 101 (Legal Services Corporation Research Institute, Washington, DC, Sept. 1981).

¹¹⁴ Kuennen, *Coercion*, *supra* note 25 at 7 n.30.

¹¹⁵ SCHNEIDER, *supra* note 19 at 65.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

of physical abuse rather than personal domination, which may feel uncomfortably close to home.”¹¹⁸

In order to pass civil protective order laws, feminists believed they had to pursue a strategy that made battered women different and discrete from a mythical “every woman” in order for the state and policy makers to pay attention to women subjected to abuse.¹¹⁹ Feminists highlighted physical violence in order to “legitimize . . . the notion that women were subjects of abuse and that physical battering was something serious and unique that happened to women. Society would be willing to redress demonstrable physical injury.”¹²⁰ Therefore, feminists’ focus on physical harm permitted a less threatening but undeniable way to evidence the power and control that feminists were arguing lay at the core of domestic violence.¹²¹ Feminists also linked the civil domestic violence definition to crimes in order to remedy the failings of the criminal justice system to protect women subjected to abuse.¹²²

Similarly, battered women activists, in identifying domestic violence for legislation, chose to focus on “the amount, type, frequency or intensity of the hitting, or link hitting with rape or other forms of sexual abuse, or with other types of violence.”¹²³ As a result, the early definitions of domestic violence for civil protective order statutes were incident based. The goal was to define domestic violence as incidents that were graphic, injurious and violent. Consequently, domestic violence was seen as identifiable, addressable and distinct. The incident-based approach with the focus on physical harm paralleled crimes such as assault and battery. By naming the acts of domestic violence as crimes in the civil protective order laws, advocates were able to hold states accountable for acts that prior to the 1970s had been treated systematically as criminal only if they occurred between strangers and out in public.¹²⁴

It should be noted that when the feminists turned to the state to address domestic violence, they did so warily and with the understanding that the state would be but one tool in a bigger toolbox.¹²⁵ The feminists

¹¹⁸ *Id.*

¹¹⁹ *Id.* By showing that battered women were discrete, they could be identified as a group that could assert and own legal rights. *Id.* at 71-72.

¹²⁰ *Id.* at 65.

¹²¹ *Id.*

¹²² Balos, *supra* note 22 at 564.

¹²³ SCHNEIDER, *supra* note 19 at 65.

¹²⁴ *Id.*

¹²⁵ Miccio, *House Divided*, *supra* note 31 at 272-273.

were willing to rely on the states in order to find a remedy for some women but were also concerned because the states' historic failure to protect women from domestic violence made states a party to the violence toward and terror of women.¹²⁶ The feminists knew that in creating a policy to involve the state would require reassessment and reexamination of its impact on women.¹²⁷

By the late sixties, state legislatures began enacting civil protective order statutes with the limited definition of domestic violence. The great success in legislation highlighted a tension, however, between the instrumental need to define domestic violence in a way that legislators, judges and society would pay attention to and remedy and the feminist vision and real women's experience of domestic violence as being a continuum of violence resulting from exercises of power and control.¹²⁸ In the end, the practical problems took precedence and domestic violence was circumscribed to the highlighting of physical violence and crimes. The preambles of many of these laws underscore the limited focus on physical violence. For instance, in the preamble to New Jersey's Prevention of Domestic Violence Act, it states that "domestic violence is a serious crime against society; that there are thousands of persons in this state who are regularly beaten, tortured and in some cases even killed by their spouses and cohabitants"¹²⁹ Thus began the narrative that continues today: Domestic violence is a physically violent crime and the civil law should permit outside actors to save lives subjected to domestic violence as they deem necessary. At the same time, the construct of the civil laws served to silence the original narrative of the battered women's movement: that all abuse is of a piece and harmful to women and that the most effective tool to address domestic violence is to empower women to make decisions themselves about how best to remedy it.

Once successful in getting states to pass civil protective orders laws, the movement did reassess and discovered that certain victims of domestic violence were not captured by the definition of domestic violence. Therefore, the movement worked to get states to amend the original statutes

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ SCHNEIDER, *supra* note 19 at 66-67. It should be noted that some feminists saw a focus on power and control as making domestic violence more gender-neutral than a male domination framework would do. *Id.* at 67 (2000). As Schneider herself states, however, "A theoretical framework that recognizes the primacy of gender need not exclude other factors." *Id.*

¹²⁹ See Kuennen, "No-Drop", *supra* note 15 at 82 (citing the Preamble to New Jersey's Prevention of Domestic Violence Act).

in different ways. For instance, many states amended their civil protective order laws to include the crimes of harassment and stalking to the definition of domestic violence.¹³⁰ These amendments reflected an understanding that domestic violence was not necessarily incident based but happened as a pattern or practice of behavior. Not all states, however, have amended their CPO domestic violence definition to include harassment or stalking.¹³¹ Currently, due to further reflection of the movement, there is advocacy in various states to expand the definition of domestic violence beyond isolated incidents of violence to include coercive control.¹³² Despite these improvements, the vast majority of CPO laws continue to fail all women subjected to abuse due to their continuing narrowness.

¹³⁰ 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, 874-875 (1993)

¹³¹ See *infra* Part I.c.

¹³² See EVAN STARK, *COERCIVE CONTROL*, *supra* note 25.

c. CIVIL PROTECTIVE ORDER LAWS¹³³

Remember Vanessa and Kim who were subjected to psychological, emotional and economic abuse but not physical abuse? Under the vast majority of jurisdictions' CPO laws today, they would have no remedy. Given the anti-domestic violence advocacy, social science and legal theory community's broad understanding of domestic violence and how it harms women, it should be axiomatic that civil legal remedies for women would respond to all forms of domestic violence. Yet two-thirds of the civil protective order statutes in the 50 states and the District of Columbia fail to address non-physical forms of abuse and the systemic controlling behavior that are essential components of domestic violence.¹³⁴ For women like Susan, who are subjected to physical, psychological and emotional abuse, they face a civil legal system that often denies their full experience of abuse and thereby also refuses to remedy it.

i. Common Features of Civil Protective Order Laws

Under the current civil legal system, the narrative of saving lives, as deemed necessary by outside actors and not the woman herself, continues. A person subjected to abuse is permitted to petition the court for an order that is intended to address the abuse in her relationship.¹³⁵ Most states permit an ex parte hearing for a temporary civil protective order that lasts a few weeks until the final protective order hearing.¹³⁶ If a final civil

¹³³ It should be noted that states provide civil protective orders under lots of different names, such as final protective orders, civil protection orders and injunctions. For ease of reference, I will refer to all such orders as "civil protective orders" or "CPOs". Similarly, almost all states identify domestic violence as the ground for CPOs, but sometimes call domestic violence by other names such as domestic abuse, family violence, dating violence, and interfamily offense. Again, for ease of reference, I refer to this ground as "domestic violence" for ease of reference although domestic abuse is perhaps a better, more inclusive term.

¹³⁴ See Goodmark, *Law Is The Answer?*, *supra* note 25 at 28-30 (arguing that the focus on crimes and physical violence excludes battered women from benefiting from civil protective orders and battered women from custody determinations that rely on civil protective orders).

¹³⁵ See e.g. D.C. CODE §16-1005(c)(10) (2008) (providing that the relief ordered by the Court may include "directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter.")

¹³⁶ See Klein & Orloff, *supra* note 130 at 1031-1042. See e.g. D.C. CODE §16-1004(d)(1) (2008) (providing for a 14-day ex parte temporary protective order if the court finds "the safety or welfare of a family member is immediately endangered by the respondent."); MD. CODE ANN., FAM. LAW § 4-505(a)(1) (West 2007) (if "a judge finds

protective order is issued, it usually is of a limited duration, such as six months or a year.¹³⁷ To qualify for a protective order, the petitioner usually needs to show that she is in a qualifying relationship,¹³⁸ subjected to abuse¹³⁹ and the remedies that would best address the abuse in the relationship.¹⁴⁰ As discussed in detail below, the states differ as to how they define abuse warranting a protective order.¹⁴¹ The various remedies available also vary by state and may include an order that the respondent not further abuse or threaten to abuse the petitioner; the respondent stay away from the petitioner and/or her residence, school and place of employment; the respondent not contact or attempt to contact the petitioner; the respondent vacate a joint residence with the petitioner; the respondent

that there are reasonable grounds to believe that a person eligible for relief has been abused, the judge may enter a temporary protective order to protect any person eligible for relief from abuse”). The order can last for seven days after service. MD. CODE ANN., FAM. LAW § 4-505(c)(1) (West 2007).

¹³⁷ See Klein & Orloff, *supra* note 130 at 1085-1088 (identifying duration of different states’ CPOS, including several that permit orders to last indefinitely, a few that last three years, a couple that last for two years, and over half lasting for a year).

¹³⁸ Such qualifying relationships may include a relationship by marriage, blood, adoption and cohabitation. See *id.* at 814-842. See e.g. D.C. CODE §16-1001(5) (2008) (defining the qualifying relationship as one by present or past “blood, legal custody, marriage, domestic partnership, having a child in common, or with whom the offender shares or has shared a mutual residence.” In addition, if jurisdictional requirements are met, the relationship may also be or have been “a romantic relationship.” And finally, if the person is stalked by the offender, even without one of the above relationships, the person qualifies.); MD. CODE ANN., FAM. LAW § 4-501(1) (West 2007) (defining the qualifying relationship as “(1) the current or former spouse of the respondent; (2) a cohabitant of the respondent; (3) a person related to the respondent by blood, marriage, or adoption; (4) a parent, stepparent, child, or stepchild of the respondent or the person eligible for relief who resides or resided with the respondent or person eligible for relief for at least 90 days within 1 year before the filing of the petition; (5) a vulnerable adult; or (6) an individual who has a child in common with the respondent.”).

¹³⁹ See Klein & Orloff, *supra* note 130 at 848-876 (itemizing the various criminal acts, sexual assaults, interferences with personal liberty, threats, attempts to harm, harassment, emotional abuse, damage to property, and stalking that constituted domestic violence for purposes of differing states’ CPOS as of 1993). See e.g. D.C. CODE §16-1001(5) (2008) (domestic violence, called an intrafamily offense, includes any act punishable as a criminal offense); MD. CODE ANN., FAMILY LAW § 4-501(b)(1) (West 2007) (“Abuse” includes: “(i) an act that causes serious bodily harm; (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm; (iii) assault in any degree; (iv) rape or sexual offense . . . or attempted rape or sexual offense in any degree; (v) false imprisonment; or (vi) stalking . . .”). For a full fifty-state survey of the definition of domestic violence in CPO laws, see *infra* Part I.c.ii.

¹⁴⁰ See e.g. Klein & Orloff, *supra* note 130 at 910-1006 (describing the remedies available under state CPO laws).

¹⁴¹ See *infra* Part I.c.ii.

and/or petitioner participate in certain counseling or domestic violence programs; the respondent pay for any medical expenses resulting from the abuse; safe custody and visitation arrangements for any minor children in common; the respondent pay any necessary child or spousal support to the petitioner; award use and possession of jointly-owned vehicles and/or other personal property; the respondent surrender any firearms; the respondent pay any necessary filing fees or court costs; and any other relief that would address the domestic violence.¹⁴² Interestingly, in general, the states have only slightly modified these remedies since the inception of the civil protective order remedy.¹⁴³ If the orders are violated, the petitioner may ask the court to find the respondent in criminal or civil contempt.¹⁴⁴ In addition, many jurisdictions make violation of a civil protective order itself a crime.¹⁴⁵

ii. Categories of Domestic Violence Offered A Remedy Under CPO Laws

As discussed above, domestic violence harms women because of the systematic oppression through physical, sexual, psychological, emotional and economic abuse. The vast majority of CPO laws, however, delimit domestic violence and hence fail to adequately serve women subjected to abuse and seeking a legal remedy.¹⁴⁶ Although there are some states that

¹⁴² See e.g. D.C. CODE § 16-1005(c) (2008) (providing multiple CPO remedies, including the catch-all remedy “directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter.”); MD. CODE ANN., FAM. LAW § 4-506(d) (West 2007) (providing several CPO remedies but does not include a catch-all remedy).

¹⁴³ See Lisa G. Lerman, *State Legislation on Domestic Violence*, 3 RESPONSE TO VIOLENCE IN THE FAMILY 1, 5-6 (1980) (itemizing the civil remedies available under the protective orders in 1980).

¹⁴⁴ Klein & Orloff, *supra* note 130 at 1101-1106 (1993); See e.g. D.C. CODE §16-1005(f) (2008) (a violation of a protective order is subject to contempt); MD. CODE ANN., FAM. LAW § 4-508(b) (West 2007) (a violation of a protective order may result in a finding of contempt).

¹⁴⁵ Klein & Orloff, *supra* note 130 at 1142; See e.g. D.C. CODE §16-1005(g) (2008) (a violation of a protective order shall be chargeable with a misdemeanor crime); MD. CODE ANN., FAM. LAW § 4-508(a) (West 2007) (a violation of a protective order may result in a criminal prosecution).

¹⁴⁶ In general, the criminal law suffers from the same limited definition of domestic violence as the civil laws do, with its focus on discrete criminal acts such as assault. See generally Burke, *supra* note 25 at 558-559. Professor Alafair Burke critiques the criminal justice system for not looking at the pattern of power and control at play in a domestic violence relationship. See generally *id.* She argues that the criminal law needs to account for a “pattern of domestic violence with the intent to gain power or control over the

recognize that domestic violence includes acts other than physical violence and threats of or fear of physical violence as grounds for a protective order, none of the states address the entire broad range of harms from domestic violence as experienced by women. This section discusses various forms of abuse recognized currently by the nation's CPO laws.

a. Physical violence and crimes

All of the states have statutes that provide for a civil protective order as a remedy for domestic violence that involves a battery, assault, bodily injury, threat of bodily injury or placing a person in fear of physical injury.¹⁴⁷ Most state statutes explicitly cross-reference the criminal code to

victim." *See generally id.* at 556. Similarly, Deborah Tuerkheimer critiques the criminal law for being too bounded by incidents of violence. Tuerkheimer, *supra* note 25 at 960-962. She states that the harm from the criminal law's failings is the violence is decontextualized and not found credible by judge and jury. Legislators in certain states are creating broader definitions of domestic violence in the criminal law, to include actual crimes of domestic violence and to move beyond incidents of violence. Burke, *supra* note 25 at 561. The Tuerkheimer and Burke critiques cite to similar failings as exist in the civil system but very different resulting harms. The differing harms are because the criminal law does not portend to be effectuating the goals of the woman subjected to domestic violence. Rather, it is furthering the state's view of what the goals should be regarding domestic violence as a crime. Therefore, a narrow definition of domestic violence in the civil law context results in excluding women from legal remedies and disempowering them as they struggle to redefine their relationship with their partner who is abusing them.

¹⁴⁷ALA. CODE § 30-5-2 (2008); ALASKA STAT. § 18-66-990(3) (2008); ARIZ. REV. STAT. ANN. § 13-3601 (2007); ARK. CODE ANN. § 9-4-102(3) (2007); CAL. FAM. CODE § 6203(a) (West 2008); COLO. REV. STAT. § 13-14-101(2) (2007); CONN. GEN. ST. § 46b-38a (2007); 10 DEL. CODE § 1041(1) (2005); D.C. CODE § 16-1001(5) (2008); FLA. STAT. § 741.28 (2008); GA. CODE ANN. § 19-3-1 (2007); HAW. REV. ST. § 586-1 (2008); IDAHO CODE ANN. § 39-6303(1) (2007); 750 ILL. COMP. ST. 60/103 (2007); IN. CODE § 31-9-2-42 (2008); Iowa Code Ann. § 236.2 (2007); KAN. ST. ANN. § 60-3102(a) (2007); KY. ST. ANN. § 403.720 (West 2007); LA. REV. STAT. ANN. § 2132 (3) (2007); 19 ME. REV. ST. ANN. § 4002(1) (2007); MD CODE ANN., FAM. LAW § 4-501 (West 2007); MASS. GEN. LAWS ch. 209A, § 1 (2005); MICH. COMP. LAWS § 600.2950(1) (2007); MINN. STAT. § 51813.01(a) (2007); MISS. CODE ANN. § 93-21-3(a) (2007); MO. REV. STAT. § 455.010(1) (2007); MONT. CODE ANN. § 40-15-102 (2005); NEB. REV. ST. § 42-903(1) (2005); NEV. REV. STAT. § 33.018 (2005); N.H. REV. STAT. ANN. § 173-B:1(I) (2007); N.J. STAT. ANN. § 2C:25-19 (2005); N.M. STAT. § 40-13-2(c) (2006); N.Y. DOM. REL. LAW § 821(1) (2005); N.C. GEN. STAT. § 50-B-1(a) (2005); N.D. CENT. CODE § 14-07.1-01(2) (2005); OHIO REV. CODE ANN. § 3113.31(A)(1) (West 2007); OKLA. STAT. tit. 22, § 60.1(1) (2007); OR. REV. ST. § 107.705(1) (2007); 23 PA. CONS. STAT. ANN. § 6102(a) (2007); R.I. GEN. LAWS § 15-15-1(2) (2007); S.C. CODE ANN. § 20-4-20(a) (2007); S.D. CODIFIED LAWS § 25-10-1(1) (2007); TENN. CODE ANN. § 36-3-601(1) (2005); TEX. REV. CIV. STAT. ANN. § 71.004 (2007); UTAH CODE ANN. § 30-6-1(1) (2007); 15 VT. STAT. ANN. § 1101(1) (2007); VA. CODE ANN. § 16-1-228 (2007); WASH. REV. CODE § 26.50.010(1) (2007); W. VA. CODE § 48-27-202 (2007); WIS. STAT. § 813.12 (am) (2007); WYO. STAT. ANN. § 35-

define these physically violent acts and other acts, like sexual assault, as constituting actionable domestic violence.¹⁴⁸ Others reference acts that constitute crimes, without explicitly cross-referencing the criminal statutes.¹⁴⁹

b. Coercive control, false imprisonment and restraint on liberty

Only sixteen states offer any recognition to the role of power and control in domestic violence by remedying coercive behavior, false imprisonment or interference with personal liberty in their civil protective order laws.¹⁵⁰ These states, however, differ in whether or not they require

21-102(a)(iii) (2007).

¹⁴⁸ ALA. CODE § 30-5-2 (2008); ALASKA STAT. §18-66-990(3) (2008); ARIZ. REV. STAT. ANN. § 13-3601 (2007); COLO. REV. STAT. § 13-14-101(2) (2007); 10 DEL. CODE § 1041(1) (2005); D.C. CODE § 16-1001(5) (2008); GA. CODE ANN. § 19-3-1 (2007); HAW. REV. ST. § 586-1 (2008); IN. CODE § 31-9-2-42 (2008); Iowa Code Ann. § 236.2 (2007); LA. REV. STAT. ANN. § 2132 (3) (2007); 19 ME. REV. ST. ANN. § 4002(1) (2007); MD CODE ANN., FAM. LAW § 4-501 (West 2007); MINN. STAT. § 51813.01(a) (2007); MISS. CODE ANN. § 93-21-3(a) (2007); MONT. CODE ANN. § 40-15-102 (2005); NEB. REV. ST. § 42-903(1) (2005); N.H. REV. STAT. ANN. § 173-B:1(I) (2007); N.J. STAT. ANN. § 2C:25-19 (2005); N.C. GEN. STAT. § 50-B-1(a) (2005); OHIO REV. CODE ANN. § 3113.31(A)(1) (West 2007); 23 PA. CONS. STAT. ANN. § 6102(a) (2007); S.C. CODE ANN. § 20-4-20(a) (2007); S.D. CODIFIED LAWS § 25-10-1(1) (2007); 15 VT. STAT. ANN. § 1101(1) (2007); WASH. REV. CODE § 26.50.010(1) (2007); W. VA. CODE § 48-27-202 (2007); WIS. STAT. § 813.12 (am) (2007).

¹⁴⁹ CONN. GEN. ST. § 46b-38a (2007); FLA. STAT. § 741.28 (2008); MO. REV. STAT. § 455.010(1) (2007); NEV. REV. STAT. § 33.018 (2005); N.Y. DOM. REL. LAW § 821(1) (2005); N.D. CENT. CODE § 14-07.1-01(2) (2005); TEX. REV. CIV. STAT. ANN. § 71.004 (2007).

¹⁵⁰ ALA. CODE § 30-5-2(a)(1)(d) (2008) (criminal coercion); 10 DEL. CODE § 1041 (1) (g) (2005) (false imprisonment and coercion, defined as compelling or inducing a person to engage in or abstain from conduct which the victim has a legal right to abstain or engage in by instilling fear of physical injury, property damage, criminal conduct, accusation of having committed a crime, subjecting person to hatred, contempt or ridicule, participating or not in a legal claim or defense, interfering with person's official duties as a public servant, or intending to harm another person materially regarding person's health, safety, business, calling, career, financial condition, reputation or personal relationships; 11 DEL. CODE §§ 791-792 (2007)); FLA. STAT. § 741.28(2) (2007) (false imprisonment); IDAHO CODE ANN. § 39-6303(1) (2007) (forced imprisonment); 750 ILL. COMP. ST. § 60/103 (9) (2006) ("‘Interference with personal liberty’ means committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage."); IN. CODE § 34-6-2-34.5 (2008) (coercion actionable when intended through the beating, mutilating, torturing or killing of an vertebrate animal); 19 ME. REV. ST. ANN. § 4002(1)(C) and (D) (2007) ("compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to

physical violence, or a threat of physical violence, in order to make the coercive control actionable. For instance, in Nevada and Missouri, the laws require that the coercion result from force or a threat of force.¹⁵¹ In Alabama, the law permits a remedy for only criminal coercion.¹⁵² The laws of Indiana and New Hampshire permit coercive control to be actionable without physical violence to the petitioner when there is the torturing, mutilating or killing of animals, actions that convey a strong message of control and inflict emotional distress.¹⁵³ Finally, many states permit petitioners to obtain a protective order on the grounds of restraint of physical liberty, false imprisonment, or interference with freedom.¹⁵⁴

c. Course of conduct leading to psychological, emotional or economic abuse

Only sixteen states and the District of Columbia provide a remedy for domestic violence that is composed of any form of psychological, emotional or economic abuse other than fear of physical injury.¹⁵⁵ These

abstain or to abstain from conduct in which the person has a right to engage . . . knowingly restricting substantially the movements of another person without the person's consent or other lawful authority"); MD CODE ANN., FAM. LAW § 4-501(b)(1)(v) (West 2007) (false imprisonment); MO. REV. STAT. § 455.010(1)(C) (2007) (defining coercion as "compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage"); MONT. CODE ANN. § 40-15-102(1)(ix) (2005) (unlawful restraint); NEV. REV. STAT. § 33.018 (1)(c) and (f) (2005) ("Compelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform" and false imprisonment); N.H. REV. STAT. ANN. § 173-B:1(I)(d) (2008) (interference with freedom); N.J. STAT. ANN. § 2C:25-19(a)(6) (2005) (false imprisonment); 23 PA. CONS. STAT. ANN. § 6102(a)(3) (2007) (false imprisonment); VA. CODE ANN. § 16.1-228 (2007) (forced detention); W. VA. CODE § 48-27-2002(5) (2007) ("Holding, confining, detaining or abducting another person against that person's will."). *See also* COLO. REV. STAT. § 18-6-800.3(1) (2007) (defining domestic violence as including coercion for legislative declaration purposes but not including coercion as a ground for relief).

¹⁵¹ MO. REV. STAT. § 455.010(1)(C) (2007) (defining coercion as "compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage"); NEV. REV. STAT. § 33.018 (1)(c) (2005) ("Compelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform.").

¹⁵² ALA. CODE § 30-5-2(a)(1) (2008) (abuse includes criminal coercion, which is not defined).

¹⁵³ IN. CODE § 34-6-2-34.5 (2008); N.H. REV. STAT. ANN. § 633:3-a (2008).

¹⁵⁴ *See supra* note 150.

¹⁵⁵ ALASKA STAT. § 18-66-990(3) (2008) (including harassment, defined under ALASKA STAT. § 11.61.120 (a) (2-4) (2008)); CAL. FAM. CODE § 6203(a) (West 2008)

laws can be placed in a few different categories based upon whether or not the conduct is limited by criminal law, whether or not a course of conduct is required, whether intent to cause emotional distress is required, and whether the emotional harms need to be measured subjectively and/or objectively. In the District of Columbia, the CPO law permits a civil protective order to be granted when there is a course of conduct that results in either subjective or objective emotional harm if it meets the criminal definition of stalking.¹⁵⁶ Delaware's CPO remedies a course of "alarming or distressing conduct . . . which is likely to cause fear or emotional distress . . ." but does not require actual emotional distress.¹⁵⁷ Hawaii makes actionable "extreme psychological abuse" as a form of domestic violence, and defines it as a course of conduct that both subjectively and objectively results in emotional

(including harassment, which is defined in CAL. PENAL CODE § 646.9(e) (West 2008)); 10 DEL. CODE § 1041(1)(d) (2005); D.C. CODE § 22-404(d) (2007); FLA. STAT. § 741.28 (2008) (identifying stalking, which is defined under FLA. STAT. § 784.048 (2008)); HAW. REV. ST. § 586-1 (2008); 750 ILL. COMP. ST. 60/103 (7) (2007); IN. CODE § 31-9-2-42(4) (2008) (including harassment, defined under IN. CODE § 35-45-2-2 (2008)); MICH. COMP. LAWS § 600.2950(1) (2007) (including prohibiting impairment of petitioner's employment and education and stalking, which is defined under MICH. COMP. LAWS § 750.411h (2008)); MO. REV. STAT. § 455.010(1)(d) (2007); NEV. REV. STAT. § 33.018(1)(e) (2008) (course of conduct intended to harass); N.J. STAT. ANN. § 2C:33-4 (2006); N.M. STAT. § 40-13-2(C)(2) (2006); N.Y. DOM. REL. LAW § 21 (2008) (including harassment, defined under N.Y. PENAL LAW § 240.25 (2008)); N.C. GEN. STAT. § 50B-1(a)(2005); N.C. GEN. STAT. § 14-277.3(c)(2006); OHIO REV. CODE ANN. § 2903.211(A)(1) (West 2007); R.I. GEN. LAWS § 15-15-1(7) (2007); 12 VT. STAT. ANN. § 5131(6) (2007). Interestingly, Oklahoma makes stalking and harassment actionable grounds for a CPO but explicitly carves them out from its definition of domestic violence. OKLA. STAT. tit. 22, § 60.1 (2007). Under the Oklahoma statute, stalking requires fear of death or great bodily injury. *Id.* But harassment does not require physical violence. If there is a "knowing and willful course or pattern of conduct" that "seriously alarms or annoys the [targeted] person, and which serves no legitimate purpose" then the act constitutes actionable harassment if the targeted person both objectively and subjectively suffers "suffer substantial emotional distress." *Id.*

¹⁵⁶ Under the CPO statute in the District of Columbia, domestic violence is any act punishable as a criminal offense. D.C. CODE § 16-1001(5) (2008). Such criminal offenses include stalking, which is engaging on more than one occasion "in conduct with the intent to cause emotional distress to another person. . .by . . .harassing that person." D.C. CODE § 22-404(b) (2008). And harassing is defined as "engaging in a course of conduct either in person, by telephone, or in writing, directed at a specific person, which seriously alarms, annoys, frightens, or torments the person or . . . would cause a reasonable person to be seriously alarmed, annoyed, frightened or tormented." D.C. CODE § 22-404(e)(2008). See *Richardson v. Easterling*, 878 A.2d 1212, 1217 (DC 2005) (defining actionable stalking as domestic violence for CPO purposes). Similarly, Maine includes a stalking like ground for a CPO but does not require fear of serious bodily injury nor emotional harm. 19 ME. REV. ST. ANN. § 4002(1)(F) (2008).

¹⁵⁷ 10 DEL. CODE § 1041(1)(d) (2005). See *M.B. v. H.B.*, 2003 Del. Fam. Ct. LEXIS 15 (File No C502-04668, Petition No. 02-34530) (May 2, 2003) (discussing this statutory provision).

distress.¹⁵⁸ Michigan and Missouri also remedy a course of conduct that results in subjective and objective emotional distress.¹⁵⁹ New Jersey's civil domestic violence law remedies a course of conduct that does cause or is intended to cause emotional distress.¹⁶⁰ And under six of the state laws, domestic violence includes a course of conduct that does result in emotional distress.¹⁶¹ Under three of the statutes, a course of conduct is not

¹⁵⁸ HAW. REV. ST. § 586-1(2005). The statute defines "extreme psychological abuse" as "an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress." *Id.* See *Kie v. McMahel*, 91 Haw. 438, 984 P.2d 1264 (1999) (with minimal analysis, upholding CPO on the basis of extreme psychological abuse).

¹⁵⁹ MICH. COMP. LAWS § 750.411h(1)(c) (2007) (defining domestic violence to include "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress.") In addition, under the Michigan civil domestic violence law, "[e]motional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MICH. COMP. LAWS § 750.411h(1) (b) (2007). MO. REV. STAT. § 455.010(1)(d) (2007) (stating that domestic violence includes "engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to another . . . and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable adult to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner."). See *Beckers v. Seck*, 14 S.W.3d 139 (Mo. 2000) (upholding renewal of CPO based on respondent's actions that led to plaintiff's substantial emotional distress).

¹⁶⁰ N.J. STAT. ANN. § 2C:33-4 (2006) (actionable domestic violence includes "communication or alarming course of conduct causing or with purpose of causing annoyance or alarm or subjects other to offensive touching"). See *e.g.*, *D.V. v. A.H.*, 394 N.J. Super. 388, 926 A.2d 887 (2007) (granting CPO for harassment caused by offensively coarse language in phone calls at inconvenient times causing petitioner alarm); *Tribuzio v. Roder*, 356 N.J. Super. 590, 813 A.2d 1210 (2003) (upholding CPO on grounds of harassment and stalking for defendant's repeated approaching of plaintiff, yelling at her, insistence on communication and blocking in her car).

¹⁶¹ See *e.g.* N.M. STAT. § 40-13-2(C)(2) (2006) (domestic violence includes acts causing "severe emotional distress."); N.C. GEN. STAT. § 50B-1(a) (2005) ("continued harassment that rises to such as level as to inflict substantial emotional distress" constitutes domestic violence.) Further, under the North Carolina law, harassment is conduct "directed at a specific person that torments, terrorizes, terrifies that person and that serves no legitimate purpose." N.C. GEN. STAT. § 14-277.3(c) (2006). See *Wornstaff v. Wornstaff*, 179 N.C. App. 516, 634 S.E.2d 567 (2006) (upholding CPO on basis of harassment, including banging of stapler, throwing a water bottle, and refusal to leave, which caused substantial emotional distress). OHIO REV. CODE ANN. § 2903.211(A)(1) (2007) ("pattern of conduct that knowingly causes . . . mental distress" meets the definition of domestic violence as well.). See *Dunkin v. Ireland*, 2005 Ohio 3371, 2005 Ohio App. LEXIS 3110 (no. 04AP-1175) (June 30, 2005) (upholding CPO on grounds of stalking when appellant threatened appellee she would lose kids, took photos of her house, and sorted through her

required.¹⁶² Rather, in these states, conduct that objectively and subjectively causes emotional distress is actionable under the civil laws remedying domestic violence.¹⁶³ In Rhode Island, cyberstalking that results in emotional distress is grounds for a civil protective order as it is domestic violence.¹⁶⁴ And in Vermont, stalking that results in substantial emotional distress constitutes domestic violence for CPO purposes.¹⁶⁵ Therefore, while sixteen states and D.C. provide a cause of action for emotional and psychological harm, there is little consistency as to what is actually required and the definitions are not explicitly linked to the previously cited domestic violence theories of power and control.

d. Symbolic, though not substantive, recognition of the many types of domestic violence

One state, Colorado, officially recognizes that domestic violence manifests in various types of control. The Colorado General Assembly as recently as 2007 amended its civil protective order statute to include a legislative declaration that “Domestic violence is not limited to physical threats of violence and harm but includes financial control, document

trash, because he had engaged in a pattern of conduct that caused appellee mental distress). *See also* CAL. FAM. CODE § 6203(a) (West 2008) (including harassment, which is defined in CAL. PENAL CODE § 646.9(e) (West 2008)); FLA. STAT. § 741.28 (2008) (identifying stalking, which is defined under FLA. STAT. § 784.048 (2008)); and N.Y. DOM. REL. LAW § 21 (2008) (including harassment, defined under N.Y. PENAL LAW § 240.25 (2008)).

¹⁶² *See e.g.* 750 ILL. COMP. ST. 60/103(7)(i) (2006) (for instance, creating a disturbance at petitioner’s employment or school is enough to constitute harassment). *See* Shields v. Fry, 301 Ill. App. 3d 570, 703 N.E.2d 921 (1998) (upholding CPO grounds of harassment because respondent’s acts caused petitioner emotional distress by making her uncomfortable, upset and angry). *See also* ALASKA STAT. § 18-66-990(3) (2008) (including harassment, defined under ALASKA STAT. § 11.61.120 (a) (2-4) (2008)) and IN. CODE § 31-9-2-42(4) (2008) (including harassment, defined under IN. CODE § 35-45-2-2 (2008)).

¹⁶³ 750 ILL. COMP. ST. 60/103(7) (2006) (stating that “knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress and does cause emotional distress to the petitioner” constitutes a form of domestic violence worthy of a civil protective order). *See* Shields v. Fry, 301 Ill. App. 3d 570, 703 N.E.2d 921 (1998).

¹⁶⁴ R.I. GEN. LAWS § 15-15-1(7) (2007). Under Rhode Island law, “cyberstalking” means “transmitting any communication by computer to any person or causing any person to be contacted for the sole purpose of harassing that person or his or her family.” R.I. GEN. LAWS § 15-15-1 (2007).

¹⁶⁵ 12 VT. STAT. ANN. § 5131(6)(2006) (domestic violence includes stalking, which is a course of conduct of “following or lying in wait for a person, or threatening behavior directed at a specific person . . . [and] would cause a reasonable person to fear for his or her safety or would cause a reasonable person substantial emotional distress.”).

control, property control and other types of control that make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs.”¹⁶⁶ Unfortunately, the legislature did not amend the “domestic abuse” definition of its civil protective order statute to make actionable for these forms of domestic violence.¹⁶⁷ Rather, the Colorado law limits “domestic abuse” to “any act or threatened act of violence.”¹⁶⁸ Because the law fails to include the harm from “financial control, document control, property control and other types of control” as additional actionable forms of domestic abuse for a civil protective order, the law fails to live up to the promise of the declaration.

¹⁶⁶ COLO. REV. STAT. § 18-6-800.3(1) (2007).

¹⁶⁷ COLO. REV. STAT. § 13-14-101(2) (2007).

¹⁶⁸ *Id.* It should be noted that the statute fails to define violence.

e. Conclusion

As discussed above, the fifty states and the District of Columbia do not consistently recognize and therefore fail to provide a remedy for all forms of domestic violence. Whereas all of the states recognize assault and bodily harm as domestic violence and provide a corresponding remedy, only one-third of the states recognize any form of emotional, psychological or economic abuse as domestic violence worthy of a civil law remedy. And while most state laws recognize threats of bodily harm as domestic violence, only one-third of the states permit a remedy for some form of coercive control. Only one state permits any civil law remedy for economic abuse.¹⁶⁹ Indeed, under Connecticut's civil law, it explicitly requires physical violence and threat of physical violence for actionable domestic violence when it states that "Verbal abuse or argument shall not constitute family violence unless there is present danger and the likelihood that physical violence will occur."¹⁷⁰ And the overarching theory of power and control as discussed earlier is invisible in the vast majority of the statutes.

iii. The Failure To Remedy All Harmful Domestic Violence

The failure of CPO laws to address and redress all harmful domestic violence is inconsistent with the goal of the civil protective order laws protecting women from abuse. Jurisdictions recognize that CPOs are remedial in order to protect a woman's safety and mental health and that they are designed to address abuse and subordination of women.¹⁷¹ The availability of a remedy only for that domestic violence which is a crime or results in severe physical violence reflects that the law fails to focus on the essence of domestic violence, the operation of power and control. As a result, the laws in action can provide unjust results.

For example, the District of Columbia Court of Appeals recently confronted the civil law's failure to effectuate its goal of addressing women's fundamental harms from domestic violence and the systematic exertion of power and control. Unfortunately, given the narrow scope of

¹⁶⁹ MICH. COMP. LAWS §600.2950(1) (2007).

¹⁷⁰ CONN. GEN. ST. § 46b-38a(1) (2007).

¹⁷¹ See e.g., *Murphy v. Okeke*, 951 A.2d 783, 790 (D.C. 2008) (citing to *Robinson v. Robinson*, 886 A.2d 78, 86 (D.C. 2005)); *Baker*, *supra* note 12 (manuscript at 4, on file with author) (many CPO laws intend to provide safety, time and autonomy to the petitioner).

the statute, the court had to address the failure in a way that is troublesome. Under D.C.'s CPO law, domestic violence is defined as any crime. In *Murphy v. Okeke*, the trial court had entered mutual CPOs: one against the male appellee for physically assaulting the female appellant, and one against the female for her subsequent trespass. On appeal, the court held that the male's CPO should be vacated. The court reasoned that "the trial court . . . should only enter a CPO against a party for reasons consistent with the underlying purpose of the" CPO law.¹⁷² Therefore, despite the plain language of the CPO statute that any crime would be actionable as domestic violence, the court said the female's trespass in response to the male's assault against her was not the type of domestic violence the CPO law was intended to address. Instead, the court said that the "broad remedial measures of the [D.C. CPO law] are to safeguard a victim's safety and peace of mind."¹⁷³ In addition, the Court noted that "while not strictly speaking a civil rights statute, the [CPO law] was designed to counteract the abuse and exploitation of women."¹⁷⁴ Therefore, while her CPO was for the type of domestic violence intended by the statute, his CPO was not, and the court vacated his CPO.

The *Murphy* case is an excellent example of the failures of CPO laws to address women's experience of abuse. Even though the District of Columbia legislature recognized that the purpose of its CPO law is to address the abuse and subordination of women, it failed to include these goals in the statutory domestic violence definition. Instead, D.C. included a both underinclusive (only crimes) and overinclusive (all crimes) definition that the Court of Appeals found to result in an unjust CPO law. And this is true. Yet, the cure for this problem should not be for courts to use their discretion to decide who is worthy of the remedy based on the court's understanding of the purpose despite the clear language of the statute. Such a result is problematic because real domestic violence remains silenced in the statute books and women's rights are subject to the randomness of whomever is sitting on the bench when heard. A better approach is for the legislature to address this issue and clearly amend the domestic violence definition within the CPO law.¹⁷⁵ Such amendments are necessary across

¹⁷² *Murphy v. Okeke*, 951 A.2d at 789-790 (D.C. 2008).

¹⁷³ *Id.* at 790. (citing to *Robinson v. Robinson*, 886 A.2d 78, 86 (D.C. 2005)).

¹⁷⁴ *Id.* (citing to *Cruz-Foster v. Foster*, 597 A.2d 927, 931 (D.C. 1991)).

¹⁷⁵ Interestingly, in *Richardson v. Easterling*, the D.C. Court of Appeals overturned the trial court's decision denying a CPO because although a criminal act, and hence domestic violence, had been proven, the petitioner had failed to show abuse or violence. *Richardson*, 878 A.2d 1212, 1216 (2005). In so holding, the court reasoned that the words of the statute should be construed according to their ordinary meaning. *Richardson*, 878 A.2d at 1216-1217.

the United States in order for the state CPO laws to appropriately identify for society, by capturing and remedying all forms of domestic violence, that the systematic operation of power and control through physical, sexual, psychological, emotional and economic abuse is illegal. By doing so, women like Vanessa and Susan, discussed at the beginning of this article, have the ability to exert their agency and seek legal boundaries regulating the behavior in their relationships, whether it be injunctions against certain types of behavior, for instance the insults and degrading behavior, a specific plan for the sharing of financial resources or the provision of Ulner's videotape to Susan and any copies thereto. Moreover, with legislative amendments society tells women like Kim, also discussed at the beginning of this article, that her abuse, though nonphysical, is harmful and worthy of a remedy.

II. THE CIVIL PROTECTIVE ORDER LAWS' FAILURE TO REMEDY ALL FORMS OF DOMESTIC VIOLENCE HURTS WOMEN AND SOCIETY'S COLLECTIVE UNDERSTANDING OF AND RESPONSE TO DOMESTIC VIOLENCE

The limited nature of domestic violence that is remedied under the majority of the civil protective order laws today causes negative consequences to women who are abused. Although feminists did not intend that such highlighting of physical violence would exclude all other forms of abuse,¹⁷⁶ the practical result is that non-criminal and non-physical forms of abuse are seen as irrelevant legally and experientially by the legal system, women who are abused, and even some feminists. Early feminists understood domestic violence as "premised on an understanding of coercive behavior and of power and control – including a continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation, rather than 'number of hits.'"¹⁷⁷ Yet the campaign to gain legitimacy by focusing on physical violence alone has resulted in women who are abused, like Kim, knowing they are abused but not seeing the abuse as something for which they can seek help because they do not have the requisite number of hits.¹⁷⁸ The laws' limited view of domestic violence decontextualizes the physical incidents of violence from the broader web of multifaceted abuse between intimates.¹⁷⁹ The effort to narrowly construct "battered women" into a distinct and marketable group has isolated their problems and made

¹⁷⁶ SCHNEIDER, *supra* note 19 at 65.

¹⁷⁷ *Id.*

¹⁷⁸ SCHNEIDER, *supra* note 19 at 65.

¹⁷⁹ *Id.* at 72; Kuennen, *Coercion*, *supra* note 25 at 13-15 (discussing the importance of judicial examining of the context of CPO petitioners' lives).

them appear no longer connected to the social structures that support the violence.¹⁸⁰ The media focus on domestic violence as constituting primarily severe physical harm has only exacerbated the disaggregation of domestic violence.¹⁸¹ Although much domestic violence legislative action was successful following media attention to domestic violence,¹⁸² that media attention is almost always regarding severe physical violence, and therefore, the resulting legislative initiatives continue with that focus.¹⁸³

There are three broad categories of negative consequences that result from the failure of the civil laws to remedy all fundamental harms of domestic violence. The first category is the most obvious. With the limited view of domestic violence, anyone who has been subjected to various forms of domestic violence not covered under the CPO statutory definition of domestic violence cannot file a cause of action or obtain a remedy. This is critical because women suffer great harm from psychological, emotional and economic abuse. These harms include severe emotional distress, physical harm, isolation, sustained fear, intimidation, poverty, degradation, humiliation and coerced loss of autonomy.¹⁸⁴ In addition, CPOs have been found to be successful in decreasing abuse and attacking power imbalances.¹⁸⁵ Therefore, the harms of emotional, psychological and economic abuse could be potentially successfully remediated with a CPO. Moreover, given the research that psychological and emotional abuse can lead to physical abuse, providing the CPO remedy before this happens may also eliminate the physical abuse.¹⁸⁶ The second broad category is the loss of the woman's autonomy in decisionmaking about how best to address the abuse in her relationship. Because increasing autonomy is linked with a decrease in abuse, such a result is detrimental to women.¹⁸⁷ The third category is the negative consequences caused by other civil laws linking their definition of domestic violence to CPO laws and therefore excluding

¹⁸⁰ SCHNEIDER, *supra* note 19 at 72 (2000).

¹⁸¹ Goldfarb, *supra* note 21 at 1496 (citing the Burning Bed and Nicole Brown Simpson events as permitting successful anti-domestic violence legislation). *See also* JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE* 60-64 (1999) (discussing consequences of media attention on domestic violence).

¹⁸² Goldfarb, *supra* note 21 at 1496. At the beginning of this article, there are brief discussions of Susan and Kim. *See supra* text accompanying notes 2 and 3. They were the only mass media stories that I was able to find regarding domestic violence that did not focus on the physical violence.

¹⁸³ *Id.*

¹⁸⁴ Adams, *supra* note 62 at 563-568.

¹⁸⁵ *See supra* Part I.b.

¹⁸⁶ *Id.*

¹⁸⁷ *See supra* Part I.b.

women from other legal remedies. Each of these pieces will be discussed in turn below.

a. NEGATIVE CONSEQUENCES OF STATUTORY LANGUAGE ITSELF FAILING TO REDRESS ALL FORMS OF DOMESTIC VIOLENCE

Due to the states' failure to remedy all forms of domestic violence, women subjected to abuse are often left without a remedy. For instance, Vanessa and Kim¹⁸⁸ would not be able to bring a claim or obtain a remedy in two-thirds of all states. And while Susan¹⁸⁹ would have an action for the physical abuse to which she was subjected by Ulner, she would not be eligible for a remedy in most states for the other acts Ulner committed, including the act that caused her the most pain, Ulner's demand that their son videotape Ulner's degradation and humiliation of her. And if Susan does not have a cause of action for certain forms of abuse, she might be unable to remedy them. For instance, she may want Ulner to turn over all copies of the videotape taken, but if the taping is not seen as part of the domestic violence, this relief might be denied. Many states have included in their legislative histories the goal of attacking the type of oppressive power and control demonstrated by Ulner even without the physical abuse.¹⁹⁰ The only way women can be ensured a forum to air their abuse and to seek a remedy for it is if the CPO statutes are amended accordingly. Research shows that the mere act of petitioning for a CPO can decrease subsequent violence.¹⁹¹ Accordingly, if CPO laws were to recognize all of the fundamental harms of domestic violence, more women could file petitions and perhaps experience a decrease in abuse.

b. NEGATIVE CONSEQUENCES OF CIVIL PROTECTIVE ORDER LAWS RELYING PRIMARILY ON CRIMINAL LAWS AND PHYSICAL VIOLENCE TO DEFINE DOMESTIC VIOLENCE

As identified above, legislators have often enacted civil protective order laws that primarily redress domestic violence that is explicit criminal acts.¹⁹² Part of the reason for linking the civil domestic violence definition to crimes is because battered women activists saw the civil protective order laws as a response to the failings of the criminal justice system to protect

¹⁸⁸ See *supra* notes 1 and 2 and text accompanying thereto.

¹⁸⁹ See *supra* note 3 and text accompanying thereto.

¹⁹⁰ See e.g. *Murphy v. Okeke*, 951 A.2d at 790.

¹⁹¹ *McFarlane*, *supra* note 22 at 616.

¹⁹² See *supra* text accompanying notes 148-149.

women subjected to abuse.¹⁹³ And because one of the available remedies of the civil protective order is criminal enforcement through criminal contempt or prosecution of a misdemeanor crime, some legal commentators have classified the CPO as a “hybrid” between civil and criminal laws, even further blurring the line between the two systems.¹⁹⁴ Many system actors, such as judges, clerks and lawyers, therefore, believe that all domestic violence should be interchangeable with their understanding of what is a crime.¹⁹⁵ As a result, even petitioners can become confused about the differences between the civil legal system and the criminal justice system.¹⁹⁶ Yet, the civil system is available to private parties with a dispute. The criminal system is available to the state to enforce the criminal laws. When the line is blurred between these two systems, women subjected to abuse can suffer numerous negative consequences within the civil legal system. Relatedly, many negative consequences result from domestic violence law remedying only physical violence. These negative consequences are discussed in turn below.

i. Ensures That Psychological, Emotional and Economic Abuse Will Not Be Addressed

When the civil system is deeply intertwined with the criminal justice system, it ensures that the domestic violence narrative is one of crimes and primarily physical violence alone. Therefore, psychological, emotional and

¹⁹³ Balos, *supra* note 22 at 564.

¹⁹⁴ See AM. JUR. CONTEMPT §§ 147-148 (2008) (criminal contempt is available for many violations of civil court orders); Waul, *supra* note 106 at 54. See also Goldfarb, *supra* note 21 at 1509 (citing Waul, *supra* note 106 at 53 (calling the CPO a “criminal justice intervention”).

¹⁹⁵ See FINN & COLSON, *supra* note 11 at 1 (stating that domestic violence is a crime which needs civil protective orders because the criminal justice system is not always the best system in which to address the domestic violence).

¹⁹⁶ Many petitioners seek a civil protective order because when the police responded to their 911 call, the police told them to go to court and file a “CPO.” See e.g., <http://mpdc.dc.gov/mpdc/cwp/view,a,1232,q,541117.asp> (Washington, D.C. police department website stating police responding to 911 call can make referrals to CPO proceedings) (last visited 8/25/08). Accordingly, since a criminal justice system actor is telling them to file for an order, petitioners often think that the CPO process is related to the criminal justice system. Unified intake centers, where petitioners meet with prosecutors and civil advocates and attorneys in the same physical location, and unified courts that handle both criminal and civil domestic violence cases in the same unit may heighten this confusion. See generally Thomas F. Capshew and C. Aaron McNeece, *Empirical Studies of Civil Protection Orders in Intimate Violence: A Review of the Literature*, 6 CRISIS INTERVENTION AND TIME-LIMITED TREATMENT 151, 163 (2000) (stating that women who participated in the civil legal system found it to be intertwined with the criminal justice system).

economic abuse will not be addressed or listened to in any fashion unless they can be contorted into meeting the definition of a crime that is valued by the court.¹⁹⁷ The result is that society tells women like Kim¹⁹⁸ that nonphysical violence is unworthy of a response or remedy. Many legal theorists have written about the importance of “giving a name” to domestic violence.¹⁹⁹ As Professor Schneider states “the development of legal process can shape social consciousness by identifying and redefining harm, breaking down the public-private dichotomy, and legitimizing the seriousness of the problem.”²⁰⁰ Early feminists knew that individual experience influenced and was influenced by the collective.²⁰¹ That is to say that the individual women’s ability to name the domestic violence influences society’s broader understanding of the systemic nature and impact of the power and oppression that is domestic violence.²⁰² Therefore, just as important as it is to label domestic violence as criminal and physical violence for all of the reasons the early activists knew, it is equally important that domestic violence include the label of emotional, psychological, and economic abuse as manifestations of the oppression.²⁰³ As one study shows, the “CPO process was a means for creating a public record of the abuse [women] had experienced. It was a way for them to break their silence and send a message to the batterer that his behavior would not be tolerated. Several women also indicated that filing a protective order allowed them to take some initial steps toward regaining control of their lives.”²⁰⁴ Accordingly the naming and narrative of domestic violence is unjustly constrained when co-opted as criminal law or physical violence, thereby resulting in ignoring many of the harms to women subjected to abuse.

ii. Disparate Goal Of Criminal Justice System Undermines Goals Of Women Seeking A Remedy In The Civil System

¹⁹⁷ Burke, *supra* note 25 at 570.

¹⁹⁸ See *supra* note 2 and text accompanying thereto.

¹⁹⁹ SCHNEIDER, *supra* note 19 at 46; Miccio, *House Divided*, *supra* note 31 at 288.

²⁰⁰ SCHNEIDER, *supra* note 19 at 46.

²⁰¹ Miccio, *House Divided*, *supra* note 31 at 301.

²⁰² *Id.* at 301.

²⁰³ *Id.* at 288 (“Adrienne Rich understood the power of naming. She recognized that empowerment of a people derived, in part, through the act of naming – naming the source of oppression and the site of pain. The power of naming gives voice to social phenomenon, while making visible the invisible. And it constructs how we interpret certain experiences.”).

²⁰⁴ Fischer & Rose, *supra* note 106 at 414.

Second, negative consequences also result from the fact that the criminal justice system has different goals than the civil system. In the criminal justice system, states not private parties are the actors entitled to a remedy that is driven by the states' view of justice. When the civil legal system is seen as quasi-criminal, there is a risk that outside actors, like courts and petitioner's attorneys, should save CPO petitioners based on the outside actors' view of what is the relevant harm and remedy. The criminal justice system is focused primarily on the protection from and eradication of severe physical violence for the benefit of society, while the civil system's goal is to provide the petitioner with a remedy that addresses her harms from domestic violence.²⁰⁵ As a result, when judges, clerks, advocates or lawyers believe the civil system to be the same as the criminal justice system, they often fail to permit the petitioner to include her entire experience of the violence as it exists within her relationship.²⁰⁶

Instead, system actors often limit the testimony to their view of the most worthy criminal act. Courts often consider that there is a hierarchy of crimes. Accordingly, the message from the courts is that the CPO must be sought for a worthy incident of physical violence, one where the court can feel it is actually saving a life, such as an assault or battery. Courts place crimes such as stalking and harassment at the bottom of this ranking. As a result, the courts are less inclined to grant a CPO on the basis of these crimes because they are not seen as worthy enough. Below is an example that is representative of judges' decisions across the country. In denying a cyberstalking claim as the basis for a civil protective order, despite the fact that the CPO law included cyberstalking in the definition of domestic

²⁰⁵ Shazia Choudhry, *Righting Domestic Violence*, 20 INT'L J.L. POL'Y & FAM. 95 (2006) (discussing the state's interest and its interventionist strategy as opposed to the woman's privacy interest).

²⁰⁶ It should be noted that certain jurisdictions do permit the court to inquire into the entire "mosaic" of the violence in CPO proceedings. *See Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991). However, even in these jurisdictions, the ability to explore the mosaic does not actually permit the addressing of the fundamental harms of psychological, emotional and economic abuse. This is because courts do not explore the mosaic unless the petitioner states an actionable claim of domestic violence based on the statute's definition. Therefore, for women who suffer non-physical violence, courts cannot address their abuse if the statutes only permit physical abuse to be addressed. In addition, the exploration of the mosaic is intended to permit past acts of actionable violence to be included to help corroborate the current act of violence. *See id.* (mosaic of past violent conduct should be explored to help predict future conduct). There is no remedy offered for the violence included in the mosaic and what is permissible as mosaic information is also shaped by the statute's definition of domestic violence. Finally, for women like Kim (discussed at the beginning of this article) who do not know that they can seek a remedy for the harms to which they are subjected, there is a great benefit and power to women to name domestic violence accurately in our statutes to make it clear that their abuse is illegal and they are entitled to a remedy.

violence, one trial judge stated:

In this domestic violence area, there are many crimes. At the top of the line is assault. Then there is threat of serious bodily injury. There is stalking, which is above harassment. Stalking is a course of repeated conduct that places the plaintiff in reasonable fear of bodily injury to plaintiff or a third person. Here, the course of conduct includes repeated calls that involve vulgarity or intent to upset another person, in addition to a threat to injure plaintiff and plaintiff's car. There is evidence of an extensive course of such conduct, but no one got hurt. Twelve years ago[before enactment of the stalking criminal law²⁰⁷], the court could not intervene in people's lives, where they go and how they contact others. Courts should be reluctant to do so unless the plaintiff can meet the burden of proof. I wish you had worked this out by yourselves. The court is powerless to do anything meaningful except to make this worse. A protection order wouldn't protect anyone. The only protection would be against insults. My responsibility is to protect lives. Therefore, I am denying plaintiff's protection order.²⁰⁸

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

iii. System Actors Become Desensitized to Domestic Violence That Is Not Criminal or Severe Physical Violence

Relatedly, when civil protective order statutes rely on criminal law and severe physical violence to define what is actionable domestic violence, judges and other system actors, such as clerks, attorneys and advocates, may become desensitized to all forms of domestic violence save for those

²⁰⁷ Note that stalking wasn't added as an actionable form of abuse under the CPO law in Maryland until October 1, 2005. See Effect of Amendments, MD. CODE ANN., FAM. LAW § 4-501 (West 2007).

²⁰⁸ This is a slightly modified version of a Maryland court ruling in a 2007 domestic violence civil protective order case. It is modified slightly in order to focus on the most relevant issues to this article. It is an approximation rather than a transcription because it is based on my notes rather than the hearing transcript.

with an extreme criminal battery.²⁰⁹ Therefore, the narrative becomes more restricted and the discourse of domestic violence excludes even that domestic violence which is actionable under the CPO laws but does not involve severe physical violence.

There is a range of intentional, offensive touching that can meet the criminal act of assault. Yet many courts, despite a civil protective order law's inclusion of any assault as domestic violence, will discount acts that do not result in severe physical injury or are seen as seriously violent. For instance, a husband hit his wife with an electrical cord on numerous occasions and locked her in a closet for several hours. When the wife requested a police escort at the end of her CPO hearing to retrieve her personal belongings from their joint residence, the judge refused and said "This is pretty trivial . . . This court has a lot more serious matters to contend with. We're doing a terrible disservice to the taxpayers here. You want to gnaw on her and she on you, fine, but let's not do it at the taxpayer's expense."²¹⁰ This same court desensitization to domestic violence is seen in those jurisdictions where the CPO laws encompass threats of violence and non-violent crimes, such as harassment and stalking.²¹¹ For instance, even when the CPO statute permitted threats as actionable domestic violence, "[s]ome judges are reluctant to exercise their authority to issue an order when threats are alleged but no actual battery has occurred. For example a judge in a state that authorizes protective orders on the basis of threats grants orders only if there have been several threats and the abuser has the ability to carry out his menaces."²¹² Therefore, the report shows that judges are not exercising their full statutory authority in addressing as broad a spectrum of domestic violence as is permitted under their existing CPO laws. Rather, domestic violence courts and others tend to credit only extreme criminal physical violence and discount comparatively minor physical abuse or other domestic violence.

iv. Limits Women's Stories Of Abuse To Only Criminal Or Severe Physically Violent Acts

²⁰⁹ See Wan, *supra* note 42 at 623.

²¹⁰ Buel, *supra* note 45 at 968 (citing Joan Meier, *Bettered Justice*, WASH. MONTHLY, May 1987, at 38).

²¹¹ See *supra* note 208 and text accompanying thereto.

²¹² FINN & COLSON, *supra* note 11 at 10. The authors do not know why the judges fail to do so but posit that perhaps they are uncertain about whether they met the additional requirements of the stalking statute. *Id.* at 10-11. Although unclear, this tends to indicate that any amendments need to be specific about the criteria so that judges do not add extra elements unintended by the statute.

When courts limit actionable domestic violence to decontextualized criminal events of severe physical abuse, courts and other system actors alter or silence women's stories of domestic violence told in public court proceedings. When judges minimize or justify such forms of abuse, women are even more reluctant to use the civil legal system to address their needs.²¹³ Women's ability to have a public forum to air the abuse to which they have been subjected can offer healing, validation and empowerment.²¹⁴ When advocates, lawyers and courts limit women's ability to have this necessary and appropriate public forum to address serious harms, they negatively impact women subjected to abuse. One study shows that the failure of courts to actually grant CPOs to qualified women subjected to abuse harms them further because they are subsequently subjected to more abuse and threats of abuse than women who were qualified for CPOs and received them.²¹⁵ To avoid this harm, the law and the courts need to permit women to seek civil protective orders for all forms of abuse so that the resulting empowerment of women subjected to abuse having a legal forum can effectively address the abuse.²¹⁶

It is important to note that it is not just courts who preclude women who are abused from seeking a remedy even though they are otherwise qualified under the CPO statute. Such silencing was documented by a commentator who observed the domestic violence intake center in the District of Columbia. She found that when resources were limited, petitioner's attorneys decided that "only the most 'severe' cases are assigned an attorney."²¹⁷ Therefore, qualified petitioners only received the assistance of an attorney if they were subjected to severe physical abuse, perpetuating the narrative. Linda Mills asserts that "Mainstream feminists exert power by defining who women in abusive relationships are and therefore what they should do about the violence in their lives."²¹⁸ It is important that feminists along with other advocates, lawyers and courts,

²¹³ See Buel, *supra* note 45 at 968.

²¹⁴ See e.g. Goodmark, *Telling Stories, Saving Lives*, *supra* note 107 at 756-757; Buel, *supra* note 45 at 996.

²¹⁵ Gist, *supra* note 101 at 67-68.

²¹⁶ Buel, *supra* note 45 at 1020 (arguing for a new tort of domestic violence in order to offer credibility and empowerment to victims of domestic violence).

²¹⁷ Waul, *supra* note 106 at 64 (emphasis added). Of course, such a decision is even more problematic in its determination of who is worthy of a valuable resource. Given the fact that the legal system expects to grant CPOs to women who are subjected to severe physical abuse, women subjected to abuse that does not fit the court's assumptions about "real" abuse might actually have a greater need for an attorney to be successful in their claim.

²¹⁸ MILLS, *supra* note 96 at 50.

analyze critically the stories of domestic violence that we have constructed and examine why they are the ones that focus on physical violence and exclude the other fundamental harms of domestic violence. This analysis needs to account for the fact that the legal narrative of domestic violence as almost exclusively about severe physical violence can be traced to the development of the domestic violence laws.

Now there is an expectation that domestic violence is physical violence. It is when women get killed, that the newspapers cover the stories of courts failing to help these women. And the more gruesome the violence is, the more prominent the story. And of course these stories and women's lives should be front-page news and honored by everyone's outrage and sadness. Yet other women's stories also need to be heard. Without including in the domestic violence discourse the fundamental harms from psychological, emotional and economic abuse along with physical abuse, we are excluding many women who want to seek legal redress but can't, or do seek legal redress but are denied, in order to redefine their relationship with their partner or ex-partner.

For instance, Anna Bergman, who was twenty years old, sought a civil protective order in Catonsville, Maryland on Friday, July 27, 2007.²¹⁹ When Bergman went to court seeking a protective order, she was concerned that Ryan Butler, her ex-partner and father of her children, had threatened to harm her new boyfriend.²²⁰ A court commissioner explained later that Bergman was unsuccessful in seeking a protective order because she only described the threat against her boyfriend and nothing against herself.²²¹ This was despite the fact that Bergman likely perceived the threat against her boyfriend as a threat against herself. Nonetheless, she left the courthouse without any court-ordered relief.²²² Three days later, Bergman was murdered by Butler, who also abducted their three-year-old son.²²³ This brutal murder made the news, which is how everyone learned about what Ms. Bergman experienced in the court three days earlier.

With the horrific killing of Bergman, some of the news coverage blamed clerk's offices and judges for not encouraging victims of domestic violence to fill out detailed forms asking about the history of abuse,

²¹⁹ Suzanne Collins, Family: Murdered Mom Was Denied Protective Order, *WJZ*, Baltimore, Aug. 1, 2007 (on file with author).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

including stalking and harassment.²²⁴ Experts justifiably criticized clerks, commissioners and judges for not asking enough questions to learn about the prior physical abuse between Bergman and Butler.²²⁵ The critics asked why the system failed to explore the entire context of Ms. Bergman's relationship with Mr. Butler. The answer may be that the questions were not asked because we as a society have so limited the scope of what is domestic violence in the legal system that few ever ask these questions or try to learn this information. In fact, when this legally relevant information is included, clerks or judges often state that only the most important and egregious crimes should warrant a CPO remedy.²²⁶ A judge in Wisconsin expressed his disdain for actionable but non-physical domestic violence by stating "These cases aren't anything compared to how it used to be. I've been here in family court for over 30 years and I never used to see this kind of crap . . . women used to come in with real abuse cases . . . broken arms and bloody noses."²²⁷ And because so many judges and courts have decided that it is severe physical violence that is the most important, the only goal that becomes permitted in court to be addressed is the goal of saving lives. Any other goal, such as the broader goal of trying to rearrange one's relationship with the abuser in order to remediate the multifaceted abuse and harms thereto, is more often than not precluded from being aired and litigated.

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

²²⁴ *Id.* (citing Dorothy Lennig, Legal Director, House of Ruth, who stated "'Clearly she was afraid of something and as it turns out she had a real reason to be afraid. Had the commissioner listened to her testify and read her petition, it may have shown a different story.'")

²²⁵ *Id.*

²²⁶ See *supra* note 208 and text accompanying thereto.

²²⁷ Wan, *supra* note 42 at 623.

inquiry of why has this woman come to redefine her relationship with her ex-husband and how is he exerting power and control over her. The court could then explore whether and how her ex-husband attempted to control and intimidate Ms. Bergman in a patterned and oppressive way, such as the presence of physical violence, other threats of physical violence, any economic coercion and any and all patterns of derogatory behavior, isolation, humiliation, or other psychological or emotional abuse. As a result, Ms. Bergman could relate her experience of the abuse. The research shows that such an approach by the court actually improves the woman's experience of the court, permits the woman to exert her autonomy and thus best redress the violence in her life.²²⁸

**v. The State Becomes the De Facto
Decisionmaker Thereby Undermining
Women's Agency**

In the criminal justice system, the state, through the prosecutor and the court, is the decisionmaker as to how the criminal case will proceed – such as determining what charges will be brought, what plea will be accepted, and what will be tried.²²⁹ Because courts often view CPOs as “quasi-criminal,” judges may take a “more interventionist, rather than deferential, approach.”²³⁰ For instance, judges presiding over civil protective order hearings much more frequently intervene and deny petitioners' motions to vacate than judges who decide plaintiffs' motions to dismiss in other civil litigation.²³¹ As a result, CPO judges often “are substituting their judgment for that of the victims who are seeking assistance in their courtrooms.”²³² The judges end up controlling the woman through their official power. Therefore, the legal system constructs the narrative that the state and other outside actors should be the decisionmaker to save the woman for she is ill-suited to address the

²²⁸ See *id.* at 615-631 (Wan created various typologies based on the similar ones created by James Ptacek. See James Ptacek, *Disorder in the courts: Judicial demeanor and women's experience seeking restraining orders* (Doctoral dissertation, Brandeis University, 1995) (Dissertation Abstracts International, 56, 1137)). In her typology, “good-natured” system actors who understood their role as permitting the autonomy of the petitioner provided women better experience and greater autonomy.

²²⁹ Miccio, *House Divided*, *supra* note 31 at 266 (discussing the marginalization of women subjected to abuse in the criminal justice system and specifically in no-drop prosecution jurisdictions).

²³⁰ Kuennen, “*No-Drop*”, *supra* note 15 at 44-46 (discussing the failure of judges to treat civil protective order cases as they treat other civil injunction cases).

²³¹ Kohn, *supra* note 46 (manuscript at 56 n.211, on file with author).

²³² GOODMAN & EPSTEIN, *supra* note 28 at 82.

abuse.²³³ However, a CPO case is a civil case, one that is brought by the petitioner and should be governed by her judgments and goals, not those of the judges.

By removing the role of decisionmaker from a woman subjected to abuse, the civil legal system thus undermines her ability to self-direct and define how best to address the abuse in her relationship.²³⁴ Hence, the system inhibits her agency.²³⁵ Many women are skeptical of the criminal justice system because mandatory arrest²³⁶ and no-drop prosecution²³⁷ policies have resulted in a system that overrides victims' interest for society's interest.²³⁸ Because the majority of the civil protective order laws rely upon criminal statutes to define the type of domestic violence that is worthy of a remedy, many women believe that the civil protective order system will treat them in the same manner as the criminal justice system. As a result, these women often believe that once they file a civil case, they will lose control over the outcome as they would in a criminal matter.²³⁹ And their belief is supportable. In addition to the courts' refusal to grant women's motions to dismiss, a 1990 U.S. Department of Justice report on CPOs underscores the view that CPOs are for the judges, not the women, to

²³³ *Id.* at 83.

²³⁴ Goldfarb, *supra* note 21 at 1510, 1514-1515. MILLS, *supra* note 96 at 31 ("the idea that intimate violence is best addressed by silencing the victim and letting the state take the initiative against the batterer, ignores the significance of women's agency when she is threatened by intimate violence."); Kohn, *supra* note 46 (manuscript at 67, on file with author).

²³⁵ See Goldfarb, *supra* note 21 at 1498 and n.63. Kohn, *supra* note 46 (manuscript at 70, on file with author) (research shows that women subjected to abuse are in the best position to predict future violence and that criminal justice systems that exclude such women from decisionmaking fail to enhance their safety).

²³⁶ Miccio, *House Divided*, *supra* note 31 at 265, 278-279 (by 1994 most states incorporated mandatory arrest policies, requiring the police to arrest someone in response to any 911 domestic violence related call).

²³⁷ *Id.* at 265-266 (discussing the no-drop prosecution policies that require prosecutors to pursue prosecution of domestic violence related crimes even if the victim fails to cooperate in the prosecution).

²³⁸ Kohn, *supra* note 46 (manuscript at 15 n.53, on file with author). For other reasons why women are skeptical of the criminal justice system, see Deborah M. Weissman, *The Personal is Political – And Economic: Rethinking Domestic Violence*, 2007 B.Y.U. L. REV. 387, 401 (2007). The study is consistent with one of my clinic student's client's experience. The client had been subjected to abuse, and wanted to hold her husband accountable, but did not want to involve the police in such a way as to trigger mandatory arrest and no-drop prosecution. Therefore, rather than calling the 911 number for emergencies, she called 311, which was the nonemergency police telephone number in the District of Columbia. See notes from clinic supervision sessions on file with author.

²³⁹ Waul, *supra* note 106 at 53.

use to address the domestic violence. The report states “[c]ivil protection orders. . .offer *judges* a unique additional tool for responding to the special difficulties of domestic violence cases.”²⁴⁰

The woman has lost her control as a party to the litigation when the judge and other system actors view the case as one controlled by the legal system. And if the woman’s goal for the CPO, for instance, is seeking to continue her relationship with the abuser with an injunction against future abuse, is not the same as the judge’s, for instance the woman should be separated from her abuser, the judge may be contemptuous of the woman and of the judge’s role in sanctioning her decisionmaking. One Wisconsin judge stated derisively “My job is to hand out [CPOs] to women and then watch couples kiss and make up.”²⁴¹ Such disdain arises from the belief that women should not be able to make these decisions and that they are not making the right decisions, despite, in the above instance, the research on separation assault.²⁴² And this is despite the fact that when women subjected to abuse make decisions regarding how to address the abuse in their life, this agency leads to greater empowerment of them and prevention against domestic violence.²⁴³

When courts override women’s decisions in a civil proceeding as to how to address the abuse in her relationship the result is problematic because “an important element of responding to the problem [of domestic violence] is to restore a victim’s fundamental rights of freedom, choice and autonomy.”²⁴⁴ Women’s agency can be promoted by expanding options for women subjected to abuse, including civil legal options that such women can

²⁴⁰ FINN & COLSON, *supra* note 11 at 1 (emphasis added); *but see* Kuennen, “No-Drop”, *supra* note 15 at 67 (citing to a New Jersey court decision in which the court acknowledged that the criminal and civil legal systems are different and that therefore, petitioners should have “complete autonomy in decisionmaking” in the civil case) (internal citation omitted).

²⁴¹ Wan, *supra* note 42 at 623.

²⁴² See Baker, *supra* note 12 (manuscript at 12, on file with author).

²⁴³ See *supra* Part I.b. See also Deborah Epstein, Margaret E. Bell, Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM U. J. GENDER, SOC. POL’Y & L. 465, 469 (2003); GERALD T. HOTALING AND EVE S. BUZAWA, VICTIM SATISFACTION WITH CRIMINAL JUSTICE CASE PROCESSING IN A MODEL COURT SETTING 32, grant no. 00-WT-VX-0019 (April 2003) (available from NCJRS (NCJ 195668) (whether or not women were satisfied with the domestic violence criminal justice system depended on control: control over the criminal justice system; the batterer and what he would do in the future; and stopping the violence when it happened)); Waul, *supra* note 106 at 65 (finding that women “use the CPO process to send a message to the offender that his behavior will not be tolerated”).

²⁴⁴ Kuennen, *Coercion*, *supra* note 25 at 30.

control. By expanding the recognition of all harmful domestic violence in civil protective order statutes, women subjected to multifaceted abuse are able to enter the courthouse and seek a legally enforceable redefinition of their relationship with the person perpetrating the abuse. And other studies confirm that when women subjected to abuse experience system actors who “listen, consider and respond to their needs,” the women are less at risk of re-assault.²⁴⁵

Unsurprisingly, the importance of autonomy and agency is almost self-evident once we return to a definition of domestic violence that is based on a series of actions taken to dominate another and to eradicate one’s agency.²⁴⁶ As Professor Martha Fineman has written, “we must begin to think of autonomy as possible only in conjunction with the meaningful and widespread attainment of equality.”²⁴⁷ And the civil legal system should strive to provide a forum for women seeking equality. One study shows that women sought civil protective orders in order to regain control in their lives, regain equality in the relationship, by making the abuse public and placing the abuser on notice that the behavior was under public scrutiny.²⁴⁸ In this study, women turned to the legal system to regain some of the power they felt they had lost as a result of the abuse.²⁴⁹

If domestic violence is defined as only physical harm or crimes, then domestic violence is firmly situated in a realm where society so far has been satisfied with only a societal interventionist approach that is dictated by society’s goals and values separate from the women’s. As stated in the early battered women’s movement, when the broad definition of domestic violence was still invoked, “Battered women’s rights to self-determination, including the decision to leave or stay with their husbands, were to be respected; if sexism robbed women of control over their lives, Women’s Advocates[, an early shelter in St. Paul, MN,] would work on methods for returning it, even if no one quite knew how.”²⁵⁰ This ultimate goal of empowerment was needed to counteract the undermining of agency that is

²⁴⁵ Kuennen, “No-Drop”, *supra* note 15 at 43.

²⁴⁶ Goldfarb, *supra* note 21 at 1494 (“In order to counteract the harm of domestic violence, the law’s response should focus on shifting power and control back to the victim”) (citing Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999)).

²⁴⁷ MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 29 (2004).

²⁴⁸ Strack and Hyman, *supra* note 46 at 42.

²⁴⁹ *Id.* (“The protective order becomes an announcement that the abused woman refuses to ‘take it’ anymore and is acting on her own behalf.”) (internal citation omitted).

²⁵⁰ SCHECHTER, *supra* note 32 at 63.

at the core of all domestic violence. The original drafters of CPO laws intended to provide vehicles that would promote victim autonomy.²⁵¹ And although commentators have stated that CPO laws “have proven to be tools that can significantly improve the achievement of the [goal of autonomy],”²⁵² as discussed above, this goal is often undermined by the failure to recognize all forms of abuse to which women are subjected.

By broadening the civil legal system’s recognition of domestic violence to include all forms of abuse as part of the complex dynamics of intimate relationships where the criminal justice system does not necessarily go but civil law does, our society may be able to more fully address the entire spectrum of domestic violence and provide a remedy to all women subjected to it.

c. NEGATIVE CONSEQUENCES OF OTHER LAWS RELYING ON CIVIL PROTECTIVE ORDER LAWS TO DEFINE DOMESTIC VIOLENCE

The third broad category of negative consequences from the narrow CPO recognition of domestic violence is the domino effect it has in the area of other civil laws. The narrative that domestic violence is only severe physically violent crimes becomes adopted by other civil laws, which incorporates CPO law and thus extends the exclusion of legal recognition of all fundamental domestic violence harms. As discussed above, the civil protective order domestic violence definition fails to remedy all forms of domestic violence. As a result, women who are subjected to abuse that falls outside the statutory definition or are otherwise excluded from seeking a remedy discussed are unable to seek and obtain a CPO. Without the CPO, these same women can be denied other forms of legal relief impacting their family status, immigration status and welfare status, to name a few. This is due to the fact that some civil laws that address domestic violence simply cross-reference the protective order statute to define domestic violence or rely upon the CPO itself to prove domestic violence.²⁵³

For instance, many states consider domestic violence as a factor to be considered in custody determinations and the granting of visitation

²⁵¹ Kuennen, *Coercion*, *supra* note 25 at 7 n.3.

²⁵² *Id.*

²⁵³ See D.C. CODE § 32-131.01(1) (2008) (law providing the use of accrued leave for domestic violence related leave cross-references the CPO law for the definition of domestic violence).

privileges.²⁵⁴ In the District of Columbia, for example, there is a rebuttable presumption that joint custody is not in the best interest of the child if a court finds that domestic violence, as defined in the civil protective order statute, has occurred.²⁵⁵ Also, in making certain custody or visitation determinations, the court is required to make written findings related to the allegations of domestic violence.²⁵⁶ If the court finds that one parent has committed domestic violence, a court may only grant custody or visitation to the abusive parent with specific, written findings.²⁵⁷ And the court may only award visitation to the abusive parent if the court finds that the child and other parent will be protected from harm and the abusive parent needs to prove that visitation will not harm the child.²⁵⁸ Again, however, whether there was domestic violence in the relationship rests upon the civil protective order's definition of domestic violence. Such a looping back to the civil law is common and makes the CPO laws' view of actionable domestic violence that much more important. Although many states, like the District of Columbia, appropriately consider domestic violence in custody determinations, only a limited strand of domestic violence will be considered, thus undermining the purpose of considering domestic violence in custody awards.

In addition, other civil laws may provide their own definition of domestic violence, but permit proof of a CPO to prove the necessary domestic violence. Therefore, a CPO can also control a plaintiff's ability to meet her burden of proof under such laws.²⁵⁹

III. MAKING THE CIVIL PROTECTIVE ORDER LAWS' REMEDIES AVAILABLE TO WOMEN SUBJECTED TO ALL FUNDAMENTAL HARMS OF DOMESTIC VIOLENCE

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

²⁵⁴ See Klein & Orloff, *supra* note 130 at 954.

²⁵⁵ D.C. CODE § 16-914(a)(2) (2007) (under the D.C. statute, domestic violence is labeled an "intrafamily offense").

²⁵⁶ D.C. CODE § 16-914(a-1) (2007).

²⁵⁷ D.C. CODE § 16-914(a-1) (2007).

²⁵⁸ D.C. CODE § 16-914(a-1) (2007).

²⁵⁹ See e.g. 8 C.F.R. § 204.2(c)(2)(iv)(2007) (regulation providing that in immigration self-petition cases, CPO is helpful evidence of necessary domestic violence).

women subjected to all forms of abuse.

a. **RECOGNIZING ALL FUNDAMENTAL DOMESTIC VIOLENCE HARMS UNDER THE CIVIL PROTECTIVE ORDER LAWS**

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

As stated earlier, scholars have argued recently for certain amendments to the criminal law and the civil law.²⁶⁰ These suggested amendments do address the need for the law to recognize the pattern of violence, the context of domestic violence, the intent of power and control behind the domestic violence, and coercive control as a unique form of domestic violence. These proposals, however, fall short in providing legal recognition and a cause of action for those persons who are not subjected to physical violence or a crime, such as stalking or harassment, and yet are subjected to the fundamental harms of oppression stemming from the exercise of power and control through psychological, emotional and/or economic means alone.

Although proposing specific statutory language is beyond the scope of this article, the current failings of civil protective order laws could be addressed by defining abuse as physical, sexual, psychological, emotional and/or economic abuse. The laws could then incorporate some of the various tactics of abuse as explored in psychological scales and measurements²⁶¹ and by advocates in their screening for domestic violence.²⁶² For instance, examples of qualifying psychological abuse could include repeated acts of intimidation, threats of physical harm to self, partner or children, withdrawal of immigration application, destruction of pets and property, mind games, or forcing isolation from friends, family, school and/or work, interrupting sleep, limiting food, controlling

²⁶⁰ See generally Tuerkheimer, *supra* note 25 at 959 (discussing a new domestic violence crime that considers the pattern of violence within the relationship); Burke, *supra* note 25 at 552 (addressing the need for criminal law to require the showing of power and control in criminal law); and Baker, *supra* note 12 (manuscript at 20-23, on file with author) (proposing new CPO statutory language that includes coercive control).

²⁶¹ See *supra* notes 61-70 and text accompanying thereto.

²⁶² See *supra* notes 83-90 and text accompanying thereto.

petitioner's movement because of obsessiveness and possessiveness, degradation through humiliation and name calling.²⁶³ In addition, statutes should make clear that domestic violence that contains non-severe physical violence and crimes such as harassment and stalking should be taken as seriously and afforded just as targeted a remedy as domestic violence that includes severe physical violence and crimes of battery. Moreover, as discussed below in depth, states can look to other civil laws that recognize psychological, emotional and economic abuse and use their domestic violence definitions, such as extreme cruelty or excessively vicious conduct, as models.²⁶⁴ In addition, the statutory language and not just legislative intent should identify that the law is aimed at abusive behavior that keeps one person in a position of power over the other person through the use of control, intimidation or fear.²⁶⁵

In terms of remedy, the CPO statutes need to provide additional remedies that are targeted to the petitioner's actual experience of the multifaceted abuse and her life. For instance, monetary damages should be available for the injuries to which women are subjected from their abuse.²⁶⁶ Such monetary damages are not only important for the resulting harm from physical injuries and the emotional and psychological abuse but also can be tailored to address the harm from economic abuse, which could include preclusion from seeking employment, as is the case for Vanessa.²⁶⁷

Most importantly, a range of CPO remedies is important because they need to be context specific. CPO laws will offer the greatest benefit, therefore, if they provide a remedy that includes a catchall phrase, such as "any other relief that would address the domestic violence," that permits the woman to seek a remedy crafted to her particular situation, her knowledge of the abuse, and her understanding of the best way to address it.²⁶⁸

b. MODELS FROM OTHER CIVIL LAWS THAT BROADLY

²⁶³ *Id.*

²⁶⁴ *See infra* Part III.b.

²⁶⁵ *See supra* note 83.

²⁶⁶ Zorza, *supra* note 35 at 9-10 ("The average monthly cost to New York City domestic violence victims in just medical, counseling and legal expenses was \$575. New York City spends at least \$500 million annually as a result of domestic violence – half of the cost born by New York City employers from reduced work productivity, greater absenteeism, and high turnover. The average employed battered woman misses work 18 full days per year and is late for work 60 days a year because of the violence. . . .").

²⁶⁷ *See supra* text accompanying note 1.

²⁶⁸ Klein & Orloff, *supra* note 130 at 912 (discussing the catch-all provisions in CPO statutes).

DEFINE DOMESTIC VIOLENCE

There are other civil laws beyond protective orders that deal with domestic violence. Below is a sampling of some of these laws. The following immigration, welfare, tort and divorce laws recognize domestic violence that is more broad than only severe physical violence and crimes. Many of these laws recognize that domestic violence is situated in a relationship permeated with oppressive power and control exercised in that relationship. These laws provide civil law remedies for domestic violence that occurs within a relationship and is comprised of any combination of psychological, emotional, economic, sexual and/or physical abuse. As such, they show that reframing our understanding and remedying of domestic violence in the civil protective order legal system is possible. These laws though are applicable in only very discrete areas of law and provide targeted relief toward that area – such as immigration or welfare -- and do not provide the same type of expedited and flexible injunctive, family and monetary relief that CPOs do. Accordingly, this section discusses these other laws in order to provide examples of broader standards that can be imported into civil protective order laws so that all women subjected to domestic abuse are able to obtain a comprehensive and expedited CPO remedy to assist in rearranging their relationships that contain abuse.

i. Immigration and Welfare

The Violence Against Women Act (VAWA)²⁶⁹ enacted in 1994 is federal legislation that addresses violence against women in a large spectrum of areas. One of the provisions focusing on immigrant women is the self-petition mechanism that provides an alternative to the family-based, spouse-sponsored petition to become a legal permanent resident.²⁷⁰ The self-petition process permits spouses of U.S. Citizens or lawful permanent residents to petition without a sponsoring spouse if she can demonstrate that she has been subjected to domestic violence.²⁷¹ This process implicitly recognizes the need to provide autonomy to such spouses due to the power and controlling nature of domestic violence.²⁷² To qualify to self-petition, one needs to show that one is the spouse of a U.S. citizen or lawful permanent resident and has been “battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident

²⁶⁹ VAWA of 1994, Pub. L. No. 103-322, 108 Stat. 1941-42 (1994).

²⁷⁰ 8 U.S.C. § 1154(a)(1)(A)(iii)(I) (2008) and 8 U.S.C. § 1154(a)(1)(B)(ii)(I) (2008).

²⁷¹ *Id.*

²⁷² See Kelly, *supra* note 93 at 695.

during the marriage.”²⁷³ “Extreme cruelty” has been interpreted through regulations, decisions by the Board of Immigration Appeals and the federal courts as including psychological abuse.²⁷⁴

Similar to the self-petition immigration law, federal welfare law has included various waivers to certain eligibility requirements if an individual can show that she was subjected to domestic violence. For instance, under the under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, “states [may] adopt the Family Violence Option (FVO), which would allow them to exempt a family from the act’s sixty-month cap on state benefits ‘if the family involves an individual who has been battered or subjected to extreme cruelty.’”²⁷⁵ In Maryland, for example, the domestic violence necessary for the FVO includes mental abuse.²⁷⁶ Accordingly, using the language of extreme cruelty, immigration and welfare laws provide women subjected to abuse a possibility of a remedy for nonphysical abuse in these very specific legal areas.

ii. Tort

Tort law also recognizes a remedy for the broad spectrum of domestic violence, including physical harm, battery, threat of physical harm, assault, as well as emotional harm, such as intentional infliction of

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

²⁷⁴ *Hernandez v. Ashcroft*, 345 F.3d 824, 839 (9th Cir. 2003) (“extreme cruelty” encompasses acts that may not appear violent but are nonetheless a part of the pattern of domestic violence, such as husband’s continued a pattern of controlling behavior by promising to seek marriage counseling and to end the violence and pleading for her to leave her safe haven in the U.S); BIA decision, Case No. A75900716 (1/20/2006) (on file with author) (although a cancellation of removal case under 8 U.S.C. 1229(b)(2), the BIA discusses and adopts the “extreme cruelty” standard under the self-petition law as meaning extreme mental cruelty). Prior to such interpretations, it is important to note that early critics of VAWA were concerned that “in qualifying for VAWA, public record evidence of physical abuse is recognized as the most credible documentation.” Further, early critics noted that “[w]hile VAWA allows a battered woman to seek relief based on ‘mental cruelty,’ there is no articulation in the regulations as to what evidence or standard will support a mental cruelty’ claim. Such an omission compounds the risk of limiting VAWA to claims of physical abuse.” Kelly, *supra* note 93 at 695. It is important to note that the regulations indicate that civil protective orders constitute helpful evidence in proving the domestic violence. 8 C.F.R. § 204.2(c)(2)(iv) (2008). Accordingly, as noted earlier, this is another place in which the narrow definition of domestic violence in CPO laws circumscribes women subjected to domestic violence in accessing other legal remedies.

²⁷⁵ SCHNEIDER, *supra* note 19 at 198 n.67 (citing 42 U.S.C. §608(a)(7)(C)(i) (1996)).

²⁷⁶ COMAR 07.03.03 (2008) (defining domestic violence to include “mental abuse.” COMAR 07.03.03.02(17) (2008)).

emotional distress.²⁷⁷ Courts, under equitable powers, have ordered injunctions against harassing, molesting, assaulting, battering, embarrassing, and/or humiliating behavior between intimate partners towards another.²⁷⁸ Abusive actions do not need to rise to the level of criminal activity or physical harm for a court to take jurisdiction over a restraining order case resting on tort.²⁷⁹ Even the Restatement (Second) of Torts recognizes that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”²⁸⁰ Yet even though tort law recognizes the broad spectrum of abuse as actionable and compensable, there are difficulties in bringing these claims, making it all the more important that the CPO law recognize all forms of abuse.²⁸¹

²⁷⁷ DAN B. DOBBS, THE LAW OF TORTS § 302 at 821 (2000) (“Courts have long recognized that tortfeasors should be responsible for causing distress, emotional harm, anxiety, diminished enjoyment, losses of autonomy, and similar intangible harms.”)

²⁷⁸ BOYLAN & TAUB, *supra* note 113 at 5 (citing to a study that documented these court actions).

²⁷⁹ *Id.* at 7 (internal citations omitted) (citing *Galella v. Onassis*, 353 F. Supp. 196, 226-27 (S.D.N.Y. 1972). For general discussions about intentional infliction of emotional distress cases between spouses see Tiffany Oliver, Note and Comment, *Intentional Infliction Of Emotional Distress Between Spouses: New Mexico's Excessively High Threshold For Outrageous Conduct*, 33 N.M. L. REV. 381 (2003); Brandi Monger, Case Note, *Family Law--Wyoming's Adoption Of Intentional Infliction Of Emotional Distress In The Marital Context. McCulloh v. Drake*, 24 P.3d 1162 (Wyo. 2001), 2 WYO. L. REV. 563 (2002); Meredith Taylor, Comment, *North Carolina's Recognition of Tort Liability for the Intentional Infliction of Emotional Distress During Marriage*, 32 WAKE FOREST L. REV. 1261, 1267 (1997)

²⁸⁰ RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The tentative draft for the Restatement (Third) of Torts keeps this language. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM, Ch. 8 Liability for Emotional Disturbance, §45 Intentional (or Reckless) Infliction of Emotional Disturbance (2007) (stating in its tentative draft that “An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance and, if the emotional disturbance causes bodily harm, also for the bodily harm.”) In addition, the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM, Ch. 8 Liability for Emotional Disturbance, §46 Negligent Conduct Directly Inflicting Emotional Disturbance On Another (2007) further evidences the modern trend to remedy emotional harm, even absent physical harm, by stating that “An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct:(a) places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; or (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.”

²⁸¹ See Buel, *supra* note 45 at 945-946, 982-993. It should be noted that there are some reforms being enacted that provide greater hope for the tort cause of action. *Id.* at 1023. Specifically, in California the legislature found that there should be tort liability and the

iii. Divorce

Divorce laws, with their fault grounds of cruelty and excessively vicious conduct, also provide a helpful model of laws that recognize the multifaceted nature of domestic violence.²⁸² For instance, one case stated

full panoply of legal and equitable remedies for abuse perpetrated by a domestic partner’s law. *Id.* Similarly, the Illinois Gender Violence Act, which includes physical aggression, sexual assault, and threats, provides a civil cause of action and relief against a perpetrator. *Id.* at 1023-24.

²⁸² See e.g., MD. CODE ANN., FAM. LAW §7-103(a)(7) and (8) (West 2007). See also National Immigration Law Projects Amicus Brief filed in the Hernandez v. Ashcroft case in Ninth Circuit, pp. 14-21. See [http://www.nationalimmigrationproject.org/forMembers/Amicus%20Briefs%20and%20BI%20Decisions%20-%20Extreme%20Cruelty/Laura%20Hernandez,%209th%20Circuit%20\(extreme%20cruelty\)%202002.DOC](http://www.nationalimmigrationproject.org/forMembers/Amicus%20Briefs%20and%20BI%20Decisions%20-%20Extreme%20Cruelty/Laura%20Hernandez,%209th%20Circuit%20(extreme%20cruelty)%202002.DOC) (citing the following examples of “extreme cruelty” as defined in divorce statutes and cases N.J.S.A. 2A:34-2 (Extreme cruelty, which is defined as including “any physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant.”); *Rakestraw v. Rakestraw*, 717 So.2d 1284, 1286 (Miss. Ct. App. 1998) (cruelty finding on the basis of stalking behavior); *Fuchs v. Fuchs*, 216 A.D.2d 628, 628 (N.Y. App. Div. 1995) (stalking is cruelty); *Christenson v. Christenson*, 472 N.W.2d 279, 280 (Iowa 1991) (high speed car chase is “domestic abuse”); *Knuth v. Knuth*, 1992 Minn. App. LEXIS 696, at *2 (1992) (stalking as cruelty); *State of Wisconsin v. Sarlund*, 407 N.W.2d 544 (Wis. 1987) (stalking as cruelty); *Boniek v. Boniek*, 443 N.W.2d 196, 197-98 (Minn. Ct. App. 1989) (stalking as cruelty); *Pompa v. Pompa*, 259 A.D.2d 338, 338 (N.Y. App. Div. 1999) (untrue and insulting accusations as cruelty); *Richard v. Richard*, 711 So.2d 884, 886 (Miss. 1998) (untrue and insulting accusations as cruelty); See, e.g., *Perret v. Saacks*, 612 So.2d 925, (La. Ct. App. 1993) (alarming spouse by falsely reporting illness of family member); *Osman v. Keating-Osman*, 521 N.W.2d 655, 657 (S.D. 1994) (breaching marriage contract and making false promises); See, e.g., *Harshbarger v. Harshbarger*, 1993 Ohio App. LEXIS 3125, at *3 (Ohio Ct. App. 1993) (isolating spouse by limiting telephone access part of cruelty finding); *Robinson v. Robinson*, 722 So.2d 601, 603 (Miss. 1998) (limiting social interactions as cruelty); *Gazzillo v. Gazzillo*, 379 A.2d 288, 291 (N.J. Sup. Ct. 1977) (limiting family interactions as extreme cruelty); *McFall v. McFall*, 136 P.2d 580, 582 (Cal. Ct. App. 1943) (social isolation as cruelty); *Keller v. Keller*, 763 So.2d 902, 904 (Miss. Ct. App. 2000) (demanding custody of child as cruelty); *Richardson v. Richardson*, 186 A.D.2d 946 (N.Y. App. Div. 1992) (regularly prohibiting spouse to sleep with lengthy arguments as cruelty); *Veach v. Veach*, 392 P.2d 425, 429 (Idaho 1964) (domination as a course of conduct as cruelty); *Muhammad v. Muhammad*, 622 So.2d 1239, 1241-42, 1248-49 (Miss. 1993) (forcing religion on spouse as cruelty); *Hybertson v. Hybertson*, 582 N.W.2d 402, (S.D. 1998) (same); *Gascon v. Gascon*, 187 A.D.2d 955, 955 (N.Y. App. Div. 1992) (illegally monitoring spouse)) This amicus brief was cited favorably by the Ninth Circuit in *Hernandez v. Ashcroft*. See also Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441 (2008) (citing Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 911

that “‘cruelty’ . . . encompass[es] mental as well as physical abuse [and] . . . includes any conduct . . . which is calculated to seriously impair the health or permanently destroy the happiness of the other.”²⁸³ In *Das v. Das*, for example, the court found that husband subjected wife to cruelty when he made her stay up all night, controlled her, taunted her, isolated her from friends and family, and subjected her to physical violence.²⁸⁴ *Das* and other cruelty cases around the nation²⁸⁵ show that courts in the divorce context are able to identify and remedy domestic violence in forms other than simply physical violence. Not all women who are abused, however, are married or if married, seeking a divorce. Therefore, the CPO provides an invaluable legal cause of action for women subjected to abuse.

iv. Conclusion

As seen above, immigration, welfare, torts and divorce laws recognize abuse other than physical abuse. By including a broad definition of domestic violence these laws provide more women in varying types of abusive relationships to be able to seek a civil remedy specific to their situation. They recognize that all forms of abuse are harmful to women and should be remedied. None of these laws provide the expedited and targeted range of remedies that a CPO does to address abuse. As such, the above laws provide a useful model for how broadening the definition of domestic violence in CPOs can be successful but underscore the necessity of the CPO remedy.

C. CONFRONTING CONCERNS REGARDING PROPOSAL TO REMEDY ALL FUNDAMENTAL HARMS OF DOMESTIC VIOLENCE

As discussed earlier, the domestic violence movement in the 1960s and 70s was concerned about including a broader statutory definition of domestic violence for civil protective order laws. This paper has addressed how the resulting narrow naming of domestic violence in CPO laws has perpetuated a narrative of domestic violence as only severe physical violence or crimes and this continued narrative hurts women. Today concerns continue about expanding the CPO domestic violence definition to

chart 4 (2000) (identifying that at least thirty-two states continue to have fault grounds, including cruelty)).

²⁸³ *Das v. Das*, 754 A.2d 441, 458-459 (Md. Ct. Spec. App. 2000) (citing *Scheinen v. Scheinen*, 89 A.2d 609 (1952) (citations omitted)).

²⁸⁴ *Id.* at 38, 754 A.2d at 461-62.

²⁸⁵ *See supra* note 282.

include all women subjected to abuse.²⁸⁶ This is despite the fact that one-third of the state laws and other civil laws, like immigration, welfare, torts and divorce, do address broader forms of abuse.

Perhaps the most pressing concern about the civil legal recognition of domestic violence to include psychological, emotional and economic abuse is that it might make actionable “nagging” of one’s partner.²⁸⁷ And because, as discussed earlier, CPOs can be used as proof in divorce, custody and visitation cases, a claim of nagging might result in a woman’s loss of custody of her children. Such a concern needs to be taken very seriously and appropriately addressed in the statutory language. It would disserve women to harm them further with a revision of the CPO law. The concern of “nagging” as actionable may be addressed, at least in part, by the success of psychological researchers in using scales and measurements to distinguish between women subjected to psychological abuse and those who are not.²⁸⁸ With such available tools, a hope is that legislatures can similarly craft statutes that clearly exclude routine conflict as actionable while making the serious harms of psychological, emotional and economic abuse actionable. In addition, it might be helpful if social science research could study whether and to what effect such claims are brought in those states where CPO laws cover some form of psychological or emotional abuse or their divorce laws include emotional abuse in a cruelty fault ground. Such research could actually inform a discussion of the risks of false claims from this article’s proposal.

Tied to the nagging concern is a concern that batterers might further abuse women by obtaining unwarranted protective orders against victims with unsupported claims of psychological, emotional and economic abuse.²⁸⁹ As a result, victims will be revictimized by batterers and courts.²⁹⁰ This too is a real concern. It is certainly possible that more women could be dragged to court by allegations of emotional or psychological abuse, with the risk of unwarranted CPOs being issued against them and possible arrests for CPO violations. Again, this discussion could be enriched with social science research about such claims. Until such time, it seems that this concern should be balanced against the potential benefits of an expanded recognition of domestic violence that could increase women’s autonomy and satisfaction with the legal process and thereby, decrease the abuse. As

²⁸⁶ Email discussion with various domestic violence advocates (on file with author).

²⁸⁷ *Id.*

²⁸⁸ *See supra* text accompanying note 65.

²⁸⁹ Email discussion with various domestic violence advocates (on file with author).

²⁹⁰ *Id.*

a result, more women might get a remedy for the real harm they suffer from psychological, emotional and economic abuse.

It is also a concern that broadening the definition of domestic violence might delegitimize or trivialize all forms of domestic violence.²⁹¹ As discussed above, judges and other system actors already discount actionable forms of domestic violence and such discounting hurts women who suffer from domestic violence. Perhaps including forms of abuse about which the courts do not want to hear and see as “meddling” in private relationships could exacerbate this problem. One possible way to address this concern is to ensure that the new CPO laws explicitly address the equality of all forms of abuse, as they are all tools of the exerted power and control. Another way is to have the new laws clarify that because of the harmfulness of all forms of abuse, all types of domestic violence need to be provided with a remedy based on the woman’s experience of the abuse. By recognizing and remedying all forms of domestic violence, there is a possibility that a new discourse will emerge regarding the many interconnected fundamental harms of domestic violence and the importance of remedying all of them.

There is also a concern that state legislatures might not pass a new law that fails to link domestic violence to physical harm or fear of physical harm.²⁹² This was the same concern held by the earlier battered women’s advocates resulting in the current limitations. It is true that physical violence, with its visible injuries, such as cuts, scrapes, wounds and bruising, are more verifiable than emotional or psychological abuse, which tends to be petitioner’s word against respondent’s. It is also true that going outside the realm of crimes places the courts in the disfavored realm of the family. Nonetheless, it is possible that by raising the issue in the legislature, society could begin an educational process about all fundamental harms of abuse, gain a commitment to redress its harms, and construct a new narrative about domestic violence.

As a whole, the concerns addressed above need to be weighed against the continuing negative consequences that occur from the current limited legal narrative of domestic violence. By maintaining a focus on severe physical violence alone, there is the concern that advocates, lawyers and judges perpetuate the exclusionary narrative because it is easier to expend energy and other resources for the victim of severe physical

²⁹¹ *Id.*

²⁹² *Id.*

violence when society defines her as the most worthy.²⁹³ It is the one who has been severely beaten, as opposed to the one who was subjected to emotional abuse, who is more often than not seen more worthy of time and efforts despite the real harm the latter also suffers. Perhaps the continued narrative of severe physical violence feeds into our collective consciousness of the worthiness of saving victims that society has defined as victims.²⁹⁴ Severe physical violence, underscored by bruises, cuts and other injuries, seems undeniable and undisputable. Whereas, the legal system has historically discounted the credibility of psychological and emotional harm claims because “if we can’t see it, it can’t be true.” Society also feels more comfortable labeling physical violence as outside the permissible boundaries, clearly wrong and therefore “domestic violence.” On the other hand, society is uncomfortable in drawing a line of impermissible emotional, psychological and economic abuse because it fears labeling “good” citizens as perpetrators of domestic violence. When society fears a broad legal recognition of domestic violence because it might create another tool for batterers and the courts to revictimize the victims, perhaps society constructs a false sense of control over the phenomenon of domestic violence, a sense that if society can rein in the definition of abuse, society can altogether eradicate the abuse. Or society might believe controlling remote possibilities of battering to be more important than providing a remedy for victims. Or perhaps society distrusts the legislature and courts to draft and enforce legal standards that could be discriminating and keep out mere “nagging” complaints. In the end, the criticism of a more broad recognition of domestic violence seems to be more related to how we as a society view ourselves and how we perpetuate the exclusion of women subjected to abuse that is not physically violent, than what is right for women who suffer abuse.

CONCLUSION

Currently, the domestic violence civil legal system fails women subject to all forms of abuse. Instead, the system has constricted its recognition to primarily crimes and severe physical abuse. The result is that many women have no CPO cause of action to address and seek redress for the real and harmful abuse to which they are subjected. Women, like

²⁹³ In addition, Kohn has documented that service providers see a victim of domestic violence worthy of services if she was a victim of a crime and cooperates in the system’s efforts to protect her. Kohn, *supra* note at 46 (citing Renee Romkens, *Law as a Trojan Horse: Unintended Consequences of Rights Based Interventions to Support Battered Women*, 13 YALE J.L. & FEMINISM 265, 265 n.34 (2001)).

²⁹⁴ Goodmark, *Law Is The Answer?*, *supra* note 25 at 28-30.

Kim,²⁹⁵ do not believe they have any right to a remedy for emotional abuse because it is so different from the physical abuse that receives the label of domestic violence and all of the attention. Yet, social science research indicates that domestic violence is harmful in all of its many forms because it effectuates the abuser's exertion of power and control. The forms may be physical, sexual, psychological, emotional or economic. And all of these need to bear the name of domestic violence and be able to be remedied under the CPO laws. If this occurred, the civil legal system would be a better tool for fostering the agency of women subjected to abuse. Petitioners would be able to use the civil legal system to craft the best remedy to address the abuse in their relationship and counter the power and control of all forms of domestic violence. If this were to happen and the CPO laws were to effectuate women's goals, the civil law and the legal system could increase women's ability to cope with the domestic violence in their lives.²⁹⁶ With such reform, the purpose of having CPO laws address abuse and issues of equality might actually be fulfilled for all women subjected to abuse.

²⁹⁵ See *supra* text accompanying note 2.

²⁹⁶ GOODMAN & EPSTEIN, *supra* note 28 at 94-5 ("participants who reported feeling in control of the process of working with service providers were far more likely to rate the services they received as helpful and to use the services again. (Zweig, Burt, & Van Ness, 2003). Similarly a study within the criminal justice system found that victims who chose not to report recidivist abuse to officials were those who felt they had 'no voice' in a previous prosecution (Hotaling & Buzawa, 2003). . . . Women . . . will be safer if given if given the opportunity to maximize their own agency . . .") See also Baker, *supra* note 12 (manuscript at 14-20, on file with author) (citing to a few studies showing CPOs effectiveness in decreasing physical abuse).