DEBUNKING THE STRANGER-IN-THE-BUSHES MYTH: THE CASE FOR SEXUAL ASSAULT PROTECTION ORDERS

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> "From a very young age we are taught to fear strangers. Parent[s], teachers and loved ones warn children of stranger danger[,] instructing them not to speak or go anywhere with someone they don't know.
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> "As we grow up this message is reinforced, particularly for women. We are told to be aware of our surroundings when walking alone late at night for fear of the stranger lurking in the bushes ready to attack. This story of the stranger hiding in the bushes or a dark alley is also often used when warning women about sexual assault. We are told we shouldn't go out late at night alone, especially in parks, and that we should carry pepper spray in our purses to be ready to fend off violent attackers. So we grow up thinking we can pinpoint potential perpetrators—the creepy guy in the park, the man in the hoodie walking closely behind you. . . .
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> "Messages like this are not only incredibly insensitive to victims, but dangerous for everyone. When we believe that these types of myths are reality, victims start to question what happened to them and are reluctant to report, people don't understand what consent really look likes, attackers might not know they are raping women, rapists go free, rapists rape again, rape cases aren't investigated, the list goes on and on."[1]

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1. Ximena R., *There is No Such Thing as a "Classic Rapist,"* CARE2 (July 12, 2014), http://www.care2.com/causes/%20there-is-no-such-thing-as-a-classic-rapist.html [https://perma.cc/LJH9-TD2H] (statement from sexual assault survivor).

INTRODUCTION

Sexual assault in the United States is an epidemic of staggering proportions. One in six women and one in thirty-three men will experience an attempted or completed rape in her or his lifetime.[2] On average, a sexual assault occurs every ninety-eight seconds; a rape occurs every six minutes.[3] In the United States, rape is the costliest crime to its victims, totaling an estimated $127 billion per year in medical costs, lost earnings, withdrawal from educational opportunities, pain, suffering, and lost quality of life.[4]

Despite the pervasive nature of this epidemic, incredibly harmful and dangerous myths about sexual assault continue to be peddled in media portrayals and courtrooms. More often than not, the portrait of a rapist in the media and popular culture resembles the mythical "stranger-in-the-bushes," waiting to attack an unsuspecting woman on the street.[5] As a result, judges continue to refer to the "classic rapist" at

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2. *Victims of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/victims-sexual-violence [https://perma.cc/HW5D-BPAX] (last visited Apr. 1, 2017) (RAINN stands for the Rape Abuse and Incest National Network). While these statistics highlight the reality that both men and women suffer sexual assault, this Article refers to victims by the feminine and perpetrators by the masculine for consistency and in recognition of that fact that the vast majority of sexual assaults follow this gendered paradigm.

3. *Id.*; *About Sexual Assault*, NAT'L CTR. FOR VICTIMS OF CRIME, https://www.victimsofcrime.org/our-programs/dna-resource-center/untested-sexual-assault-kits/about-sexual-assault [https://perma.cc/L97P-6MBB] (last visited Apr. 1, 2017).

4. *Where We Stand: Costs, Consequences and Solutions*, END SEXUAL VIOLENCE: NAT'L ALLIANCE TO END SEXUAL VIOLENCE [hereinafter *Where We Stand*], www.endsexualviolence.org/where-we-stand/costs-Consequences-and-solutions [https://perma.cc/EE5N-KG8P] (last visited Apr. 1, 2017) ("Rape is the most costly of all crimes to its victims, with total estimated costs at $127 billion a year (excluding the cost of child sexual abuse).").

5. Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 196 (1992) (criticizing the use of "non-traditional" to describe rapes that do not fit the "stranger-in-the-bushes" type of rape, because such rapes "are all too traditional"); Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 555 (1993) (describing the cultural stereotype of rape as "a stranger jumping out from a place of hiding and violently raping a physically resisting woman"); *see also* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 679–94 (exploring cultural and legal barriers that make prosecutions of date rape so difficult); Dana Vetterhoffer,

trial, and juries continue to expect to see a rape victim[6] in torn clothing running hysterically to the nearest police station or hospital.[7]

This "stranger-in-the-bushes" mythology does significant harm to the sexual assault prevention movement in a number of ways. First, it perpetuates confusion about consent by suggesting that anyone who does not physically resist an attack from a stranger somehow "wanted it."[8] Second, it conditions law enforcement, judges, and juries to distrust accusers if allegations are not supported by a wealth of corroborating physical evidence of struggle.[9] Third, it renders nearly impossible the chance for victims to seek prospective restraining order relief, such as no contact orders, because no such relief is needed from a "stranger" who attacks and then disappears.

Comment: No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape, 49 ST. LOUIS L.J. 1229, 1244–45 (2005) (discussing the "paradigm of the stranger in the bushes" type of stranger rape and contrasting it with the far more "common acquaintance rape, [which] does not conform to this stereotype").

6. Debate rages within the sexual assault advocacy community over whether to use the term "victim" or "survivor." *See* Rahila Gupta, *'Victim' vs 'Survivor': Feminism and Language*, INCLUSIVE DEMOCRACY (June 16, 2014), https://www.opendemocracy.net/5050/rahila-gupta/victim-vs-survivor-feminism-and-language [https://perma.cc/8JB8-6DBZ]. This Article uses the term "victim" because the Article primarily concerns itself with those "who ha[ve] recently been affected by sexual violence . . . [and] aspects of the criminal justice system." *Key Terms and Phrases*, RAINN, https://www.rainn.org/articles/key-terms-and-phrases [https://perma.cc/N4C2-D8AD] (last visited Apr. 1, 2017) ("RAINN tends to use the term 'victim' when referring to someone who has recently been affected by sexual violence; when discussing a particular crime; or when referring to aspects of the criminal justice system. We often use 'survivor' to refer to someone who has gone through the recovery process . . . .").

7. In sentencing a convicted rapist to five years in prison, Judge Michael Mettyear lamented,

> It's sad to see a man of generally good character in [prison] for such a serious [offence]. I do not regard you as a classic rapist. I do not think you are a general danger to strangers. You are not the type who goes searching for a woman to rape. This was a case where you just lost control of normal restraint.

Kevin Shoesmith, *Five Years Jail for Bricklayer Lee Setford Who 'Lost Control' and Raped Drunken Woman at Beverly Home*, HULL DAILY MAIL (July 2, 2014), http://www.hulldailymail.co.uk/years-jail-bricklayer-lee-setford-8216-lost/story-21316028-detail/story.html#7xPUh97HluCpaejq.99 [https://perma.cc/P2QQ-WD3T].

8. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 468 (2005) (discussing confusion within the criminal justice system over the concept of "consent" owing to archaic notions of rape and sexual assault and implicit bias against victims of acquaintance rape).

9. *Id.*; *see also* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1379 (1997) ("There is a great deal of anecdotal and social-scientific evidence of public (and jury) bias against norm-violating victims of acquaintance rape.").

But this myth does not reflect reality. Approximately three-quarters of all sexual assaults are committed by close acquaintances of the victims, meaning that victims often possess a credible fear of future harm from ongoing contact with their assailants.[10] Moreover, a majority of all perpetrators are repeat offenders, with as many as 53% of rapists having attempted or completed more than one rape.[11] These realities, often obscured by popular myth, highlight the very real and ever-present fear of future harm felt by victims of rape and sexual assault, and the need for prospective restraining order relief.[12]

Despite this risk of future harm, the legal system has largely failed to protect victims from their perpetrators. Just as sexual assault remains an epidemic in this country, so, too, does the widespread failure of the criminal justice system to prosecute perpetrators. Owing to widespread distrust of the justice system to provide protection, only 34% of all sexual assaults are ever reported to the police.[13] Less than 17% of those reports ever lead to an arrest.[14] District attorneys choose to prosecute fewer than one in five of these arrests due to a lack of evidence

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10. *See Perpetrators of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/perpetrators-sexual-violence [https://perma.cc/FUL8-33TB] (last visited Apr. 1, 2017) ("7 out of 10 rapes are committed by someone known to the victim.").

11. *See* Eric Anthony Grollman, *9 of 10 Campus Rapes Are Committed By Repeat Offenders [Updated]*, KINSEY CONFIDENTIAL (May 25, 2010), http://kinseyconfidential.org/most-campus-rapes-are-committed-by-repeat-offenders/ [https://perma.cc/38H2-7KE4] (citing 2010 study finding that "[t]he vast majority of the offenses are being committed by a relatively small group of men, somewhere between 4% and 8% of the population, who do it again[,] and again[,] and again"); *Perpetrators of Sexual Violence: Statistics*, *supra* note 10 (explaining that a majority of perpetrators of sexual violence have criminal histories, including violent criminal sexual histories).

12. *See* Hayley Jodoin, *Closing the Loophole in Massachusetts Protection Order Legislation to Provide Greater Security for Victims of Sexual Assault: Has Massachusetts General Laws Chapter 258E Closed It Enough?*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 102, 110 (2012) ("In addition to the vulnerability of a victim's actual safety following an attack, a victim's perceptions of physical safety are often virtually destroyed. The victim may become 'hyper-vigilant, anxious and frightened' for weeks, months, or years after being sexually assaulted. Such fear is even more exacerbated for the majority of victims who know their attackers, and who will be subject to on-going contact with them after an assault. For many victims, this terror will never go away.") (citations omitted).

13. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/ACY2-ZHQF] (last visited Apr. 1, 2017) (observing that out of every 1,000 rapes, only 344 are ever reported to police). *See also* Bryden & Lengnick, *supra* note 9, at 1377–78 ("The main source of case attrition in acquaintance rape cases is the victim's reluctance to pursue legal redress. . . . Scholars often attribute this phenomenon, at least in part, to victims' fears of a hostile or overly skeptical criminal justice system . . . .").

14. *The Criminal Justice System: Statistics*, *supra* note 13 (observing that out of 344 sexual assault reports to police, only 57 ever lead to an arrest).

sufficient to meet the beyond-a-reasonable-doubt standard for criminal offenses.[15] Cases that do proceed often get dismissed before trial, and of those cases proceeding to verdict, juries return convictions only 54% of the time.[16] Post-verdict interviews often confirm that jurors simply do not believe victims absent clear signs of physically forcible rape coupled with a victim taking immediate legal action against her assailant.[17] As a result of these evidentiary hurdles, myth-based beliefs about rape, and victims' unwillingness to even engage in such an uphill legal battle, it is estimated that only 0.6% of all sexual assault perpetrators ever spend a day in jail.[18]

Lacking adequate remedies for protection from the criminal justice system, some victims turn to private civil suits for relief.[19] But while such suits are governed by a lower burden of proof and offer some prospect of monetary compensation, they offer little by way of protection from future harm.[20] Indeed, often such suits exacerbate an already volatile situation between victim and assailant without providing any assurances of protection.[21]

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15. *Id.* (observing that out of every 1,000 rapes, 57 lead to an arrest while only 11 lead to prosecution).

16. *Id.* (observing that only 7 of every 11 prosecutions lead to a felony conviction).

17. Louise Ellison & Vanessa E. Munro, *A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study*, 13 NEW CRIM. L. REV. 781, 784 (2010) (noting that many jurors subscribe to a false premise of "the averred 'real rape' prototype," and that even when jurors later "were willing to accept that many (indeed most) rapes do not involve 'a stranger in the bushes,' [they] nonetheless relied upon other presumptions to relegate the trial scenario to one of 'overzealous' seduction rather than 'real rape'").

18. *See The Criminal Justice System: Statistics*, *supra* note 13 ("Out of every 1000 rapes, 994 perpetrators will walk free.").

19. Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1559–60 (2008) ("The last few years have seen a tremendous increase in lawsuits alleging rape or sexual assault. . . . One important change in the last decade is the government's endorsement of civil litigation as a remedy for rape victims.").

20. *See generally id.* at 1574–79 (discussing disadvantages of pursuing civil suits to adjudicate rape claims).

21. *See* Sofia Resnick, *Victims of Rape and Sexual Assault, Failed by Criminal Justice System, Increasingly Seek Civil Remedies*, REWIRE (Jan. 8, 2016), https://rewire.news/article/2016/01/08/victims-rape-sexual-assault-failed-criminal-justice-system-increasingly-seek-civil-remedies/ [https://perma.cc/4DN6-XPSR] (noting that most civil suits seeking redress for sexual assault are brought against third parties for negligence, in part because victims fear "retaliation from their assailant" if they sue the assailant directly); *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, http://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/ [https://perma.cc/FTN6-GAZS] (last visited Apr. 10, 2017) (Title IX student advocacy organization observing that "[f]or many survivors, campus reporting is their only option. Many victims of sexual violence don't want to turn to the criminal justice system . . . [because] they may fear retaliation from their assailant, who will most

Some legislatures have attempted to address these problems by expanding existing restraining order mechanisms to include sexual assault.[22] These efforts, while laudable, do not go far enough to address the unique nature of sexual assault. Civil restraining orders generally offer prospective, victim-centered relief by: requiring the assailant to stay away from the victim; proceeding expeditiously to address emergent safety situations; and offering procedural flexibility, such as lower burdens of proof and relaxed notice standards to make relief attainable for victims.[23] By and large, however, existing restraining order mechanisms are insufficient to protect victims of sexual assault. For example, domestic violence restraining orders (DVROs) may include "sexual assault" in the definition of covered violence,[24] but DVROs almost universally are only available to victims assaulted by a partner.[25] And while many states have some form of "catchall" civil harassment restraining order (CHRO), these restraining orders were designed to address "merely annoying" conduct ranging from noisy neighbors to landlord tenant disputes.[26] Understandably, then, CHROs

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likely not end up prosecuted, let alone convicted"); *see also* Kelly O'Connell, *A New Tool for Safety: Introducing Washington's Sexual Assault Protection Order*, ADVOC. NEWSL. (Wash. Coal. Of Sexual Assault Programs, Olympia, Wash.) (Aug. 2006) http://svlawcenter.org/section_resources/resource&uscore;files/SAPONewsletter.pdf (discussing ongoing threat of assailant, particularly after making a police report); *Protective Orders for Sexual Assault Victims*, THE NATIONAL CENTER FOR VICTIMS OF CRIME, http://www.ncvc.org/ncvc/AGP.net/Components/documentViewer/Download.aspxnz?DocumentID=46683 (last visited Oct. 5, 2016) (noting risk of retaliation by perpetrator).

22. *See* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, SEXUAL ASSAULT CIVIL PROTECTION ORDERS (CPOS) BY STATE (2015), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/SA%20CPO%20Final%202015.authcheckdam.pdf [https://perma.cc/WMP3-DKQ2] (summarizing the twenty-nine state statutes offering some form of civil protection relief to victims of sexual assault).

23. Peter Johnsen & Elia Robertson, *Protecting, Restoring, Improving: Incorporating Therapeutic Jurisprudence and Restorative Justice Concepts into Civil Domestic Violence Cases*, 164 U. PA. L. REV. 1557, 1558–62 (2016) (discussing generally the history of and relaxed proceedings defining civil protection order hearings).

24. *See* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE (2014), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf [https://perma.cc/ZJ3V-N2MX] (summarizing sexual assault protection order statutes in states throughout the country).

25. *Id.*

26. *See* Jodoin, *supra* note 12, at 124 (noting the frequent overuse of Massachusetts' civil harassment orders by litigants involving noise complaints and minor physical altercations); *see also* David Abel, *Restraining-Order Filings Unbound*, BOSTON.COM (Apr. 12, 2011),

employ stricter procedural guidelines to discourage frivolous filings, often requiring a showing by clear and convincing evidence that: (1) a course of conduct of multiple separate harassing incidents has taken place; and (2) a real and present danger exists that the specific harassment in question will continue.[27]

Such evidentiary requirements are inappropriate for sexual assault. While as many as 29% of all sexual assaults occur within the partnered or marital context, that leaves 71% of sexual assault victims without the benefit of a remedy through a DVRO.[28] In addition, requiring a pattern of repeated sexual assaults for a CHRO to issue ignores the recognition by legislatures throughout the country that rape and sexual assault is "the most heinous crime . . . short of murder."[29] A single incident shatters a victim's sense of safety, such that the mere presence of the assailant in the future has the potential to cause immeasurable debilitating harm.[30] Given these realities, it makes little sense to require victims to demonstrate multiple sexual assaults and a credible likelihood of yet another sexual assault in order to obtain prospective relief.

For all of these reasons, this Article makes the case for a more carefully tailored, alternative legal remedy: the Sexual Assault Protection Order (SAPO). A SAPO, as defined herein, is a civil restraining order mechanism available only to victims of rape or sexual assault, which requires a showing only by a preponderance of the evidence that: (1) a sexual assault occurred or is imminently likely to occur, and (2) the victim reasonably fears for her safety from the assailant for any reason, not just that she fears another sexual assault.[31]

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http://archive.boston.com/news/local/massachusetts/articles/2011/04/12/new_kind_of_restraining_order_leads_to_surge_in_filings/ [https://perma.cc/4XMZ-5TDY] (discussing the intended and unintended consequences of Massachusetts' harassment restraining order).

27. *See, e.g.*, CAL. CIV. PROC. CODE § 527.6 (West 2014) (California's Civil Harassment Restraining Order requires a "course of conduct" and fear of similar future harm to be proven by clear and convincing evidence).

28. *See 21 Amazing Spousal Rape Statistics*, HEALTH RES. FUNDING (Oct. 9, 2014), http://healthresearchfunding.org/21-spousal-rape-statistics/ [https://perma.cc/C4UH-YMNN] (observing that "29% of all sexual assaults of adult women were perpetrated by a husband or lover," and "9% of all reported rapes are perpetrated by a husband or an ex-husband").

29. *See* 740 ILL. COMP. STAT. ANN. 22/102 (West 2010) (Illinois' sexual assault protection order statute: "Purpose[:] Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims"); WASH. REV. CODE. ANN. § 7.90.005 (West 2007) (Washington's sexual assault protection order statute: same).

30. *See, e.g.*, BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN 32–46 (Amnesty Int'l Publ'ns 2001); *see also* Jodoin, *supra* note 12, at 110.

31. *See, e.g.*, 740 ILL. COMP. STAT. ANN. 22/201; WASH. REV. CODE. ANN. § 7.90.020.

SAPOs have gained increasing recognition by state legislatures as appropriate and necessary, with as many as ten states amending existing restraining order regimes in the last ten years to include some version of SAPO relief.[32]

While some commentators have discussed the potential benefits of SAPOs for particular jurisdictions, these scholars limit the discussion to a comparison of SAPOs to DVROs and the benefits of SAPOs for one particular state.[33] Moreover, little attention has been paid to the important and compelling constitutional counterarguments to SAPOs and similar "quasi-criminal" restraining order statutes.[34]

This Article attempts, then, to contribute to existing scholarship in three distinct ways. First, this Article addresses the critical distinctions between sexual assault and domestic violence. Modeling SAPOs after existing DVROs makes some logical sense. But ignoring the important differences between sexual assault and domestic violence risks perpetuating archaic stereotypes about rape by requiring a pattern of past conduct or extrinsic evidence of physical struggle more often present in the domestic violence context. Second, this Article takes a comprehensive look at the existing nationwide legal landscape for restraining orders in general, and SAPOs in particular. By contrasting DVRO statutes, CHRO statutes, and newly created SAPO statutes in one place, it hopefully will become apparent which evidentiary procedures and types of prospective relief are most capable of addressing the uniqueness of sexual assault. Third, this Article takes a critical look at the persuasive arguments of skeptics that SAPOs and other types of restraining orders amount to little more than criminal trials by another name, creating legitimate constitutional concerns regarding the procedural protections afforded to the accused.[35] By

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32. *See* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 22.

33. *See generally, e.g.*, Sarah Deer, *Expanding the Network of Safety: Trial Protection Orders for Survivors of Sexual Assault*, 4 TRIBAL L.J. 3 (2003–04) (discussing the status of protection orders on Native American reservations); Jodoin, *supra* note 12 (discussing Massachusetts' new sexual assault protection order mechanism).

34. *Cf.* David N. Heleniak, *The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act*, 57 RUTGERS L. REV. 1009, 1009–10 (2005) (advocating for all domestic violence cases to be handled in criminal court with criminal procedures and burdens of proof); Mary Hutton, *Domestic Violence and Due Process:* Crespo v. Crespo *and the Need for a Higher Standard of Proof*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 103, 104 (2011) (criticizing New Jersey's lax civil restraining order procedures and calling for a clear and convincing evidence burden of proof in domestic violence restraining order cases).

35. *See Cesare v. Cesare*, 694 A.2d 603, 608 (N.J. Super. Ct. App. Div. 1997), *rev'd* 713 A.2d 390 (N.J. 1998) (criticizing New Jersey's Prevention of Domestic Violence Act (PODVA): "While terroristic threats and harassment are crimes, the thrust of [PODVA] is to somehow transmogrify those crimes into some lesser offense not a 'crime,' but nonetheless with potential serious penal consequences,

giving serious consideration to these concerns, this Article arrives at a balanced approach to SAPOs and proposes a model statute that balances the need for practical prospective relief with the need to maintain the constitutional integrity of the process for the accused.

A brief note on structure. Part I introduces the nature of the problem by discussing two related epidemics: sexual assault and the failure to prosecute. Part II proposes the SAPO as a solution by discussing the history and nature of restraining orders generally, the need for and benefits of SAPOs in particular, and drawing comparisons to and distinctions from existing DVROs. Part III provides a heretofore nonexistent overview of existing SAPO and CHRO statutes. Part IV considers constitutional concerns with SAPOs and related statutes, with special emphasis on appropriate burdens of proof and available relief as informed by the Supreme Court's three-part *Mathews v. Eldridge*[36] balancing test. Part V pulls the analysis together by recommending qualities of a model statute designed to balance competing concerns.

I. TWO EPIDEMICS: SEXUAL ASSAULT AND THE FAILURE TO PROSECUTE THIS "MOST HEINOUS CRIME"

"One officer in the [Baltimore P.D.] sex crimes unit explained, 'In homicide, there are real victims; all our rape cases are bullshit.' ('All' was later revised by the same officer to '90 percent.')"[37]

As a result of efforts during the women's rights movement in the late 1960s and 1970s to increase legal gender and sexual equality, the American public became increasingly aware of the sexual assault epidemic in the United States.[38] Yet despite this increased awareness and desire by state and local governments to address the issue through existing criminal sanctions, it soon became clear that institutional prejudice and ambivalence towards rape victims—as well as the inherently reactive nature of the criminal justice system—prevented

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when the victim signs the complaint. . . . [The effect] is to circumvent the protections normally accorded an accused in a criminal case"); Hutton, *supra* note 34, at 117 (criticizing the "quasi-criminal" nature of purely civil protection order hearings).

36. 424 U.S. 319 (1976).

37. Soraya Chemaly, *How Police Still Fail Rape Victims*, ROLLING STONE (Aug. 16, 2016), http://www.rollingstone.com/culture/features/how-police-still-fail-rape-victims-w434669 [https://perma.cc/UM5T-7YAU] (citing Department of Justice report on Baltimore City Police Department practices).

38. *See* Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 98–99 (2005); *see also* Seidman & Vickers, *supra* note 8, at 467 ("In the past thirty years there has been a movement in the law seeking gender equality in sex and sexual relations. The treatment of crimes specifically targeting women, sexual assault and domestic violence, has been at the core of this gender equality movement.").

victims from obtaining meaningful legal relief.[39] This institutional prejudice in the criminal justice system continues today, with one Department of Justice report finding that, on average, police officers with less than seven years of experience believe that 50% of rape accusations are falsified, compared to views of more experienced officers and researchers who find that the number is closer to 8%.[40]

A. The Sexual Assault Epidemic in the United States

Multiple state legislatures have formally recognized "[s]exual assault [as] the most heinous crime against another person short of murder."[41] Within that context, national sexual assault statistics are truly staggering. One in six women and one in thirty-three men have experienced an attempted or completed rape.[42] On average, someone in the United States is sexually assaulted every ninety-eight seconds; someone is raped every six minutes.[43] 44% of victims are under the age of eighteen, and 80% are under the age of thirty.[44] In the United States, rape is the most costly crime to its victims, totaling approximately $127 billion per year including medical costs, lost earnings, pain, suffering, and lost quality of life, including lost educational opportunities.[45]

Importantly, and contrary to popular belief, most sexual assaults are neither isolated incidents nor perpetrated by strangers "hiding in the bushes."[46] Approximately three-quarters of non-partner sexual assaults are committed by someone known to the victim.[47] As many as 63% of sexual assaults are committed by repeat offenders.[48] More than half of rapists are a friend or acquaintance, and more than half of all rape and sexual assault incidents occurred at the victim's home or within one

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39. *See* Seidman & Vickers, *supra* note 8, at 468 (highlighting the failure of rape reform laws to lead to increased prosecutions).

40. *See* Chemaly, *supra* note 37.

41. 740 ILL. COMP. STAT. ANN. 22/102 (West 2010) (Illinois' Sexual Assault Protection Order); WASH REV. CODE ANN. § 7.90.005 (West 2007) (Washington's Sexual Assault Protection Order).

42. *See Perpetrators of Sexual Violence: Statistics*, *supra* note 10; *see also* Jodoin, *supra* note 12, at 104–05 ("Research on the prevalence of rape in the United States suggests that between one in six and one in eight women have experienced at least one completed rape in their lifetime.").

43. *Victims of Sexual Violence: Statistics*, *supra* note 2; *About Sexual Assault*, *supra* note 3.

44. *Victims of Sexual Violence: Statistics*, *supra* note 2.

45. *See Where We Stand*, *supra* note 4.

46. *See* Bachman & Paternoster, *supra* note 5, at 570.

47. *See Perpetrators of Sexual Violence: Statistics*, *supra* note 10.

48. *See* Grollman, *supra* note 11.

mile of the home.[49] These facts—that most sexual assaults are committed by someone in the victim's life in or near the victim's home—highlight the very real and credible fear of future harm expressed by many victims of sexual assault.

B. The Failure of the Criminal Justice System to Address the Epidemic

"In the wake of demands for equal rights for women under the law and tighter criminal justice controls during the 1970s, reform of rape laws became a legislative priority."[50] Over the next three decades, state legislatures began responding to this political pressure by reforming and redrafting rape statutes.[51] These criminal justice reforms focused

> almost exclusively on the victim's role within the criminal justice system . . . [and] fell into four categories: (1) redefinition of the offense (repealing spousal exemptions and abolishing specific gender roles for the accuser and accused); (2) evidentiary reforms (elimination of corroboration requirements, enactment of rape shield statutes); (3) reforms in statutory age requirements; and (4) reforms in statutory structures (grading of offenses according to severity of force and resulting injuries).[52]

These statutory reforms have failed to result in more effective prosecutions.[53] Two primary reasons exist for the failure of these well-meaning, yet ineffective reforms. First, the unique nature of sexual assaults presents difficult evidentiary issues for prosecutors, who must prove guilt beyond a reasonable doubt. Sexual assault often occurs behind closed doors and involves private, intimate circumstances only truly known to two people—the victim and the assailant. As a result, district attorneys decline to prosecute the vast majority of sexual assault

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49. *Sexual Assault and Rape Statistics, Laws, and Reports*, SEXUAL ASSAULT RESPONSE SERVS. S. ME., http://www.sarsonline.org/resources-stats/reports-laws-statics [https://perma.cc/9Y7W-T5CR] (last visited Apr. 1, 2017) ("More than half of all rape/sexual assault incidents were reported by victims to have occurred within one mile of their home or at their home.").

50. Seidman & Vickers, *supra* note 8, at 469.

51. *Id.* at 469–70.

52. *Id.* at 470.

53. *Id.* at 467–68 ("Few commentators can point to any data suggesting that criminal rape reform laws have deterred the commission of rape, increased its prosecution, or increased conviction rates. In short, the 'outcomes' of the criminal justice system—arrest, indictment, and conviction—have remained fairly constant.") (citations omitted); *see also* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320 (2000).

cases due to the lack of extrinsic evidence, leaving victims with no criminal remedies.[54]

Second and more troublingly, the failure of these reforms appears rooted in the perpetuation of archaic societal attitudes about "sexual autonomy and gender roles in sexual relations."[55] As one commentator poignantly noted:

> The vast majority of people—including law enforcement personnel, judges and potential jurors—remain conflicted about what constitutes 'consensual' sex. They are ambivalent about placing criminal sanctions on 'non-violent' sexual assault or, for that matter, anything short of violent penetration that results in physical injuries. Jurors, prosecutors and police are confused about the boundary line between sex and rape.[56]

Recent highly publicized rape cases seem to confirm this "confusion," at least on the part of judges. In one notorious case, Judge Robin Camp asked a nineteen-year-old victim who was raped over a bathroom sink, "Why couldn't you just keep your knees together? . . . Why didn't you just sink your bottom down into the basin so he couldn't penetrate you? . . . If you were frightened, you could have screamed."[57] Judge Camp also wondered aloud during the trial "why she allowed the sex to happen if she didn't want it," and that "[s]he certainly had the ability, perhaps learnt from her experience on the streets, to tell (him) to f--- off."[58]

Recent Department of Justice reports about police responses to rape allegations confirm that "confused" may be too generous a description of attitudes towards rape and sexual assault. Rolling Stone magazine offered a compelling summary of one such report about the Baltimore Police Department:

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54. *See Story v. State*, 721 P.2d 1020, 1046 (Wyo. 1986) ("According to FBI statistics comparing rape prosecutions with prosecutions of other violent crimes, rape is one of the most difficult to prosecute successfully."); *see also* Bryden & Lengnick, *supra* note 9, at 1196 ("Afraid that losing cases will look bad on their records, prosecutors are excessively reluctant to prosecute acquaintance rapists.").

55. Seidman & Vickers, *supra* note 8, at 468 ("While laws about rape have changed, attitudes about sexual autonomy and gender roles in sexual relations have not.").

56. *Id.*

57. Melissa Chan, *Canadian Judge Under Review for Berating Teen Rape Victim*, N.Y. DAILY NEWS (Nov. 11, 2015), http://www.nydailynews.com/news/world/canadian-judge-review-berating-teen-rape-victim-article-1.2431358 [https://perma.cc/5Y6J-7VKM].

58. *Id.*

> Last week, the Department of Justice released a scathing report of the Baltimore City Police Department, concluding that officers were pervasively abusing their power in bluntly racist and gender-biased ways. . . .
>
> In addition to illuminating these racist outcomes, the report also shed light on police failures related to the treatment of sexual assault victims, overwhelmingly women and overwhelmingly black. Investigators found that the department treats victims of sexual assault with 'undue skepticism,' and then went on to cite examples of officers dismissing assault, mocking or insulting survivors and harassing victims.
>
> One officer asked a woman bringing a rape charge, 'Why are you messing that guy's life up?' In another case, an officer is described laughing when a prosecutor calls a victim a 'conniving little whore.' . . . This report exists alongside the facts that between 2010 and 2014 only 15 percent of rape kits gathered by the city were processed and only 17 percent of sexual assault reports resulted in arrests.
>
> While many people are outraged and horrified by the findings of the new DOJ report, what it found is not rare. Studies—and a regular stream of disturbing examples—consistently expose systemic problems in police treatment of sexual assault victims: harassing treatment of victims, the downgrading and miscoding of rape, failures to investigate cases, repeated officer sexual misconduct and abuses of power. A second remedy, thorough and consistent training in the complexity of sexual and intimate partner violence, also remains elusive, despite a torrent of incidents over years in which the police exhibit beliefs in gender stereotypes and rape myths. The two remedies are related, in the most basic sense that men tend to have more inaccurate beliefs about rape than women do.
>
> It makes sense that untrained and ill-informed police officers are no less subject to popular rape myths than anyone else. However, studies have shown that police—in line with studies of other fraternal settings, like college fraternities—are less likely to believe sexual assault victims. In 2012, police in Cranberry, Pennsylvania were found liable in the harassment of a victim, saying to her, among other things, 'Your tears won't save you now.' Rape victims are sometimes 'interviewed' in interrogation rooms. For years, people

> reporting sexual assault in St. Louis were urged by police to sign a 'Sexual Assault Victim Waiver,' which absolved the police from responsibility for investigating the crime or reporting it to the FBI.
>
> When victims don't conform to idealized versions of what a rape victim should look and act like, untrained and inexperienced officers, like most people, are highly likely to doubt them. Studies show that surveyed police officers think up to 50 percent of rape victims are making false claims, until they have more than seven years of experience working with them, after which the estimate drops to between eight and 10 percent, closer to the two to eight percent of cases that researchers have found is accurate. Related problems of bias and rape mythologizing exist at every level of the criminal justice system, beginning with dispatchers who are often responsible for assigning a criminal code to incidents as they are reported, and ending in courtrooms, where judges have enormous leeway in sentencing, often with deplorable outcomes for victims.
>
> Sixty-nine percent of police departments surveyed in 2012 reported that dispatchers, frequently with little or no training, are initially responsible for coding crimes. These codes are important because they are analyzed in order to understand trends and to allocate resources. Rapes are among the more frequently downgraded and miscoded crimes reported, which hides the high incidence of rape in the United States. In 2014, for example, an Ohio 911 dispatcher was recorded harshly insisting over the phone that a 20-year-old woman reporting her rape 'quit crying' and went on to tell her that the police would never find her assailant based on her description. From dispatchers, victims are passed along what is often a hostile chain of interviews, interrogations, rape kit collection, a failure of departments to investigate—and, sometimes, outright police cover-ups. Dr. Debra Patterson, an associate professor at the Wayne State University School of Social Work, studied police interactions with sexual assault survivors and found that up to half experience secondary victimization as a result of reporting the crime.[59]

As a result of this societal ambivalence and confusion about "sexual autonomy and gender roles in sexual relations," combined with

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59. Chemaly, *supra* note 37.

the sometimes shocking treatment of victims by law enforcement personnel, sexual assault victims, and "especially acquaintance rape victims, continue to encounter the same hurdles that they did thirty years ago."[60] Given the threat of such publicly humiliating and degrading treatment, it is little wonder that sexual assault remains the "least reported, least indicted and least convicted felony in the United States."[61] According to a report by the Department of Justice, over 65% of rapes and sexual assaults are never reported to the police.[62] Of the sexual assaults that are reported, approximately 18% ever lead to an arrest.[63] Even when there is an arrest, as many as 48% of these cases are dismissed before trial.[64] For the small fraction of sexual assault cases that do proceed to trial, the felony conviction rate stands at approximately 54%.[65] Of those convicted, nearly 25% of perpetrators are released on probation without ever setting foot inside of a prison.[66] In total, of all the rapes and sexual assaults committed in the United States, *only 0.6% resulted in the incarceration of the offender*.[67]

C. The Effects of the Failure to Prosecute on Victims and Society

Sexual assault, by its very nature, represents the most intimate and soul-shattering violation of a person's body. This very personal violation shatters a victim's sense of dignity and self-worth, in part because the assailant dehumanizes and degrades the victim, seeing her not as a human being but merely a physical vessel for his pleasure.[68]

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60. *See* Seidman & Vickers, *supra* note 8, at 468–69 ("These hurdles include[:] the centralizing of the victim's dress, behavior and state of mind[;] the brutalizing attack on her privacy by the threat of public use of rape crisis, medical, and therapy records[;] the continuing ability of the defense to litigate the character, conduct and mental health of the victim in an effort to prove consent or motive to lie[;] and the continuing view that victims should demonstrate a set of behaviors consistent with someone who has really suffered the trauma of assault. Jurors still expect evidence of fresh complaints by victims with accompanying hysteria and torn clothes, as well as other indicia of resistance even when resistance is not a statutory element.").

61. Jodoin, *supra* note 12, at 105.

62. LYNN LANGTON ET AL., DEP'T OF JUSTICE, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010, at 1 (2012), https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf [https://perma.cc/VFD7-4JG8].

63. Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/ [https://perma.cc/8SSY-KYQX].

64. Jodoin, *supra* note 12, at 107.

65. *Id.*

66. *Id.*

67. LANGTON ET AL., *supra* note 62.

68. CAMERON BOYD, AUSTRALIAN CENTRE FOR STUDY SEXUAL ASSAULT, THE IMPACTS OF SEXUAL ASSAULT ON WOMEN (2011), https://aifs.gov.au/sites/default/files/publication-documents/rs2.pdf

This destruction of personhood often leads to a constant "hyper-vigilant, anxious and frightened" state for weeks or years after being assaulted.[69]

The inherently disempowering effect of sexual assault also leaves victims feeling permanently unsafe and vulnerable to future attacks. Many victims describe a feeling of powerlessness and lack of control in every aspect of their lives, including in their ability to maintain any sense of safety in the world.[70]

Within this context, it is tragic that current stereotyped attitudes towards sexual assault in the criminal justice system subject victims to unnecessary secondary trauma and disempowering claims of false accusations. These realities have directly contributed to widespread feelings of fear and distrust by sexual assault victims towards the criminal justice system, a withdrawal from legitimate forms of protection, and an unwillingness to cooperate with law enforcement in other areas beyond just the initial assault.[71] This distrust reinforces the lack of safety and security felt by victims in every aspect of their lives.

The effects of this broken system are felt by society at large as well. In addition to the crippling economic cost discussed previously, failures to prosecute this "most heinous crime" contributes to feelings of impunity for sexual predators, increasing recidivism rates.[72] While only approximately 6% of men ever attempt or complete a rape, a staggering 63% of these men are repeat offenders.[73] At a 2014 Summit

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[https://perma.cc/RHM6-PZ5S] (quoting an unnamed survivor articulating a common post-traumatic stress response: "Sense of a foreshortened future was for me the most terrifying symptom of trauma, I was obsessed with the thought that I was going to die . . . even though he was gone, my psyche still behaved as if it expected a disaster to happen"); VICTIM RIGHTS LAW CTR., BEYOND THE CRIMINAL JUSTICE SYSTEM: TRANSFORMING OUR NATION'S RESPONSE TO RAPE, 1-1, 23, 3-1 (Susan H. Vickers et al. eds., 2003) (discussing shattering effect sexual assault has on victim's sense of safety).

69. Jodoin, *supra* note 12, at 110 ("Such fear is even more exacerbated for the majority of victims who know their attackers, and who will be subject to on-going contact with them after an assault. For many victims, this terror will never go away.").

70. *The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS OF CRIME, http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization [https://perma.cc/76QX-KP2G] (last visited Apr. 1, 2017) (describing the responses of victims in the immediate aftermath of assaults).

71. *See* Seidman & Vickers, *supra* note 8, at 472 ("[M]any victims simply do not view the criminal justice system as one that will provide them with protection."); *see also Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539, 622 (1992) (noting how many victims choose not to report sexual assault because those who do find themselves forced to "reveal intimate, painful details [of their assault] to different prosecutors and different judges").

72. *See supra* Part I.

73. Amelia Thomson-DeVeaux, *What if Most Campus Rapes Aren't Committed By Serial Rapists*, FIVETHIRTYEIGHT (July 13, 2015, 11:00 AM),

on Sexual Assault at Dartmouth College, one Department of Justice official made a startling announcement: "We know that the majority of rapes are committed by serial rapists, and those folks are very unlikely to be reached by any prevention messages that we're going to be sending out, or education about rape."[74] The official concluded that at least part of the failure of education and outreach programs could be attributed to inadequate enforcement mechanisms, giving serial rapists little disincentive to stop committing sexual assault.[75]

II. A PROPOSED SOLUTION: THE SEXUAL ASSAULT PROTECTION ORDER

Despite attempts to address the sexual assault epidemic through modification of existing criminal codes, lingering prejudice and ambivalence—combined with the rigidity of the criminal system—has rendered traditional legal avenues all but useless for sexual assault victims. The shockingly low incarceration rate for perpetrators of rape and sexual assault clearly indicates a failure of the criminal justice system to adequately protect victims of sexual assault, particularly "in light of startling evidence that sexual assault victims face significant safety risks following an attack."[76] As one commentator cogently observed:

> In some cases, the assailant poses a risk of assaulting the victim again. In other cases, the assailant may utilize the fear created by the first attack to continue to threaten, intimidate, or prevent the victim from seeking assistance or reporting the incident to law enforcement. The victim may also be vulnerable to retaliation by the assailant if she chooses to seek assistance or report the crime to law enforcement. Other victims often experience stalking in conjunction with their assault. Moreover, all of these risks are heightened if the victim is subject to on-going contact with the assailant. The

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http://fivethirtyeight.com/features/what-if-most-campus-rapes-arent-committed-by-serial-rapists/ [https://perma.cc/S4GW-X68W].

74. *Id.*

75. *Id.*; *see also* Fred Thys, *At Summit on Sexual Assault, Administrators Learn Strategies to Stop Serial Rapists*, WBUR NEWS (July 16, 2014), http://www.wbur.org/news/2014/07/16/at-summit-on-sexual-assault-administrators-learn-strategies-to-stop-serial-rapists [https://perma.cc/JJ2Q-Y2HM].

76. Jodoin, *supra* note 12, at 108 (citing study by The National Center for Victims of Crime highlighting the risk of retaliation by perpetrators of sexual assault).

> victim may be at particular risk if the assailant knows where the victim lives, works, or goes to school.[77]

Recognizing these unique challenges faced by sexual assault victims, advocates have lobbied for decades for alternative legal remedies freed from the constraints of the criminal system and designed to provide prospective victim-centered relief.[78] These advocacy efforts closely mirror the efforts to reform domestic violence prosecution laws, efforts which led to the creation of "quasi-criminal" domestic violence restraining order remedies in all fifty states and the District of Columbia.[79] The similarities between domestic violence and sexual assault—both involve physical assaults, often in private intimate settings with no witnesses besides the parties and little conclusive evidence, making criminal prosecution problematic at best—provide a logical justification for the creation of similar civil protection remedies for both offenses.

The following section provides an overview of civil protection orders generally, the need for and benefits of a carefully tailored protection order for sexual assault, and an informative comparison of SAPOs to DVROs.

A. Civil Protection Orders Generally

A civil protection order, also known as a restraining order, provides a prospective civil remedy for victims by placing a "legal burden on the assailant to have no further contact with the victim."[80] Civil protection orders provide victims of criminal violence with an alternative to the criminal justice system, where the slow nature of the proceedings, higher burden of proof, lack of available victim-centered remedies, and requirement that victims confront their assailants often

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77. *Id.* at 108–09; *see also* JESSICA E. MINDLIN & LIANI JEAN HEH REEVES, CTR. FOR LAW & PUB. POLICY ON SEXUAL VIOLENCE, RIGHTS AND REMEDIES: MEETING THE CIVIL LEGAL NEEDS OF SEXUAL VIOLENCE SURVIVORS 40 (2005) (citations omitted), https://law.lclark.edu/live/files/6469-rights-and-remedies-meeting-the-civil-legal-needs [https://perma.cc/TL4W-DBLJ] (discussing the right of stalking post-sexual assault); O'Connell, *supra* note 22 (discussing safety risks of ongoing contact with the assailant after a sexual assault); *Why Schools Handle Sexual Violence Reports*, *supra* note 21.

78. *See* Seidman & Vickers, *supra* note 8, at 467–69 (summarizing the history of rape law reform).

79. *See* Smith, *supra* note 38, at 96–98 (summarizing history of domestic violence law reform).

80. Jodoin, *supra* note 12, at 115 ("Such orders derive from the traditional common law civil injunction, and were adapted initially in the 1970s as a mechanism to protect victims of domestic violence.").

makes it an impractical and unappealing option for victims of intimate crime.[81]

"The process for obtaining a civil protection order varies by jurisdiction," but is nearly always more expedient, simple, and prospective than the process governing criminal trials.[82] In most states, petitioners can obtain a temporary or emergency protection order, valid for up to three weeks, without a full hearing.[83] These emergency provisional measures are often granted ex parte, but constitutional due process requires courts to hold an evidentiary hearing shortly after the issuance of the temporary order, and the restrained party must be given notice of the hearing.[84] After a hearing, the court can make the order "permanent," but most state statutes limit the permanence of these orders to a period of one to three years.[85] "Civil rules of procedure apply, including a standard of proof that is lower than [the 'beyond-a-reasonable-doubt' standard] in criminal cases"—the highest standard of proof in the American legal system.[86]

In addition to more favorable procedures, civil protection orders offer victim-centered options for relief that are often more comprehensive than those available in criminal protection orders (and certainly in criminal sentencing). Civil protection orders can require the assailant to stay away from the victim, and in some states, civil protection orders can include orders relating to child custody, visitation, and support.[87] They can grant the victim restitution or other economic relief, including possession of a shared residence or other property.[88] Some state civil protection orders can also require assailants to relinquish firearms, seek counseling, or undergo drug and alcohol

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81. Smith, *supra* note 38, at 97 (describing nature and history of civil protection orders).

82. *Id.* at 100.

83. *Id.*; *see also* CAL. CIV. PROC. CODE § 527.6 (West 2014) (civil harassment restraining order authorizing Temporary Restraining Order (TRO) without notice for fifteen to twenty-two days).

84. Smith, *supra* note 38, at 100–01; *see also, e.g.*, COLO. REV. STAT. ANN. § 13-14-103 (West 2013) (Colorado civil restraining order requiring permanent hearing within three weeks of granting of TRO); CAL. CIV. PROC. CODE § 527.6 (same); 740 ILL. COMP. STAT. ANN. § 22/208 (West 2010) (Illinois Sexual Assault Protection Order requiring same).

85. Smith, *supra* note 38, at 101.

86. *Id.*

87. *See, e.g.*, COLO. REV. STAT. ANN. § 13-14-103 (authorizing temporary child placement as appropriate remedy); OR. REV. STAT. ANN. § 107.718 (West 2014) (Oregon civil harassment statute authorizing relief necessary to "[p]rovide for the safety and welfare of the petitioner and the children in the custody of the petitioner"); *see generally* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 24.

88. *See generally* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 24.

treatment.[89] Unlike remedies in criminal proceedings, which punish the offender for past acts while ignoring the ongoing needs of the victim, these civil protection order remedies are non-punitive measures designed to prospectively prevent future harm.

B. The Need for a Civil Protection Order Specifically for Sexual Assault

As demonstrated *supra*, existing criminal justice remedies fall far short of offering the type of prospective protection sexual assault victims need to regain a sense of security from their assaults. Private civil suits and existing civil protection order mechanisms likewise fail to provide the kind of carefully tailored relief required to address sexual assault. And even if criminal justice reforms increased the efficacy of prosecutions against assailants, the inherently offender-centric nature of criminal prosecutions fails to account for the specific needs of sexual assault victims.

1. PRIVATE CIVIL SUITS DO NOT OFFER ADEQUATE PROSPECTIVE SECURITY

Among the legal options available to sexual assault victims, private civil lawsuits seeking monetary or other redress for criminal activity may provide the fewest protections actually needed by victims. An obvious advantage of the private civil mechanism is that such suits are governed by the lower preponderance-of-the-evidence standard as opposed to the beyond-a-reasonable-doubt standard in criminal trials, making it an attractive alternative for sexual assault cases often lacking in overwhelming extrinsic evidence.[90] Private suits also give the victim control over the proceedings in a way that state-sponsored criminal proceedings cannot. However, private civil lawsuits generally are concerned with redressing past conduct through the award of money

89. *See generally id.*

90. *See* Lininger, *supra* note 19, at 1579–80 (discussing benefits of civil suits for sexual assault). Perhaps the most famous example of a civil suit succeeding to seek redress for criminal activity after the failure to secure a criminal conviction is the O.J. Simpson case. After famously being acquitted for the murders of Ron Goldman and Nicole Brown Simpson, Simpson was nevertheless found civilly liable for their deaths in a subsequent lawsuit and ordered to pay millions of dollars in restitution to the victims' families. B. Drummond Ayres Jr., *Jury Decides Simpson Must Pay $25 Million in Punitive Award*, N.Y. TIMES (Feb. 11, 1997), http://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html [https://perma.cc/YA4K-Z4C3].

damages rather than providing prospective protection and other relief to victims in emergent situations.[91]

Of course, preliminary injunctive relief is available to private civil litigants that can afford temporary prospective relief by protecting the status quo, but the wheels of traditional civil justice spin too slowly for the sexual assault victim in need of immediate, permanent solutions. Lacking a reliably timely mechanism by which victims can secure permanent injunctive relief, the traditional civil system lacks the flexible and expedient structures required for an effective prospective remedy.

2. EXISTING CIVIL PROTECTION ORDERS IMPOSE UNNECESSARY BARRIERS TO PROTECTION

Compared to civil actions for damages, civil protection order actions provide prospective, immediate, victim-centered relief needed by sexual assault victims. However, most existing civil protection order statutes either are simply not available to sexual assault victims or impose evidentiary requirements more suitable for noise complaints or bar fights than for allegations of rape or sexual assault.

a. Civil Protection Orders Tailored to Non-Sexual Assaults

Many states, in recognition of the unique nature of certain types of harassment, have enacted a series of civil restraining order remedies tailored to specific circumstances. These types of restraining orders include, *inter alia*, elder abuse restraining orders, workplace violence restraining orders, and stalking restraining orders.[92] Though sexual assault may be present in each of these situations and may serve as a satisfactory type of "harassment" sufficient for the restraining order to issue, these narrowly tailored orders obviously do not and cannot address the vast majority of sexual assault cases.

The restraining order most commonly—if inaccurately—associated with sexual assault cases is the DVRO. Some version of the DVRO exists in all fifty states and the District of Columbia, and virtually all of them explicitly state that a single instance of sexual assault suffices for

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91. Lininger, *supra* note 19, at 1579–80 (noting that injunctions are available in traditional civil proceedings but are generally much longer and more arduous evidentiary processes).

92. *See Restraining Orders*, CAL. CTS.: THE JUD. BRANCH CAL., http://www.courts.ca.gov/1260.htm [https://perma.cc/43FV-EA63] (last visited Apr. 3, 2017) (listing all types of restraining orders in California, including "Domestic Violence Restraining Order," "Elder or Dependent Adult Abuse Restraining Order," "Civil Harassment Restraining Order," and "Workplace Violence Restraining Order").

a restraining order to issue.[93] However, virtually all of these statutes require the presence of a partnered relationship between victim and assailant for the order to apply.[94] While the majority of sexual assaults occur between acquaintances, an acquaintance relationship is insufficient for purposes of a DVRO. As seen below with the case of Noora, this subtle distinction in the status of the relationship between victim and assailant can make all the difference in a state like California with no carefully tailored SAPO statute:

> Noora,[95] an Iraqi refugee resettled east of San Diego, found herself homeless after her husband was sent to prison and she could no longer afford rent. Desperate, Noora took a friend's suggestion that she offer house cleaning and cooking services in exchange for a room. The friend recommended Noora to Daniel, a joint acquaintance, who offered to provide her with a spare room in his house in exchange for regular house cleaning and maintenance.
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> Within two weeks of moving in, Noora was forcibly sexually assaulted by Daniel. Daniel threatened her with a gun and explained that she would be back on the streets within a day if she did not consent to his demands. Over the next month Daniel raped Noora approximately twenty times before Noora finally called the police and had Daniel arrested. The District Attorney declined to prosecute the case, citing a lack of evidence.
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> Noora then turned to the civil court system for protection and sought a restraining order against Daniel. At the hearing, Daniel defended himself by claiming he and Noora were engaged to be married and had only had consensual sex as a part of their intimate relationship. Noora vehemently denied the existence of any relationship, and offered extrinsic

93. Smith, *supra* note 38, at 100; *see* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 24.

94. Smith, *supra* note 38, at 96; *see* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 24.

95. While this story is based on actual events, all names have been changed to protect the privacy of the parties. The civil action described herein was brought on behalf of the victim by the Center for Community Solutions, a non-profit legal and advocacy organization and the only rape crisis center in San Diego County. I became familiar with Noora's case during research for this Article in interviews with CCS staff attorneys, including Noël Harlow, who represented Noora in her CHRO hearing. *See* Interview with Noël Harlow, Attorney, Center for Community Solutions (Apr. 28–29, 2013) [hereinafter Harlow Interview] (notes on file with Author).

> evidence, including police testimony, that Daniel had threatened her with multiple guns, including an unregistered firearm. The court found the evidence "compelling," but found that it did not meet the statutory "clear and convincing evidence" burden of proof required by the statute because it was "not immediately and patently obvious on its face that the alleged conduct occurred."[96]
>
> Ironically, had Noora not challenged Daniel's false claim that he and Noora were in an intimate relationship Noora likely would have prevailed. In California, domestic violence restraining order hearings based on allegations of partner violence require only proof by a preponderance of the evidence—in other words, that it was "more likely than not" that the alleged conduct took place. But because Noora was not partnered with her assailant, she did not qualify for a domestic violence restraining order and its relaxed burden of proof. Her only recourse as a victim of sexual assault was to seek relief under California's more generic "civil harassment restraining order," which governs everything from neighbor disputes to prank phone calls and requires a showing by "clear and convincing evidence."

b. "Catchall" CHROs

Noora's case illustrates an example of what this Article calls "catchall" CHROs, or civil harassment restraining orders. These CHROs, which exist in approximately twenty-one states, are designed to govern all forms of harassment disputes not covered by DVROs or any other specially protected situation like elder abuse.[97] These statutes are employed by petitioners for a wide range of conduct, from landlord tenant disputes to neighbor disputes over noise to cyberbullying.[98] Given the limitless application of these statutes and the obvious risk of frivolous litigation arising from the abusive application of these statutes, virtually all CHROs impose heightened filing and evidentiary requirements. Typically, these requirements include: (1) a demonstrated

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96. These quotes come from the presiding judge in Noora's permanent Civil Harassment Restraining Order hearing, who made these comments at oral argument. *See* Harlow Interview, *supra* note 95. The oral argument itself was neither recorded nor transcribed due to budget cuts to California's judiciary. *See* Kramm Court Reporting, *San Diego Court Reporters in Civil Courtrooms are Laid Off – November 5*, JD SUPRA BUS. ADVISOR (Oct. 1, 2012), http://www.jdsupra.com/legalnews/san-diego-court-reporters-in-civil-court-83782/ [https://perma.cc/X83F-FHPK].

97. *See* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 22.

98. *See* Jodoin, *supra* note 12, at 127.

pattern of three or more separate incidents of harassment;[99] (2) a demonstrated credible fear that the same type of conduct will continue in the future;[100] and (3) proof of both elements by clear and convincing evidence.[101]

Applying CHROs to sexual assault creates a host of problems. First, the mere grouping of sexual assault with "harassment" or merely "annoying conduct" inherently diminishes the seriousness of sexual assault as "the most heinous crime short of murder." Second, "such a misclassification . . . diminishes the public['s] awareness of the statute's [applicability to sexual assault] and misleads eligible individuals into believing that [such a] statute does not offer them protection."[102] Third, requiring sexual assault victims to use the same mechanism as noisy neighbors exposes them to "misdirected opposition."[103] Many critics of CHROs point to their overuse as retaliatory devices by litigants in trivial matters.[104] Sexual assault is anything but trivial.[105]

Practical considerations limit the utility of CHROs as well. The very private and intimate nature of sexual assault creates evidentiary problems, particularly given the fact that most rapes do not occur during or after a violent physical altercation with the assailant. As in Noora's case, this paucity of evidence makes meeting a heightened clear-and-convincing evidence standard all but impossible in most

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99. *See, e.g.*, MASS. GEN. LAWS ch. 258E, §1 (2010) (Massachusetts civil harassment order available to a person who suffers from three or more acts of harassment).

100. CAL. CIV. PROC. CODE § 527.6 (West 2014) (civil harassment restraining order requiring proof of credible fear of future harm of the same kind of conduct leading to the original petition).

101. *Id.* (requiring proof by clear and convincing evidence).

102. Jodoin, *supra* note 12, at 129.

103. *Id.*

104. *See id.*; *see also* Abel, *supra* note 26 (discussing "surge" in restraining order filings under Massachusetts' catchall CHRO and court officials' dissatisfaction with number of complaints); Editorial, *Harassment Orders May Cause More Problems Than They Solve*, MASS. LAW. WKLY. (Dec. 13, 2010), http://masslawyersweekly.com/2010/12/09/harassment-orders-may-cause-more-problems-than-they-solve/ [https://perma.cc/8V7H-H8V5] (discussing abuse of statute by frivolous litigants).

105. *See* Jodoin, *supra* note 12, at 127 ("The problem with including sexual assault in a statute that is largely intended as a harassment statute is that sexual assault is not synonymous with harassment, and it implicates considerations different than those encountered by harassment victims. . . . [T]he concerns underlying the adoption of the heightened standard [of proof in civil harassment hearings]—neighbor arguments, 'bar fights,' 'landlord tenant disputes,' 'minor violent crimes,' and other 'frivolous reasons,'—are not considerations that are applicable to sexual assault victims. Rather, claims for protection by sexual assault victims, like those of domestic violence victims, are inherently non-frivolous due to the serious violent nature of the crime.") (citations omitted).

situations.[106] Moreover, requiring a victim to prove multiple sexual assaults discounts the seriousness of sexual assault as an attack on one's entire person. While preventing someone from running to court the first time a neighbor's turns a stereo up too loudly makes some sense, preventing a rape victim from seeking protection after a single assault does not.

Likewise, a sexual assault victim should not have to prove that she will likely suffer *another sexual assault* from the perpetrator for a restraining order to issue. As discussed *supra*, sexual assault victims feel a real and ever-present sense of insecurity after being violated at such an intimate physical level, and the mere presence of the assailant risks triggering and re-traumatizing her.[107] Where it seems logical to require a neighborhood noise complainant to demonstrate a likelihood that the same noisy conduct is likely to continue absent court intervention, the serious traumatic effects of sexual assault are such that victims should not be forced to prove they will likely be raped or sexually assaulted before receiving protection from the perpetrator's presence.[108]

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106. *See Crespo v. Crespo*, 972 A.2d 1169, 1176 (N.J. Super. Ct. App. Div. 2009) ("[A] clear-and-convincing standard would saddle victims of [intimate] violence with a burden that would often foreclose relief in many deserving cases. When the testimony of the plaintiff is pitted against the testimony of the defendant, with no other corroborating testimony or evidence, a plaintiff would likely have difficulty sustaining the sterner standard urged by defendant here."); JOHN F. DECKER & CHRISTOPHER KOPACZ, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES, 8-10/11 (LexisNexis 5th ed. 2012) ("Prosecutors seeking to achieve a rape conviction [are] faced with evidentiary barriers as well. The Illinois Supreme Court explained that, because as 'Lord Hale once aptly observed[,] . . . an accusation of rape is easily made, hard to be proved and still harder to be defended by one ever so innocent,' it was necessary that . . . a rape complainant's testimony either had to be clear and convincing or be corroborated by other evidence."); Matthew Q. Clarida & Madeline R. Conway, *Univ. Announces New Sexual Assault Policy Including Central Office, 'Preponderance of the Evidence' Standard*, HARV. CRIMSON (July 2, 2014), http://www.thecrimson.com/article/2014/7/3/new-sexual-assault-policies/ [https://perma.cc/Z6A6-9EPN] (discussing change in Title IX sexual assault complaint policies at Harvard after outcry over clear-and-convincing evidence standard).

107. *See Post Traumatic Stress Disorder in Rape Survivors*, AM. ACAD. EXPERTS IN TRAUMATIC STRESS, http://www.aaets.org/article178.htm [https://perma.cc/325W-MX24] (last visited Apr. 1, 2017) (describing rape trauma syndrome, including the ability to be triggered into a state of paralysis in the presence of one's attacker).

108. Jodoin, *supra* note 12, at 128 (criticizing confusion in Massachusetts' harassment statute regarding whether "the sexual assault plaintiff [must] prove that she is in a substantial likelihood of immediate danger of the same type of 'harassment' alleged when she initially filed the order. . . . However, many sexual assault victims may not be in a substantial likelihood of being sexually assaulted again. They may, however, be vulnerable to harassment, intimidation, or other physical or psychological harm at the hands of their attacker") (citations omitted).

3. EVEN EFFECTIVE CRIMINAL SANCTIONS LACK VICTIM-CENTERED SOLUTIONS

A primary problem with the current legal landscape for sexual assault victims is the woeful inadequacies of the criminal justice system to treat victims fairly and effectively incapacitate offenders. Yet, even if reform efforts led to more humane treatment of victims and increased incarceration rates for perpetrators, the very nature of criminal prosecutions in this country deprive victims of the power and control so many sexual assault victims need following the assault.[109]

The "victim" in criminal prosecutions is the State, not the actual victim.[110] The "plaintiff" is also the State and the victim is but the "complaining witness."[111] Once a district attorney chooses to prosecute the crime, the victim largely loses the ability to protect her identity, protect her privacy, or halt the proceedings.[112] State prosecutors often will press forward with the prosecution if enough evidence exists to convict without the victim's assistance, even if the prosecution itself

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109. *See* SAFE HORIZON, AFTER SEXUAL ASSAULT: A RECOVERY GUIDE FOR SURVIVORS 7, http://movingtoendsexualassault.org/wp-content/uploads/2014/09/After-Sexual-Assault-A-Recovery-Guide-for-Survivors.pdf [https://perma.cc/S92T-6P6K] (last visited Apr. 1, 2017) (describing the need for sexual assault victims to "regain a sense of control" over their world); Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. MED. 111, 111–12 (2006) ("[S]uccessful recovery is subjective and measured by whether the survivor increases his or her involvement in the present, acquires skills and attitudes to regain control over his o[r] her life, forgive him or herself for guilt, shame and other negative cognitions, and gain stress reduction skills for overall better functioning.") (citation omitted).

110. *Criminal and Civil Justice*, NAT'L CTR. FOR VICTIMS OF CRIME, https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/criminal-and-civil-justice [https://perma.cc/PJA4-6JYC] (last visited Apr. 1, 2017) (discussing differences between criminal case and civil case from a victim's perspective, including the idea that a "crime is considered 'a crime against the state'").

111. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 27 n.136 (1999) (describing inconsistencies between a domestic violence restraining order case and concurrently pending criminal case because the "complaining witness" victim was neither notified of nor asked to participate in the criminal trial: "The parties to a criminal prosecution are the defendant and the state. The victim's role is limited to that of a 'complaining witness'").

112. *See id.* at 40 n.205 (recounting a domestic violence prosecution that proceeded over the express wishes of the victim: "Although the girlfriend did not wish to press charges, the government proceeded and subpoenaed her to testify"); *see also* Bryden & Lengnick, *supra* note 9, at 1221–22 (observing "several reasons for victims' failure to report" sexual assault, including the recognition that they cannot control the public prosecution of any reported crime even if "she wishes to conceal some aspect of her own behavior—drug use, for example—immediately prior to the rape").

increases the risk of violence to the victim.[113] Moreover, criminal prosecutions seek only offender-related relief in the form of incarceration and other retributive punishment; little consideration is given to the needs of the victim beyond "putting away the bad guy."[114] Criminal prosecutions obviously are important, but for many sexual assault victims who have just been disempowered by their assailants, the feeling of powerlessness associated with a subsequent criminal prosecution largely out of their control is the last thing victims want or need.[115]

C. The Benefits of SAPOs

Sexual assault protection orders provide meaningful relief to victims that the criminal system cannot because they offer: (1) procedural flexibility unavailable in the criminal system; (2) prospective, victim-centered relief designed to deter future harm; and (3) emotional empowerment experienced by victims who control the process.

1. PROCEDURAL FLEXIBILITY

Civil protection orders are easier to obtain than criminal convictions and criminal orders of protection. Whereas constitutional due process requires proof beyond a reasonable doubt for a criminal conviction, civil protection orders can apply a lower standard of proof;

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113. *See* Epstein, *supra* note 111, at 18 (criticizing bright line prosecutorial policies not to drop domestic violence prosecutions regardless of the circumstance, because "[a] no-drop policy may, in some cases, trigger a physical attack. Although dropping charges in response to a batterer's threat allows him to retain control, forcible prosecution can result in a deadly retaliation assault").

114. *See Criminal and Civil Justice*, *supra* note 110 (highlighting fact that the goal of a criminal trial "is to hold defendant accountable to the state" and that the victim has no "right to direct the prosecution of the case or to veto the prosecutor's decisions"). While many District Attorney offices maintain victim liaison offices, many of these offices are concerned primarily with administering state-run victims' compensation funds. The goal of victim monetary compensation is laudable, but neither offers the victim the ability to control the prosecution in any way nor any form of prospective protection from the assailant. *See id.* (describing "State Crime Victim Compensation" goals and procedures); *see also* Seidman & Vickers, *supra* note 8, at 472 ("Most victim compensation statutes require some form of involvement with the criminal justice system in order for the victim to pursue a compensation claim. Placing the availability of civil remedies in the hands of the criminal justice process causes real harm to victims . . . .").

115. *See, e.g.*, Bryden & Lengnick, *supra* note 9, at 1195 ("Victims often do not report the rape, largely because they fear overbearing, hostile police, and—should a trial ensue—vicious attacks on their character" which are out of their control) (citations omitted); Chivers-Wilson, *supra* note 109, at 115 (highlighting the psychological need for rape victims to regain control after an assault).

in most states, a victim need only sustain proof by a preponderance of the evidence.[116] This lower standard of proof is critically important in the sexual assault context because of the uniquely intimate and complex circumstances surrounding sexual violence. In this context, extrinsic evidence is often lacking, and

> there are usually few, if any, eyewitnesses to . . . [sexual] violence. Most of the events complained of in such matters happen behind closed doors or during private communications; as a result, most cases turn only on the trial judge's assessment of the credibility of only two witnesses—the plaintiff and the defendant.[117]

As a result, district attorneys routinely decline to criminally prosecute domestic violence and sexual assault cases because of their inability to prove the cases beyond a reasonable doubt.[118] Yet while a victim may not have the evidence necessary to sustain criminal charges, she may have evidence to support a finding that she is in danger, or that a past crime occurred, under a lower burden of proof.[119]

Importantly, civil orders also can provide protection more quickly than criminal orders of protection. In civil court, a temporary order can be issued upon the victim's sworn statement, and a hearing for a

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116. *See, e.g.*, ALASKA STAT. § 18.65.850 (2014); COLO. REV. STAT. ANN. § 13-14-103 (West 2013); CONN. GEN. STAT. § 46b-16a (2015); D.C. CODE § 16-1005 (2013); 740 ILL. COMP. STAT. ANN. 22/201 (West 2010); ME. REV. STAT. ANN. tit. 19, § 4005 (2011); MD. CODE ANN., CTS. & JUD. PROC. § 3-1503 (West 2016); NEV. REV. STAT. § 200.378 (2009); N.M.R.A., RULE 1-066 (2016); N.D. CENT. CODE § 12.1-31.2-01(4) (2016); OR. REV. STAT. § 163.763(2)(d) (2015); S.D. CODIFIED LAWS § 22-19A-11 (2011); TENN. CODE ANN. § 36-3-601(b) (2016); VT. STAT. ANN. tit. 12, § 5133(b) (2016); VA. CODE ANN. § 19.2-152.9(D) (2014); WASH. REV. CODE ANN. § 7.90.090(1)(a) (West 2007).

117. *Crespo v. Crespo*, 972 A.2d 1169, 1176–77 (N.J. Super. Ct. App. Div. 2009) (citations omitted).

118. *See* Bryden & Lengnick, *supra* note 9, at 1196 ("Afraid that losing cases will look bad on their records, prosecutors are excessively reluctant to prosecute acquaintance rapists.").

119. Deborah Gartzke Goolsby, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1188–92 (1990) (attributing failure to prosecute and convict offenders in simple rape cases on unattainably high burdens of proof and on evidentiary issues tied to systemic male biases, including force requirements, overreliance on prior relationship testimony, corroboration requirements, and fresh complaint requirements); *see* Bryden & Lengnick, *supra* note 9, at 1294–95 ("The charge of massive, systemic bias against acquaintance rape victims rests at bottom on three assumptions: . . . That the guilt of most acquaintance rapists can be proven beyond a genuinely reasonable doubt, to the satisfaction of unbiased factfinders.") (citations omitted).

permanent order can be held shortly thereafter.[120] In contrast, while a temporary order can be granted in criminal cases in relatively short order, a conviction and "permanent" criminal order can take months or even years.[121] Such expeditious relief is critical for victims of such intimate crimes, because victims of sexual assault are often at greatest risk of serious physical harm shortly after separation from an assailant.[122]

2. PROSPECTIVE RELIEF

Further, civil orders of protection provide far more comprehensive remedies than those available in criminal court. These remedies focus on the future safety of the victim rather than the punishment of the offender for past misconduct.[123] In addition to ordering the perpetrator to stay away from and have no contact with the victim, civil orders can

120. *See* David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 88, 101 (2008) (explaining that civil restraining order statutes "generally seek to provide a quick and simple mechanism by which victims of domestic violence can obtain a judicial remedy," by *inter alia*, requiring only "an affidavit or verified complaint for a temporary restraining order to issue without notice") (citations omitted); *see also* Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 365 (2002) (observing that due process requirements mandate that a hearing be held shortly after issuance of a temporary restraining order); Taylor et al., *supra*, at 83 ("After notice to the alleged abuser, a full hearing is held within a relatively short period of time at which the alleged abuser may appear and defend the action. An order of longer duration may then be entered; commonly one to two years is entered.") (citations omitted).

121. *See* Seidman & Vickers, *supra* note 8, at 472 ("[T]he criminal justice process is too slow and poorly equipped to protect against the immediate devastating consequences of assault.").

122. *See* Jodoin, *supra* note 12, at 112 ("Because civil protection orders are drafted specifically with victim assistance in mind, they are also designed to be more victim-friendly than the criminal justice system. Court procedures, filing systems, personnel, and hearings are tailored to ensure that the victim obtains the necessary protections she needs. Additionally, the burden of proof in protection order hearings is typically lower than the 'beyond a reasonable doubt' standard used in the criminal process.") (citations omitted); Mindlin & Reeves, *supra* note 77, at 20 (discussing factors to consider in evaluating a victim's safety from an assailant, particularly in the immediate aftermath of the sexual assault).

123. *See* Seidman & Vickers, *supra* note 8 at 476 ("Rape victims may also use civil protective orders to insulate themselves form many of the negative social and economic impacts of rape . . . ."); Jennifer Rios, *Note: What's the Hold-Up? Making the Case for Lifetime Orders of Protection in New York State*, 12 CARDOZO J.L. & GENDER 709, 716–18 (2006) (discussing protection orders as a source of protection for victims).

provide relief in the form of economic orders.[124] They can also require that an assailant surrender firearms.[125] They can issue orders regarding the possession and use of shared residences, automobiles, or other personal effects or can order the assailant to vacate a shared residence.[126] They also can require that the assailant pay the mortgage or rent on the victim's residence or pay for victim's counsel.[127] They can order that the assailant pay for expenses related to the violence such as medical expenses, counseling expenses, temporary shelter or housing expenses, and expenses to repair or replace damaged property.[128] Most states have a catch-all provision that allows courts discretion to fashion additional remedies specific to each victim.[129]

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124. Seidman & Vickers, *supra* note 8, at 476 ("Rape victims may also use civil protective orders . . . for limited restitution costs associated with rape."); ME. STAT. tit. 19-A, § 4007(I)-(L) (2016) (Maine "Protection from Abuse" Order providing for monetary compensation related to the harassment or violence). A majority of DVRO statutes provide for economic restitution in recognition of the likely economic impact of fractures in a partnered relationship. *See, e.g.*, ALASKA STAT. § 18.66.100(c)(12)–(14) (2014); CAL. FAM. CODE § 6342(a)(1) (West 2015); DEL. CODE ANN. tit. 10, § 1045(a)(7) (2017); D.C. CODE § 16-1045 (2013); IND. CODE. § 34-26-5-9(c)(3)(D) (2016); MINN. STAT. § 518B.01(6)(a)(11) (2015); MISS. CODE ANN. § 93-21-15(2)(a)(vi) (West 2014).

125. *See, e.g.*, OHIO REV. CODE ANN. § 2903.214(F)(2) (West 2016) (Ohio's Civil Protection Order authorizing relinquishment of firearms); 22 OKLA. STAT. ANN. tit. 22, § 60.11(5) (West 2016) (Oklahoma Civil Protection Order authorizing same); WIS. STAT. ANN. § 813.123(5m) (West 2015–16) (Wisconsin Civil Harassment Restraining Order authorizing same); MONT. CODE. ANN. § 40-15-201(2)(f) (West 2011) (Montana "Temporary Order of Protection" authorizing same if the gun was used in the assault).

126. *See* Smith, *supra* note 38, at 100 ("[I]n some states, judges issuing civil protection orders can include orders relating to child custody and visitation. They can also require [the] person to seek counseling or drug or alcohol treatment, they can grant the petitioner possession of the residence or other property, child support, or other economic relief, and they can keep the respondent from accessing the petitioner's personal information.") (citations omitted).

127. *See id.* at 121.

128. *See id.*

129. *See, e.g.*, ALA. CODE § 30-5-7(b)(9) (2015) (catchall provision in Alabama's domestic violence restraining order); N.M. STAT. ANN. § 40-13-5(A)(7) (2008) (catchall provision in New Mexico's domestic violence restraining order). These catchall provisions can be fashioned in a way to protect sexual assault victims in ways that are unique to their situation. *See* Jodoin, *supra* note 12, at 112–13 ("Protection orders may also assist victims seeking to have an assailant removed from their daily environment, such as at their school, home, or place of employment. Many institutions, such as housing authorities, schools, and employers, attempt to limit their potential liability to the assailant by refraining from removing the assailant from the victim's surroundings, unless acting pursuant to a court order. A civil protection order issued by a court often gives the victim the ability to negotiate with these organizations, and it may expedite the process for removing the assailant from the victim's daily life.") (citations omitted).

3. VICTIM EMPOWERMENT

The criminal justice system, by its very nature, focuses on punishment of the offender for past acts first, burdens and benefits to "the state" second, and the victim third (if at all).[130] This hierarchy can make already vulnerable sexual assault victims feel even more powerless. Prospective, victim-directed protection orders have the opposite effect.

> Studies show that victims who obtain civil protection orders against their attackers subsequently experience increased feelings of safety after obtaining the order. In addition, research indicates that 'one of the most significant benefits of seeking and obtaining an Order for Protection' is that it serves to empower the victim by allowing her to initiate a course of action after a dehumanizing attack. Moreover, victims often report that civil protection orders were instrumental in helping them recover and improve their overall feelings of well-being after an attack.[131]

D. The Model for Success: The DVRO

Much like the sexual assault epidemic, increased awareness of the domestic violence epidemic happened as a result of efforts during the women's rights movement to shine a light on social injustices perpetrated overwhelmingly against women.[132] The initial legislative response—to modify existing criminal statutes—mirrored the response

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130. *See* Epstein, *supra* note 111, at 4–5.

131. Jodoin, *supra* note 12, at 111, 113 (citations omitted) ("Additionally, public safety may benefit as a result of civil protection orders for sexual assault victims. If a victim feels safe, she is more likely to report the attack and to cooperate with law enforcement agencies, which in turn allows the criminal justice system to operate more efficiently. Finally, civil protection orders for sexual assault victims 'send a strong message to the perpetrator and the community that sexual assault is not acceptable behavior.' Such a message may actually serve as a deterrent to both the offender and other potential sexual assailants.") (citations omitted).

132. *See* 750 ILL. COMP. STAT. ANN. 60/102(3) (West 2010) (stating that one of the underlying purposes of the Domestic Violence Act is to "recognize that the legal system has ineffectively dealt with family violence in the past"); Smith, *supra* note 38, at 99 ("By the late 1970s, the problem of domestic violence and the failure of government to respond adequately were gaining recognition across the country. The clear push by victims' advocates and feminists was to strengthen governmental responses to domestic violence, especially in the criminal justice system.") (citations omitted); Taylor et al., *supra* note 120, at 83–84 ("[P]rior to the enactment of domestic violence statutes beginning in the 1970s, judicial process was largely unavailable to victims as a practical remedy . . . .").

to sexual assault awareness as well.[133] Unfortunately, these "reforms" had little discernible impact, leading to advocacy efforts for the creation of a civil legal remedy.[134] A short discussion of this history is necessary to provide context for the justification for similar civil legal remedies for victims of sexual assault.

1. THE DOMESTIC VIOLENCE EPIDEMIC

Like sexual assault, domestic violence is a nationwide (indeed, worldwide) epidemic affecting millions of individuals regardless of age, economic status, race, religion, or education. According to the National Network to End Domestic Violence and the National Intimate Partner and Sexual Violence Survey, more than one in three women "have experienced rape, physical violence, and/or stalking" by a partner during adulthood,[135] and approximately one in twelve men "has experienced sexual violence other than rape" by a partner.[136] On average, three women are killed by a current or former intimate partner each day in the United States;[137] since 1976, nearly one-third of all female homicide victims have been killed by their intimate partner.[138] Approximately seven million people each year in the United States are raped and/or physically assaulted by a current or former spouse or partner.[139] Approximately 37% of women seeking injury-related treatment in hospital emergency rooms were treated for injuries inflicted by a current or former spouse or partner.[140] A twenty-four-

133. *See* JEFFREY FAGAN, U.S. DEP'T OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 8–10 (1996), http://www./ncjrs.org/pdffiles/crimdom.pdf [https://perma.cc/34SM-MNDG] (discussing prevalent theory in the 1970s that the proper response to domestic violence was the criminalize the act in order to increase awareness and public response by establishing it as a public criminal act rather than a private matter).

134. *See id.*

135. NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC AND SEXUAL VIOLENCE FACT SHEET, http://nnedv.org/downloads/Policy/AD14/AD14_DVSA_Factsheet.pdf [https://perma.cc/LN3F-JPUQ] (last visited Apr. 1, 2017).

136. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 42 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/PA8U-PJZM].

137. NAT'L NETWORK TO END DOMESTIC VIOLENCE, *supra* note 135.

138. BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. 1993-2004, at 7 (2006), https://www.bjs.gov/content/pub/pdf/ipvus.pdf [https://perma.cc/F5FE-ZMRF].

139. NAT'L NETWORK TO END DOMESTIC VIOLENCE, *supra* note 135.

140. NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE AND SEXUAL ASSAULT FACT SHEET, http://www.worldpulse.com/sites/default/files/post/3180/8675/post_document/2ec5156

hour nationwide survey conducted in 2008 found that over 60,000 victims of domestic violence received services in a single day.[141]

As with sexual assault, partner violence exacts an enormous economic toll. The cost of intimate partner violence annually exceeds $5.8 billion, including $4.1 billion in direct health care expenses.[142] Between one-quarter and one-half of domestic violence victims report that they lost a job, at least in part, due to domestic violence.[143] The estimated annual cost to employers from lost employee productivity in the United States is estimated at $13 billion.[144] The negative impact of partner violence is especially harmful and far-reaching for children. Approximately 15.5 million children are exposed to domestic violence every year.[145] Men exposed to domestic violence as children are 3.8 times more likely than other men to perpetrate domestic violence as adults.[146] Women exposed to domestic violence as children are 150 times more likely to abuse their children.[147] Children that are exposed to violence are far more likely to attempt suicide, abuse drugs and alcohol, engage in teenage prostitution, and commit sexual assault crimes.[148]

40cf69abf62bb9059fe4c84d2/dvsa_factsheet.pdf [https://perma.cc/A4PB-M6X8] (last visited Apr. 2, 2017).

141. NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE COUNTS 2008: A 24-HOUR CENSUS OF DOMESTIC VIOLENCE SHELTERS AND SERVICES 3 (2009), http://nnedv.org/downloads/Census/DVCounts2008/DVCounts08_Report_Color.pdf [https://perma.cc/G6RG-34PT].

142. NAT'L NETWORK TO END DOMESTIC VIOLENCE, *supra* note 140.

143. *Id.*

144. THE BNA SPECIAL REPORT SERIES ON WORK & FAMILY, VIOLENCE AND STRESS: THE WORK/FAMILY CONNECTION 3 (1990). Women who experience domestic violence are more likely to experience spells of unemployment, have health problems, and receive welfare benefits. Nearly half of all homeless women and children have experienced domestic violence. *See* NAT'L NETWORK TO END DOMESTIC VIOLENCE, *supra* note 135.

145. Renee McDonald et al., *Estimating the Number of American Children Living in Partner-Violent Families*, 20 J. FAM. PSYCHOL. 137, 142 (2006) (referring to a 2001 study).

146. JEFFREY L. EDLESON, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, EMERGING RESPONSES TO CHILDREN EXPOSED TO DOMESTIC VIOLENCE (2011), http://vawnet.org/sites/default/files/materials/files/2016-09/AR_ChildrensExposure.pdf [https://perma.cc/RL5G-N49P].

147. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 27 (3d ed. 2003).

148. David A. Wolfe et al., *Strategies to Address Violence in the Lives of High Risk Youth*, *in* ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN (Einat Peled et al., eds. 1995); *see also* FAMILY VIOLENCE PREVENTION FUND, THE FACTS ON CHILDREN AND DOMESTIC VIOLENCE, https://police.ucsf.edu/system/files/domesticviolencechildren.pdf [https://perma.cc/P2X3-5P8U] (last visited Apr. 2, 2017).

2. THE FAILURE OF THE CRIMINAL JUSTICE SYSTEM TO ADDRESS THE EPIDEMIC

Before the rise of the women's rights movement, "[i]t was generally accepted that treatment, rather than criminal prosecution, was the best solution for problems in the family," including family violence.[149] "The legislature sought not to punish but to provide 'practical help.'"[150] But by as early as 1962, states such as New York were under increasing pressure from constituents to address the so-called "emerging" problem of domestic violence.[151] The initial focus of lobbying efforts by victims' advocates were aimed at strengthening governmental responses to domestic violence via the criminal justice system.[152] Rather than enact any new legislation, however, the common governmental response was to remind those in the criminal justice system that physical violence, including domestic violence, was criminal activity that should be punished as such.[153]

These "reforms" had little discernible impact. Across the country it became clear that police, prosecutors, and criminal courts were slow to respond to the problem, and by the late 1970s this failure of government to respond adequately had gained widespread recognition across the country.[154] Moreover, as the notion of the "cycle of violence" inherent in abusive relationships became more widely understood and accepted, government officials began to recognize the limits of the backward-looking criminal justice system to adequately address the problem.[155]

3. THE SUCCESS OF DOMESTIC VIOLENCE RESTRAINING ORDERS

As a result of this growing recognition, advocates shifted their approach and began to advocate for legislation that would allow victims to obtain relief in civil court, including prospective relief to prevent future violence.[156] These efforts were wildly successful. In 1976, only

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149. Smith, *supra* note 38, at 98–99.

150. *Id.* at 99.

151. *Id.* at 98.

152. *Id.* at 99 (summarizing early history of domestic violence reform movement as one primarily focused on criminalization of the offense).

153. *See* Smith, *supra* note 38, at 148; *see generally* Fagan, *supra* note 133.

154. Smith, *supra* note 38, at 99 ("By the late 1970s, the problem of domestic violence and the failure of government to respond adequately were gaining recognition across the country.").

155. *See id.*

156. *Id.* at 99 ("Across the country, police, prosecutors, and criminal courts were slow to respond to the problem, so advocates of battered women began to push for legislation that would allow victims relief in civil court.").

two states had civil protection orders for domestic violence victims;[157] "[b]y 1994, all fifty states [and the District of Columbia] had adopted some form of domestic violence civil protection order legislation."[158] Today, "[s]tates are repeatedly revisiting their protection order legislation to expand protection, to reduce the cost of obtaining orders, to streamline the process, and to create state and national registries for the protection orders."[159]

The practical success of these legislative changes is difficult to understate. In the years since domestic violence prevention orders have been widely available across the country, non-fatal intimate partner violence against women has decreased 63% and the number of women killed by an intimate partner has decreased 24%.[160] Moreover, studies show that the availability of DVROs help victims escape the economic devastation experienced by so many victims in the weeks and months following an abusive episode.[161] This economic impact has particular resonance for the sexual assault survivor community, given then devastating economic spiral felt by so many victims in the months following an attack.[162] This tangible benefit of carefully crafted restraining orders specifically for victims of domestic violence provides hope for the possible success of SAPOs.

4. THE LIMITS OF COMPARISON BETWEEN DOMESTIC VIOLENCE AND SEXUAL ASSAULT

Non-partner sexual assault, though different in many respects from domestic violence, shares many of the same unique characteristics that necessitated the creation of a civil protective remedy for domestic violence. Like domestic violence, sexual assault is a nationwide epidemic affecting primarily (though not exclusively) women that only received widespread attention as such during the women's rights

157. Ko, *supra* note 120, at 362.

158. Smith, *supra* note 38, at 100; *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) ("Currently, all fifty states plus the District of Columbia and Puerto Rico male civil protection orders available to victims of domestic violence.").

159. Smith, *supra* note 38, at 100.

160. Monica N. Modi et al., *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*, 23 J. WOMEN'S HEALTH 253, 254 (2014).

161. *See* Seidman & Vickers, *supra* note 8, at 476.

162. *Id.* at 473 ("What the legal system offers [sexual assault] victims should, therefore, be designed to meet their most immediate needs: preventing the traumatic economic and psychological downward spiral that frequently begins within the first six months after assault.").

movement.[163] Like domestic violence, sexual assault often occurs behind closed doors and involves private, intimate circumstances only truly known to two people—the victim and the assailant. As a result, district attorneys decline to prosecute the vast majority of sexual assault cases due to the lack of extrinsic evidence, leaving victims with no criminal remedies.[164] Like domestic violence, legislatures have attempted to address the problem by modifying existing criminal codes, but lingering prejudice and ambivalence—combined with the rigidity of the criminal system—has rendered traditional legal avenues all but useless for sexual assault victims.[165] Like domestic violence, advocacy efforts have led to the creation of civil protective orders offering prospective, victim-centered remedies for victims of sexual assault.[166]

Unlike domestic violence, however, these efforts have not borne fruit throughout the country. Currently, only twenty-eight states and the District of Columbia offer any type of civil protective remedy for victims of sexual assault, and many of these remedies—such as California's Civil Harassment Restraining Order—are broadly drafted and governed by procedures better suited for neighbor disputes and bar fights than for the unique circumstances of sexual assault.[167]

One must be careful, however, not to draw unwarranted parallels between domestic violence and sexual assault. Legal literature is replete with analyses of the causes, effects, and remedies for domestic violence (and with good reason), and the temptation exists to simply group the decidedly less considered subject of sexual assault in with the analysis of domestic violence for all of the reasons discussed above. But, at least for purposes of discussing appropriate civil protection order remedies, two important distinctions must be drawn:

(1) Presence of past conduct and other extrinsic evidence: Often, though not always, domestic violence incidents are accompanied by a long history of past abusive conduct. Given the "cycle of violence" in abusive relationships, petitioners in domestic violence cases often can point to a pattern of abuse as evidence of the need for prospective relief. Many DVRO petitions also are accompanied by some form of extrinsic evidence of physical trauma, including evidence of bruising or

163. *Id.* at 467.

164. *See* Bryden & Lengnick, *supra* note 9, at 1196 ("Afraid that losing cases will look bad on their records, prosecutors are excessively reluctant to prosecute acquaintance rapists.").

165. *See* Jodoin, *supra* note 12, at 108; Seidman & Vickers, *supra* note 8, at 468–69.

166. Jodoin, *supra* note 12, at 112.

167. *See, e.g.*, CAL. CODE CIV. PROC. § 527.6 (West 2014); *see also* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 22.

cuts. Sexual assault, on the other hand, often lacks both indicia of extrinsic evidence. While a victim may have a long-term acquaintance relationship with her assailant, the attack itself may take the form of an isolated incident. Moreover, sexual assault victims may very well lack the opportunity or ability to forcefully fend off an attacker, either from their incapacitation as a result of intoxication or fear resulting from threats of deadly violence. Requiring a showing of past conduct or extrinsic evidence of resistance, therefore, would ignore the realities of many incidents of sexual assault.

(2) Likelihood of future harm: Restraining orders provide prospective relief against predicted future behavior, so courts naturally consider the likelihood of future harm absent the issuance of an order. The likelihood of future harm is often presumed in domestic violence cases, because the existence of a partnered relationship between the victim and assailant virtually assures at the least chance of close physical contact in the future. The same may not necessarily be the case for sexual assault.

III. OVERVIEW OF EXISTING CIVIL PROTECTION ORDER REGIMES

All fifty states and the District of Columbia have offered restraining orders specifically designed for victims of domestic violence since 1994.[168] However, as of 2016, only twenty-nine states offer any type of prospective relief for sexual assault victims, and the vast majority of these statutes are neither specifically tailored to sexual assault nor offer meaningful, effective relief opportunities for sexual assault victims.[169] The landscape is changing, with several states expanding CHROs to include sexual assault or enacting separate SAPOs.[170] But the pace of change has been slow.

This section provides an overview of the two main types of restraining orders available to victims of sexual assault: catchall CHROs and narrowly tailored SAPOs. In doing so, this section contrasts California's catchall CHRO with Washington's narrowly tailored SAPO.

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168. *See* Smith, *supra* note 38, at 100 ("By 1994, all fifty states had adopted some form of domestic violence civil protection order legislation.").

169. *See* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 22.

170. *See, e.g.*, 740 ILL. COMP. STAT. ANN. 22/102 (West 2010) (Illinois' Sexual Assault Protection Order); MASS. GEN. LAWS ch. 258E, § 1 (2010) (amendment of Massachusetts' harassment restraining order to provide specialized protections for sexual assault); WASH. REV. CODE ANN. § 7.90.020 (West 2007) (Washington's Sexual Assault Protection Order).

A. CHRO Statutes Available to Sexual Assault Victims

According to the ABA Commission on Domestic and Sexual Violence, twenty-nine states currently offer some form of civil protection order remedies for victims of sexual assault.[171] But many of these statutes merely define "sexual assault" as one of the many types of "harassment" for which relief may be granted, including annoying neighbor conduct, bar fights, and landlord-tenant disputes.[172] These statutes provide the type of "catchall" relief that ignores the seriousness of sexual assault and the unique needs of sexual assault victims.

States employing catchall CHROs to address sexual assault include, *inter alia*: California (applicable to a person who has been harassed, sexually assaulted, or threatened with violence);[173] Minnesota (applicable to "a person who is a victim of harassment");[174] New Mexico (applicable to a person who will suffer "immediate and irreparable injury, loss or damage");[175] North Dakota (defining "disorderly conduct" and offering relief for "intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person");[176] Oklahoma (applicable to "victim of domestic abuse, . . . stalking, . . . harassment, [or] . . . rape");[177] South Dakota (applicable to "victim of stalking, . . . [or] physical injury as a result of an assault, or . . . a crime of violence as defined in the [criminal code]");[178] Vermont (applicable to a victim of "stalking or sexual assault");[179] Virginia (applicable to cases involving a "conviction or threat of "an act of violence, force, or threat");[180] and Wisconsin (applicable where "the respondent has engaged in harassment with intent to harass or intimidate the petitioner").[181] And while these catchall statutes have inherent limits in their applicability to sexual assault victims, it must be remembered that these statutes provide at least a possible relief avenue for sexual assault victims. Twenty-one states provide no such avenue for relief at all.

California's Civil Harassment Restraining Order provides a perfect example of the limits of catchall CHROs to the unique needs of sexual assault victims. A CHRO is available to "[a] person who has suffered

171. *See* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 22.
172. *Id.*
173. CAL. CIV. PROC. CODE ANN. § 527.6(a)(1) (West 2014).
174. MINN. STAT. ANN. § 609.748(2) (West 2014).
175. N.M.R.A., RULE 1-066(B)(1) (2016).
176. N.D. CENT. CODE § 12.1-31.2-01(1) (2016).
177. 22 OKLA. STAT. ANN., tit. 22, § 60.2 (West 2016).
178. S.D. CODIFIED LAWS § 22-19A-8 (2011).
179. VT. STAT. ANN. tit. 12, § 5133(a) (2011).
180. VA. CODE ANN. § 19.2-152.10(a) (2014).
181. WIS. STAT. ANN. § 813.125(3)(a)(2) (West 2015–16).

harassment,"[182] which is defined as: (1) unlawful violence (including any assault and battery, such as sexual assault); (2) a credible threat of violence; or (3) a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.[183] A "[c]ourse of conduct is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose . . . ."[184] Although this definition is disjunctive, suggesting that no "course of conduct" requirement exists for the unlawful violence or credible threat of violence prongs, confusion exists over whether "unlawful violence" like sexual assault also requires a course of conduct, such as a repeated pattern of sexual assault.[185]

Upon filing a petition for an injunction, a plaintiff may receive a temporary restraining order for a period of up to fifteen to twenty-two days whether or not the defendant has been notified of the petition.[186] To receive a temporary restraining order, the plaintiff must show both: (1) "reasonable proof of harassment," and (2) "that great or irreparable harm would result to the [plaintiff]" without the order.[187] This second, prospective prong requires a showing that a real threat of future harm exists, and that harm must be the same type of harm already inflicted.[188] In other words, a victim of sexual assault must demonstrate a real threat that she will suffer another sexual assault in the future.

Within fifteen to twenty-two days of the issuance of the temporary restraining order, the court will hold a hearing on the petition for a permanent injunction.[189] "If the judge finds *by clear and convincing evidence* that unlawful harassment exists, an [injunction] shall issue prohibiting the harassment."[190]

California's CHRO statute highlights three critical deficiencies in catchall statutes lumping sexual assault in with merely annoying conduct. By treating sexual assault less like domestic violence and more like prank calls, California has: (1) created confusion about when, whether, and to what extent its CHRO statute applies to victims of sexual assault; (2) required proof of elements, such as a repeated pattern of past conduct and a reasonable likelihood of the same type of harm occurring in the future, that are inapplicable to sexual assault; and

182. CAL. CIV. PROC. CODE § 527.6(a)(1) (West 2014).
183. *Id.*
184. *Id.*
185. *See Harris v. Stampolis*, 204 Cal. Rptr. 3d 1, 10–11, 13–15 (2016).
186. CAL. CIV. PROC. CODE § 527.6(d), (f).
187. *Id.* § 527.6(d).
188. *See id.*
189. *Id.* § 527.6(g)–(j) (the plaintiff can renew the statute every five years).
190. *Id.* § 537.6(i) (emphasis added).

(3) imposed a burden of proof that is not practically achievable for an intimate, private violent act like sexual assault.

B. SAPO Statutes

Several states have amended their civil protection order statutes in recent years specifically to include a sexual assault protection order available specifically to victims of rape and sexual assault. Notably, Illinois and Washington included identical language into the "purpose" section of their respective SAPO Acts to underscore the urgent need to respond to the sexual assault crisis:

> Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. According to the FBI, a woman is raped every six minutes in the United States. Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim. It is the intent of the legislature that the sexual assault protection order created by this chapter be a remedy for victims who do not qualify for a domestic violence order of protection.[191]

Washington's SAPO statute provides a remarkable contrast to the unworkable CHRO in California. Unlike California's CHRO, a petitioner under Washington's SAPO need only allege

> the existence of nonconsensual sexual conduct or nonconsensual sexual penetration[,] . . . accompanied by an affidavit made under oath stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought.[192]

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191. WASH. REV. CODE ANN. § 7.90.005 (West 2007) (Washington's Sexual Assault Protection Order); *see also* 740 ILL. COMP. STAT. ANN. 22/102 (West 2010) (Illinois' Sexual Assault Protection Order).

192. WASH. REV. CODE ANN. § 7.90.020.

Moreover, a petitioner need only prove the first element—that a nonconsensual sexual contact occurred—by a preponderance of the evidence.[193]

This statute alleviates the myriad problems associated with catchall CHROs like California's Civil Harassment Restraining Order. First, it eliminates any confusion about the purpose or applicability of the statute to sexual assault, which creates public awareness of the availability of such relief and protects victims from any misdirected opposition by opponents of frivolous litigation. Second, it requires only allegations and proof of elements applicable to sexual assault: namely, that a sexual assault occurred and that the victim reasonably fears for her future safety. Third, it requires a lower burden of proof in recognition both of the lack of extrinsic evidence in sexual assault cases and the central governmental interest in eliminating sexual assault. As demonstrated in the next section, this lower burden of proof not only makes prospective relief practically available to sexual assault victims but also satisfies constitutional due process.

IV. THE CONSTITUTIONAL LIMITS OF CIVIL PROTECTION ORDERS

Notwithstanding the clear need for civil protection remedies to fill the gaps where the criminal justice system fails, many courts and commentators express concern over the perceived lack of due process guarantees for respondents in restraining order hearings.[194] Given that a protection order seeks a public court judgment of criminal acts, and that violation of the order itself is a crime, some argue that domestic violence and sexual assault protection order statutes unjustly use an equitable proceeding to punish criminal behavior, thus depriving the accused of the due process rights to which he or she would otherwise be entitled.[195] As one commentator explained, "[the] Legislature cannot, by a mere change of name or form, convert that which is in its nature a prosecution for a crime into a civil proceeding and thus deprive parties of their rights to a trial by jury."[196]

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193. *See Roake v. Delman*, 377 P.3d 258, 260, 262 (Wash. Ct. App. 2016) (finding that Washington's Sexual Assault Protection Order requires a petitioner to allege, but not prove, fear of future harm).

194. *See, e.g.*, *Cesare v. Cesare*, 694 A.2d 603, 608 (N.J. Super. Ct. App. Div. 1997), *rev'd* 713 A.2d 390 (N.J. 1998) (opining that protection orders "transmogrify . . . crimes into some lesser offense not a 'crime' . . . to circumvent the protections normally accorded an accused in a criminal case"); Hutton, *supra* note 34, at 104 (calling for a clear and convincing evidence burden of proof in domestic violence restraining order cases).

195. Heleniak, *supra* note 34, at 1009–10, 1014, 1024 (advocating for all domestic violence cases to be handled in criminal court with criminal procedures and burdens of proof).

196. *Id*. at 1009 (quoting 21A AM. JUR. 2D Criminal Law § 1071 (1998)).

These constitutional concerns typically take two forms: (1) concerns that lower burdens of proof to adjudicate what is essentially criminal activity unconstitutionally deprives the accused of procedural protections; and (2) concerns that the more punitive provisions of civil protection orders, particularly those impinging upon other substantive constitutional rights, present a quasi-criminal "punishment" to the accused that requires adjudication by a jury. However, even those questioning the procedural sufficiency of such orders acknowledge that, "[r]egardless of how high the stakes undoubtedly are for the accused facing domestic [and sexual] violence charges, the victims of genuine abuse have even more at risk."[197]

These tensions are real and merit serious discussion when considering the types of procedural protections to afford respondents in civil protection order hearings, and the types of relief available for petitioners. As demonstrated below, these dual concerns over appropriate burdens of proof and available remedies are interrelated and cannot be considered effectively in isolation. Any such discussion must be informed by the three-part balancing test announced in *Mathews v. Eldridge* to determine what due process protections are constitutionally required in so-called "quasi-criminal" proceedings.[198] The next section analyzes this test with respect to domestic violence and sexual assault protection orders as it relates to constitutionally sufficient burdens of proof and available prospective remedies.

A. Burdens of Proof and Available Remedies in "Quasi-Criminal" Proceedings: Mathews v. Eldridge

The Fourteenth Amendment of the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[199] Courts recognize two types of due process protected by the Fourteenth Amendment: substantive due process and procedural due process.[200] The term "substantive due process" refers to "the nature of the potential deprivation and the adequacy of the government's reasoning."[201] In other words, "substantive due process" encompasses the nature of an individual's life, liberty, or property interest, and the

197. Hutton, *supra* note 34, at 118; *see also Cesare v. Cesare*, 713 A.2d 390, 392 (N.J. 1998) (PODVA was passed, after all, because thousands of New Jersey citizens were being "regularly beaten, tortured, and in some cases even killed by their spouses or cohabitants") (quotations omitted) (citations omitted).

198. 424 U.S. 319, 335 (1976).

199. U.S. CONST. amend. XIV, § 1.

200. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545 (3d ed. 2006).

201. Hutton, *supra* note 34, at 103.

government's interest in depriving an individual of that interest.[202] The greater the nature of the individual's interest, the more compelling the government's interest must be before it can constitutionally deprive an individual of that interest.[203]

The term "procedural due process . . . refers to the procedures that the government must follow before it deprives a person of life, liberty or property."[204] As with substantive due process, the greater the liberty interest at issue, the greater the procedural due process protections are required. One such procedural due process protection is the burden of persuasion in government proceedings. The Supreme Court has recognized a "continuum [of] three standards or levels of proof for different types of cases."[205] "Civil cases, which involve monetary disputes where society is generally thought to have little interest in the outcome, are at one extreme."[206] These cases are governed by a "preponderance of the evidence" burden of persuasion, which requires only that the movant prove that it is "more likely than not" that the alleged conduct occurred.[207] Some courts have referred to this low standard as the "51-49" standard.[208] At the other extreme are criminal cases, "in which the interests at stake for the defendant are so high" that the government must prove "beyond a reasonable doubt" that the alleged conduct occurred.[209] In these cases, "society imposes almost the entire risk of error upon itself."[210]

Certain civil cases fall between these two extremes, due to the competing interests at stake.[211] The Supreme Court has considered the constitutional sufficiency of burdens of persuasion in a number of these "quasi-criminal" contexts, including deportation cases, denaturalization proceedings, civil commitment proceedings, and parental termination proceedings.[212]

In considering whether the adoption of a particular burden of persuasion adheres to constitutional due process principles, the Supreme Court articulated a balancing test in *Mathews v. Eldridge*.[213] Recognizing that due process is "flexible and calls for such procedural

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202. *Id.*

203. *Id.*

204. *Id.* (quoting CHEMERINSKY, *supra* note 200).

205. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

206. Hutton, *supra* note 34, at 108–09 (citations omitted).

207. *See id.* at 108–10.

208. *See, e.g.*, *United States v. Rodriguez*, 73 F.3d 161, 163 (7th Cir. 1996); *Jones v. Poole*, 2008 WL 4054415, at *8 (S.D.N.Y. Aug. 29, 2008).

209. Hutton, *supra* note 34, at 109.

210. *Addington*, 441 U.S. at 424.

211. *See* Hutton, *supra* note 34, at 109.

212. *See id.*

213. 424 U.S. 319, 335 (1976).

protections as the particular situation demands,"[214] the *Mathews* Court created a test, which requires consideration of three factors:

1) "[T]he private interest that will be affected by the official action;"
2) "[T]he risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and"
3) "[T]he Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[215]

As explained by one commentator:

> The three *Mathews* factors are interactive; the more important the private interest at stake, the greater the state's obligation to ensure that risk of erroneous deprivation is low. Conversely, the less important the individual's private interest, and the more important that of the state, the greater the risk of wrongful deprivation the state is allowed to tolerate.[216]

B. Application of the Mathews *Balancing Test to Quasi-Criminal Proceedings*

The Supreme Court applied these flexible factors to a variety of "quasi-criminal" contexts in the years immediately after *Mathews*. A brief summary of how these factors are applied in different contexts is helpful to better understand how the factors should be applied to sexual assault protection orders.

1. CIVIL COMMITMENT PROCEEDINGS

In *Addington v. Texas*,[217] an appellant challenged his involuntary and indefinite civil commitment after a psychiatric examiner found that he was "mentally ill and require[d] hospitalization in a mental hospital."[218] The medical examiner's finding was later upheld at trial

214. *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

215. *Id.* at 349 (holding that due process did not require an evidentiary hearing prior to termination of government disability benefits).

216. *See* Hutton, *supra* note 34, at 106–07 (citations omitted).

217. 441 U.S. 418 (1979).

218. *Id.* at 420 (citations omitted).

under Texas' "preponderance-of-the-evidence standard" for civil commitment hearings.[219]

Relying on *Mathews*, the Supreme Court found the preponderance-of-the-evidence standard inadequate given the serious liberty deprivation in civil commitment cases, and held that constitutional due process required a showing by clear and convincing evidence:

> One typical use of the [intermediate] standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases.[220]

The Court found the clear and convincing standard necessary and adequate to "strike[] a fair balance between the rights of the individual and the legitimate concerns of the state."[221]

2. PARENTAL TERMINATION PROCEEDINGS

In *Santosky v. Kramer*,[222] the Supreme Court applied *Mathews* in holding that constitutional due process required a showing by clear and convincing evidence in parental termination proceedings.[223] Weighing heavily in the Court's decision was the presence of a fundamental liberty interest: the right to parent one's own children.[224] The presence of this fundamental right, the Court concluded, mandated that greater

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219. *Id.* at 432–33.

220. *Id.* at 424. Justice Burger, writing for the majority, noted that in addition to the obvious liberty interest at stake in a civil commitment proceeding, "it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual." *Id.* at 425–26.

221. *Id.* at 431.

222. 455 U.S. 745 (1982).

223. *Id.*

224. *Id.* at 747. Justice Blackmun, writing for the majority, stated the Supreme Court's "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Id.* at 753 (citations omitted). Justice Blackmun argued that the protection of this fundamental liberty interest becomes even more important when the family situation is less than ideal, stating that: "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753–54.

procedural protections, including higher burdens of proof, be afforded the respondents.[225] This case highlighted the fact that *Mathews* analyses can implicate both procedural and substantive due process concerns. As the "right to custody [of one's child] is deemed a fundamental right, substantive due process requires that the government prove that terminating custody is necessary to achieve a compelling [state interest]."[226]

3. REVOCATION OF MEDICAL LICENSES

Applying the *Mathews* test in a different context, the Supreme Court of New Jersey rejected a constitutional due process challenge to New Jersey's preponderance-of-the-evidence standard in medical license revocation proceedings.[227] The court found that:

> From a constitutional standpoint, the clear and convincing standard has been found to be required as a matter of due process when the threatened loss resulting from civil proceedings is comparable to the consequences of a criminal proceeding in the sense that it takes away liberty or permanently deprives individuals of interests that are clearly fundamental or significant to personal welfare.[228]

The court also addressed the risk of erroneous deprivation prong, observing that a higher burden of proof may be required where "the subject matter itself is intrinsically complex and not readily amenable to objective assessment."[229] "These situations," the court noted, "reasonably call for an allocation and enhancement of the burden of proof to compensate for the difficulties encountered in determining the contested issues."[230] By contrast, the issues in a medical licensing case do not require such a heightened standard of proof; "[w]hile these standards are broad, they are capable of objective measurement."[231] In other words, "[t]he relative transparency of the factual issues at stake lowers the risk of erroneous deprivation enough to make a preponderance of the evidence sufficient under *Mathews*."[232]

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225. *Id.* at 747.

226. Hutton, *supra* note 34, at 107 (quoting CHEMERINSKY, *supra* note 200, at 546).

227. *See In re Polk*, 449 A.2d 7, 16–17 (N.J. 1982).

228. *Id.* at 13.

229. *Id.* at 16.

230. *Id.*

231. *Id.* at 15.

232. Hutton, *supra* note 34, at 110. Some have applied the Court's reasoning in *Polk* to argue for a heightened burden of proof in domestic violence actions, given

4. DOMESTIC VIOLENCE PROTECTION ORDERS

In 2009, the Superior Court of New Jersey applied these factors to domestic violence restraining order proceedings. In *Crespo v. Crespo*,[233] the Court considered a challenge to the state's Prevention of Domestic Violence Act (PDVA), which permitted findings of domestic violence through the application of the lower "preponderance" standard instead of an intermediate "clear and convincing" standard.[234] At trial, the judge agreed with the respondent husband's constitutional argument that the preponderance standard was "constitutionally inadequate" given the severe personal and professional consequences of domestic violence restraining orders.[235]

The Court of Appeals reversed, finding that the preponderance standard enunciated by the New Jersey legislature in adopting the DVPA passed constitutional muster.[236] At the outset, the court observed that, "[d]omestic violence actions, by their very nature, naturally pit the first and third *Mathews* factors, that is, victims' interests in being protected from domestic violence against defendants' liberty interests in being free to say what they wish and go where they please."[237] Persuaded by the New Jersey legislature's "unmistakable expressions of public policy" demonstrating that the legislature "obviously viewed the victims' interests as highly important and of far greater weight than defendants' interests," the court concluded that:

> the limits imposed upon a defendant's private interests carry far less weight in the *Mathews* analysis than does the governmental interest in eliminating domestic violence and in affording immediate and effective protection to victims of domestic violence.[238]

With regard to the second *Mathews* factor, the risk of erroneous deprivation, the court discussed the uniqueness of domestic violence:

> there are usually few, if any, eyewitnesses to marital discord or domestic violence. Most of the events complained of in such matters happen behind closed doors or during private communications; as a result, most cases turn only on the trial

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the private, intimate nature of the proceedings, and thus the fact that the evidence is often "intrinsically complex and not readily amenable to objective assessment." *Id.*

233. 972 A.2d 1169 (N.J. Super. Ct. App. Div. 2009).

234. *Id.* at 1171–72.

235. *Id.* at 1175.

236. *Id.* at 1177.

237. *Id.* at 1176.

238. *Id.*

> judge's assessment of the credibility of only two witnesses – the plaintiff and the defendant.[239]

The court reasoned that,

> a clear-and-convincing standard would saddle victims of domestic violence with a burden that would often foreclose relief in many deserving cases. When the testimony of the plaintiff is pitted against the testimony of the defendant, with no other corroborating testimony or evidence, a plaintiff would likely have difficulty sustaining the sterner standard urged by defendant here.[240]

While the court acknowledged that

> judges—being human—may at times err in assessing which of the two contestants has told the truth; we do not, however, view *Mathews* as requiring a burden of persuasion that more effectively eliminates the chance of a mistaken adjudication at the steep price of permitting countless more meritorious claims to be lost at the hands of the clear-and-convincing evidence standard.[241]

Notably, the court in *Crespo* applied the *Mathews* risk of erroneous deprivation prong in precisely the opposite fashion from the court in *In re Polk*,[242] finding that the relative lack of clear evidence in domestic violence proceedings required application of a lower burden of proof to eliminate "the steep price of permitting countless more meritorious claims to be lost at the hands of the clear-and-convincing evidence standard."[243]

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239. *Id.* at 1176–77 (quotations omitted) (citations omitted).

240. *Id.* at 1777. Some commentators have criticized the *Crespo* court's consideration of the second *Mathews* factor, the risk of erroneous deprivation, because it applied this factor in precisely the opposite way it was applied in *Mathews*, *Polk*, and the lower court in *Crespo*. *See* Hutton, *supra* note 34, at 116–17 ("The court cited the scarcity of objective proof and the difficulty of making determinations based upon anything more than intuitive judgments about credibility as factors weighing *against* a higher standard of proof . . . In effect, the superior court seems to have held that, because the risk of erroneous deprivation in domestic violence cases is so high, the court ought to employ a *lower* standard of proof, contrary to the holding in *Mathews*.").

241. *Crespo*, 972 A.2d at 1177.

242. 449 A.2d 7 (N.J. 1982).

243. *Crespo*, 972 A.2d at 1177. *Cf. In re Polk*, 449 A.2d at 16 (calling for an "enhancement of the burden of proof to compensate for the difficulties encountered in determining . . . . contested issues" that are not "readily amenable to objective assessment").

Critics of lower burdens of proof in the restraining order context claim that the *Crespo* court applied the risk of erroneous deprivation factor

> in precisely the opposite way it was applied in *Mathews* . . . . In effect, the superior court seems to have held that, because the risk of erroneous deprivation in domestic violence cases is so high, the court ought to employ a *lower* standard of proof, contrary to the holding in *Mathews*.[244]

But this reasoning only considers the second *Mathews* factor in isolation and ignores that the three-prong test is interactive and requires a balancing of competing interests. Even where the risk of erroneous deprivation is low, a heightened burden of proof may be required where, on balance, the potential private liberty interest far outweighs the governmental interest.[245] By contrast, where the governmental interest in curbing the widespread epidemic of domestic violence is significantly more important than the private interest affected (restricting one's freedom of movement from a single individual), then the balance of interests may still tilt in favor of a lower burden of proof even if a higher burden of proof could "effectively eliminate[] the chance of a mistaken adjudication . . . ."[246] Simply put, some interests, such as the elimination and prevention of domestic violence, are simply too great to risk imposing "a burden that would often foreclose relief in many deserving cases," particularly when the punishment imposed is relatively minor in scope.[247]

The Washington Court of Appeals reached the same conclusion when a similar *Mathews* due process challenge was made against that state's Domestic Violence Prevention Act.[248] In *State v. Karas*,[249] the court applied the *Mathews* factors to decide that ex parte protection orders were constitutionally proper because they did

> not protect merely the 'private right' of the person named as petitioner in the order. . . . [but] the public . . . interest in

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244. Hutton, *supra* note 34, at 116–17 (footnotes omitted).

245. For example, in the civil commitment context, the serious restriction on all freedom of movement caused by involuntary commitment far outweighs the relatively less important governmental interest of protecting people from themselves. Thus, even where the risk of erroneous deprivation is relative low, given objective professional psychiatric evaluation procedures, a heightened burden of proof applies. *See Addington v. Texas*, 441 U.S. 418, 423 (1979).

246. *Crespo*, 972 A.2d at 1178.

247. *Id.* at 1177–78.

248. *State v. Karas*, 32 P.3d 1016, 1020–21 (Wash. Ct. App. 2001).

249. 32 P.3d 1016, 1020–21 (Wash. Ct. App. 2001).

> preventing domestic violence[;] . . . [because] the minor curtailment of [defendant's] liberty imposed by the protection order [was minor;] and [because of] the significant public and governmental interest in reducing the potential for irreparable injury, the Act's provision of notice and a hearing before a neutral magistrate satisfies the inherently flexible demands of procedural due process.[250]

C. Application of Mathews to Sexual Assault Protection Orders

As the discussion above demonstrates, the *Mathews* balancing test is designed to be considered holistically and flexibly. The greater the potential liberty deprivation, the greater the procedural protections and burdens of proof—particularly when that liberty deprivation impinges upon a fundamental constitutional right.[251] Conversely, when the potential liberty deprivation does not impinge upon a basic fundamental liberty, courts are more willing to opt for lower burdens of proof—particularly when the interests of the petitioner implicate important societal objectives.[252]

While one may feel inclined to automatically treat SAPOs like DVROs because sexual assault more closely resembles domestic violence than civil commitment, parental termination, or medical license revocation, a more nuanced analysis of each *Mathews* factor is required.

1. THE PRIVATE INTERESTS AFFECTED

As with DVROs, the most common and immediate private interest affected by the grant of a SAPO is a limitation on the respondent accused's freedom of movement.[253] At its core, restraining orders are "stay away" orders requiring an offender to stay away from the petitioner. While this official action certainly represents a deprivation of some degree of liberty interests, requiring someone to stay away

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250. *Id.* (quotations omitted) (citations omitted).

251. *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 768–70 (1982) (deprivation of fundamental constitutional right to raise one's own children); *Addington v. Texas*, 441 U.S. 418, 423–25 (1979) (deprivation of basic liberty in involuntary civil commitment proceedings).

252. *See Crespo*, 972 A.2d at 1177 (limits loss of freedom of movement from a "stay away" order to prevent future acts of domestic violence); *In re Polk*, 449 A.2d 7, 16–17 (N.J. 1982).

253. *See* ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 22 (summarizing remedies under twenty-nine state statutes with harassment restraining order mechanisms for sexual assault victims, each of which includes some form of "stay away" or "no contact" order).

from one person falls far short of the type of liberty deprivation felt in a civil commitment hearing.[254]

Of course, that liberty deprivation may be felt more acutely depending on the circumstances, especially if the petitioner and respondent live, work, or attend school together. But any temptation to employ a flexible or changing burden of proof to respond to these special circumstances must be rejected for two reasons. First, it is unconstitutional. Implicitly changing the burden of proof in a statutory mechanism renders the statute impermissibly vague and denies the parties the protections afforded them by their representatives.[255] Second, any situation where a respondent's freedom of movement may be more greatly restricted due to a "stay away" order naturally involves a riskier and more dangerous situation for the petitioner, a counterbalancing consideration justifying the liberty deprivation upon appropriate proof. The closer and more regularly the parties have contact with one another—at home, school, or work—the greater the risk to the sexual assault victim that she will be re-traumatized by the offender's presence (or worse) if a restraining order does not issue.[256]

With respect to the private interest affected vis-a-vis stay away orders, then, it appears that a lower burden of proof suffices, because "the limits imposed upon a defendant's private interests carry far less weight in the *Mathews* analysis than does the governmental interest in eliminating [sexual assault] and in affording immediate and effective protection to victims of [sexual] violence."[257]

The analysis does not end there, however. Restrictions on freedom of movement are but one of the many possible remedies available to victims of sexual violence. As existing restraining order mechanisms—DVROs, SAPOs, and CHROs— demonstrate legislatures have the ability to impose significant restrictions on respondents beyond freedom of movement. These restrictions include, *inter alia*, restrictions on ability to communicate with the petitioner's family,[258] relinquishment of

254. *See Addington*, 441 U.S. at 432–33 (discussing the significance of civil commitment as akin to incarceration).

255. *See, e.g.*, *State v. Keaveney*, 28 P.3d 372, 374 (Idaho 2001) (holding it unconstitutionally impermissible to shift burdens of proof in criminal matter in a matter inconsistent with the criminal statute in question); *see also* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1684 (1987) (discussing vagueness implications of shifting burdens of persuasion on a case-by-case basis).

256. *See* Mindlin & Reeves, *supra* note 77, at 20 (explaining that factors exacerbating risk of future assault for victims include how much the assailant knows about the victim and the degree of contact with the assailant).

257. *Crespo*, 972 A.2d at 1176.

258. *See, e.g.*, N.C. GEN. STAT. ANN. § 50C-5 (West 2013) (North Carolina's Civil No Contact Order prohibits communication directly or indirectly with petitioner and family or household members).

firearms,[259] electronic monitoring,[260] monetary compensation,[261] and any other relief the court deems appropriate.[262] One must also consider the "adverse social consequences to the individual"[263] of a public adjudication that he has committed a sexual assault.[264]

Some of these restrictions, such as the loss of child custody and relinquishment of firearms, directly impinge upon recognized constitutional rights, and therefore require additional scrutiny.[265] As with court hearings impinging upon fundamental liberty interests such as the right to parent one's own children, a carefully tailored SAPO should require a heightened adjudicatory finding before depriving respondents of basic and fundamental constitutional liberty interests. As discussed below, such a balanced approach can be achieved without eliminating the efficacy of SAPOs by requiring a lower preponderance burden of proof at the trial phase and a high clear and convincing evidence burden of proof for the imposition of certain "punishments" and the "sentencing" phase.

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259. *See, e.g.*, MONT. CODE. ANN. § 40-15-102(f) (West 2011) (Montana "Civil Protective Order" authorizing same if the gun was used in the assault); OHIO REV. CODE ANN. § 2903.214(F)(2) (West 2016) (Ohio's Civil Protection Order authorizing relinquishment of firearms); 22 OKLA. STAT. ANN. tit. 22, § 60.2 (West 2016) (Oklahoma Civil Protection Order authorizing same); WIS. STAT. ANN. § 813.125(4m) (2015–16) (Wisconsin "Civil Harassment Restraining Order" authorizing same).

260. OHIO REV. CODE ANN. § 2903.214 (authorizing electronic monitoring under appropriate circumstances).

261. *See, e.g.*, ALASKA STAT. § 18.66.100(C)(12–15) (2014) (Alaska's domestic violence restraining order authorizing monetary compensation); CAL. FAM. CODE § 6342(a)(1) (West 1994) (California domestic violence restraining order authorizing same); DEL. CODE. ANN. tit. 10, § 1045 (2017) (Delaware domestic violence restraining order authorizing same); ME. STAT. tit. 19, § 4007(1)(K) (2016) (Maine's "Protection from Abuse Order" authorizing same).

262. TEXAS CODE CRIM. PROC. ANN. art. 7A.05(a)(1) (West 2015); *see also, e.g.*, VT. STAT. ANN. § 5131(c)(1) (2011) (authorizing other orders the court deems necessary to protect petitioner or other parties involved); WASH. REV. CODE ANN. § 7.90.090(2)(d) (West 2007) (authorizing any other relief as the court deems necessary to protect the petitioner).

263. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

264. *See id.* at 432.

265. *See McDonald v. City of Chicago*, 561 U.S. 742, 768–70 (2010) (recognizing the right to bear arms protected by the Second Amendment as a fundamental right); *Santosky v. Kramer*, 455 U.S. 745, 747 (1981) (recognizing the historical significance of protecting family matters, including the right to parent one's own children, as a fundamental liberty interest); *Robinson v. St. Peter's Med. Ctr.*, 564 A.2d 140, 145 (N.J. Super. Ct. Law Div. 1989) ("The preservation of the parent-child relationship as reflected in the right to raise one's children has been deemed 'essential,' a 'basic civil right of man' . . . ." (citations omitted)).

2. THE RISK OF AN ERRONEOUS DEPRIVATION

The most significant criticisms leveled against DVROs, SAPOs and other restraining orders involve the risk that a government will erroneously deprive a respondent of the foregoing liberty interests by issuing restraining orders in response to false accusations.[266] A natural tension exists here with respect to sexual assault, which by its nature is a private and intimate act often characterized by a paucity of extrinsic evidence and little to adjudicate beyond the conflicting narratives of the parties.

As discussed above, different courts have applied this risk of erroneous deprivation prong in different ways.[267] As the Supreme Court of New Jersey suggested in *In re Polk*, a lack of objectively verifiable evidence creates a very real risk of erroneous deprivation—that courts will "get it wrong"—suggesting that a higher burden of proof may be required to guard against erroneous results.[268] As some critics have suggested, why should the burden of persuasion be lowered because of an inherent paucity of evidence?[269] Should not the reverse be true? Should not courts erect more significant barriers where, as with intimate partner and sexual violence, there exists a lack of extrinsic evidence, and critical judgments are made on the basis of conflicting testimony, leading to an increased risk of abuse?[270]

This argument ignores two important points. First, the second *Mathews* prong considers not only the "risk of an erroneous deprivation of such interest through the procedures used," but also "the probable value, if any, of additional or substitute procedural safeguards . . . ."[271] In other words, imposing a heightened "clear and convincing evidence" burden of proof only makes constitutional sense under this second

266. *See* Hutton, *supra* note 34, at 110–11.

267. *See, e.g.*, *In re Polk*, 449 A.2d 7, 16 (N.J. 1982) (finding that a higher burden of proof should apply when the evidence is not readily susceptible to "objective assessment," and thus there stands an increased risk of error); *Crespo v. Crespo*, 972 A.2d 1169, 1176–77 (N.J. Super. Ct. App. Div. 2009) (finding that lower burdens of proof may be required when there exists a lack of evidentiary clarity so that the right to relief is not effectively foreclosed to deserving petitioners).

268. *In re Polk*, 449 A.2d at 16.

269. *See* Heleniak, *supra* note 34, at 1015 (lamenting the ability of domestic violence victims to secure a restraining order on less than overwhelming evidence that includes "hearsay and examples of prior bad acts that are not allowed under the rules of evidence . . . [and] prior events that were not alleged in the complaint"); *see also id.* at 1015–16 ("After a few short hours of testimony . . . the judge declares that by a preponderance of the evidence the defendant committed the acts charged in the complaint, effectively labeling the defendant as a wife-beater.").

270. *See* Hutton, *supra* note 34, at 116–17 (criticizing court reasoning that, "because the risk of erroneous deprivation in domestic violence cases is so high, the court ought to employ a lower standard of proof, contrary to the holding in *Mathews*").

271. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

prong if this higher burden somehow reduces the risk of erroneous deprivation. In fact, the opposite appears true. National studies find that false rape and sexual assault allegation rates stand at approximately 2—10%, suggesting that the risk of erroneous deprivation is already a small one.[272] When one considers the very public shaming sexual assault victims face when they come forward to hold their accusers to account, it becomes clear why so few women would voluntarily subject themselves to such ridicule under false pretenses.

Second, even a lower preponderance-of-the-evidence standard requires some probable showing that sexual assault occurred. If a factfinder hears two equally plausible conflicting testimonial accounts, and no other corroborating evidence exists, a restraining order will not issue even under this lower burden of proof. In truth, the same argument applies for sexual assault as does domestic violence: "a clear-and-convincing evidence standard would saddle victims of [sexual assault] with a burden that would often foreclose relief in many deserving cases."[273]

But burdens of proof are not the only procedural safeguards available. States should consider the utility of imposing other evidentiary requirements to guard against the risk of erroneous deprivation, including the requirement of in-person testimony by petitioners and third party witnesses and an appropriate opportunity for cross-examination.

3. THE GOVERNMENTAL INTEREST

As with domestic violence, the governmental interest in preventing sexual assault cannot be overstated. When a woman is sexually assaulted every two minutes, and economic costs from rape and sexual assault top $127 billion per year, it goes without saying that state governments have a special interest and obligation to do anything possible to reverse the tide of such an epidemic.[274] Governments simply can neither afford nor justify "the steep price of permitting countless more meritorious claims to be lost at the hands of the clear-and-convincing evidence standard" and other overly burdensome procedural safeguards.[275]

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272. *See* David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1318 (2010) (examining ten years' worth of reported cases of rape and sexual assault and concluding that "the prevalence of false allegations is between 2% and 10%").

273. *Crespo v. Crespo*, 972 A.2d 1169, 1177 (N.J. Super. Ct. App. Div. 2009).

274. *See Where We Stand*, *supra* note 4.

275. *Crespo*, 972 A.2d at 1177.

4. CONCLUSION

It appears likely, then, that SAPOs should employ the lower preponderance-of-the-evidence standard to ensure that victims have an effective mechanism to seek prospective relief and governments have an effective tool in combating the sexual assault epidemic. However, procedural due process may require a more nuanced approach with respect to the types of evidentiary showings necessary to meet this standard and with the types of prospective relief available to petitioners. The next section recommends a balanced approach that addresses these competing practical and constitutional concerns.

V. A BALANCED APPROACH: A MODEL SEXUAL ASSAULT PROTECTION ORDER

Any sexual assault protection order seeking to balance the need for a practical and effective tool for petitioners and for a constitutionally sound set of procedural protections for respondents must contain, at a minimum, a showing by a preponderance of the evidence that both: (1) a sexual assault or credible threat of sexual assault occurred, and (2) the petitioner reasonably feels fear of future harm from the respondent. In addition, courts should require the in-person testimony of anyone otherwise under the subpoena powers of the state and the parties, unless doing so would create a real and present danger for the petitioner or other witnesses. Finally, prospective relief available should be limited to stay-away orders and monetary compensation, unless a petitioner can demonstrate by clear and convincing evidence why constitutional rights such as the right to bear arms should be infringed in the interest of petitioner safety.

A. Two Required Elements of a SAPO: Past Conduct and Fear of Future Harm

All civil protection orders are premised on the allegation that either past criminal conduct has occurred or imminently will occur absent relief.[276] The same should be true for SAPOs. This section examines each type of harm in turn.

276. *See* Jane K. Stoever, *Freedom From Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 373 (2011) ("The purpose of civil protection orders is to rapidly provide relief to help a person become safe . . . .").

1. PAST CONDUCT: PAST SEXUAL ASSAULT OR CREDIBLE THREAT OF FUTURE ASSAULT

For all existing sexual assault protection order statutes, states require a showing that a sexual assault did, in fact, occur.[277] States differ, however, with respect to how many past sexual assaults must have occurred before relief can be granted. For example, Washington's SAPO statute requires only a showing that a single past sexual assault has occurred, whereas Massachusetts' harassment restraining order (which includes sexual assault) requires a minimum of three past acts.[278]

The Massachusetts model is gravely flawed and should not form the basis of SAPO requirements moving forward. Requiring petitioners to prove a pattern of repeated sexual assaults before securing relief ignores the seriousness of sexual assault as "the most heinous crime . . . short of murder."[279] As discussed *supra*, a single incident of sexual assault risks sending a victim into a "hyper-vigilant" state, where she feels constant insecurity and vulnerability.[280] Moreover, a single incident at the hands of an attacker is more than sufficient to trigger crippling harm for the victim at the mere mention or presence of the assailant in the future.[281] For these very real reasons, it makes no sense to require a victim to suffer multiple assaults before even having the opportunity to be free from her attacker's presence.

However, states should also acknowledge and grant relief in situations where specific, credible threats have been made against petitioners even when no sexual assault has yet occurred. Protection

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277. *See, e.g.*, ALASKA STAT. § 18.65.850(a) (2014) (relief available to a person who believes that the person *is* a victim of sexual assault); CAL. CIV. PROC. CODE ANN. § 527.6(a)(1) (West 2014) (relief available to a person who *has been* harassed or sexually assaulted); 740 ILL. COMP. STAT. ANN. 22/201 (West 2010) (relief available for any person who *is* a victim of non-consensual penetration); WASH. REV. CODE ANN. § 7.90.020(1) (West 2007) (relief available for anyone who *is* a victim of nonconsensual sexual conduct).

278. *See* MASS. GEN. LAWS ch. 258E, § 1 (2010) (relief available to a person who suffers three or more acts of harassment); WASH. REV. CODE ANN. § 7.90.020(1) (requiring only a single past act of sexual contact); Jodoin, *supra* note 12, at 128 (noting confusion over whether Massachusetts' amended harassment statute requires more than one act of sexual violence for an order to issue).

279. 740 ILL. COMP. STAT. ANN. 22/102 (Illinois' sexual assault protection order statute: "Purpose: Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims."); *see also* WASH. REV. CODE. ANN. § 7.90.005 ("Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims.").

280. Jodoin, *supra* note 12, at 110.

281. *See Post Traumatic Stress Disorder in Rape Survivors*, *supra* note 107.

orders are designed to prevent future harm, and that should be true even where no past criminal conduct has yet occurred.[282]

The ability to issue a restraining order solely on the basis of a threat should be narrowly tailored, however. Vague, generalized, or long ago threats neither inspire genuine credible fear of imminent future harm nor should form the basis for the issuance of a restraining order. Threats should be specific, recent, and accompanied by some type of prior conduct sufficient to give rise to a reasonable, credible fear of future harm. Terrorist threat statutes, such as California's criminal terrorist threat statute, provide an appealing model for how to provide meaningful limits on the issuance of SAPOs in response solely to threats.[283]

2. REASONABLE FEAR OF FUTURE HARM

Restraining orders exist to provide prospective relief to victims to protect them from *future harm*. Therefore, it would make neither logical nor constitutional sense to issue a restraining order where the victim felt no fear of future harm. For example, if an assailant is incarcerated and serving a life sentence, a victim need not secure a restraining order to protect herself from future harm. Or to the put the point more directly, a victim need not seek prospective relief protecting her from her attacker if the attacker is dead.

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282. To take this logic one step further, one might wonder what logical predicate requires the existence of a past act or imminent threat of future attack at all if the goal is simply to prevent future assaults. For example, if a person possesses the criminal record or displays the characteristics of sexually deviant or predatory tendencies such that one could predict with reasonable certainty that an attack will happen *at some point* in the future, why not proactively issue a restraining order to prevent the future harm? Several reasons. First, this hypothetical more accurately describes a "Minority Report" type Hollywood account of the world than it does actual predictive capabilities in the real world. Second, to the extent that courts possess any such predictive capacity in this regard, the two most salient indicators of a future assault are past conduct and immediately recent threatening activity. Third, as a constitutional matter, courts cannot and should not issue sweeping orders infringing on basic fundamental liberties without a credible basis for concluding that such infringement is necessary *at that time*.

283. *See* CAL. PENAL CODE § 422(a) (West 2011) (requiring state to prove the victim experienced reasonable "sustained fear" to achieve a conviction for criminal terrorist threat). The element of "sustained fear" requires a certain level of specificity, and must be informed some amount of prior conduct to reasonably convey the imminence of the threat. *See, e.g.*, *People v. Allen*, 40 Cal. Rptr. 2d 7, 11 (1995) (finding that "sustained fear" is reasonable for purposes of section 422 if the threat was sufficiently specific "that [the] statement would be taken as a threat, whether or not he actually intended to carry it out," and accompanied by "[t]he victim's knowledge of . . . prior conduct" to demonstrate actual fear of future harm). Requiring a similar showing of specificity for an imminent threat of harm would prevent the overuse or potential abuse of a SAPO based on threats alone.

Outside these rare and extreme examples, however, states should impose few restrictions on a petitioner's ability to satisfy this element. For example, some states require petitioners to demonstrate a credible fear that they will face the *same type* of harm in the future, i.e., another sexual assault.[284] Such a requirement ignores the reality faced by victims of sexual assault. Following an assault, the mere mention or presence of the attacker can cause immeasurable harm.[285] Moreover, numerous cases exist where rapists continue to terrorize their victims through actions other than physical assaults, such as stalking, threats, or cyberbullying.[286] SAPO statutes should not restrict access to relief based solely on how or in what way the attacker will harm his victim in the future. It should suffice for petitioners to show that a reasonable likelihood exists that the assailant has the likely opportunity to cause future harm.

B. Evidentiary Requirements: In-Person Testimony

If, on the one hand, a model SAPO provides expanded relief for mere threats of sexual assault and fears of any type of future harm, then it should, on the other hand, require specific forms of credible and corroborative evidence to secure this relief. In particular, courts should not issue restraining orders solely on the basis of written declarations without the opportunity for in-person confrontation and meaningful cross-examination.

Some may argue that petitioners should not be required to appear in person at a civil protection order hearing, particularly given that certain rape shield laws have historically protected rape victims from appearing in criminal trials. But criminal matters balance this inability to confront the accuser with a requirement that guilt be proven beyond a reasonable doubt. In the civil protection order context, a much lower burden of proof applies. Petitioners should not have the benefit of a lower burden of proof and also the ability to meet this low burden of proof solely through written testimony. At a minimum, petitioners

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284. *See* Jodoin, *supra* note 12, at 128 ("[M]any sexual assault victims may not be in a substantial likelihood of being sexually assaulted again. They may, however, be vulnerable to harassment, intimidation, or other physical or psychological harm at the hands of their attacker.") (citations omitted).

285. *See* Mindlin & Reeves, *supra* note 77, at 20 (explaining that sexual assault victims' safety risks fall along a continuum based on a number of factors, including the identity of the assailant, how much the assailant knows about the victim, the location of the assault, the presence of weapons or other perpetrators during the assault, the extent of physical injuries, and the degree of contact between the victim and the assailant both before and after the assault).

286. *See Post Traumatic Stress Disorder in Rape Survivors*, *supra* note 107 (describing rape trauma syndrome, including the ability to be triggered into a state of paralysis in the presence of one's attacker).

should be required to demonstrate with reasonable certainty a significant risk of harm flowing from her in-person courtroom presence before being allowed to rest on written sworn declarations.[287]

C. Prospective Relief: Heightened Proof for Greater Liberty Deprivations

Any prospective restraining order relief should start with a requirement that the respondent stay away from and have no contact with the petitioner. Other relief not directly affecting a constitutional right, such as monetary compensation, should be available where appropriate. However, any other relief infringing upon a respondent's fundamental constitutional freedoms should be restricted to a showing that such relief is specifically necessary on the facts presented. One such common type of relief offered by restraining orders includes the relinquishment of firearms.

The Second Amendment provides that "the right . . . to . . . bear Arms shall not be infringed."[288] However, as with any constitutional right, this right is far from absolute. Criminal defendants and respondents in civil restraining order actions regularly must relinquish firearms when their past conduct suggests a violent pattern sufficient to justify depriving them of deadly weapons.[289] Given the primacy of firearm ownership as a constitutional right, however, the ability to require relinquishment of firearms should be limited in the SAPO context to situations where the facts themselves suggest a propensity towards physical violence or violence with a deadly weapon.

While this Article does not call for changing existing state restraining order statutes which mandate the automatic relinquishment of firearms upon the issuance of any restraining order, where state

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287. In striking the right balance, legislators should also be cognizant of the very real, damaging, and long-term effects the presence of a restraining order on one's record has on future educational, employment, and housing prospects. While this Article makes no comment on the fairness or propriety of this reality, it is worth noting that, much like a prison sentence, these "quasi-punishment" collateral consequences of a restraining order often outlive the terms of the restraining order itself. To the extent a protection order statute seeks only to prospectively protect the individual victim and neither intends to "punish" the perpetrator not create a general deterrent effect, legislators may consider the possibility of sealing SAPO records as a further effort to find a principled balance.

288. U.S. CONST. amend. II.

289. *See, e.g.*, MONT. CODE. ANN. § 40-15-201 (West 2011) (Montana "Temporary Order of Protection" authorizing relinquishment of firearms if the gun was used in the assault); OHIO REV. CODE ANN. § 2903.214(F)(2) (West 2016) (Ohio's Civil Protection Order authorizing relinquishment of firearms); 22 OKLA. STAT. ANN. tit. 22, § 60.11(5) (West 2016) (Oklahoma Civil Protection Order authorizing same); WIS. STAT. ANN. § 813.125 (West 2015–16) (Wisconsin Civil Harassment Restraining Order authorizing same).

statutes are silent this Article calls for the constitutionally sound requirement of a heightened clear-and-convincing evidence standard showing that relinquishment of firearms is necessary for the prevention of future harm. This requirement in essence creates a bifurcated trial similar to criminal proceedings, whereby proof of "guilt" is governed by a preponderance of the evidence standard and proof of certain remedial necessities at the "sentencing" phase is governed by a higher standard.[290]

The ultimate grant of relief, however, should be fact specific and considered on a case by case basis. Bright line rules, such as the one employed by Montana's restraining order statutes, prove unworkable in practice. Montana's civil restraining order statutes, which encompass relief for sexual assault victims, require a gun to actually have been used in the assault before a court can order firearms relinquished.[291] Such a bright line rule ignores the fact that attackers can demonstrate their propensity for violence—and indeed, their willingness to kill—without the use of a firearm in a particular attack. Moreover, such a rule denies petitioners the ability to present evidence demonstrating a credible fear of future harm based on an assailant's past conduct or threats involving firearms.

CONCLUSION

Archaic stereotypes about sexual assault perpetuate the notion that most rapes are committed by "strangers-in-the-bushes," when in reality the majority of sexual assaults are committed by acquaintances of the victims. Often sexual assault victims have close, ongoing contact with their assailants at school, work, or home, and thus remain at significant risk of continued harm in the weeks and months after the initial assault. This reality, coupled with the epidemic failure of the criminal justice system to prosecute offenders, highlights the urgent need for prospective, victim-centered relief designed specifically to protect sexual assault victims from future violence from their attackers.

Any such prospective protective order mechanism must be carefully tailored to address the unique needs of sexual assault victims, including implementing a reasonable burden of proof that reflects the relative lack of extrinsic evidence in most cases and the need to provide an attainable form of relief for victims in need. Such protection order

290. In practice, this higher burden of proof should not present an insurmountable obstacle in deserving cases, as sexual assault advocates and experts note that the presence of firearms or other weapons at an assault or the assailant's known possession of deadly weapons demonstrates a markedly increased risk of future violent harm.

291. MONT. CODE ANN. § 40-15-201(f).

mechanisms should also recognize the wide range of probable future harm facing sexual assault victims and require only a probable fear of some future harm instead of a particular type of harm or future fear of a repeat sexual assault. However, given the serious liberty deprivations contemplated by restraining orders, as well as the social condemnation attached to an adjudication that a respondent has committed a sexual assault, these statutes should employ certain procedural safeguards to protect the rights of the accused, including the right to personally confront and cross-examine witnesses. Finally, any available relief should be limited to no contact orders, monetary relief and other remedies not directly implicating a fundamental liberty interest, unless the need for a more consequential remedy can be proven by a heightened burden of proof. This balanced approach to SAPO relief will ensure both that sexual assault victims have real and ready access to prospective civil protections and that the constitutional rights of the accused remain protected in the process.