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Civil Orders for Protection: Freedom or Entrapment?

Nina W. Tarr*

INTRODUCTION

Everyone knows what is best. Everyone knows how to fix her. Everyone has advice. Everyone knows how to punish her. We call her “a battered woman” as if this says it all, although she dislikes the tag. We treat her like a “bad girl” who will not do what any of us says.

Women who are hurt by loved ones, family members, intimate acquaintances, and household members are multidimensional and their experiences are all over the map. Civil Orders for Protection (Orders for Protection)¹ are the most readily available legal means of accessing the protection of the state to separate the woman from her batterer. Once labeled a “battered woman,” however, society assumes that a woman automatically fits into the helpless construct that is associated with the “battered woman syndrome.” If she is not seriously hurt or not helpless enough, then society finds that she is not a battered woman and should not be allowed to take advantage of the beneficence to which “deserving” helpless women are entitled; that is, she does not adequately portray society’s idea of the damsel in distress. Yet, if she is a helpless creature who is worthy of special

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1. This Article exclusively addresses the issues associated with Civil Orders for Protection, as opposed to Criminal Orders for Protection which prosecutors may seek as part of a criminal case. In most states, a violation of a Civil Order for Protection will result in criminal charges, but the Petitioner in the civil case is considered the victim and not the state.

treatment, then she forfeits the respect afforded to other adults who are allowed by our legal system to make autonomous choices.

Who is she? She is an adult woman who is trying to survive, and she often does quite a good job of it. However, we, as lawyers and advocates who encounter her at the one moment she comes to our office to obtain an Order for Protection can lose sight of the whole picture as we try to get that piece of paper in her hand. Orders for Protection play a critical role in protecting individual women, stimulating the cross-disciplinary study of domestic abuse, and alerting the civil and criminal justice systems, as well as the public, as to the pervasiveness of domestic violence. Research has shown that the main dynamic in a battering relationship is “social entrapment,” described as the social extension of “entrapment.” “Entrapment” is characterized by “(1) a focus on social isolation, fear, and coercion that men’s violence creates in women’s lives; (2) attention to the indifference of powerful institutions to women’s suffering; and (3) identification of ways that men’s coercive control can be aggravated by structural inequalities of gender, class and racism.”² The original concept of an Order for Protection as a means of helping women escape social entrapment has been undermined because many state agents now use the existence of one as a means to coerce and control women. Consequently, rather than allowing a woman to escape social entrapment, an Order for Protection can further entrap the woman. By obtaining an Order of Protection, a woman may be substituting an intimate batterer with the all-powerful state machine. What becomes apparent is that state social systems are a quagmire, and a decision that may be strategically sound for one goal may significantly undermine other legal, social, and psychological objectives.

Most importantly, as laws and state actors have begun to approach intervention in domestic abuse cases more aggressively, women are consequentially forced to seek Orders for Protection. Psychological research indicates that one of the most significant benefits of seeking and obtaining an Order for Protection is that the woman feels

2. JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM; THE POWER OF JUDICIAL RESPONSES 10 (1999).

empowered because *she* has successfully initiated the action.³ The legal systems and policies that impose the “one size fits all” approach do women a psychological disservice by either forcing them to get an Order for Protection, punishing them for failing to do so, or denying them a voice and recognition if they fail to comport with the current agenda.

Twenty years ago, we, as advocates, hoped that Orders for Protection would invoke the criminal justice system to protect victims of abuse, but now we see that relying on the legal system can make the life of abuse victims even more unmanageable. A woman who seeks an Order for Protection because she is being abused in either her home or partnership risks finding herself the “victim” of a host of Alice in Wonderland experiences that may result from the policies of mandatory arrests, “hard” no-drop policies,⁴ state child protective services, overcrowded courts, insurance discrimination, welfare benefit loss, employment discrimination, immigration policies, and “equality theory” child custody laws.

This Article describes some of the ways that the state now entraps battered women by the Order for Protection system so that lawyers and advocates will fully advise their clients of the consequence of their choices.

Part I provides a brief synopsis of the legal resources available to women before the availability of Orders for Protection, briefly describes how the situation has changed in most jurisdictions, and highlights the legal benefits of Orders for Protection. Part II discusses the psychological benefits of an Order for Protection and then provides some data to illustrate what might happen when cases proceed. Part III, the major part of the Article, examines the unforeseen consequences of obtaining an Order for Protection that we, as advocates, often ignore when counseling clients, including: the psychological costs; the risks of losing children in custody battles with family members or the State; the loss of autonomy and free agency for the victim in the criminal justice system; the impact on her employment and the possibility of employment discrimination; the

3. Karla Fischer & Mary Rose, *When “Enough is Enough”: Battered Women’s Decision Making Around Orders of Protection*, 41 CRIME AND DELINQ. 414, 423-25 (1995).

4. See *infra* note 144 and accompanying text.

likelihood of changes in both life and health insurance eligibility or liability; the chance of a change in immigration status; and the potential loss of government benefits.

The literature written on domestic abuse contains many references to the theory that domestic or partner violence is partially the result of the perpetrator's frustration at being unable to "control" either his life or that of his victim. Control is a core concept in understanding the dynamics of intimate violence.⁵ Additionally, control is a core concept in understanding the frustration of individuals who have attempted to use the legal system to ameliorate or eliminate the problem of intimate violence.

Frequently, when the legal system attempts to control violence, it fails, and the situation explodes with new forms of chaos. For example, prosecutors may attempt to gain control by adopting "no-drop" policies which force an abused woman to testify regardless of the likely impact of her testimony.⁶ The prosecutors may or may not get a conviction, but even if they do, the conviction will rarely result in incarceration. Regardless, by forcing her to testify, the prosecutor has created more chaos for the woman who has already suffered from her lack of meaningful control over her abuser's violent behavior. The child welfare agency may try to control the violence in the home by accusing the woman of failing to protect her children. Thereafter, the welfare agency may remove the children, who end up in the nightmare of the legal systems that are designed to protect the welfare of both abused and neglected children. Each component of the legal system blames another. Meanwhile, the woman who is trying to exercise control over her own life becomes further entrapped.

I. LEGAL REMEDIES BEFORE ORDERS FOR PROTECTION

In the 1970s, in most jurisdictions of the United States, a woman who was hurt by her husband, partner, lover or household member would have had to overcome huge hurdles to compel the state to

5. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

6. See *infra* notes 143-47 and accompanying text.

intervene in her home to protect her. Now, some argue, the pendulum has swung to the other extreme so that a battered woman cannot get the state out of her home. A historical perspective on the cumbersome nature of a battered woman's legal alternatives assists in understanding the costs and benefits of today's Orders for Protection.

A. Civil Remedies

The only civil remedy available to most women before the movement to make Orders for Protection available was an injunction in one of three varieties: temporary (emergency), preliminary, or a permanent restraining order. In order to get an injunction, the woman had to bring a lawsuit, which, in most cases, meant a divorce proceeding. Thus, only a married woman had standing to bring the requisite civil action to receive the injunction. The battered woman had to be prepared to file for divorce or legal separation, and a hurdle for many women was accepting that their marriages had to end before the legal system could intervene to stop the violence. Furthermore, the "no-fault" divorce movement had not yet taken hold, so the woman had to allege sufficient grounds to warrant the divorce.

Most courts were not receptive to *pro se* divorces, and neither *pro bono* lawyers nor free legal aid were readily available. Consequently, a woman had to have sufficient funds to hire a lawyer and pay the filing, court, and service fees. Given the extra motions for temporary relief and additional courtroom appearances by the lawyer, which were necessary to procure an injunction, the divorce would not be "simple." Thus, lawyers would charge higher retaining fees and predict larger litigation costs. Moreover, many jurisdictions required a bond for the issuance of a civil injunction, which also required additional cash or property.⁷

The time delays at each stage of a divorce were staggering. To get the case started, the 1970's battered woman would be interviewed by the lawyer who would produce the paperwork. The paperwork included the Petition for Dissolution of Marriage, a Summons, a Motion for a Temporary (or Emergency) Injunction, and supporting Affidavits. The lawyer filed the papers at the courthouse and then had

7. See, e.g., 735 ILL. COMP. STAT. 5/11-103 (1993).

to find a judge who would put the case on his or her calendar. Only rarely would a judge hear a case on the day that it was filed because of the calendar backlog. Courts frowned on *ex parte* proceedings, so only in the most egregious situations, or in cases heard by sympathetic judges, could a woman obtain a hearing on an emergency injunction, the only type of injunction that did not require notice to the other party. More often, the papers had to be served on the batterer before the judge would even see the lawyer and the battered woman. Further delays would occur as either the sheriff or other process servers tracked down the batterer to serve him with all of the documents, and thus give notice of the hearing on the injunction. In some jurisdictions, even if the case were heard as an emergency injunction, the judge would ask for live testimony of the battered woman. The judge may have also required corroborating witnesses, so the lawyer would have to put off the hearing until testimony could be prepared. Even if the court accepted affidavits, the lawyer still needed time to prepare the witnesses.

If the woman wanted to have a judge hear her Motion for a Temporary Restraining Order (TRO) on an *ex parte* basis, in most jurisdictions, she would have to prove that “immediate and irreparable injury, loss or damage” would result before notice could be served.⁸ The court arranged a priority setting for the hearing on the preliminary injunction, because the TRO automatically expired in ten days. If she convinced the court to hear the case as an emergency, the woman had to prove beyond a reasonable doubt that she was likely to prevail in the case, and further, that she had no other remedies at law available.⁹

The available remedy was usually limited to ordering the batterer to stay away from the woman because the courts preferred to follow standard procedures on the issues of custody, child support, possession of real and personal property, alimony, and division of debts. Regardless of whether it was a temporary, preliminary, or permanent injunction, a violation was at worst considered civil contempt, requiring a tremendously cumbersome proceeding to alert

8. See 735 ILL. COMP. STAT. 5/11-101 (1993).

9. 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 (1993).

the court to the violation. Again, the lawyer had to draft documents such as an Order to Show Cause, including supporting Affidavits, and a Notice of Hearing, and then serve them on the batterer. If the batterer appeared and the court found a violation, the court usually issued a ruling to find the batterer in contempt. Such a ruling had no actual consequence; instead, it usually amounted to a verbal “slap on the hand.” Sometimes, the batterer might be fined, but only in extreme cases might he be jailed for civil contempt.

II. CIVIL ORDER OF PROTECTION SYSTEMS

A. Legal Benefits of the Civil Order for Protection System

Most U.S. jurisdictions have created systems allowing battered women to obtain an emergency Order for Protection using forms, in an expedited proceeding, and without paying a filing fee. The details of both the laws and procedures vary from one jurisdiction to another.¹⁰ The law in Illinois¹¹ is fairly typical, however, so this Article uses it as a prototype to discuss covered persons, definitions of abuse, timing issues, expenses, and available remedies.

In most jurisdictions, Orders for Protection are available to a wide class of abused persons. As a result, a woman no longer must be married to her batterer and file for divorce before she can seek the protection of the law without the help of the police or a prosecutor. For example, the Illinois Domestic Violence Act protects “any person abused by a family or household member.”¹²

10. Battered women often see an advocate or lawyer at some stage in the process of obtaining a permanent Order for Protection, often for a related matter, so opportunities exist to counsel them on the topics raised in this Article. For example, a lawyer representing a woman in a divorce may learn that the woman is abused and will blithely advise her to get an Order for Protection on her own rather than to pay her attorney’s fees. It is an error for that lawyer to fail to consider all of the consequences of that advice.

11. The Illinois Domestic Violence Act was first passed in 1986. 750 ILL. COMP. STAT. 60/101-401 (1993).

12. 750 ILL. COMP. STAT. 60/201(a)(i) (1993). This section further includes: (ii) any high risk adult with disabilities who is abused, neglected or exploited by a family or household member; (iii) any minor child or dependent adult in the care of such a person; and (iv) any person residing or employed at a private home or public shelter which is housing an abused family or household member. “Family or household members” are defined in the statute as including:

Prior to the enactment of Order for Protection statutes, most judges, police, and prosecutors did not think that the justice system should intervene in domestic matters, so a battered woman received protection only if she had severe injuries. Under most modern statutes, an abused woman may obtain an Order for Protection to stop physical abuse before it escalates.¹³ In addition, a woman can get an Order for Protection against harassment, which is defined in Illinois as “knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner.”¹⁴

The filing process has been simplified so that a battered woman can apply for an Emergency Civil Order for Protection without the assistance of a lawyer by using forms obtained from a clerk at the courthouse, an advocate, or a Prosecutor’s office, depending on the jurisdiction. Women may thereby take advantage of these forms without the expense and access problems of hiring an attorney. But the placement of the forms in prosecutors’ offices, so that battered women must talk to either an assistant prosecutor or a victim’s advocate, creates potential conflicts which will be later discussed in this Article. The priorities of the prosecutor may not completely coincide with those of the battered woman. Eventually, they may even have a direct conflict if the prosecutor decides to intervene on behalf of the children, prosecute the batterer against the woman’s wishes, or prosecute the woman for either a failure to protect her children or contempt. In some counties, battered woman find that “advocates” can create a barrier to the courts because they screen the

[S]pouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, [and] persons with disabilities and their personal assistants

750 ILL. COMP. STAT. 60/103(6) (1993).

13. Under 750 ILL. COMP. STAT. 60/103(1) (1993), abuse includes “physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation.”

14. 750 ILL. COMP. STAT. 60/103(7) (1993).

applicants and exercise some judgment as to whether the woman should even apply for an Emergency Order. The advocates of most battered women deserve praise and admiration for their commitment and efforts, but there are still counties and poorly trained individual advocates whose services are more of a hindrance than a help. For example, some advocates may be serving their own interests, if their funding is conditioned on successful representation, or if they perceive a personal ego threat. They may be intimidated by a judge who is impatient with “frivolous applications,” feel pressure from the local defense bar, or may simply feel overwhelmed.

In theory, the forms provided for battered women who seek protection are simplified, but as the law in this area becomes more complex, the “simple” forms have followed suit. Thus, most are now impossible for a lay-person to comprehend. Specifically, a single form includes allegations that the woman has a relationship with the batterer that puts her in the protected group of people, factual allegations regarding the abuse, questions regarding her children, finances, personal and real property, as well as questions regarding the court’s jurisdiction over the case, and a section on remedies. In some courtrooms, the judge expects the applicant to have completed a proposed form order before going to the courtroom, but in others the judge completes the order. Most jurisdictions have eliminated or reduced the filing fees.

In the busier courtrooms around the country, judges have a special docket each day to hear Petitions for Emergency Orders for Protection, thus eliminating the scheduling delays of the Motions for Temporary Injunctions. The judge reviews the paperwork and takes either sworn or unsworn statements from the battered woman. If the Emergency Order is granted, the woman will immediately receive the paper Order. The court will provide the sheriff with a copy to serve, and will notify the police department of the Emergency Order in case they receive a call regarding a violation. One issue that remains a problem in some jurisdictions is the sheriffs’ lack of diligence in serving Emergency Orders on respondents.

Because Emergency Orders for Protection are *ex parte* orders, the petitioner must generally return to court within ten days. At a subsequent hearing, the petitioner has an opportunity to argue before the judge as to why the Emergency Order should be continued for

some fixed amount of time, and the respondent has a chance argue why the Order should not be entered. These proceedings may turn into fairly complex evidentiary hearings in which witnesses are sworn in, the rules of evidence are applied to the admission of information, and both parties present and cross-examine witnesses. The questions of negotiations, mediations, settlement conferences, and reciprocal orders for protection arise in the context of these contested hearings. If the woman prevails, the judge issues a Restraining Order and sends the parties on their way. If not, the woman can reapply for a new Emergency Order when another incident occurs.

Aside from holding a batterer in contempt, courts around the country now provide battered women with a wide variety of injunctions, including orders prohibiting abuse, neglect, exploitation, stalking, harassment, etc. Additionally, other options include: orders for the grant of the exclusive possession of a shared residence; “stay away” orders; orders for mandatory counseling of a variety of types; awards of the physical care and possession of minor children; temporary legal custody; visitation; prohibitions from removing or concealing minor children; possession of personal property (including vehicles); protection of personal property; payment of child support or spousal maintenance; reimbursement for financial losses caused by the abuse; prohibition of entry; prohibitions of firearms possession; prohibition of access to records; orders of payment for shelter services; and orders for other injunctive relief.¹⁵ This array of remedies is much broader than what was available historically.

In a 1993 article, Professor Joan S. Meier synthesized several of the theories which integrated law and psychology in an attempt to understand domestic violence.¹⁶ The early part of the twentieth century saw a shift away from the view that wife battering was as acceptable a form of punishment as punishing children and animals, and was therefore “normal.” Perception shifted to the assumption that, in the pathological families where battering occurred, it was as a

15. See, e.g., 750 ILL. COMP. STAT. 60/214 (1993).

16. Joan Meier, *Notes from the Underground: Integrating Psychological & Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993).

result of the woman's masochism. When Lenore Walker first articulated the concept of the "battered woman's syndrome" and explained the "cycle of violence," the perspective shifted to seeing battered women as victims who had "learned helplessness."¹⁷ In the few cases where a woman met all of the requirements of the "syndrome," she could invoke the defense to her benefit in a criminal case, but the syndrome worked to her disadvantage in any civil case. The consequence of the battered woman's syndrome analysis is that judges and juries saw battered women as abnormal and responsible for their own abuse.¹⁸ Another analysis suggested that battered women exhibited the symptoms of post-traumatic stress syndrome because of their state of being constantly alert (hyperarousal), the constant reliving of the original abuse (intrusion), and their frequent numb or detached state (constriction).¹⁹ As Meier points out, this explanation moved the analysis away from the woman's character to an examination of her behavior. The theory suffered the same limitations as the battered women's syndrome because it required the evidence of many behavioral characteristics in order to be useful. Mary Ann Dutton, a clinical psychologist and Meier's collaborator, suggested that an alternative approach would be to examine the context of both the pattern of violence and the woman's strategy for response.²⁰ The four key components of Dutton's analysis include the history of abuse (including the scope and severity), the woman's psychological response, her strategic responses, and other intervening factors.²¹ Meier agrees that this approach is useful for understanding battered women. She points out, however, that the approach is problematic from a legal perspective because it is too vague to be used in court, relies on the woman's psychological make-up rendering her vulnerable, and focuses on the woman's behavior instead of the batterer's conduct.²²

17. *Id.* at 1310.

18. *Id.* at 1306.

19. *Id.* at 1312-13.

20. *Id.* at 1315. See generally Mary Ann Dutton, *Understanding Women's Response to Domestic Violence: A Redefinition of Battered Women's Syndrome*, 21 HOFSTRA L. REV. 1191 (1993).

21. Meier, *supra* note 16, at 1315.

22. *Id.* at 1316-17.

More recently, researchers have come to understand that the central issues in domestic and intimate violence are power, dominance, and control.²³ Meier summarizes some of this analysis as follows:

As Martha Mahoney points out, portrayal of the abuser's exercise of power and control over the woman implicitly shifts the attention away from her psychology to his motivations for his violence. When it is clear that his violence, and everything else he does to her, is directed at controlling and possessing her, it is harder to blame her for what she did or didn't do. Moreover, understanding the pattern of control makes it easier to understand how she "didn't leave" during the time when he "wasn't violent." Second, as Evan Stark points out, focusing on power and control can counter the tendency of the courts to focus on specifiable incidents of physical violence (usually meaning injury), which often trivializes the severity of abuse relationships in which little or no physical injury occurs, yet the abuse is profound, severe, and extensive. Finally, the abuser's need for power and control may bring to the surface a dynamic which is common in these cases in court, but rarely identified: the courts' intimidation by batterers and the framing of compliant responses so as to avoid provoking his rage and possible violence.²⁴

Evan Stark, a social worker and psychologist, theorizes that the concept of "entrapment" best summarizes the experience of battered women because "what creates a battered woman is neither violence per se nor the psychological status of either party, but the mix of social and psychological factors that make it seemingly impossible for the victim to escape or to effectively protect herself from abuse."²⁵ The batterer uses his control to permeate all aspects of the

23. *Id.* at 1317.

24. *Id.* at 1318 (footnotes omitted) (citing Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 57 (1991); Evan Stark, *Framing and Reframing Battered Women*, in DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 287, 279-82 (Eva Buzawa ed. 1993)).

25. *Id.* at 1319 (quoting Stark, *supra* note 24, at 290).

woman's life, including all of her basic needs and relationships.²⁶

When a woman applies for an Order for Protection, she shifts the dynamics of power, dominance, and control which provides her with psychological benefits.²⁷ James Ptacek theorizes that the main benefit a woman receives may arise from the knowledge that she may invoke the criminal justice system.²⁸ According to research by Karla Fischer and Mary Rose, a woman may find that applying for an Order for Protection provides an opportunity to reclaim what she has lost.²⁹ Most significantly, the Order for Protection alters the pattern of power, dominance and control.³⁰ According to Fischer, Vidmar and Ellis, another psychological benefit of applying for an Order of Protection is moving the woman beyond her state of denial because the application process requires her to articulate the specifics of the abuse, and to name it as such.³¹

Thus, Orders for Protection best serve to end domestic abuse if they give the woman a new sense of control over her own life. As the rest of this Article makes clear, however, both the legal system and the state have undermined this powerful benefit by entrapping the woman in a new quagmire. Rather than being controlled by an abuser, once a woman has applied for an Order for Protection, she is incapable of either escaping her status as an "abused woman" or protecting herself from the state.

III. PRESSURES ON WOMEN WHO ARE MOTHERS

A. Custody Cases

Battered women with children may find that facts are treated differently in various courtrooms within the same jurisdiction. The judge who is hearing a woman's custody case against the father of her children may discount her allegations of domestic abuse as

26. *Id.* at 1319; *See also* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993).

27. Fischer & Rose, *supra* note 3, at 422.

28. PTACEK, *supra* note 2, at 167.

29. Fischer & Rose, *supra* note 3, at 423.

30. *Id.* at 425.

31. *Id.*

irrelevant to the best interest of the children. The woman must consider the costs of accusing her children's father of domestic violence and removing him from the home. She may fear that he will offer accusations of abuse against her so that she will lose custody. In many states, "friendly parent" provisions raise the stakes on filing an Order for Protection, and yet if a woman does not get an Order for Protection, she risks being accused of a failure to protect her children. The various theories proposed by scholars attempting to explain battered women's circumstances consistently seem to backfire on women when the theories are applied by the courts in custody cases.³²

Mothers who are victims of domestic violence are vulnerable at every turn. At the outset, a mother may stay in an abusive relationship because she does not see alternatives which provide for a "family." Her constructed image of what a life is "supposed to be" may include a male in the home, regardless of his behavior. Accordingly, she may tolerate the intolerable to perpetuate the illusion for herself, her children, and for the outside world that everything is "okay." In the same way that cycles of violence have "honeymoon" or positive periods for the mother, the batterer will have positive periods with the children. Accordingly, the mother may cling to those images to rationalize her decision to continue to live with a dangerous man. Consciously or unconsciously, a batterer can use these desires to manipulate a mother.

A mother may also fear the practical problems associated with being a single mom. For instance, she knows that without a partner, she is likely to lose income, financial security, child care, a co-parent to nurture or discipline the children, companionship, another person to provide transportation, and a general helpmate. The world tends to see only one aspect of a battered woman's life and forgets that the batterer is likely to interact with her and her children in a multi-faceted manner so that there are both costs and benefits to separating from him. On Friday night, he may burn her with a cigarette, but on Saturday morning he will coach his child's Little League team. They both know that at any moment he can hurt her, and that dynamic is ever-present, even in the moments of apparent calm. Nevertheless,

32. Meier, *supra* note 16, at 1309 nn.44-47 and accompanying text.

she may convince herself that his contributions are worth the risks.

Many batterers recognize that an easy way to maintain control of a woman is to frighten her with the threat of losing her children. If the batterer has isolated and/or sufficiently demeaned a woman so that she has no self-confidence in her ability to judge reality, he can convince her that she is a bad mother who is undeserving of her children.³³ She may believe she is a bad person who deserves to be punished, that she neglects to care for her children properly, and that her life is so unmanageable that she cannot adequately care for her children on her own. Many battered women are convinced that the batterer in their lives is much more effective at manipulating systems, including systems of justice, and that if he tries, he can successfully convince a court or investigator that the woman is undeserving of custody.

The mother may find herself up against a court's preference to award custody of the children to the "friendly parent."³⁴ The "friendly parent" is the one who does not make allegations about the other parent, who does not withhold access to the child, and who is cooperative. Conversely, "unfriendly parents" are those who make allegations and who are "alienating." As such, the friendly parent gets the child, or at least more time with the child. The flaw with this analysis is that "custody becomes a regard for behavior which is not necessarily correlated to the child's interest."³⁵ The difficulty for a battered woman is that if she tries to protect her children from an abusive relationship without the benefit of a court order, courts will see her as "unfriendly" and award custody to the abuser.³⁶ If she applies for an Order for Protection and it is denied, then the abuser has further evidence that she is unfriendly and once more he gets the upper-hand. If, on the other hand, she chooses not to report the violence or abuse to anyone, then she can later be accused of failing to protect her children. Moreover, as we have seen, her credibility is

33. See, e.g., JODY RAPHAEL, *SAVING BERNICE: BATTERED WOMEN, WELFARE, AND POVERTY* 40 (2000).

34. See, e.g., *Lawrence v. Lawrence*, 20 P.3d 972 (Wash. Ct. App. 2001); *Custody of Nunn*, 14 P.3d 175 (Wash. Ct. App. 2000).

35. Margaret K. Dore & J. Mark Weiss, *Lawrence and Nunn Reject the "Friendly Parent" Concept*, 6 DOMESTIC VIOLENCE REP. 81 (2001).

36. *Id.* at 82.

diminished if she subsequently tries to raise the previous abuse in a custody trial. The judge will be skeptical of her claims, and will wonder why she did not apply for an Order for Protection.

Jurisdictions vary in their treatment of domestic abuse in custody cases.³⁷ Some courts have a presumption that custody cannot be awarded to a parent who has committed domestic abuse. In other jurisdictions, domestic abuse is simply a factor to be considered when determining the best interests of the children. These jurisdictions may force a woman to prove that the domestic abuse has had a direct impact on her children.³⁸ If she proves that the abuse has had an impact on her children, the court may find that the mother is a “battered woman” who is not strong or assertive enough to parent or protect her children. If the abuse was bad enough, then the court reasons that the woman should have obtained an Order for Protection. If she applied for an Order for Protection and did not receive one, she is an unfriendly parent. If the abuse was not sufficient to merit an Order for Protection, the court may question why the mother is raising it as an issue in the custody case. Thus, around and around the mother must go in deciding how to proceed.

If a woman receives an Order for Protection and does not call the police after each violation, subsequent agencies and courts may view her with skepticism. Did the violation really occur? Was she lying then or is she lying now? This questioning of her veracity may discredit her testimony on other fronts. If she is involved in a custody case, should the court believe her? If she is testifying in the state’s prosecution of the batterer, and she testifies about incidents when she did not call the police, is her credibility destroyed before the jury? Does she do better to get the Order for Protection or not?

One of the most unfortunate developments in the past few years is a battering man’s use of *pro se* Orders for Protection to get emergency custody of his children. When battered women begin to articulate that they are considering leaving, men have discovered that they can reassert their control by misusing the legal system. The men win the race to the courthouse and present the judge with a story

37. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1044 (1991).

38. *Id.*

about the mother's erratic behavior toward her children, or tell the judge that she is the first aggressor in their disputes. Judges often feel compelled to apply an "equality theory" approach to these allegations which means that they take the allegations at face value and issue emergency orders to grant batterers with temporary "possession" of the children. Even though this type of Order does not result in formal custody in most jurisdictions, and a subsequent evidentiary hearing on the question of temporary or permanent custody will always follow, the initial strike still has the effect of terrifying the woman that she will lose her children. This manipulation of the legal system re-enforces the woman's fears that the system will work against her, thus bolstering the man's perception of power, and further confusing their children. Despite the language in both statutes and cases on the "best interest of the children," many judges show a strong preference in favor of maintaining continuity in a child's custody arrangement. As a result, once a father wins the first round in court, he has put the woman in a defensive posture that can often be difficult to overcome.

B. Battered Women Caught up in Accusations of Child Abuse and Neglect

Mothers who are battered by their household partners, lovers, or husbands risk losing their children in child neglect proceedings unless they attempt to obtain an Order for Protection. In particular, an Order must be sought if a mother has been involved with someone who has hurt her, regardless of whether she continues to live with him or faces his harassment after separation. States often use evidence of a mother's failure to do so as evidence of a "failure to protect" in a child abuse and neglect proceeding. Failure to protect is considered "passive child abuse,"³⁹ and its liability usually requires that "(1) the defendant had a legal duty to protect the child, (2) the defendant had actual or constructive notice of the foreseeability of abuse, (3) the child was exposed to such abuse, and (4) the defendant failed to prevent such abuse."⁴⁰ Put somewhat differently, parents

39. Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure to Protect Laws*, 76 N.Y.U. L. REV. 272, 279 (2001).

40. *Id.*

may be penalized under “commission statutes,” if they are the actual abuser, or under “omission statutes,” if they passively expose children to the risk of harm or fail to protect them.⁴¹ Parents may be found for a failure to protect if they “fail to prevent *actual* abuse by an identifiable offender.”⁴² More recently, liability has ensued if they “‘permit’ children to remain in an environment where abuse *could* occur or the risk of harm is evident.”⁴³

As Jeanne Fugate has explained, in the typical case, “a woman [does] not perform her ‘maternal role’ adequately to convince a court that she shielded a child from the abuse of a boyfriend, live-in lover, or spouse, or even someone not in an intimate relationship with [her].”⁴⁴ Very few reported cases which report a failure to protect have been brought against men.⁴⁵ Fugate theorizes that the gender disparity is caused by the greater number of women who have custody of their children. She also argues, though, that the gender disparity is a result of courts applying an elevated scrutiny to women as well as gender stereotypes including the “All-Sacrificing Mother, the All-Knowing (and thus All-Blamed) Mother and the Nurturing Mother/Breadwinning Father.”⁴⁶ Of these, the stereotype of the “All-

41. Melissa A. Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect her Child an Acceptable Solution When her Child Witnesses Domestic Violence?* 69 *FORDHAM L. REV.* 1487, 1490 (2001).

42. *Id.* (citations omitted) (emphasis in original).

43. *Id.* (citations omitted) (emphasis in original).

44. Fugate, *supra* note 39, at 279-80.

45. *Id.* at 281.

46. *Id.* at 289. According to Fugate:

[The “All-Sacrificing Mother” is] the most revered form of love, a mother’s love for her child, is expected to overcome “all physical, financial, emotional and moral obstacles,” including, in the realm of failure-to-protect laws, any victimization at the hands of another. The Courts wrongly assume first that a mother *can* leave the abuser and, second, that a threat of imprisonment [or separation] will encourage her to act to protect her children when she otherwise would not. Courts demand that women, in contrast to men, must sacrifice their safety, including standing up to the men who beat them, in order to save their children and fulfill their “maternal instinct.”

Id. at 290-91.

Courts disregard arguments that the mother may have tried to leave or that her attempts were ineffective. The courts assume that an Order for Protection is an effective means of protection against any form of violence, that shelters are available to anyone, and financial safety nets will always be there. *Id.* at 290-94.

The “all-knowing” stereotype assumes that a woman knows everything that is going on with her children and therefore is to blame if anything has a negative impact on her children.

Sacrificing Mother” who will protect her young at all costs, and against all odds, is the one that has most worked against battered women who are unable to extricate themselves from their batterers.⁴⁷

The jurisprudence has shifted away from its earlier presumption that children should not be removed from their abused mothers unless the state can prove that the children have been harmed. The jurisprudence then shifted to the presumption that if children observed abuse, then they had been harmed and, therefore, should be removed from the abused mother’s care. Therefore, the state no longer had a burden to prove harm, and need only show that the child had observed abuse.⁴⁸ Thus, the pendulum has now swung even further in favor of removal, and the latest presumption is that children are harmed when they live in a home where the mother is being abused, regardless of whether they observe the abuse or not.⁴⁹

Battered mothers are strictly liable for any harm to their children.⁵⁰ It does not matter whether a mother hurt her child or if she intended to hurt her child, or whether she tried to leave but was prevented by the batterer. Courts are disinterested in hearing a mother’s opinion that leaving was more dangerous than staying.⁵¹ If the mother stays in a situation where she herself is being hurt, then she is responsible.⁵² Some courts apply an “objective” or “reasonably prudent parent” standard which assumes that any abuse in the home is unacceptable and a reasonable person would get an Order for Protection.⁵³ Some courts modify this standard by considering the reasonably prudent parent “under like circumstances,” and thereby take into account some characteristics of either the person or her

Men do not have the same level of responsibility. *Id.* at 294-97.

Courts often assume that mothers raise their children while the men earn the family’s money. If a woman goes to work, she is seen as abandoning her children to a male caregiver and, therefore, has no excuse if something happens to the child while in the caretaker’s care. *Id.* at 297-98.

47. *Id.* at 290-94.

48. Trepiccione, *supra* note 41, at 1491.

49. See G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN’S L.J. 89, 111-13 (1999) (citing *In re Katherine C.*, 122 Misc. 2d 276, 278-79 (1984)).

50. Trepiccione, *supra* note 41, at 1494; see also Miccio, *supra* note 49, at 107-10.

51. Miccio, *supra* note 49, at 109.

52. *Id.* at 117.

53. *Id.* at 110-12.

situation.⁵⁴

G. Kristian Miccio has suggested that courts should apply the “reasonable battered mother test” (RBMT).⁵⁵ She argues that because the state contributes to trapping women in situations prone to battering, it should not accuse women of a failure to protect unless it takes into account the social context of the violence.⁵⁶ Miccio believes that “neutrality obscures the gendered nature of domestic violence, the state’s failure to respond and the construct of mothering. The RBMT functions then as both a legal and social corrective.”⁵⁷ Miccio is correct that in dependency and neglect proceedings, the courts should use the RBMT rather than an objective standard, but not for the reasons that she articulates. In her Article, she relies on many cases from the 1980s that illustrate circumstances where hospitals did not intervene, police failed to arrest, prosecutors failed to prosecute, and the criminal justice system failed to convict, thus leaving mothers vulnerable to their batterers. Miccio fails to consider Iowa, Oklahoma and Minnesota, which recognize affirmative defenses that take into account duress or an inability to act because of a reasonable fear of the abuser.⁵⁸

As the rest of this Article illustrates, the state no longer neglects battered women. In fact, the state is ready to intervene in every aspect of their lives. Battered mothers are not allowed to exercise full autonomy or act as independent agents because so many competing forces compel them to behave in a particular manner. Consequently, in neglect and abuse proceedings, courts must either use the RBMT or unfairly hold the mother accountable for many dynamics outside of her control. Policies and procedures that are based on broad assumptions and essentialist stereotypes fail to take into account the individual nature of the lives of these women and their children. Not all battered women suffer the same type of abuse, and not all children experience the same situation. “One size fits all” reactive strategies that remove children from their mothers make no sense from social,

54. *Id.* at 112.

55. *Id.* at 94.

56. *Id.* at 119.

57. *Id.* at 115.

58. Trepiccione, *supra* note 41, at 1498.

psychological, legal, economic, or policy perspectives. In fact, one criticism of the social science studies that is often cited as the basis for removing children from home when they witness abuse is their diverging definitions of “abuse.” The studies do not distinguish who is being abused, and they do not distinguish between children who are observers as compared to children who are directly abused.⁵⁹ Furthermore, the studies are often based on information that is gathered at shelters from women and children who are in a state of turmoil. As such, causation is not always clear and the men’s perspective is invisible.⁶⁰ Finally, other factors are unclear, such as the degree of violence, the history of violence, and the nature of the violence.⁶¹ Other flaws in the research include a failure to account for demographic variables, small sample sizes, lack of researchers’ training, and lack of longitudinal studies.⁶²

C. Insurance

Women who are victims of domestic violence have been discriminated against by health insurance, life insurance, and home owners’ insurance companies.⁶³ According to Ellen Morrison, both the American Council of Life Insurance and the Health Insurance Association of America advocate the practice of discriminating against battered women.⁶⁴ Likewise, Prudential Insurance Company, First Colony Life Insurance, Nationwide, and State Farm Mutual Insurance Company, like many other insurance companies, have

59. *Id.* at 1503.

60. *Id.*

61. *Id.*

62. *Id.* at 1504.

63. Michelle J. Mandel, *Ensuring that Victims of Domestic Abuse are Not Discriminated Against in the Insurance Industry*, 29 MCGEORGE L. REV. 677 (1998); Ellen J. Morrison, *Insurance Discrimination Against Battered Women: Proposed Legislative Protections*, 72 IND. L.J. 259, 260 (1996).

64. Morrison, *supra* note 63, at 266 (citing Deborah L. Shelton, *Adding Insult to Injury: Families Hurt by Domestic Violence Take a Second Hit When Insurers Deny them Coverage*, AM. MED. NEWS, Dec. 4, 1995, at 11-12; Fern Shen, *For the Battered Spouse, Insurers’ Bias Worsens Pain*, WASH. POST, Mar. 9, 1995, at A1; WOMEN’S LAW PROJECT & PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INSURANCE DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE (Sept. 1995) (unpublished manuscript on file with the Women’s Law Project and the Pennsylvania Coalition Against Domestic Violence).

adopted underwriting procedures which discriminate against victims of domestic violence.⁶⁵ When women apply for Orders for Protection, they create a public record which indicates that they have been abused. Insurers justify their discrimination by claiming that the status of being a battered woman is a pre-existing condition and that battered women choose to stay with their batterers.⁶⁶ Insurance companies rely on their discretion to charge higher rates according to people's proclivity toward dangerous activities or lifestyles.⁶⁷ As such, they categorize battered women as a high risk group who will bankrupt the system, arguing that it is legitimate to charge these women additional costs for their insurance because it would be unfair to spread the cost of their injuries to others insured by the company.⁶⁸ In an attempt to legitimize the practice with regard to life insurance, the insurance industry claims that denial of life insurance protects battered women from being killed by their spouses for insurance money.⁶⁹

Although, the insurance industry has successfully thwarted any federal legislation prohibiting insurance discrimination against battered women,⁷⁰ sixteen states have passed legislation attempting to

65. Morrison, *supra* note 64, at 275.

66. *Id.*

67. *Id.* at 272.

68. *Id.* at 273; *see also* Mandel, *supra* note 63, at 678.

69. Morrison, *supra* note 63, at 275. It is beyond the scope of this Article to discuss all of these arguments, but for a more lengthy discussion, see Deborah S. Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair?: A Case Study in Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 356 (1997).

70. Morrison, *supra* note 63, at 277-79, describes the 1995 bill as follows:

The legislation, entitled the Victims of Abuse Insurance Protection Act, would prohibit insurers from denying abuse victims coverage in all forms of insurance. The proposed legislation reads:

(a) No insurer or health carrier may, directly or indirectly, engage in any of the following acts or practices on the basis that the applicant or insured, or any person employed by the applicant or insured or with whom the applicant or insured is known to have a relationship or association, is, has been, or may be the subject of abuse:

(1) Denying, refusing to issue, renew or reissue, or canceling or otherwise terminating an insurance policy or health benefit plan.

(2) Restricting, excluding, or limiting insurance or health benefit plan coverage for losses as a result of abuse or denying a claim incurred by an insured as a result of

abuse, except as otherwise permitted or required by State laws relating to life insurance beneficiaries.

(3) Adding a premium differential to any insurance policy or health benefit plan.

(4) Terminating health coverage for a subject of abuse because coverage was originally issued in the name of the abuser and the abuser has divorced, separated from, or lost custody of the subject of abuse or the abuser's coverage has terminated voluntarily or involuntarily Nothing in this paragraph prohibits the insurer from requiring the subject of abuse to pay full premium for the subject's coverage under the health plan.

The language of this legislation constrains insurers from discriminating against domestic violence victims in several ways. First, insurance companies cannot refuse to issue or terminate an insurance policy on the basis of abuse. Second, insurers cannot limit coverage or deny claims which arise from domestic violence incidents. Third, the Bill prohibits companies from charging a higher premium based on a prior history of abuse. Finally, insurers cannot terminate health coverage for a domestic violence victim when the original coverage was issued in the abuser's name and when the abuser's acts would otherwise cause the victim to lose coverage.

Id. (citing 145 H.R. 2654, 104th Cong., 1st Sess. (1995)).

According to Morrison, the legislation also provided for privacy and dual systems of remedies. *Id.* at 278.

71. Mandel, *supra* note 63, at 682 n.43 (citing ARIZ. REV. STAT. ANN. §§ 20-448 (West Supp. 1996) (prohibiting an insurance company from “denying, restricting, canceling, limiting or refusing to renew coverage based on the fact that the proposed insurer is or has been a victim of domestic violence”); DEL. CODE ANN. tit. 18, § 2304(24)(a) (Supp. 1996) (prohibiting the imposition of discriminating practices by life and health insurance companies against victims of domestic abuse); FLA. STAT. ANN. § 626.9541 (West 1995) (stating that an insurer may deny insurance based on an applicant's medical condition, but shall not look at whether that condition was caused by an act of abuse); IND. CODE ANN. § 27-8-24.3-6 (Michie 1996) (restricting an insurer from “denying, refusing to contract with, or refusing to renew based on the fact that the individual has been or has the potential to be a victim of domestic violence”); KAN. STAT. ANN. §§ 40-2404 (Supp. 1996) (prohibiting insurance discrimination on the sole basis of having been a domestic abuse victim, but permitting an insurance company to continue to underwrite on the basis of a preexisting physical or mental condition, even if that condition was caused by abuse); ME. REV. STAT. ANN. tit. 24, § 2159-B (West 1996) (declaring that an insurer “who issues life, health or disability coverage may not deny, cancel, refuse to renew, or limit coverage based on the fact that the individual is a victim of abuse or has the potential to be a victim of abuse”); MD. ANN. CODE, Insurance § 234D (Supp. 1996) (declaring that if a person being considered for insurance is a victim of domestic abuse then the insurance company may not use information regarding the status of the person as a victim of domestic abuse to deny, cancel, or refuse to renew coverage; increase rates for life insurance, health insurance, or a health benefits plan; or apply a rating factor or underwriting practice that takes into account that information); N.M. STAT. ANN. § 59A-16B-4 (Michie 1997) (prohibiting an insurance company from unfairly discriminating against an individual based solely on their status as a victim of domestic abuse); N.Y. INS. LAW § 2612 (Consol. 1997) (prohibiting insurance discrimination against individuals solely because they have been a victim of domestic violence); TENN. CODE

have suggested that even these laws do not go far enough to protect battered women.⁷²

Ironically, The National Association of Insurance Commissioners (NAIC), an association of state insurance regulators, has passed the “Unfair Discrimination Against Subjects of Abuse Model Act.”⁷³ The Model Act focuses on battered women’s need for privacy and is based on the assumption that women may be hiding from their batterers.⁷⁴ The Model Act attempts to prohibit the disclosure of information regarding abuse by insurers, and tries to establish protocols to protect victims of domestic abuse when they are working with insurance companies.⁷⁵ Yet, the mere act of applying for an Order for Protection would obviate any protection that this meager Model Act might provide.

Women who are denied insurance are not necessarily notified of the reason,⁷⁶ and insurers are not required to report their criteria for underwriting.⁷⁷ The existence of an Order for Protection, or even an application for an Emergency Order for Protection, may haunt a battered woman for years.

D. Employment

Because batterers seek women whom they can control, keeping their victims financially insecure can be a driving force for their abusive behavior.⁷⁸ A batterer may attempt to sabotage a woman’s

ANN. §§ 56-8-304 (Supp. 1996) (prohibiting unfair discriminatory acts that “deny, refuse to renew, restrict, or cancel a health benefit plan on the basis of the individual’s abuse status”). See also Hellman, *supra* note 69, at 387.

72. See, e.g., Michael J. Sudekum, *Homeowner’s Policies and Missouri Law Make Recovery for the Domestic Violence Victim/Co-Insured an Olympic Challenge*, 69 UMKC L. REV. 363 (2000).

73. Mandel, *supra* note 63, at 684.

74. *Id.*

75. *Id.*

76. *Id.* at n.63 (citing Dana Coleman, *Domestic Violence Victims’ Insurance Rights Backed*, N.J. LAW., Apr. 22, 1996, at 10).

77. *Id.* (citing Ellen J. Morrison, *Insurance Discrimination Against Battered Women: Proposed Legislative Protections*, 72 IND. L.J. 259, 283 (1996) (stating that insurers are not required to report the criteria that they use in their underwriting process)).

78. Patricia Cole & Sarah M. Buel, Symposium Briefing Paper: *Safety and Financial Security for Battered Women: Necessary Steps for Transitioning from Welfare to Work*, 7 GEO. J. POVERTY LAW & POL’Y 307, 313 (2000); see also Erin Meehan Richmond, Note, *The*

employment and training opportunities by beating her the night before an interview or test, promising to provide child care, transportation, clothing or other essentials for employment. As a result, the batterer psychologically undermines her confidence in her ability to succeed.⁷⁹ Once a woman is employed, batterers often ruin job opportunities by causing absenteeism, frequently calling or appearing at a place of employment, and by continuing to undermine the woman's confidence.⁸⁰ Research reveals that domestic violence is a major barrier to employment.⁸¹ Domestic violence imposes costs on employers, including huge losses of employee availability and revenue, and also creates security problems.⁸² As soon as an employer becomes aware of domestic violence in a woman's life, either through her own actions or the actions of her batterer, her employer may either fire her or press her to get an Order for Protection. An employer may perceive a woman's failure to obtain an Order for Protection as a lack of cooperation, thus putting the woman's employment at risk. If an employee is hurt "in the course of" or "arising out of" work, her exclusive remedy will be worker's compensation.⁸³ Worker's compensation may not pay if the injury results from an "inherently private relationship," but employees have successfully sued their employers for failing to provide secure work settings.⁸⁴ If the employer is aware that a woman is being threatened and fails to protect her, the employer may have liability under a theory of intentional tort. Therefore, employers' concerns about their own liability make battered women unappealing candidates for employment.

Some observers find an argument under the Family and Medical Leave Act that employers must allow victims of domestic abuse to

Interface of Poverty and Violence Against Women: How Federal and State Welfare Reform Best Respond, 35 NEW ENG. L. REV. 569, 580 (2001).

79. Raphael, *supra* note 33, at 31, 38.

80. *Id.*

81. Cole & Buel, *supra* note 78, at 314.

82. Jennifer Moyer Gaines, Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope without a Safety Net?*, 31 TEX. TECH. L. REV. 139, 143 (2000).

83. *Id.* at 144-45.

84. *Id.* at 147-48.

take leave (though not necessarily paid leave) to attend court dates.⁸⁵ This arises from the requirement that a woman who seeks an Order for Protection must personally appear in court even if she is represented by counsel. Thus, if she is employed during the court hours, she will miss work each time she must appear, and if her batterer is allowed endless continuances, her situation is exacerbated. Most courts around the country hear Order for Protection cases during mass docket calls, causing the applicant to wait for hours. In theory, a woman's employer should not discriminate against her because of her need to protect herself, but experience suggests that this theory is unrealistic.⁸⁶

E. Welfare

Welfare statistics illustrate that intimate battery cuts across all class lines.⁸⁷ The modern battered women's movement has strategically emphasized that this problem affects the safety of all women because such a "universalist" approach appeals to both policy makers and society as a whole.⁸⁸ The number of women below the poverty line who are affected by domestic abuse is higher than in other classes, however, and poverty and domestic abuse are inextricably tied to one another.⁸⁹ Poor women who are battered are more likely to need to rely on public services or the criminal justice

85. *Id.* at 148-49.

86. For an argument that battered women are protected from discrimination under the Americans with Disabilities Act, see Marta B. Varela, *Protection of Domestic Violence Victims under the New York City Human Rights Law's Provisions Prohibiting Discrimination on the Basis of Disability*, 27 *FORDHAM URB. L.J.* 1231 (2000). Varela's argument requires, however, that the woman can make a showing that the abuse qualifies under the limited standards of the ADA.

87. Richmond, *supra* note 78, at 571 n. 13.

88. *Id.* at 571 nn.14-15 (citing Joan Meier, *Domestic Violence, Character and Social Change in the Welfare Reform Debate*, 19 *LAW AND POL'Y* 205, 208, 223 (1997)).

89. Mark Matthew Graham, *Domestic Violence Victims and Welfare "Reform": The Family Violence Option in Illinois*, 5 *J. GENDER RACE & JUST.* 433, 437-40 (2002) (citing JODY RAPHAEL & RICHARD M. TOLMAN, TRAPPED BY POVERTY, TRAPPED BY ABUSE: NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE (Apr. 1997)); see also Cole & Buel, *supra* note 78, at 309-12; Richmond, *supra* note 78, at 571-73; RAPHAEL, *supra* note 33, at 27 (finding that there is a greater incidence of domestic violence in households on welfare).

system, so their situations are exposed to public scrutiny.⁹⁰ In contrast, a woman with a reliable income, insurance, and friends and family with financial resources can rely on private sources to either escape the abuse or remedy her situation.⁹¹

A woman who is abused by someone who provides her with financial support may be reluctant to obtain an Order for Protection. Food, shelter, and medical care may be more critical to her than physical safety,⁹² particularly if she lacks confidence that an Order for Protection will actually stop the violence. Even the promise of some child support or maintenance may be too ethereal because either the reliability or the amount of support is likely to be insufficient. Consequently, working with a battered woman to restore her financial security is a critical element in obtaining her physical safety. Unfortunately, current welfare programs, like the courts, offer relief with one hand and a series of unrealistic barriers and expectations with the other. Once more, the system tells the battered woman how to live and will punish both her and her children if she fails to comply. As one author aptly put it, “when observed through the lens of domestic violence, the women are victims in need of assistance. When observed through the lens of public welfare, many of these same women are demonized and assistance is denied or provided sparingly with punitive conditions.”⁹³

The welfare reform of the 1990s, called the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),⁹⁴ caused damage to the interests of battered women in a number of ways.⁹⁵ At the outset, the Act eliminated the concept of welfare as an entitlement, thus depriving recipients of their due process rights.⁹⁶ Erin Meehan Richmond succinctly described the

90. *Id.* Welfare-eligible women are more likely to have obtained an Order for Protection and to have dealt with the courts in domestic violence matters.

91. *Id.*

92. See Cole & Buel, *supra* note 78, at 310.

93. Richmond, *supra* note 78, at 595 (quoting Ruth A. Brandwein, *Family Violence, Women and Welfare, in THE TIES THAT BIND: BATTERED WOMEN, CHILDREN, AND WELFARE REFORM* 3, 5 (Ruth A. Brandwein ed., 1999)).

94. Pub. L. No. 104-193 (1996) (codified in scattered sections of 7, 29, & 42 U.S.C.).

95. For a discussion of PWORA, see Cole & Buel, *supra* note 78, at 310-12; see also Richmond, *supra* note 78, at 578-83.

96. Graham, *supra* note 89, at 449 (citing 42 U.S.C. § 601(a) (2001)).

barriers as follows: First, PRWORA replaced Aid to Families with Dependent Children (AFDC) with Temporary Aid to Needy Families (TANF), eliminating entitlement to public assistance and requiring states⁹⁷ to cap the number of years that a person may receive TANF.⁹⁸ Thus, a woman may be unable to receive TANF because of the lifetime cap. Even if she does receive it, she must assume that it is a temporary resource. State do have an option of eliminating the cap for individual families under a “hardship” exception which is discussed further below. Second, states must require recipients to seek job training and employment in an effort to transition them from welfare to work, a primary goal of the PRWORA. Some states currently require participation from the beginning of receipt of any benefits.⁹⁹ Third, the PRWORA allows states to require women to cooperate in establishing the paternity of their children and in seeking child support.¹⁰⁰ Fourth, the states have an option to cap the level of benefits a woman receives for her family to discourage her from having more children.¹⁰¹ Fifth, a woman under the age of eighteen who has a child of more than three months old must be pursuing either a high school diploma or some other approved training.¹⁰² Teen mothers must live with a parent, a legal guardian, or an adult relative in order to receive benefits.¹⁰³ Sixth, the PRWORA makes immigrants ineligible for any public assistance, whether the immigrants are illegal or not.¹⁰⁴

Under the 1996 Welfare Reform Bill, Congress set a schedule by which a certain percentage of welfare recipients in each state must attain employment. In 2001, this schedule required forty-five percent of single parents to work at least thirty hours per week and ninety percent of two parent families to work thirty-five hours per week.¹⁰⁵

97. Richmond, *supra* note 78, at 579.

98. *Id.* at 579 (citing 42 U.S.C. §§ 602(a)(1)(A)(ii), 608 (a)(7)(A)).

99. Richmond, *supra* note 78, at 580 (citing 42 U.S.C. § 607). For example, in Idaho, a woman who cannot find employment must engage in volunteer activity. *Id.* at 592-93.

100. *Id.* (citing 42 U.S.C. § 608(a)(2)).

101. *Id.* at 581.

102. *Id.* at 582 (citing 42 U.S.C. § 608(q)(4)).

103. *Id.* (citing 42 U.S.C. § 608(a)(5)).

104. *Id.* (citing 42 U.S.C. § 608, 1622(b) (Supp. V 1999)).

105. Graham, *supra* note 89, at 450 (citing ILLINOIS DEP'T OF HUMAN SERVICES, TANF FEDERAL PARTICIPATION RATE REQUIREMENTS, at www.state.il.us/agency/dhs/tsconp.html)

In 2002, as this Article goes to print, President George W. Bush is pushing for an increase to force recipients to work forty hours a week. Moreover, he is advocating amendments to the welfare legislation that will pressure welfare recipients to get married and stay married.

Under pressure from various advocacy groups that lobbied for mandatory waivers to protect battered women from the hardship of these reforms, Congress included the Family Violence Option.¹⁰⁶ The Family Violence Option allows states to opt into a program that would identify victims of domestic violence on welfare, refer them to counseling and support services, and waive some of the requirements listed above.¹⁰⁷ The Family Violence Option is not compulsory, and Health and Human Services did not adopt regulations interpreting the statute until 1999.¹⁰⁸ States have no incentive to participate in the Family Violence Option because they receive no additional funds to defray the additional expense of screening and referrals. All but nine states have taken the option.¹⁰⁹ Some research indicates that states have implemented the Family Violence Option unevenly.¹¹⁰ Initially, the waiver language in the Family Violence Option created some confusion regarding the “hardship” section of the original PRWORA that allowed states to exempt up to twenty percent of their welfare caseload from program requirements, for reasons including but not limited to domestic abuse.¹¹¹ This confusion was clarified by Department of Health and Human Services regulations that took effect on October 1, 1999,¹¹² which clarified that the participating

(last visited Oct. 29, 2002).

106. *Id.* at 452.

107. Richmond, *supra* note 78, at 583-84 (citing 42 U.S.C. § 602(a)(7)(A)(i)-(iii) (1999)).

108. Graham, *supra* note 89, at 455 (citing 64 Fed. Reg. 17720, 17781 (Apr. 12, 1999) (relevant provisions codified at 45 C.F.R. §§ 260.50-260.59 (2001))).

109. *Id.* at 435 (citing *National Center on Poverty Law, and Other Advocates Urge Illinois General Assembly to Adopt the Family Violence Option* Illinois Welfare News) Mar. 2001, at www.povertylaw.org/advocacy/iwn/iwnarticle.cfm?id=24.

110. Graham, *supra* note 89, at 435 (citing MARCELLENE HEARN, NATIONAL ORGANIZATION FOR WOMEN, DANGEROUS INDIFFERENCE: NEW YORK CITY’S FAILURE TO IMPLEMENT THE FAMILY VIOLENCE OPTION, at www.now/def.org/html/issues/wel/dangindi.shtml (last visited Oct. 29, 2002)).

111. Richmond, *supra* note 78, at 586.

112. 45 C.F.R. § 260.10 to § 260.76 (1999) Subpart B (§§ 260.50-59) address special provisions applicable to domestic abuse.

states under the Family Violence Option will not be penalized if more than twenty percent of their cases exceed time limits, so long as those cases are “federally recognized good cause domestic violence waivers.”¹¹³ The Family Violence Option provides no relief for teenage mothers or immigrant women.¹¹⁴

According to a study by Tufts University, forty-two states have adopted policies that are likely to put poor families in a worse position than before welfare reform, and that, as of October 1, 1997, “twenty-four states have adopted welfare policies which ‘provide less assistance in achieving job readiness and obtaining jobs than was provided under previous welfare policies.’”¹¹⁵

The entire Family Violence Option is based on the false assumption that women will voluntarily reveal to their welfare workers that they are being battered, that the women’s needs will be adequately assessed, and that states have adopted systems that will provide effective intervention and counseling.¹¹⁶ Women are suspicious of how their abuse is relevant to their welfare application, and are understandably concerned that the information will be misused.¹¹⁷

Under PRWORA, women must cooperate in paternity and child support, because a failure to cooperate means a reduction in aid for the family.¹¹⁸ PRWORA is more punitive than previous welfare programs in that children’s benefits may now be reduced because of their parents’ actions.

PRWORA also expanded the Federal Parent Locator Service which was originally created in 1974 to provide database information

113. *Id.* (quoting 45 C.F.R. § 260.55 (2001)) The hardship exception is codified at 42 U.S.C. §§ 608 (a)(7)(C). *See* 42 U.S.C. § 608(a)(7)(C)(iii) for the definition of “battered or subject to extreme cruelty.”

114. Richmond, *supra* note 78, at 587; *see also* Demie Kurz, *Women, Welfare and Domestic Violence*, 25 SOC. JUST. 105, 113 (1998).

115. Richmond, *supra* note 89, at 592 (quoting CENTER ON HUNGER AND POVERTY, TUFTS UNIVERSITY, ARE STATES IMPROVING THE LIVES OF POOR FAMILIES? A SCALE MEASURE OF STATE WELFARE POLICIES 14-16 (1998) (discussing barriers to employment); THE URBAN INSTITUTE, BUILDING AN EMPLOYMENT FOCUSED WELFARE SYSTEM; WORK FIRST AND OTHER WORK-ORIENTED STRATEGIES IN FIVE STATES 9 (1998)).

116. *See* Cole & Buel, *supra* note 78, at 318-20.

117. *See* Graham, *supra* note 89, at 457 (citing Cole & Buel, *supra* note 78, at 317-18).

118. Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and Failure to Account for Domestic Violence*, 15 WIS. WOMEN’S L.J. 367, 377 (2000).

on parents and children. Under PRWORA, two new databases were created: a central registry for support orders and a Directory of New Hires.¹¹⁹ Both databases attempt to streamline the efforts to locate parents who owe child support. States are required to have a family violence indicator that is to be activated when potential safety concerns are recognized. The family violence indicator extends a waiver to women to avoid participating in otherwise mandatory paternity proceedings. Each state defines its own criteria for triggering the family violence indicator. Some rely on the existence of a protective order, findings of child abuse, or self reporting, whereas others require women to make a showing of “good cause.” Some observers are concerned that if women are not aware of the family violence indicator, they may not take the necessary action to trigger it to protect themselves.¹²⁰ A small number of women apply under their state’s “good cause” requirement. In a Denver study, twenty-one percent said they did not apply for good cause waiver because of fear of their abusive partner and thirty-two percent said they did not have the documents to prove harm.¹²¹

F. Immigration

Battered women who are not citizens of the United States share all of the vulnerabilities of other battered women, but their circumstances are exacerbated by their non-citizenship status. Depending on their country of origin, their situation may be complicated by their dynamics of race, culture, class and gender, which are all more fully described in other articles.¹²² Given these variables, there is no “essential” immigrant woman, but these women’s common plight of non-citizenship status prevents them from taking advantage of many of the protections afforded to citizens

119. *Id.* at 375-76.

120. *Id.* at 376.

121. Jessica Pearson et al., *Child Support and Domestic Violence: The Victims Speak Out*, 5 VIOLENCE AGAINST WOMEN 427, 441 (table 3) (1999).

122. *See, e.g.*, Cecelia M. Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 205-09 (1999) (describing the distinctive experiences of Asian women, Latinas and Non-African-American Black immigrants).

who have suffered abuse.

As in other areas of the law that attempt to provide both protection and relief for battered women, immigration law reflects conflicting policies that ultimately undermine a woman's ability to exercise agency for the safety of herself and her children. United States policies towards non-citizens are fraught with inconsistencies, and once more, the law attempts to control. Most significant to this Article are the immigration policies that favor marriage by giving advantages in obtaining citizenship to women with qualified marriages to citizens or lawful permanent residents. In addition, immigration regulations punish domestic abuse more severely than criminal statutes alone because they categorize a conviction for domestic abuse as a deportable offense. Both sets of policies result in traps for women who seek to escape domestic abuse.

In order to become a United States citizen, a battered woman may find herself with limited options. She may independently self-petition for immigrant status,¹²³ or her spouse may petition for her, which gives her the status of conditional residency if she has been married for less than two years.¹²⁴ If the Immigration and Naturalization Service (INS) questions her status and begins its removal proceedings under 240A, the woman may rely on the Violence Against Women Act (VAWA)¹²⁵ to cancel the removal proceedings.¹²⁶ Each of these options is fraught with barriers that her batterer may exploit to control her.

In order to have a removal proceeding cancelled or to self-petition for citizenship, a woman must prove that she has been of good moral character for three consecutive years prior to her application.¹²⁷ Prior criminal acts and prostitution are grounds for finding a lack of good moral character, despite the fact that forced prostitution is recognized

123. *Id.* at 167-72 (citing 8 C.F.R. § 204.2(c) (1999)).

124. Espenosa, *supra* note 122, at 173-75 (citing Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1646 (1994 & Supp. V 1999)) [hereinafter INA]).

125. Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40701-40703, 108 Stat. 1902, 1953 (1994).

126. *Id.* at 172-74.

127. Elizabeth Shor, Note, *Domestic Abuse and Alien Women in Immigration Law: Response and Responsibility*, 9 CORNELL J.L. & PUB. POL'Y 710 (2000) (citing INA § 240, 8 U.S.C. § 1229) (1994 & Supp. IV 1998)).

as a form of abuse.¹²⁸ The good moral character requirement leaves a non-citizen woman vulnerable to her abuser who may realize that he can threaten to have her charged with domestic violence or have her arrested in retaliation when she finally invokes the law or leaves her abuser.¹²⁹ Mandatory arrest laws, no-drop policies, laws that encourage arrest of mutual aggressors, and programs that encourage police to arrest the first aggressor without determining who is really the provocateur¹³⁰ leave non-citizen women even more subject to attack than the general population of women.¹³¹ If the non-citizen woman is arrested because of her husband's abuse of the legal system, she may find herself making a Hobson's choice, as a plea bargain may cause her to lose her status of good moral character for citizenship purposes.

Moreover, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA)¹³² re-defined "convictions" so that a woman who has been wrongly arrested may find herself being deported.¹³³ Under this definition, deferred adjudications are considered final convictions, so a woman who accepts an offer of either diversion or counseling, to avoid having to go to trial, has technically received a conviction that may result in her deportation.¹³⁴

128. *Id.* Shor, *supra* note 122, at 711 (citing INA § 101(f)(3), 8 U.S.C. § 1101(f)(3) (1994 & Supp. IV 1998)).

129. Espenosa, *supra* note 122, at 171.

130. *Id.* at 181-91.

131. *Id.* at 181-205.

132. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 322, 110 Stat. 3009-546, 3009-628 to 629 (1996)(codified as amended at 8 U.S.C. § 1101(a)(48)(A)(Supp. III 1997)).

133. *Id.* at 180-81 (citing 8 U.S.C. § 1101(a)(48)(A) (Supp. III 1999)).

A conviction for immigration purposes is defined as:

[A] formal judgement of guilt of the alien entered by a court, or if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Id. at 180.

134. *Id.* at 181. Espenosa explains how a battered immigrant woman can suffer as a result of the new definition of conviction in conjunction with the "good moral character" requirement:

In the typical case, a new aggravated felony conviction would render an applicant deportable, but would not make them inadmissible. Therefore, non-VAWA applicants are allowed to adjust their status, while VAWA applicant's visa can be denied on the

Immigration policies reflect the trend toward zero tolerance for domestic abuse and once more, the “get tough” policies of the law backfire on women who are the victims of domestic abuse.¹³⁵ Because the commission of domestic abuse is grounds for deportation, some women are deterred from reporting their abuse.¹³⁶ For a non-citizen woman whose presence in the United States is based on her marriage to a permanent resident, the deportation of her spouse could result in her loss of ability to self-petition for citizenship. Additionally, if her husband is deported, she may subsequently be deported as well.¹³⁷ Moreover, the non-citizen abused woman may be financially dependent on the abuser, may rely on him to provide language translations, or may need him to explain the legal and cultural systems. Thus, family and social pressures will deter her from being “the one” who caused the deportation of her husband.

Cecelia M. Espenosa has suggested a number of solutions to the problems of the intersection of domestic abuse laws, immigration laws, and the criminal justice system which exacerbate the plight of battered women rather than alleviate their problems. At the outset, she recommends the elimination of the good moral character requirement from VAWA, because traditional petitioning requirements do not require an affirmative showing of good moral character.¹³⁸ She suggests that judges use a case-by-case analysis to allow criminal and immigration courts to make judicial recommendations against deportation.¹³⁹ Such recommendations would encourage the use of treatment and deterrence so that families can choose counseling and rehabilitation, not just punishment.¹⁴⁰ These remedies are especially important for women who are accused of domestic abuse, when in fact they are acting in self-defense or

ground of lack of good moral character. The good moral character requirement which exists for VAWA applicants creates an adverse and uneven result.

135. *Id.* at 209-14.

136. Shor, *supra* note 127, at 706 (citing Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1421 (1993)).

137. *Id.*

138. Espenosa, *supra* note 122, at 215-17.

139. *Id.* at 216-17.

140. *Id.* at 218.

mutual combat which are often difficult for women to prove.

Espenoza's recommendations are victim-oriented and logical, but are contrary to the emerging pattern. The legislatures and courts are more interested in "controlling" the lives of non-citizen battered women, and substituting their own judgment, than they are in giving women the autonomy to make themselves safe from abuse.

G. Criminal Justice System

One of the greatest developments of the Order for Protection statutes is that a violation of an Order will result in a criminal charge. The possibility of a criminal charge provides a woman with much stronger clout than would the mere filing of a motion for civil contempt.

In the 1980s, after the historic research completed in Minnesota, most jurisdictions adopted a "mandatory arrest" policy that required police to make an arrest regardless of the wishes of the victim.¹⁴¹ Advocates for battered women argued that because police officers had historically been reluctant to arrest for the crime of domestic violence, mandatory arrest laws eliminated the inconsistencies allowed by individual discretion. They also argued that perpetrators pressured women to tell the police not to arrest, and that battered women should not have to choose whether to have a batterer arrested. The advent of the mandatory arrest policy was the first major loss of agency for battered women. Observers have argued that women's awareness that the police will arrest their batterers regardless of their wishes has deterred many women from calling the police or enforcing their Orders for Protection.¹⁴² Women may want violence to stop, say these observers, but they do not necessarily want the perpetrator to be incarcerated.

The development of "no-drop" policies and legislation was another major loss of battered women's autonomy, and prohibited prosecutors from dropping their criminal charges at the request of the

141. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859 (1996).

142. See Katherine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1464 (2000).

victim.¹⁴³ According to Cheryl Hanna, no-drop policies may be “hard,” in which “cases proceed regardless of the victim’s wishes when there is enough evidence to go forward,”¹⁴⁴ or “soft,” in which “prosecutors do not force victims to participate in the criminal process; rather, victims are provided with support services and encouraged to continue the process.”¹⁴⁵ Hanna suggests that it is difficult to assess no-drop policies because of the variations of published policies, and the gaps that exist between the policies and their implementation.¹⁴⁶ In hard no-drop cases, the prosecutor issues a subpoena for the woman’s testimony, and her failure to cooperate may result in contempt proceedings.¹⁴⁷ Thus, she is essentially mandated to participate.

Supporters of no-drop policies have encroached even further upon women’s autonomy through the use of “victimless” prosecutions. Prosecutors work closely with the police to gather all evidence as if the woman will not testify, so that regardless of her wishes, the prosecutor may go forward. To assist the police in proceeding with victimless prosecutions, appropriations under VAWA provide funds to local police departments to purchase tape recorders and instant cameras to help gather evidence at the scene. Additionally, money is appropriated for training programs so that officers would be knowledgeable about how to interview witnesses and gather evidence.¹⁴⁸

These prosecutorial and police practices intersect with the other areas of law which are invoked when a woman applies for an Order for Protection. She may not have a choice about obtaining an Order for Protection because of laws associated with custody, employment, welfare, or immigration, but once she gets it, she is trapped in a system that spins out of control. Her choice to get an Order for

143. Hanna, *supra* note 141, at 1862.

144. *Id.* at 1863.

145. *Id.*

146. *Id.* at 1865.

147. *Id.* at 1892 (discussing the 1983 Alaska case of Maudie Wall, a battered woman who was jailed for failure to participate in prosecution of her husband).

148. The theoretical debate regarding whether these policies are “in the best interest” of battered women is beyond the scope of this Article and is well-summarized in Cheryl Hanna’s article supporting the elimination of victims in the decision of how and whether to proceed. *Id.* at 1868-1900.

Protection may even impact her access to insurance protections. Many observers of domestic violence policy issues fail to consider these far-reaching consequences and ignore the fact that the criminal justice system does not exist in a vacuum.

IV. HOW TO COUNSEL THE CLIENT AT RISK

Others have documented the social, cultural, and racial dynamics that have discouraged women from using the State to intervene in her family.¹⁴⁹ Anyone who counsels a woman about getting an Order for Protection has acted irresponsibly if the considerations identified by these scholars are not foremost in the counselor's mind. Counselors must remain client-centered at all stages of the client's case, because only the client knows what strategies will keep her safe and what is most important in her life. As Katherine K. Baker articulately argues in her review of Elizabeth M. Schneider's new book, *BATTERED WOMEN AND FEMINIST LAWMAKING*,¹⁵⁰ maintaining relationships may be paramount in a woman's life. The lawyer or advocate must alert the client to a wide range of legal consequences, however, that may not be apparent to the client as she is preoccupied with her own safety.

Schneider explains how advocates have "moved from being suspicious of the state involvement to being supportive of it,"¹⁵¹ but argues that the shift may have caused the pendulum to swing too far. This Article described the intersection of Civil Orders for Protection and the laws associated with issues of custody, insurance, employment, welfare, immigration and criminal prosecutions. In our preoccupation with one client or one theoretical cause, we may lose sight of the bigger picture that what was once a ticket to freedom has now become a license to entrap.

149. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993).

150. See Baker, *supra* note 142.

151. *Id.* at 1470.