

VOLUNTARY IRREVOCABLE PROTECTION ORDERS: A  
COMMITMENT MECHANISM FOR DOMESTIC VIOLENCE  
SURVIVORS

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*This article analyzes the legal framework of domestic violence in the United States and provides a potential solution to its lack of effective, non-coercive commitment mechanisms. It proposes a novel legal scheme designed to protect domestic violence survivors without ignoring their autonomy rights: the voluntary irrevocable protection order. Under this proposal, a survivor who initiates a petition for a civil protection order or is involved in a criminal case would at the outset be able to make the order impossible to vacate, even at her own request, for a certain time period. This proposal uses research from behavioral economics to design a commitment mechanism for domestic violence survivors in order to extend the benefits of maintained protection orders to more people and encourage others who might have previously feared being forced into the criminal justice system to seek help. By securing the consent of survivors, the legal system can discharge its criminal justice and community safety functions without unduly imposing the will of the state on survivors. Besides providing a low-cost commitment mechanism to domestic violence survivors, the opportunity for survivor autonomy is the greatest advantage that voluntary irrevocable protection orders offer.*

## INTRODUCTION

“I don't believe anything that you're saying ... The reason I don't believe it is because I don't believe that anything like this could happen to me ... Therefore, since I would not let that happen to me, I can't believe that it happened to you.”<sup>1</sup>

You probably know someone with an abusive partner.<sup>2</sup> Maybe you have noticed signs—missed work, canceled plans, implausibly explained injuries, anxiety when the phone rings—maybe you have even heard the

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<sup>1</sup> Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 338 (2011) (quoting MD. SPECIAL JOINT COMM. ON GENDER BIAS IN THE COURTS, GENDER BIAS IN THE COURTS 2–3 (1989)).

<sup>2</sup> THE NAT'L CTR. FOR INTIMATE PARTNER VIOLENCE, 2018 INTIMATE PARTNER VIOLENCE STATISTICAL FACT SHEET 1 (2018), [https://ovc.ncjrs.gov/ncvrw2018/info\\_flyers/fact\\_sheets/2018NCVRW\\_IPV\\_508\\_QC.pdf](https://ovc.ncjrs.gov/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_IPV_508_QC.pdf) (presenting data that in the United States, approximately thirty-two percent of women will be victims of physical violence, and forty-seven percent of men and women will be victims of psychological aggression by an intimate partner in their lifetime).

angry voice on the other end. Maybe you thought “this could never happen to me, and if it did, I would not respond in the same way.” If you have ever wondered “why don’t they just get up and leave?,” you are in good company with many judges, clerks, prosecutors, police, and other members of the legal system.<sup>3</sup>

What is abundantly clear from domestic abuse research is that survivors’ reasons for refusing to leave are diverse and complex.<sup>4</sup> It is less clear, however, how best to enhance survivor safety and agency, hold abusers accountable, and challenge abusers’ senses of entitlement to dominate their partners.

Domestic violence is “abuse within the context of an intimate partner relationship, where one partner asserts power and control over the other.”<sup>5</sup> It is a public health problem plagued by underreporting and historical underenforcement, yet it is responsible for the deaths of more than half of the women murdered in the United States each year.<sup>6</sup> Domestic violence encompasses much more than just physical violence, however, and can include psychological, sexual, and economic coercion.<sup>7</sup> The societal costs of domestic violence are immense, with the medical care and productivity losses alone estimated to exceed \$8.1 billion annually.<sup>8</sup>

Domestic violence survivors typically leave and return to their abusers many times before permanently ending the relationship.<sup>9</sup> While their reasons vary, one way to partially explain this cycle is through inconsistent intertemporal preferences. Inconsistent intertemporal preferences are preferences that change over time rather than remaining stable.<sup>10</sup> They appear in many everyday situations that nearly everyone experiences; familiar examples include the decision to diet or exercise followed by lack of follow-through, or the decision to save money for the future followed by the later decision to spend money now. Inconsistent intertemporal

<sup>3</sup> Stoeberl, *supra* note 1, at 336–37.

<sup>4</sup> *Id.* at 335, n. 170.

<sup>5</sup> THE NAT’L CTR. FOR INTIMATE PARTNER VIOLENCE, *supra* note 2, at 1.

<sup>6</sup> Maya Oppenheim, *Trump Administration ‘Rolling Back Women’s Rights by 50 Years’ by Changing Definitions of Domestic Violence and Sexual Assault*, INDEPENDENT (Jan. 24, 2019, 5:47 pm), [https://www.independent.co.uk/news/world/americas/trump-domestic-abuse-sexual-assault-definition-womens-rights-justice-department-a8744546.html?fbclid=IwAR3VsvFJO9DH\\_Em13\\_cUUPdzy\\_A00nkZk0xQFuE6ek1VrI3vHWdrOC1LDSs](https://www.independent.co.uk/news/world/americas/trump-domestic-abuse-sexual-assault-definition-womens-rights-justice-department-a8744546.html?fbclid=IwAR3VsvFJO9DH_Em13_cUUPdzy_A00nkZk0xQFuE6ek1VrI3vHWdrOC1LDSs).

<sup>7</sup> THE NAT’L CTR. FOR INTIMATE PARTNER VIOLENCE, *supra* note 2, at 1.

<sup>8</sup> DEP’T OF HEALTH & HUM. SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (Mar. 2003), <https://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf> (figure adjusted for inflation; 2003 amount is \$5.8 billion).

<sup>9</sup> *Cycle of Violence*, SHELTER FOR HELP IN EMERGENCY (last visited Feb. 1, 2020), <https://www.shelterforhelpinemergency.org/get-help/cycle-violence>.

<sup>10</sup> Anna Aizer & Pedro Dal Bó, *Love, Hate and Murder: Commitment Devices in Violent Relationships*, 93 J. PUB. ECON. 412, 414 (2009).

preferences make it difficult for people to make optimal, time-neutral decisions.<sup>11</sup>

A commitment mechanism is one way to induce follow-through with initial preferences.<sup>12</sup> For example, a person may sign a contract with a personal trainer or put money into an account from which they cannot withdraw for a specified period in order to induce their future self to act in accordance with their current self's preferences. Domestic violence is another area where commitment mechanisms could be helpful. Assuming that the survivor's initial decision to leave is the right one, she may demand a way to induce her future self to act consistently with it.

State and local governments have implemented certain civil and criminal policies and protections, which essentially function as commitment mechanisms, to combat domestic violence. All jurisdictions allow survivors of domestic violence to petition the court for a civil protection order.<sup>13</sup> A civil protection order is an injunction prohibiting the abuser from contacting, harassing, or harming the petitioner for a specified period.<sup>14</sup> However, the survivor is usually able to ask the court to remove the order before it has expired. On the criminal side, criminal protection orders, mandatory arrest policies, and no-drop prosecution policies exist to increase enforcement against offenders. These policies are designed to overcome historic justice system resistance to domestic violence intervention by cabining the discretion of various state actors.<sup>15</sup> However, they might also help to overcome changed preferences of survivors, who frequently refuse to cooperate in state attempts to prosecute abusers or enforce

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<sup>11</sup> See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1545 (1998) (concluding that in reality, humans display only bounded rationality, bounded willpower, and bounded self-interest); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1059 (2000) (finding that humans frequently "fail to maximize their expected utility," and identifying behavioral factors that may complicate the key assumption in rational choice theory of decisions based on cost-benefit analysis).

<sup>12</sup> See *infra* Section I.B.3.

<sup>13</sup> Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 53 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1036–37 (2014) (quoting *State v. Rhodes*, 61 N.C. 453, 455–56 (1868)) ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."); Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 WOMEN'S RTS. L. REP. 169, 170 (2001) (listing reasons traditionally stated for police officer hesitation to engage with domestic violence cases, including both the perceptions that domestic violence is not criminal behavior and that it involves the most dangerous kind of police work).

protection orders.<sup>16</sup> Although it is possible that these policies reduce the incidence of domestic violence in some situations, they may also discourage reporting and even increase danger because they strip the survivor of the autonomy to make an informed choice about when and for how long to involve the state in her life.

This article proposes a novel legal scheme designed to protect domestic violence survivors without ignoring their autonomy rights: the voluntary irrevocable protection order. Under this proposal, a survivor who initiates a petition for a civil protection order or is involved in a criminal case would, at the outset, be able to make the order impossible to vacate, even at her own request, for a certain period of time. This proposal uses research from behavioral economics to design a commitment mechanism for domestic violence survivors in order to extend the benefits of maintained protection orders to more people and encourage others who might have previously feared being forced into the criminal justice system to seek help. By securing the consent of survivors, the legal system can discharge its criminal justice and community safety functions without unduly imposing the will of the state on survivors. Besides providing a low-cost commitment mechanism to domestic violence survivors, this space for survivor autonomy is the greatest advantage that voluntary irrevocable protection orders offer over existing systems.

This article analyzes the legal framework of domestic violence in the United States and provides a potential solution to its lack of effective, noncoercive commitment mechanisms. Part I provides background information on the prevalence of and on conceptual theories of domestic violence, motivating the need for a commitment mechanism. Part II describes existing approaches to protecting domestic violence victims, including civil and criminal protection orders, mandatory arrest, and no-drop prosecution policies. Part III analyzes these approaches as commitment mechanisms and ultimately concludes that, despite some positive features, these existing frameworks inadequately address the need to protect survivors without unduly infringing on their autonomy rights. Finally, Part IV proposes the creation of voluntary irrevocable protection orders and explains how these orders could both provide low-cost commitment mechanisms to domestic violence survivors and preserve adequate space for survivor autonomy.

## I. DOMESTIC VIOLENCE IN PRACTICE AND CONCEPT

### *A. Prevalence of Domestic Violence*

Domestic violence is “abuse within the context of an intimate partner relationship, where one partner asserts power and control over the other.”<sup>17</sup> Statutory definitions vary by state, but domestic violence can

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<sup>16</sup> Aizer & Dal Bó, *supra* note 10, at 412.

<sup>17</sup> NAT’L CTR. FOR INTIMATE PARTNER VIOLENCE, *supra* note 2, at 1.

include physical, sexual, and psychological abuse, and economic coercion.<sup>18</sup> In the United States, approximately thirty-two percent of women will be victims of physical violence, and forty-seven percent of men and women will be victims of psychological aggression by an intimate partner in their lifetimes.<sup>19</sup> Although far fewer women than men are victims of homicide, about seventy percent of victims killed by an intimate partner are female.<sup>20</sup> Intimate partner violence is the most common type of violence committed against women;<sup>21</sup> more than half of the women murdered each year in the US are killed by an intimate partner.<sup>22</sup>

Estimating the extent of domestic violence and its strain on the judicial system is difficult because it requires piecing together many different types of data, such as police reports, emergency room admissions, and survey results.<sup>23</sup> Pervasive underreporting also makes estimating rates of both domestic violence and recidivism difficult.<sup>24</sup> Historically, family violence was considered a private matter, which largely prevented judicial relief for survivors and punishment of abusers.<sup>25</sup> Legal treatment of

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> SHANNAN CATALANO ET AL., FEMALE VICTIMS OF VIOLENCE 2 (last updated Oct. 23, 2009), <https://www.bjs.gov/content/pub/pdf/fvv.pdf>. This article will refer to survivors as women and abusers as men as shorthand, but the analysis applies to abuse by women of men and violence in same sex relationships as well. In 2008, about 99% of the intimate partner violence against women was committed by men. *Id.* Domestic violence is perpetrated primarily by men, whether against same sex or opposite-sex partners; PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 56 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (“Male same-sex cohabitants were more likely to report victimization by a male partner than were male opposite-sex cohabitants by a female partner. In comparison, female same-sex cohabitants reported less violence by a female partner than did female heterosexual cohabitants by a male partner.”).

<sup>21</sup> CLAUDIA GARCIA-MORENO, ET AL., WHO MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN, WORLD HEALTH ORG. xiv (2005), [http://whqlibdoc.who.int/publications/2005/924159358X\\_eng.pdf?ua=1](http://whqlibdoc.who.int/publications/2005/924159358X_eng.pdf?ua=1) (reporting three quarters of all violence against women is perpetrated by domestic partners); Anna Aizer, *The Gender Wage Gap and Domestic Violence*, 100 AM. ECON. REV. 1847, 1848 (2010).

<sup>22</sup> Oppenheim, *supra* note 6.

<sup>23</sup> Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL’Y REV. 51, 51, 59 (2000).

<sup>24</sup> *See, e.g.*, Stoever, *supra* note 15, at n. 12 (discussing study finding sixty-two percent re-arrest rate for domestic violence offenders in New York, which is only a small percentage of domestic violence due to underreporting) (finding that “in 2008, 72% of the intimate partner violence against males and 49% of the intimate partner violence against females was reported to police.”); Catalano, *supra* note 20, at 2.

<sup>25</sup> *See e.g.*, Stoever, *supra* note 15, at 1036–37 (quoting *State v. Rhodes*, 61 N.C. 453, 455–56 (1868)) (“We will not inflict upon society the greater evil of

domestic violence has since changed dramatically, and perception of domestic violence as a private matter has evolved somewhat as a result of reform movements in the 1960s and 1970s.<sup>26</sup> Still, detection remains a serious problem because of the inherently private nature of the setting in which domestic violence most often occurs: the home.<sup>27</sup> Social stigma and survivor feelings of guilt or shame about the abuse also account for low response rates.<sup>28</sup> In 2015, in more than eighty percent of domestic violence victimizations, the victim did not receive assistance from the legal system or a victim service agency.<sup>29</sup>

A multi-country study by the World Health Organization found that acts of physical violence are almost always part of a larger course of abusive conduct rather than isolated incidents.<sup>30</sup> The typical domestic violence offender engages in a pattern of crimes against the same victim, exhibiting high rates of recidivism.<sup>31</sup> In fact, past abuse is the best predictor of future abuse.<sup>32</sup> Social science research also indicates that controlling

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raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”).

<sup>26</sup> *Id.* at 1041 (discussing efforts of the battered women’s movement to create legal mechanisms to enhance women’s safety and independence).

<sup>27</sup> However, from 1995–2015, estimated rates of violent intimate partner victimization decreased from 15.5 to 5.4 per 1,000 women and 2.8 to 0.5 per 1,000 men. DEP’T OF HEALTH & HUM. SERVS., *supra* note 8, at 1, 33.

<sup>28</sup> Isabel Ruiz-Pérez et al., *Methodological Issues in the Study of Violence Against Women*, 61 J. EPIDEMIOLOGY & CMTY. HEALTH ii26, ii27 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2465770/>.

<sup>29</sup> NAT’L CTR. FOR INTIMATE PARTNER VIOLENCE., *supra* note 2.

<sup>30</sup> See Claudia Garcia-Moreno et al., *supra* note 21, at xiii (finding that most women who had ever been physically abused by partners experienced acts of violence more than once and that controlling behaviors such as routinely attempting to restrict a woman’s contact with her family or friends, insisting on knowing where she is at all times, and controlling her access to health care, were associated with the risk of physical and sexual violence); Waul, *supra* note 13, at 52 (reporting on National Crime Victimization Survey and National Institute of Justice/Centers for Disease Control and Prevention studies finding that many women experience multiple victimizations); see also *U.S. v. Meade*, 175 F.3d 215, 226 (1st Cir. 1999) (noting: “The dangerous propensities of persons with a history of domestic abuse are no secret, and the possibility of tragic encounters has been too often realized.”).

<sup>31</sup> See Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire that Predicts the Likelihood that a Victim of Intimate Partner Violence Will Be Murdered by Her Partner*, 24 WIS. J.L. GENDER & SOC’Y 277, 306 (2009).

<sup>32</sup> Stoever, *supra* note 15, at 1064. See also Waul, *supra* note 13, at 52 (reporting three studies which found that a “batterer’s prior abuse history is a significant predictor of continuing abuse following issuance of a protection order.”). Noting that ending an abusive relationship is usually an iterative process over time rather than a single decision, *id.* at 56, and multiple studies conclude

behaviors which are not themselves criminal can predict future physical danger.<sup>33</sup> “Women whose partners verbally abused them, were jealous or possessive, or denied them access to family, friends, and income were significantly more likely to report” experiencing physical violence.<sup>34</sup> Behaviors intended to monitor, control, or threaten can cause psychological damage that is sometimes more severe and long lasting than the physical effects of abuse.<sup>35</sup> Overall, the findings from the National Violence Against Women Survey make clear that many women in violent relationship are victims of “systematic terrorism,” experiencing multiple forms of coercion at the hands of their abusers.<sup>36</sup>

### B. Time Inconsistency in Domestic Violence

#### 1. The Stages of Abuse and the Stages of Leaving

In 1979, Lenore Walker developed the cycle theory of abuse in order to help explain patterns of behavior in abusive relationships.<sup>37</sup> Although Walker herself recognized that the cycle is a simplified model that cannot perfectly describe all abusive relationships,<sup>38</sup> it continues to be a widely used concept in U.S. domestic violence programs.<sup>39</sup> The cycle consists of

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that for most women, “filing for a [civil protection order] was a desperate attempt to obtain help with an increasingly dangerous situation.” *Id.* at 57.

<sup>33</sup> Stoever, *supra* note 10, at 1089 (citing Keith E. Davis et al., *Stalking Perpetrators and Psychological Maltreatment of Partners: Anger-Jealousy, Attachment Insecurity, Need for Control, and Break-Up Context*, 15 VIOLENCE & VICTIMS 407, 407 (2000) (stalking is significantly correlated with psychological abuse)); *see also* Troy E. McEwan et al., *A Study of the Predictors of Persistence in Stalking Situations*, 33 LAW & HUM. BEHAV. 149, 149 (2008) (stalkers have the potential to cause immense harm to their victims).

<sup>34</sup> Tjaden & Thoennes, *supra* note 20, at 56.

<sup>35</sup> Stoever, *supra* note 1, at 328, n. 110 (citing Mary Ann Dutton et al., *Court-Involved Battered Women's Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse*, 14 VIOLENCE & VICTIMS 89, 97 (1999)).

<sup>36</sup> Tjaden & Thoennes, *supra* note 20, at 56.

<sup>37</sup> LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* 126 (2d ed. 2000) (referencing her 1979 work).

<sup>38</sup> *Id.* (noting: “These women were not randomly selected and they cannot be considered a legitimate data base from which to make specific generalizations.”).

<sup>39</sup> *See, e.g., Cycle of Violence*, WOMEN’S CTR. YOUTH & FAM. SERVS., <https://www.womenscenteryfs.org/index.php/get-info/prevention/education/14-cycle-of-violence> (last visited Feb. 1, 2020); *The Cycle of Violence*, MARJAREE MASON CTR., <https://mmcenter.org/stay-informed/cycle-violence> (last visited Feb. 1, 2020); *Cycle of Violence*, *supra* note 9; Robert F. Friedman, Note, *Protecting Victims from Themselves, but Not Necessarily from Abusers: Issuing A No-Contact Order over the Objection of the Victim-Spouse*, 19 WM. & MARY BILL RTS. J. 235, 240 (2010) (battered women syndrome has primarily appeared in the legal system as a defense in assault or homicide cases—the defense being that, as a result of repeated abuse, the woman finally reached a breaking point).

three stages: 1) tension building; 2) acute violence; and 3) reconciliation/honeymoon.<sup>40</sup>

During the tension building phase, stress builds and the abuser feels ignored, threatened, annoyed, or wronged.<sup>41</sup> The victim feels as if she is “walking on eggshells” and attempts to avoid the impending violence by being agreeable, avoiding family and friends, or trying to reason with or please the abuser.<sup>42</sup> During the acute violence stage, the abuser attempts to dominate the victim with physical violence, often coupled with verbal and psychological abuse.<sup>43</sup> The victim may attempt to protect herself or her children, leave, or call the police.<sup>44</sup>

During the reconciliation/honeymoon phase, the abuser feels concern about being held accountable for his behavior and worries about being shamed by others or left by the victim, and claims to feel overwhelming remorse and sadness.<sup>45</sup> This phase marks an apparent end of violence, with the abuser assuring the victim that it will never happen again or that he will do his best to change.<sup>46</sup> Common abuser behaviors during this stage include begging for forgiveness, declaring love, wanting to get counseling, and self-mutilation.<sup>47</sup> Abusers are often so convincing, and survivors so eager for the relationship to improve, that survivors stay in the relationship, attempt to stop legal proceedings, and feel happy and hopeful of change.<sup>48</sup> A survivor may also return out of economic necessity or because the abuser threatens more violence against her or her children if she does not.<sup>49</sup> The total cycle can occur hundreds of times in a relationship and can take anywhere from a few hours to over a year to complete.<sup>50</sup> The cycle usually shortens over time; eventually the reconciliation stage may disappear, and violence will become more frequent.<sup>51</sup>

Researchers have modeled the process of leaving an abusive relationship as consisting of five stages.<sup>52</sup> In the first and second stage, the survivor begins to lose affection for the abuser and emotionally disconnect from the relationship.<sup>53</sup> In the third stage, the survivor notices the effects

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<sup>40</sup> Walker, *supra* note 37, at 126.

<sup>41</sup> *Id.*

<sup>42</sup> *The Cycle of Violence, supra* note 39; *Cycle of Violence, supra* note 9.

<sup>43</sup> *The Cycle of Violence, supra* note 39.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Stoever, *supra* note 1, at 335, n. 150.

<sup>50</sup> *The Cycle of Violence, supra* note 39.

<sup>51</sup> *Cycle of Violence, supra* note 9.

<sup>52</sup> Lyndal B. L. Khaw & Jennifer Hardesty, *Leaving an Abusive Partner: Exploring Boundary Ambiguity Using the Stages of Change Model*, 1 J. FAM. THEORY & REV. 38, 43–48 (2009).

<sup>53</sup> *Id.* at 43–44.

of the abuse, prepares to leave, and leaves.<sup>54</sup> In the fourth stage, the survivor goes back to the relationship.<sup>55</sup> The fifth stage is when the survivor finally ends the abusive relationship.<sup>56</sup> This stage is marked by separation for six or more months.<sup>57</sup> The average victim will leave an abusive relationship seven times before she leaves permanently.<sup>58</sup> As the next section will explore, this cyclical pattern is not unique to domestic violence. It is present in many everyday situations, and there are ways to break it. However, there are few areas in which the ramifications of the cycle are as potentially serious as in domestic violence, and ending the cycle becomes correspondingly more urgent. The remainder of this article will discuss existing efforts to break the cycle of abuse and propose an improved mechanism.

## 2. Inconsistent Intertemporal Preferences

Classic economic rational decision-making models assume that people have stable preferences and will use all available information about the past, present, and future to make the best possible decisions over time.<sup>59</sup> However, well-established literatures in psychology and behavioral economics have shown that humans often display what are called inconsistent intertemporal preferences.<sup>60</sup> Inconsistent intertemporal preferences do not remain stable but change over time.<sup>61</sup> For example, a person with the sincere desire to avoid junk foods and lose weight today may

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<sup>54</sup> *Id.* at 44–46.

<sup>55</sup> *Id.* at 40.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Cycle of Violence*, *supra* note 9 at \*2 (Cal. Ct. App. 2014) (“Victims of domestic violence return to their abusers an average of seven times.”); *see also* New Jersey Div. of Youth & Family Servs. v. I.H.C., 2 A.3d 1138, 1146 (N.J. Super. App. Div. 2010) (explaining that “victims of domestic violence leave their abusers an average of seven times before they are able to leave permanently.”); *People v. Basulto*, No. B159993, 2003 WL 22456800, at \*4 n.3 (Cal. Ct. App. 2003) (“[T]he average domestic violence victim leaves and returns to their relationship five times.”).

<sup>59</sup> HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS* 3, (8th ed. 2010). [http://dl.booktolearn.com/ebooks2/science/economy/9780393934243\\_intermediate\\_microeconomics\\_by\\_varian\\_1e58.pdf](http://dl.booktolearn.com/ebooks2/science/economy/9780393934243_intermediate_microeconomics_by_varian_1e58.pdf)

<sup>60</sup> *See, e.g.*, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1545 (1998) (concluding that in reality, humans display only bounded rationality, bounded willpower, and bounded self-interest); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1059 (2000) (finding that humans frequently “fail to maximize their expected utility,” and identifying behavioral factors that may complicate the key assumption in rational choice theory of decisions based on cost-benefit analysis).

<sup>61</sup> Aizer & Dal Bó, *supra* note 10.

tomorrow find the temptation to snack irresistible. A person who has made the decision to save more money for retirement today may change their mind and decide to make an expensive purchase tomorrow. Someone who has chosen to quit smoking might give in to the pull of nicotine just a few hours later.

The stages of an abusive relationship can be at least partially explained by inconsistent intertemporal preferences on the part of the victim. When the abuse has just occurred, the victim strongly prefers to remove herself from the abuser and possibly end the relationship for good. However, for a variety of reasons outlined above (abuser manipulation, financial circumstances), as time passes from the last abuse incident, the victim's preferences may reverse.<sup>62</sup> This is consistent with empirical evidence indicating that emotional states can affect demand for goods or actions.<sup>63</sup> The cycle of abuse, however, dictates that a victim will likely rekindle her desire to leave.<sup>64</sup>

From a time-neutral position, survivors wishing to maximize their overall utility will almost certainly want to end the abusive relationship.<sup>65</sup> Nevertheless, the dynamics of the abuse—including the fact that victims are in a personal relationship with, often live with, and may be financially

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<sup>62</sup> See Waul, *supra* note 13, at 56 (reporting studies of domestic violence victims and protection orders finding that common reasons for failing to request a permanent protection order were that the couple had reconciled and pressure from the batterer).

<sup>63</sup> See George Lowenstein, *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 267 (2001) (“[E]motional reactions to risky situations often diverge from cognitive assessments of those risks.”); George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORG’L BEHAV. & HUM. DECISION PROCESSES 272, 273–74 (1996) (“Behavior at variance with deliberation, however, is by no means confined to the realm of the ‘abnormal.’”); Daniel Read & Barbara van Leeuwen, *Predicting Hunger: The Effects of Appetite and Delay on Choice*, 76 ORG’L BEHAV. & HUM. DECISION PROCESSES 189, 190, 199–201 (1998) (testing the “cold-to-hot empathy gap” and finding significant effects of current hunger, rather than future hunger, on future food choices); Timothy Wilson & Daniel Gilbert, *Affective Forecasting*, 35 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 345, 393 (2003) (“It might seem that as people experience life’s successes and setbacks, they should come to recognize that their emotional reactions do not last as long as they expected . . . there is evidence that people’s memory for their past emotional reactions is poor.”); Daniel Gilbert et al., *The Future is Now: Temporal Correction in Affective Forecasting*, 88 ORG’L BEHAV. & HUM. DECISION PROCESSES 430, 440 (2002) (“The ability to project oneself forward in time is one of our most important and uniquely human capacities, but research shows that people often have trouble with such ‘mental time travel.’”).

<sup>64</sup> Waul, *supra* note 13, at 57 (reporting a study’s finding that a quarter of domestic violence victims sought protection orders after five or more years abuse).

<sup>65</sup> Stoeber, *supra* note 1, at 325 (quoting Jody Brown, *Working Toward Freedom from Violence: The Process of Change in Battered Women*, 3 VIOLENCE AGAINST WOMEN 5, 5 (1997)).

dependent on their abusers—can make it impossible for survivors to escape the cycle.<sup>66</sup> Researchers working with survivors of domestic abuse find that they are “typically active survivors who are highly motivated to terminate the violence and are vigorously engaged in help-seeking efforts and the process of surviving violence.”<sup>67</sup> Abuse survivors engage in many strategic responses and behaviors to protect their children and themselves, including leaving their abusers, seeking counseling, telling others, and involving the justice system.<sup>68</sup> Some of the most common advice they give to other survivors is “don’t let the pattern persist, no matter what.”<sup>69</sup> However, in most cases, the pattern does persist far beyond the first time the woman decides that the abuse must end. Further, the most difficult stage of the cycle—permanently ending the violence—begins only after the survivor leaves.<sup>70</sup>

It is difficult for many people, including members of the justice system, to believe that anyone could stay in a violent intimate partner relationship for any length of time, much less years. Judges sometimes disbelieve reports of violence because they “cannot fathom that (1) it could happen to them, or (2) they would respond in the same way.”<sup>71</sup> One author and practitioner has commented: “I have always sensed that these examiners needed to be able to reassure themselves that this could not happen to them.”<sup>72</sup> In denying a request for a protection order, one judge explained, “I don’t believe anything that you’re saying . . . The reason I don’t believe it is because I don’t believe that anything like this could happen to me . . . Therefore, since I would not let that happen to me, I can’t believe that it happened to you.”<sup>73</sup> Framing the cycle of domestic violence as a form of the inconsistent intertemporal preferences experienced by almost every human being will provide some context as to how “it could happen to [you]” for those who have never experienced any form of domestic abuse.<sup>74</sup> At the same time, it is critical to highlight that responsibility for the continuation of domestic violence lies with abusers, not victims. “Perhaps . . . observers feel a need to blame someone . . . to explain why it could not happen in their own home . . . It seems easier—less

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<sup>66</sup> See Waul, *supra* note 13, at 56 (reporting studies of domestic violence victims and protection orders finding that common reasons for failing to request a permanent protection order were that the couple had reconciled and pressure from the batterer).

<sup>67</sup> Stoeber, *supra* note, 1 at 325.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 331 (quoting Jody Brown, *Working Toward Freedom from Violence: The Process of Change in Battered Women*, 3 VIOLENCE AGAINST WOMEN 5, 5 (1997)).

<sup>70</sup> *Id.* at 332.

<sup>71</sup> *Id.* at 338.

<sup>72</sup> *Id.* at 337–338, n.165.

<sup>73</sup> *Id.* at 338 (quoting MD. SPECIAL JOINT COMM. ON GENDER BIAS IN THE COURTS, GENDER BIAS IN THE COURTS 2–3 (1989)).

<sup>74</sup> *Id.*

frightening—to ask why battered women stay . . . than to ask why men batter.”<sup>75</sup> Complete change will not come until we fully address the dynamics underlying the problem—abusers’ desire for power and control. One piece of the puzzle is developing domestic violence responses that both empower women to leave and help them keep their abusers away. Voluntary irrevocable protection orders can help accomplish this important goal.

### 3. Commitment Mechanisms

The fact that a person experiences the phenomenon of inconsistent intertemporal preferences does not mean that she is doomed to perpetually repeat the same, unhappy cycle. A person with inconsistent intertemporal preferences can often foresee that her preferences will change in the future, especially if she has experienced the same change many times in the past. In response to this foreseeable undesirable preference reversal, this person may try to discipline her future behavior by committing herself to a certain future action. She may seek out a commitment mechanism, which is a way to force or encourage her future self to act consistently with a decision made by her past self.<sup>76</sup>

Research has established commitment mechanisms as effective means of overcoming the inconsistent intertemporal preferences problem in a variety of settings. One study found that long-term gym usage significantly increased when participants were asked to self-fund a contract committing them to visit the gym a few times a week.<sup>77</sup> Participants got their money back if they kept their gym commitments, and if not, the money was donated to charity.<sup>78</sup> This strategy worked even better than simply paying participants to go to the gym, and the effects persisted after the program ended.<sup>79</sup> The government can also supply commitment mechanisms. Two examples are IRA and 401k accounts, which provide not only tax-advantaged retirement saving but also penalties for removing money before retirement.<sup>80</sup> These penalties allow savers to incentivize their future selves

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<sup>75</sup> Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1682 (1990).

<sup>76</sup> Aizer & Dal Bó, *supra* note 10.

<sup>77</sup> Heather Royer et al., *Incentives, Commitments, and Habit Formation in Exercise: Evidence from a Field Experiment with Workers at a Fortune-500 Company*, 7 AM. ECON. J.: APPLIED ECON. 51, 52–53 (2015).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 53.

<sup>80</sup> 26 U.S.C. §§ 401, 408 (2019); *see Topic No. 557 Additional Tax on Early Distributions from Traditional and Roth IRAs*, INTERNAL REVENUE SERV. (last updated Aug. 23, 2019), <https://www.irs.gov/taxtopics/tc557> [<https://perma.cc/FT6P-Y6NK>] (“To discourage the use of IRA distributions for purposes other than retirement, you’ll be assessed an additional 10% tax on early distributions from traditional and Roth IRAs, unless an exception applies.”); *Topic No. 558 Additional Tax on Early Distributions from Retirement Plans*

to leave the money to compound rather than spending it. Another government-provided commitment mechanism is high taxes on unhealthy but addictive items, such as cigarettes. These taxes can help bring smoker purchasing behavior in line with quitting—some smokers’ desired but individually unachievable time-consistent preference.<sup>81</sup> Voluntary “no gambling” registries are yet another government-provided commitment mechanism which allow those who register to prevent their future selves from entering state-run casinos.<sup>82</sup>

Domestic violence is another area where commitment mechanisms could be helpful. Assuming that the survivor’s initial decision to leave is the right one, she may demand a way to overcome foreseeable inconsistent intertemporal preference reversals and induce her future self to act consistently with her initial preference. One empirical study has found demand for commitment mechanisms among survivors of domestic violence.<sup>83</sup> Anna Aizer and Pedro Dal Bó analyzed prosecutorial no-drop policies, which require the government to prosecute domestic violence cases even if the victim asks that the case be dropped or will not cooperate.<sup>84</sup> They found that the implementation of these policies decreased the number of murders perpetrated by domestic violence survivors against their abusers by fifteen to twenty percent.<sup>85</sup> This study reveals demand from survivors for commitment mechanisms which are less costly than murder, which is probably the costliest and most permanent commitment mechanism there is.<sup>86</sup> In response to no-drop policies, victims substituted away from murdering their abusers towards relying on legal interventions, indicating that no-drop policies are effective commitment mechanisms.<sup>87</sup> Although these policies may help reduce the incidence of domestic

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*Other than IRAs*, INTERNAL REVENUE SERV. (last updated Aug. 23, 2019), <https://www.irs.gov/taxtopics/tc558> [<https://perma.cc/2NKN-8MWR>] (“To discourage the use of retirement funds for purposes other than normal retirement, the law imposes an additional 10% tax on certain early distributions from certain retirement plans.”).

<sup>81</sup> Jonathan Gruber & Sendhil Mullainathan, *Do Cigarette Taxes Make Smokers Happier?*, 5 *ADVANCES IN ECON. ANALYSIS & POL’Y* 1 (2005), <https://www.nber.org/papers/w8872.pdf> (finding empirical evidence that cigarette excise taxes make smokers happier, consistent with the time inconsistent model of smoking); Jonathan Gruber & Botond Koszegi, *Is Addiction ‘Rational’? Theory and Evidence*, 116 *Q. J. ECON.* 1261, 1292 (2001) (finding empirical evidence that smokers exhibit inconsistent intertemporal preferences and suggesting that cigarette taxes should incorporate not only externalities but also “internalities” that smokers impose on themselves).

<sup>82</sup> Ian Ayres & Frederick E. Vars, *Libertarian Gun Control*, 167 *U. PA. L. REV.* 921, 944 (2019).

<sup>83</sup> Aizer & Dal Bó, *supra* note 10, at 413.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See Id.*

violence in some situations and even help survivors permanently leave their relationships, they may also have counterproductive effects, which this article examines in Part III.A below. Nonetheless, this study corroborates the inconsistent intertemporal preferences explanation of domestic violence. Understanding this underlying dynamic will help to craft improved responses, like the voluntary irrevocable protection order this article proposes in Part IV.

## II. THE LEGAL SYSTEM'S RESPONSES TO DOMESTIC VIOLENCE

Before the 1970s in most states, a woman experiencing partner violence had to overcome massive legal burdens to force the state to intervene on her behalf.<sup>88</sup> Among many police officers, prosecutors, and judges, the prevailing attitude was that domestic violence was a private matter and that women were responsible for their victimization for failing to immediately and permanently leave the relationship, or for “triggering violence in others.”<sup>89</sup> One judge articulated this attitude by asking: “Why don’t they just get up and leave?”<sup>90</sup> Although this attitude still persists to some extent,<sup>91</sup> legal responses to domestic violence have improved.

Stronger and more easily obtainable justice system responses to domestic violence followed community-based efforts to provide shelter and support for victims and their children in the 1970s and 1980s.<sup>92</sup> Although the legal system has responded over time to intimate partner violence in a variety of ways, prosecution and civil protection are the two core areas that receive the most extensive resources and attention.

### A. Current Prosecutorial Policies and Practices in Response to Domestic Violence

Historically, the concept of protecting family privacy prevented judicial relief for survivors and punishment of abusers.<sup>93</sup> In the 1960s and 1970s, the battered women’s movement worked to make domestic violence a public rather than private matter, to provide shelter and support for abused women, and to pass laws against domestic violence.<sup>94</sup> A primary focus was aggressive criminal justice reform, in an attempt to correct

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<sup>88</sup> Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL’Y 157, 160–61 (2003).

<sup>89</sup> Stoever, *supra* note 1, at 361; Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1193 (1994).

<sup>90</sup> Rhode, *supra* note 89, at 1193 (quoting *Report of the New York Task Force on Women and the Courts*, 15 FORDHAM URB. L.J. 11, 32 (1987)).

<sup>91</sup> See Stoever, *supra* note 1, at 336–339 (discussing judges and clerks’ often expressed disbelief that a woman could stay in a violent relationship for so long).

<sup>92</sup> Waul, *supra* note 13, at 53.

<sup>93</sup> See e.g., Stoever, *supra* note 15.

<sup>94</sup> *Id.* at 1041

historic police and prosecutor failure to treat domestic violence as a crime.<sup>95</sup> Most states passed mandatory arrest laws and no-drop prosecution policies.<sup>96</sup> Mandatory arrest laws require police to make an arrest when there is probable cause to believe domestic violence has occurred,<sup>97</sup> and no-drop prosecution policies require a prosecutor to continue with a case regardless of the victim's wishes, whenever there is adequate evidence of the offense.<sup>98</sup> Criminal protection orders often accompany these policies.<sup>99</sup>

Mandatory arrest policies are a key component of the criminal justice system's response to domestic violence. Oregon was the first state to enact such a policy in 1977.<sup>100</sup> All states now allow officers to make warrantless arrests if there is probable cause of domestic violence, but vary in the discretion they give to police.<sup>101</sup> Most states have either preferential or mandatory arrest statutes, which respectively limit or completely restrict police discretion.<sup>102</sup> Although the aim of mandatory arrest statutes is to remove police discretion and resistance to arrest, they also remove the victim's control over the process, including her choice in when and for how long to involve herself in the criminal justice system.<sup>103</sup>

No-drop prosecution policies followed mandatory arrest policies as a parallel limit on prosecutorial discretion.<sup>104</sup> Accordingly, no-drop policies require prosecutors to pursue all domestic violence cases whenever there is evidence of the crime, with or without the cooperation of the victim.<sup>105</sup> At their most coercive, mandatory prosecution policies allow prosecutors

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<sup>95</sup> *Id.* at 1036–37; see Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 WOMEN'S RTS. L. REP. 169, 170 (2001) (listing reasons traditionally stated for police officer hesitation to engage with domestic violence cases, including both the perceptions that domestic violence is not criminal behavior and that it involves the most dangerous kind of police work).

<sup>96</sup> Stoever, *supra* note 15, at 1041 n.139 (citing Lisa Goodman & Deborah Epstein, *Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence*, 20 J. INTERPERSONAL VIOLENCE 479, 480–81 (2005)).

<sup>97</sup> See, e.g., D.C. Prevention of Domestic Violence Amendment Act of 1990, D.C. Code Ann. § 16-1031, (West 1990) (requiring police officers to make an arrest in all situations where there is probable cause to believe intra-family violence has occurred).

<sup>98</sup> See Stoever, *supra* note 15, at n. 139.

<sup>99</sup> See Friedman, *supra* note 39, at 246.

<sup>100</sup> *Id.* at 241.

<sup>101</sup> *Id.*; Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 942 (1999).

<sup>102</sup> O'Connor, *supra* note 101.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (“With stronger arrest policies in place, anti-domestic violence advocates next turned their attention to reform of prosecution practices.”).

<sup>105</sup> Friedman, *supra* note 39, at 242.

to subpoena and hold recalcitrant victims in contempt of court.<sup>106</sup> There is evidence of prosecutors using this power. For example, in 1983 under an Anchorage, Alaska no-drop policy, a survivor who filed a complaint and later changed her mind was jailed overnight for refusing to cooperate.<sup>107</sup> Some prosecutors tell survivors that their children will be taken away if they do not comply.<sup>108</sup> Advocates of mandatory prosecution and participation policies argue that the societal benefits of prosecuting abusers outweigh the short-term costs to a victim's autonomy.<sup>109</sup>

Criminal protection orders often accompany the mandatory arrest and prosecution policies outlined above. They are similar to the civil protection orders which will be detailed in Part II.B below, except that the victim in a criminal case is rarely involved in their creation and they are usually automatically imposed.<sup>110</sup> The victim is not a party to criminal proceedings, and may not be able to ask the judge to vacate this type of order.<sup>111</sup> In contrast, survivors can ask the judge to vacate civil protection orders, and this request is usually granted, as discussed in the Part III.

### B. *The Current Landscape of Civil Protection Orders*

All fifty states and the District of Columbia have legislation allowing an individual to petition for a civil protection order against another individual.<sup>112</sup> Civil protection orders are injunctions prohibiting the respondent—the individual against whom the civil protection order is sought—from contacting, harassing, or harming the petitioner.<sup>113</sup> In contrast to criminal protection orders, civil protection orders are survivor-initiated and can often be tailored to the specific needs of the survivor.<sup>114</sup> Surpassing tort remedies and criminal justice system involvement, the civil protection order is the legal remedy domestic violence survivors most widely choose.<sup>115</sup> A civil protection order can prohibit the abuser from contacting

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<sup>106</sup> EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 194 (3d ed. 2003).

<sup>107</sup> O'Connor, *supra* note 101, at 946.

<sup>108</sup> Stoever, *supra* note 1, at 315–16.

<sup>109</sup> O'Connor, *supra* note 101, at 946.

<sup>110</sup> Stoever, *supra* note 15, at 1069.

<sup>111</sup> Friedman, *supra* note 39, at 247.

<sup>112</sup> Waul, *supra* note 13, at 53.

<sup>113</sup> *Id.* at 53–54.

<sup>114</sup> Stoever, *supra* note 15, at 1070; *see also* Dana Harrington Connor, *Civil Protection Order Duration: Proof, Procedural Issues, and Policy Considerations*, 24 TEMP. POL. & CIV. RTS. L. REV. 343, 361 (2015) (“[T]he civil system has the potential to best promote survivor autonomy by vesting the decision-making authority in the petitioning party as opposed to a state prosecutor.”).

<sup>115</sup> Stoever, *supra* note 15, at 1019; *see also* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008) (stating civil protection orders are the “most commonly used legal remedy for domestic violence.”).

the victim; prohibit abuse, intimidation, and harassment; determine child custody and visitation issues; mandate counseling for the offender; and restrict firearm possession, among other conditions.<sup>116</sup>

In most jurisdictions, a victim can obtain a temporary protection order valid for 7 to 14 days through an ex-parte petition.<sup>117</sup> The victim must then participate in a hearing, where her abuser can challenge the protection order request, so that it is possible to obtain a permanent order that lasts around one to two years.<sup>118</sup> Although civil protection order hearings are civil proceedings in which the judge must only determine that prior abuse has occurred and is likely to be repeated by a preponderance of the evidence, abuser violation of a civil protection order can be a criminal offense.<sup>119</sup> Most women requesting civil protection orders do so in response to severe abuse over a long period of time rather than an isolated incident.<sup>120</sup>

### III. CURRENT DOMESTIC VIOLENCE RESPONSES AS COMMITMENT MECHANISMS

Part I outlined the potential demand for commitment mechanisms in the domestic violence context. It is possible to view the legal system's current domestic violence responses outlined in Part II as attempting to meet this demand. This Part will explore criminal and civil domestic violence responses as commitment mechanisms and demonstrate that, despite some positive features, these frameworks inadequately address the need to protect survivors without unduly infringing on their autonomy interests.

#### *A. Mandatory Arrest and No-drop Policies as a Commitment Mechanism*

Criminal justice reforms such as mandatory arrest and no-drop prosecution policies can act as commitment mechanisms for domestic violence victims with inconsistent intertemporal preferences.<sup>121</sup> These policies not only reduce the discretion of police and prosecutors who may not take domestic violence seriously,<sup>122</sup> but also prevent survivors from deviating from the choices made by the versions of themselves who were closest to

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<sup>116</sup> Friedman, *supra* note 39, at 245 n. 73 (citing ENCYCLOPEDIA OF DOMESTIC VIOLENCE 583 (Nicky Ali Jackson ed., 2007)).

<sup>117</sup> Waul, *supra* note 13, at 54.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 57 (reporting multiple studies concluding that for a majority of women, "filing for a CPO was a desperate attempt to obtain help with an increasingly dangerous situation.").

<sup>121</sup> Aizer & Dal Bó, *supra* note 10, at 413 (finding that no-drop provisions decreased the occurrence of homicide of abusers by victims by 15–22% and concluding that no-drop provisions are an effective commitment mechanism for domestic abuse survivors).

<sup>122</sup> Waul, *supra* note 13, at 53.

experiencing the abuse.<sup>123</sup> Many survivors have experienced high levels of violence, and often intervention comes after a long period of physical, psychological, and economic harm.<sup>124</sup>

Once the victim initially decides to ask for help (or, in some cases, once a family member or bystander has contacted authorities on her behalf), she can no longer easily alter the decision to continue with the criminal justice course of action. This provides a powerful commitment mechanism similar to those which are effective in the areas of physical fitness and retirement planning.<sup>125</sup> Just as the cost of a gym contract keeps people using the gym and looming IRS penalties keep taxpayers from removing money from their retirement accounts early, police and prosecutor refusal to walk away from a case might keep the victim from returning to an abusive relationship. Additionally, some prosecutors and advocates of these mechanisms assert that the batterer will sometimes stop harassing the victim after he discovers that the victim no longer controls the prosecution.<sup>126</sup> Other justifications in support of pursuing prosecution over the objections of the victim include: a state interest in prosecuting abusers which outweighs the victim's interests; the need to remind the abuser and public that domestic violence is a crime;<sup>127</sup> and the paternalistic need to increase victim safety.<sup>128</sup> As a result, some have praised mandatory responses as fulfilling the state's "promise of equal protection, bodily integrity, and sex equality,"<sup>129</sup> and sending a clear message that the private sphere is no longer a place where violence can happen with impunity.<sup>130</sup>

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<sup>123</sup> *Id.* at 55 (reporting on Minnesota mandatory arrest study finding that arrest deters subsequent violence and on a meta-analysis finding "that combining arrest, batterer treatment, and tougher prosecution contributes to lower recidivism rates...").

<sup>124</sup> *Id.* at 57.

<sup>125</sup> See *supra* Part I.B.3.

<sup>126</sup> Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 874 (1994).

<sup>127</sup> O'Connor, *supra* note 101, at 961.

<sup>128</sup> Friedman, *supra* note 39, at 242–43; see also Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 *B.C. THIRD WORLD L.J.* 159, 182–83 (2003) (discussing potential state interests in prosecuting domestic abusers over victim objections, including public safety, and "because they encourage equality between men and women. Thus, the sacrifice of individual victim interests are regarded by these proponents as necessary for overall societal change.").

<sup>129</sup> Stoeber, *supra* note 15, at 1042 (quoting Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 *CARDOZO WOMEN'S L.J.* 303, 304 (2005)).

<sup>130</sup> See Ciraco, *supra* note 15, at 176 (discussing opinions that before mandatory arrest policies, non-intervention was prevalent among male doctors, judges, psychiatrists, and social workers in addition to police officers).

However, mandatory criminal justice policies also limit a survivor's decision-making power concerning her participation in the criminal justice process.<sup>131</sup> This is especially true when the victim is not the one who initially contacts the authorities.<sup>132</sup> When prosecutors force a survivor to testify or refuse to drop a case, they strip the survivor, who has already suffered from a lack of meaningful control over her abuser's violent behavior, of additional autonomy.<sup>133</sup> In the case of criminal protection orders, although the parties to the order may choose to disregard it, state intervention persists.<sup>134</sup> Even if a survivor chooses to invite her abuser back into her home, police officers can make routine unannounced visits to homes with a history of domestic violence and arrest anyone subject to a protection order found there.<sup>135</sup>

By removing the victim as decisionmaker, mandatory arrest, prosecution, and protection orders leave courts without the information they need to weigh the victim's wishes.<sup>136</sup> Taking away decision-making power at the outset from the person most familiar with the intricacies of her situation leads to suboptimal results under almost any economic theory.<sup>137</sup> Additionally, this approach may make survivors less likely to report future abuse and cooperate in subsequent proceedings.<sup>138</sup> This is especially problematic because jail sentences and probationary periods for domestic violence offenses are typically brief,<sup>139</sup> leading to safety concerns

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<sup>131</sup> Waul, *supra* note 13, at 53; *see* Tarr, *supra* note 88, at 161 ("Now, some argue, the pendulum has swung to the other extreme so that a battered woman cannot get the state out of her home.").

<sup>132</sup> Friedman, *supra* note 39, at 250–51, 251 n. 114.

<sup>133</sup> Tarr, *supra* note 88, at 160 (discussing "no-drop" policies, in which prosecutors "force an abused woman to testify" even though her testimony may or may not result in a conviction, and even conviction will rarely result in incarceration).

<sup>134</sup> Jeannie Suk, *Criminal Law Comes Home*, 116 *YALE L.J.* 2, 49–50 (2006).

<sup>135</sup> *Id.* at 50.

<sup>136</sup> O'Connor, *supra* note 101, at 948.

<sup>137</sup> *See, e.g.,* VARIAN, *supra* note 59 at 718–19 (explaining how asymmetric information between buyers and sellers can cause significant problems in a market). If we analogize to the domestic violence situation, where the state is the supplier of protection/commitment mechanisms and the victim the consumer, asymmetric information, especially where the superior information of the consumer is ignored by the supplier, will cause inappropriate supply of protection/commitment mechanisms.

<sup>138</sup> Goldfarb, *supra* note 115, at 1523 (explaining that survivors are more likely to report subsequent abuse if they feel that their preferences have been respected in previous legal proceedings).

<sup>139</sup> *See* Stoever, *supra* note 15, at 1069. *See also* Stoever, *supra* note 1, at 316 ("An abuse survivor may not desire criminal justice involvement...in light of the short one-to-three-day jail sentences that abusive partners typically face for domestic violence crimes."); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 *U. PA. L. REV.* 2151, 2166 (1995) (citing a study of

surrounding mandatory criminal responses. Perversely, mandatory criminal responses may create an incentive problem for women who currently want help but know that their abuser's arrest could result in retaliatory violence.<sup>140</sup>

Ultimately, mandatory criminal responses may have counterproductive effects, revictimize the survivor for the actions of the abuser, and substitute the state for the abuser as a coercive actor in the survivor's life.<sup>141</sup> On the other hand, when judges "treat litigants fairly and respectfully, and consider the rights and wishes of the petitioner and respondent, petitioners feel like they have had an empowering court experience, [which] predicts a survivor's . . . willingness to use the court system . . . as she progresses through the stages of ending violence."<sup>142</sup>

### B. Civil Protection Orders as Commitment Mechanisms

Civil protection orders have the potential to combine government enforcement with greater survivor autonomy than criminal enforcement mechanisms.<sup>143</sup> When survivors take the initiative to apply for civil protection orders against their abusers, they demonstrate a desire to end the abuse and possibly the relationship.<sup>144</sup> However, there is empirical evidence suggesting that survivors exhibit inconsistent intertemporal preferences which often lead them to quickly ask the court to remove the

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mandatory arrest policies finding that the average time in custody varied from two to twenty-four hours).

<sup>140</sup> See, e.g., Ciraco, *supra* note 15, at 177 (discussing the chilling effect on incentives to call the police when a woman knows mandatory arrest would result in retaliatory violence); Tjaden & Thoennes, *supra* note 20, at 54 (reporting that the National Violence Against Women Survey found that about 60 percent of protective orders were violated); Stoever, *supra* note 1, at 335 ("It is now well understood that there is a high likelihood of 'separation assault,' that leaving is a major risk factor for homicide, and that women have a well-grounded fear of increased violence to themselves and their children if they attempt to leave.").

<sup>141</sup> O'Connor, *supra* note 101, at 961 ("Excessive use of state power, particularly forcing the victim to participate in the prosecution, can result in the revictimization of the victim for the actions of the abuser.").

<sup>142</sup> Stoever, *supra* note 1, at 360.

<sup>143</sup> Waul, *supra* note 13, at 53 (A civil protection order "combines a victim-initiated intervention with the power of enforcement by the criminal justice system.").

<sup>144</sup> Stoever, *supra* note 15, at 1089 ("Taking the initiative to seek a protection order commits a survivor to a course of action and indicates an 'awareness of serious safety concerns.'") (quoting TK Logan & Robert Walker, *Civil Protection Order Outcomes: Violations and Perceptions of Effectiveness*, 24 J. INTERPERSONAL VIOLENCE 675, 685 (2009)); see also Waul, *supra* note 13, at 56 (reporting on a study in which some women indicated that "filing a protection order allowed them to take some initial steps toward regaining control of their lives.").

order.<sup>145</sup> Civil protection orders, even in states where they are available for longer durations, are therefore less-than-ideal commitment mechanisms for domestic violence survivors.

In New Jersey in 2017, the most common reason for dismissal of a request for a temporary restraining order was that the plaintiff withdrew the complaint.<sup>146</sup> While 38.2% of requests for temporary restraining orders were granted, 22% of all requested were dismissed either because the plaintiff withdrew the complaint or failed to appear.<sup>147</sup> Pennsylvania tells an even more dramatic story during this same time period, with 48.9% of temporary protection from abuse orders dismissed because the plaintiff withdrew her petition or did not appear for the evidentiary hearing.<sup>148</sup> The most recent available evidence from Delaware similarly shows that of the 50% of protection from abuse petitions which were dismissed, 86% were dismissed because the petitioner voluntarily withdrew the petition before the hearing or failed to appear for the hearing.<sup>149</sup> Only 13% of petitions dismissed were dismissed because abuse was not found by a preponderance of the evidence.<sup>150</sup> Although a comprehensive fifty-state survey is beyond the scope of this article, the data from these three states supports the inference that many survivors who finally request help from the legal system change their minds before an order is even issued.

Even in cases where a civil protection order is issued, survivors often request that it be removed before it has expired. A study conducted in 2008 reported that most state protection order statutes fail to address motions to vacate, allowing judges to use their inherent power to dissolve judicial orders.<sup>151</sup> Judicial practice varies, but in the past, judges often vacated orders whenever petitioners made such a request.<sup>152</sup> Currently, judges

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<sup>145</sup> Waul, *supra* note 13, at 55 (reporting on the few studies looking at the CPO process from the victim's perspective, finding that "although more women are...filing for a temporary order...only 45 to 60 percent of female petitioners returned to court to obtain the permanent protection order.").

<sup>146</sup> N.J. FAM. PRAC. DIV., ADMIN. OFF. CTS., ST. OF N.J., REPORT ON THE PREVENTION OF DOMESTIC VIOLENCE ACT 19 (2017) (15.8% of TROs were dismissed in 2017 because the plaintiff withdrew the complaint) <https://njcourts.gov/courts/assets/family/2017dvannualreport.pdf?c=v4t> [<https://perma.cc/DG4X-3FRT>].

<sup>147</sup> *Id.* (15.8% of TROs were dismissed in 2017 because the plaintiff withdrew the complaint and 6.1% because the plaintiff failed to appear).

<sup>148</sup> THOMAS B. DARR, PA., 2017 CASELOAD STAT. OF THE UNIFIED JUD. SYS. OF PA. 46 (2017).

<sup>149</sup> DEL. DOMESTIC VIOLENCE COORDINATING COUNCIL, 2014 ANNUAL REPORT & FATAL INCIDENT REVIEW TEAM REPORT 24 (2014).

<sup>150</sup> *Id.*

<sup>151</sup> Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 227 (2008).

<sup>152</sup> See, e.g., *Carfagno v. Carfagno*, 672 A.2d 751, 757 (N.J. Super. 1995) ("where the victim has consented to lifting the restraining order and the court

sometimes require petitioners, as well as their abusers, to provide good cause for vacation.<sup>153</sup> Both of these approaches can be problematic. On the one hand, although some petitioners undoubtedly request vacation in a time-consistent way because of changed circumstances,<sup>154</sup> many requests for vacation are probably due to the same mechanisms that cause survivors to go back to their abusers in the cycle of abuse.<sup>155</sup> Granting

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finds that the victim is doing so voluntarily, the court should dissolve the order without further consideration or analysis.”); *see also* *Torres v. Lancellotti*, 607 A.2d 1375, 1376 (N.J. Super. 1992) (acknowledging that “established case law holds that the reconciliation of parties ‘acts as de facto vacation of the court order’” although holding differently itself); *Hayes v. Hayes*, 597 A.2d 567, 570 (N.J. Super. 1991) (“Reconciliation of the parties, for example, acts as a de facto vacation of the order.”); *Mohamed v. Mohamed*, 557 A.2d 696, 698 (N.J. Super. 1989) (“[I]f the court finds the parties had an intervening reconciliation, the prior [domestic violence] orders should be *sua sponte* dismissed.”).

<sup>153</sup> *See* *Torres v. Lancellotti*, 607 A.2d 1375, 1377 (N.J. Super. 1992) (requiring “analysis of the necessity for continued protection and restraints” before vacation for mutual violation of protection order). There is a split in authority in New Jersey. *Compare* *I.J. v. I.S.* 744 A.2d 1246, 1247 (N.J. Super. 1999) (holding that “(1) statutory ‘good cause’ requirement to dismiss restraining order applies to abuser and not to victim; and (2) to dismiss restraining order at victim’s request, victim must understand the cycle of violence and consequences of dismissal and her request to dismiss must be voluntary and without coercion.”) *with* *Stevenson v. Stevenson*, 714 A.2d 986 (N.J. Super. 1998) (holding that statutory “good cause” requirement applies to victim as well as abuser, and dissolution of restraining order is discretionary, not mandatory, even if good cause is shown.).

<sup>154</sup> Vacation of an order can simultaneously be a rational response and inadvisable. *See, e.g.*, *People v. Goodsell*, No. 235634, 2003 Mich. App. LEXIS 819, at 1, 3 (Mich. Ct. App. Mar. 25, 2003) (petitioner moved to vacate her protection order seven days after obtaining it because respondent threatened to burn her house down, told her “he could kill [her] if he had to lose [her],” and threatened to harm the father of her son).

<sup>155</sup> *See, e.g.*, *People v. Goodsell*, No. 235634, 2003 Mich. App. LEXIS 819, at 3 (Mich. Ct. App. Mar. 25, 2003) (petitioner moved to vacate her protection order after seven days because defendant “promised never to do it again” and threatened her); *I.J. v. I.S.*, 744 A.2d 1246, 1248–49 (N.J. Super. 1999) (plaintiff’s motion stated, “I would like to see this drop, as my daughter’s father has been jailed through no fault of his own. I have been under the belief that my restraining order was expired after one year. Thinking this was the case I has asked & allowed to participate in his daughter’s life more. He’s been working and paying child support. He’s been trying to get his life together. So I permitted him to come over any time, as long as he didn’t cause trouble. I was trying to be supportive and I gave him the wrong information about the restraining order. Now he is in jail and I feel very bad about it. He’s on probation for five yrs. [sic] And I would like to get this matter straight so that he can go home and continue working and doing the rite[sic] thing.”). *See also* *Waul, supra* note 13, at 56 (reporting studies of domestic violence victims and protection orders finding

these vacation requests is therefore likely inconsistent with the preferences of the survivor's past and future selves although in the moment she believes it is the best decision.<sup>156</sup> At the same time, however, refusal to grant a vacation petition against the petitioner's wishes takes away her autonomy, just as the abuser's control and violence takes it away.<sup>157</sup> Survivors who feel that their preferences have not been respected in previous legal proceedings may be less likely to report subsequent abuse or to comply with the requirements of the protection order—the same problems present in mandatory criminal responses to domestic abuse.<sup>158</sup>

#### IV. VOLUNTARY IRREVOCABLE PROTECTION ORDERS: A COMMITMENT MECHANISM TO PREVENT ABUSE AND PRESERVE SURVIVOR AUTONOMY

The preceding discussion underscores that despite vast improvements from the first half of the twentieth century, current legal mechanisms still provide suboptimal responses to domestic violence. The following section will lay out a proposal for reform: voluntary irrevocable protection orders. States should provide survivors of domestic abuse with the option to obtain an irrevocable (for a certain time period) protection order. Voluntary irrevocable protection orders would balance competing security and autonomy interests by providing both a low-cost commitment mechanism to domestic violence survivors and greater space for survivor autonomy than is currently available in existing systems. By securing the survivor's consent, the justice system will be able to discharge its criminal justice and community safety functions without unduly imposing the will of the state on the survivor. Voluntary irrevocable protection orders provide safety by supplying self-imposed commitment mechanisms that bind survivors, unlike all too easily revoked civil protection orders. At the same time, they provide autonomy by allowing survivors to make decisions for themselves and helping to end the use of coercive tactics such as forcing survivors to participate in the criminal response system.

Under a voluntary irrevocable protection order scheme, a survivor who initiates a petition for a civil protection order or is involved in a

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that common reasons for failing to request a permanent protection order were that the couple had reconciled and pressure from the batterer).

<sup>156</sup> An extreme example is *Kelleher v. Galindo*, where the court held that plaintiff's telephonic request for dismissal of her ninth TRO against defendant was insufficient. *Kelleher v. Galindo*, 796 A.2d 306, 310 (N.J. Super. 2002) ("This court has no doubt that if it were to grant plaintiff's request to dismiss this most recent TRO, it would not be very long before plaintiff was back in the Cherry Hill Municipal Court seeking a tenth TRO against defendant.").

<sup>157</sup> See Stoeber, *supra* note 1, at 309 ("Preconceptions about what is best for all survivors of domestic violence present safety risks, conflict with survivor autonomy, and run contrary to the civil system of protection.").

<sup>158</sup> Goldfarb, *supra* note 115, at 1523 (explaining that survivors are more likely to report subsequent abuse if they feel that their preferences have been respected in previous legal proceedings).

criminal case would at the outset be given the opportunity to make the order impossible to vacate, even at her own request, for a certain time period. This would allow the survivor to determine the duration of the order at a time when the abuse is most salient, all the reasons to leave are most obvious, and the abuser has not yet had a chance to pressure her. Most survivors take the step to ask for protection after prolonged abuse rather than a single incident, so it is likely that many of them have already experienced the cycle of abuse many times and would like a way to follow through with ending it. At the same time, it is important that the irrevocability decision is made by, rather than for, the survivor. The survivor's current self will be binding a future version of herself, just as people do in the contexts of going to the gym and saving for retirement.<sup>159</sup> The legal system will therefore not contribute to the autonomy-stripping the survivor has already experienced at the hands of her abuser. Voluntary irrevocable protection orders would provide a stronger commitment mechanism in the civil sphere and reintroduce some survivor autonomy in the criminal sphere.

Voluntary irrevocable protection orders are a form of what Colin Camerer et al. have called “asymmetric paternalism,” or libertarian paternalism.<sup>160</sup> A policy is asymmetrically paternalistic if it “creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational.”<sup>161</sup> Examples include mandatory disclosures to home-buyers, wait periods before buying a car or getting married, and return periods after purchases made through door-to-door sales.<sup>162</sup> In the family law context, a few weeks delay is very little to a couple who has rationally decided to enter a theoretically permanent marriage, but could provide considerable benefits to those who have not fully considered the decision.<sup>163</sup> Similarly, voluntary irrevocable protection orders should have little effect on the survivor with time-consistent preferences, but could be very helpful to the survivor who foresees that her preferences may become inconsistent and wishes to commit herself to her decision. Voluntary irrevocable protection orders should therefore appeal both to policymakers who favor inflexible anti-paternalism, because they preserve survivor decision-making autonomy, and to those who have no qualms with paternalistic policies but would like to make them more efficient.<sup>164</sup>

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<sup>159</sup> See discussion *supra* Part I.B.3.

<sup>160</sup> Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for Asymmetric Paternalism*, 151 U. PA. L. REV. 1211 (2003).

<sup>161</sup> *Id.* at 1212.

<sup>162</sup> *Id.* at 1241–43.

<sup>163</sup> *Id.* at 1243.

<sup>164</sup> *Id.* at 1212–13. Paternalism in the context of domestic violence is rightly viewed with some skepticism, given the historical purposes of paternalism to make decisions in the interest of people incapable of contracting for themselves, including “idiots, minors or married women.” *Id.* at 1213 (quoting *Rogers v. Higgins*, 48 Ill. 211, 217 (1868)).

Setting irrevocable protection orders as the default option could also make them more effective. Default rules are successful because humans exhibit a bias toward the status quo,<sup>165</sup> even when the cost of switching choices is very low.<sup>166</sup> Therefore, as long as survivors are fully informed of their choices,<sup>167</sup> a default system where survivors are presumed to want their restraining order in place irrevocably for some amount of time could be an effective way to increase the orders' prevalence. Six months could be a reasonable baseline default, because this is when the final, permanent stage of leaving an abusive relationship begins.<sup>168</sup> However, longer periods could also be available upon request. Domestic violence protection orders are effective for only a limited time in most states,<sup>169</sup> but multiple studies have found correlations between protection order duration and survivor safety.<sup>170</sup>

There are still problems with a voluntary irrevocable protection order scheme. One issue is the fact that a hearing will likely still be required some time after an order is first requested. In most jurisdictions, a temporary protection order valid for seven to fourteen days can be obtained in an ex-parte petition without a full hearing.<sup>171</sup> The petitioner must then return to court to obtain the permanent order and participate in a hearing where her abuser can challenge the protection order request.<sup>172</sup> This provides a period for the survivor to develop inconsistent intemporal preferences and change her mind about participating in seeing the protection order to its completion, as well as time for the abuser to pressure her inside or outside court. However, allowing the victim to commit her future self

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<sup>165</sup> Status quo bias is the tendency to stick with existing policies and choices more often than rational decision-making would predict, even when it is very easy to switch. *Id.* at 1224.

<sup>166</sup> A well-publicized area of success with defaults is organ donation. Opt-out systems, in which the donor is presumed to give consent unless they affirmatively opt-out (which is usually as easy as checking a box on a form), dramatically increase effective rates of consent for donation. Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 *SCIENCE* 1338, 1338 (2003). For example, Germany, which uses an opt-in system, has an organ donation consent rate of 12%, while Austria, a country with a very similar culture and economic development, but which uses an opt-out system, has a consent rate of 99.98%. *Id.*

<sup>167</sup> Fully informing victims has the added benefit of independently making them more likely to follow through with the protection order process. *See* Waul, *supra* note 13, at 65 (“Women who reported that [the agency] helped them understand the process were more likely to return to court . . . women who understood the process and what was expected from them may have been less intimidated or fearful about returning for the CPO hearing.”).

<sup>168</sup> *See* Khaw & Hardesty, *supra* note 52, at 40; *supra* Part II.B.

<sup>169</sup> Stoever, *supra* note 15, at 1046–48 (discussing fifty-state survey conducted by the author).

<sup>170</sup> *Id.* at 1066.

<sup>171</sup> Waul, *supra* note 13, at 54.

<sup>172</sup> *Id.*

to the protection order course of action may still provide some benefits in preventing a change of mind.<sup>173</sup> It will also give more legitimacy to court (and prosecutor, in criminal cases) policies of continuing with a case despite a victim's request that an order be vacated or a case be dropped. The justice system will have the consent of the victim at some point in time, and the victim will be a partner to system actors engaged in combating domestic violence, rather than a passive or coerced participant. Besides providing low-cost commitment mechanisms to domestic violence victims, this space for survivor autonomy is voluntary irrevocable protection orders' greatest advantage over existing systems.

Another benefit of the voluntary irrevocable protection order is that, although abusive partners frequently violate protection orders,<sup>174</sup> there is evidence to suggest that an abuser may be less likely to harass a victim if he believes she lacks the ability to rescind the order.<sup>175</sup> This is a positive element of mandatory arrest and no-drop prosecution policies as well, but would be combined with victim choice and consent in the voluntary irrevocable protection order scheme.

Protection orders can have life-changing benefits for survivors of domestic violence. Although separation is one of the most dangerous times for victims of domestic violence,<sup>176</sup> studies have found up to an eighty-six percent decrease in subsequent physical violence against women who obtained and kept civil protection orders, as a result of decreased risk of contact from the abuser, weapon threats, injuries, and abuse requiring medical treatment.<sup>177</sup>

Reducing domestic violence also has significant benefits for society. Every year, domestic violence survivors lose 8 million days of paid work and 5.6 million days of household productivity, and their children sustain

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<sup>173</sup> See Royer et al., *supra* note 77, at 53 (finding that effects of exercise program persisted after program ended when combined with commitment option); Read & van Leeuwen, *supra* note 63, at 201 ("That is, although you are very likely to break down and order a hamburger when you go to McDonalds, it is still a good idea to plan to eat a salad. More generally, if you promise to control yourself in the future (perhaps by using a condom, refusing the third drink, or skipping dessert) you are more likely to do so than if you have made no such promise.").

<sup>174</sup> Stoever, *supra* note 15, at 1065.

<sup>175</sup> Corsilles, *supra* note 126, at 874.

<sup>176</sup> Stoever, *supra* note 1, at 335.

<sup>177</sup> Stoever, *supra* note 15, at 1065 (citing JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 164 (1999); Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 15 AM. J. FAM. L. 59, 60 (2001); Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS'N 589, 591 (2002)).

significant welfare losses.<sup>178</sup> The estimated costs of domestic violence in terms of medical care and productivity losses exceed \$8.1 billion annually.<sup>179</sup> There are significant mental health repercussions as well, with twenty percent of women and five percent of men who identify as victims of domestic violence experiencing one or more symptoms of PTSD.<sup>180</sup> Additionally, personal safety, especially in one's home, has traditionally been one of the most highly protected values in Anglo-American jurisprudence.<sup>181</sup> Protection orders result in widespread economic and safety benefits,<sup>182</sup> and keeping more of them in place when they are necessary is an important public policy goal.<sup>183</sup>

Voluntary irrevocable protection orders could extend the benefits of keeping protection orders in place to more survivors<sup>184</sup> while encouraging others who might have previously been unwilling—because of fear of being forced into the criminal justice process—to seek help.<sup>185</sup> Statutes and

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<sup>178</sup> Stoever, *supra* note 15, at 1081–82 (Pointing out that, according to court records, children often witness violent incidents); Catalano et al., *supra* note 20, at 4.

<sup>179</sup> DEP'T OF HEALTH & HUM. SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (Mar. 2003), <https://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf> (figure adjusted for inflation; 2003 amount is \$5.8 billion).

<sup>180</sup> THE NAT'L CTR. FOR INTIMATE PARTNER VIOLENCE, *supra* note 2, at 1.

<sup>181</sup> See, e.g., *State v. Kameenui*, 753 P.2d 1250, 1252 (Haw. 1988) (“There is no constitutionally protected right to remain free in [one’s] home after physically harming someone residing there.”); *Ohio v. Reid*, 135 N.E.3d 517, 521 (Ohio Ct. App. 2019) (explaining castle doctrine: “a person who lawfully is in that person’s residence has no duty to retreat before using force in self-defense, defense of another, or defense of that person’s residence.”).

<sup>182</sup> Stoever, *supra* note 15, at 1082 (“According to a recent study on the costs and benefits of domestic violence protection orders, every dollar spent on protection order interventions produced \$30.75 in avoided costs to society.”).

<sup>183</sup> See Stoever, *supra* note 1, at 363; Tjaden & Thoennes, *supra* note 20, at 55 (“Intimate partner violence should be treated as a significant social problem.”).

<sup>184</sup> See Tjaden & Thoennes, *supra* note 20, at 52 (“Specifically, 17.1 percent of the women but only 3.5 percent of the men who were physically assaulted by an intimate obtained a restraining order against their assailant after their most recent victimization.”).

<sup>185</sup> Almost every respondent to the National Violence Against Women Survey who experienced physical violence and did not report it to the police said they did not think the police could do anything, and about one-third of women and one-quarter of men said they did not want the police or courts involved; such “findings suggest that many victims of intimate partner violence—men and women alike—do not consider the justice system a viable or appropriate intervention at the time of their victimization.” Tjaden & Thoennes, *supra* note 20, at 51; see Tarr, *supra* note 88, at 161 (discussing how the balance of domestic violence protection may have gone too far in the direction of making it impossible for some survivors to extricate the state from their lives).

court opinions already state that protection order statutes should be interpreted broadly because they are “remedial laws [meant to] offer safety and protection to victims, their children, and the public at large.”<sup>186</sup> Whether through liberal judicial construction of protection order statutes in light of the widespread agreement on their general purpose or through state statutory amendment, voluntary irrevocable protection orders could be made available to every domestic violence survivor.

Voluntary irrevocable protection orders are not a panacea for every abuse survivor, but wherever a survivor desires a commitment mechanism to follow through with long-term court-ordered protection, this remedy should be available. When combined with other forms of relief such as economic support, custody, and possession of the home, voluntary irrevocable protection orders could reduce the likelihood that survivors will ultimately agree to the abuser’s attempts to reconcile out of fear, financial necessity, or legal tactics.<sup>187</sup> Voluntary irrevocable protection orders can be one useful tool to help end the systematic terrorism of domestic violence. By empowering survivors to take control of their own lives, voluntary irrevocable protection orders will be a way to reunite survivors of domestic violence with agency and dignity.

#### CONCLUSION

The current landscape of legal responses to domestic violence is both under-protective and over-coercive of survivors of domestic violence. Criminal responses that bring and keep the survivor under the auspices of the criminal justice system with or without her consent replace her abuser with the state as the coercive actor in her life and provide incentives to abstain from reporting domestic violence to authorities. Civil remedies allow space for inconsistent intertemporal preferences and do not adequately meet survivor demand for commitment mechanisms.

This article has developed a middle ground: the voluntary irrevocable protection order, an asymmetrically paternalistic commitment

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<sup>186</sup> Stoever, *supra* note 15, at 1081.

<sup>187</sup> See Stoever, *supra* note 1, at 365 (“The general refusal to grant financial maintenance, child support, rental or mortgage assistance, or temporary possession of property makes it very difficult for low-income petitioners to create a separate household.”); see also LUNDY BANCROFT ET AL., *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 98 (2012) (giving an example of how even children can be used to covertly transmit threats—one abuser told “his wife prior to separation, ‘I love you, and that’s for life. If I can’t have you, no one else will, and we’re going to die together.’ After separation, he said to the children, ‘Tell your mother I will always love her.’”); Stoever, *supra* note 1, at 331 nn. 136–137 (discussing how economic instability tying the victim to the abuser can nullify criminal and civil responses to domestic violence and discussing legal tactics including custody litigation which batterers use in attempts to exert control over their former victims).

mechanism. This proposal balances survivor safety and autonomy, providing a way for the justice system to discharge its criminal justice and community safety functions without unduly imposing its will on the survivor. Voluntary irrevocable protection orders provide safety by supplying self-imposed commitment mechanisms which bind survivors, unlike all too easily revoked civil protection orders. At the same time, they provide autonomy by allowing the survivor to make the decision for herself rather than imposing it on her, as in the criminal response system.

If we take the promise of ending domestic violence seriously, we must recognize its complexities and the need for individualized responses. Social, financial, emotional, and psychological support are just as important as legally binding protections in assisting survivors in the process of exiting and recovering from abusive relationships. Domestic violence responses which empower women to leave and help them keep their abusers away, like the one developed here, are one piece of the puzzle. With commitment to addressing the underlying dynamics of the cycle of domestic violence, the promise of freedom from domestic violence could one day be a reality.

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