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“NO-DROP” CIVIL PROTECTION ORDERS: EXPLORING THE BOUNDS OF JUDICIAL INTERVENTION IN THE LIVES OF DOMESTIC VIOLENCE VICTIMS

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I. INTRODUCTION

As the Supreme Court’s decision in *Castle Rock v. Gonzales*² illustrates, the American legal system continues to struggle with the development of appropriate legal responses to the problems of domestic violence.³ Although states now have spent

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2. 545 U.S. 748 (2005). In *Castle Rock*, Jessica Gonzales had a civil protection order against her estranged husband. *Id.* at 752. One night Gonzales’ husband took the parties’ daughters without permission, in violation of the order. *Id.* at 753. The police told Ms. Gonzales there was nothing they could do. *Id.* at 753-54. At 3:20a.m., the husband arrived at the police station, opened fire, and was shot and killed by the police. *Id.* The police found the bodies of all three daughters, whom the husband had already murdered, in his truck. *Id.* Ms. Gonzales asserted that the failure of the police to respond to her report of her husband’s violation violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Id.* at 754-55. Specifically, she alleged that because the protection order statute required police to arrest when they had probable cause to believe a restrained party violated a provision of the order, she had a property interest in the enforcement of the terms of her order. *Id.* at 753.

3. Despite language in the Colorado statute telling police they “shall arrest” perpetrators who violate civil protection orders, the Court reasoned that the police had discretion to decide whether or not to do so. *Id.* at 757. The pertinent part of the statute read as follows: “A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that . . . the restrained person has violated or attempted to violate any provision of a restraining order” *Id.* The Court found that other Colorado statutes used the word “shall,” but still gave police discretion, so that the statute underlying the protection order would have used much stronger language if it truly mandated police action. *Id.* at 756. The Court thus held that there was no personal entitlement to “something as vague and novel as enforcement of restraining orders.” *Id.* at 757.

many years experimenting with different approaches, policymakers and advocates face an inherent tension in the modern system of legal remedies for domestic violence victims. On one hand, battered women's⁴ advocates have worked for years to persuade the state to view and respond to domestic violence as a widespread social and public health concern, rather than a private matter to be dealt with in the home.⁵ Since nearly one third of American women report physical or sexual abuse by a husband or boyfriend at some point in their lives,⁶ ensuring women's safety is a natural and primary goal of the legal regime established to respond to this problem.

On the other hand, an important element of responding to the problem is reestablishing and maintaining victims' sense of control over their own lives.⁷ For the past thirty years, battered women's activists have been clear about the importance of autonomy for victims, free from the controlling behaviors of the batterer.⁸ Ironically, some of the remedies adopted to protect victims of domestic violence actually diminish victims' autonomy. In the criminal realm, this is reflected in the movement to impose "no drop" prosecutions, requiring the state to prosecute batterers even if the victim does not wish to pursue the case.⁹

In the civil context, states have responded to domestic violence with the adoption of statutes authorizing courts to enter civil protection orders (CPOs) to protect women from batterers, and making it relatively easy for victims to obtain such orders. State court judges hearing CPO cases consider both the policy underlying CPOs and the impact of domestic violence on the public when determining whether to grant or deny relief. Similar considerations come into play when a victim requests that a CPO

4. This article refers to victims as women and perpetrators of intimate partner violence as men, given empirical findings that most intimate partner violence is committed by men against women. See Patricia Tjaden & Nancy Theones, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women, Policy Implications*, NCJ 183781, November 2000.

5. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 24, 45-46 (2000).

6. Violence Against Women and Department of Justice Reauthorization Act (VAWA III), Publ. L. No. 109-162, 119 Stat. 2960 (2005).

7. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 317-319 (1982).

8. *Id.*

9. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (supporting aggressive prosecution policies in domestic violence cases).

be vacated. In fact, some judges refuse to drop victims' orders when they so request, reasoning that dissolution, or "vacatur," would be contrary to public policy.¹⁰ Such reasoning seems logical, given the seriousness with which judges are directed to, and should, treat domestic violence. Nonetheless, this article argues that while domestic violence is a public problem that merits a serious response by the state, neither public policy nor the public's interest requires judges to maintain CPOs against the wishes of victims. As explained below, doing so may even be contrary to both.

A victim may wish to vacate her order for myriad reasons. She may want to reconcile with the batterer rather than live without his financial support.¹¹ Loss of that support may cause her to be unable to pay her bills or to provide for her children. It may mean the difference between maintaining a roof over her head or becoming homeless, and as a consequence, facing violence at the hands of a stranger. If the protection order prohibits the batterer from contacting the parties' children, the victim may feel responsible or guilty, or may believe that this result is not in her children's best interest. Members of her family, religious institution, and community may pressure her to keep the family together.¹² The batterer may pressure her to drop the order. Or it may be

10. See *Stevenson v. Stevenson*, 714 A.2d 986, 995 (N.J. Super. Ct. Ch. Div. 1998) ("[A] real threat of recurrence of domestic violence by defendant upon his battered wife will exist if the Final Restraining Order is dissolved. This court will not be an accomplice to further violence by this defendant, by wholly dissolving at this point the restraints that have been entered against him."); *Irene D. v. Anthony D.*, 449 N.Y.S.2d 584, 586 (N.Y. Fam. Ct. 1982) ("To permit a discontinuance as regards the children would, in this Court's judgment, expose them to the very real risk of imminent and potentially serious harm. Similarly, even a discontinuance of the petitioner's individual claim would be inimical to the children's best interests. Children cannot possibly remain unscathed in a home where their mother is made a punching bag."); *Tobkin v. Florida*, 777 So.2d 1160, 1165 (Fla. Dist. Ct. App. 2001) ("It indeed may be wise policy to require court approval prior to allowing a petitioner to dismiss a petition for an injunction for protection against domestic violence. The petitioner-victim may be intimidated into dropping the case by threats or fear of the respondent. And, in view of these concerns, we invite the legislature and the Family Law Rules Committee to consider whether legislation and a special dismissal rule is needed in cases involving injunctions against domestic violence. Nevertheless, the law does not presently require such court-approval.").

11. See Barbara J. Hart & Erika A. Sussman, *Civil Tort Suits and Economic Justice for Battered Women*, 4 VICTIM ADVOC. 3, 4 (2004) (explaining that access to economic viability is critical to the long-term safety of victims, but that civil protection orders and the majority of legal mechanisms available to battered women do not account for this reality).

12. See, e.g., Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 958 (1999) (summarizing litera-

that, while in effect, the protection order accomplished the goals for which the victim obtained it, and she no longer needs or wants the state's intervention in her life.

The dilemma for judges is that almost no state statutes or published opinions provide specific criteria to analyze a victim's motion to vacate her order. Armed with little but public policy as a guide, state court judges struggle with the tension between providing maximum protection to victims, for their safety and that of the public, and respecting the autonomy of victims as civil litigants in private rights of action.

In the absence of state law, federal doctrine regarding vacatur of traditional civil injunctions may provide a baseline from which a judge may begin her analysis. This article applies federal standards to published state court opinions regarding dissolution of CPOs. It argues that denying a victim's motion to vacate a protection order sharply departs from analogous federal decisions. In traditional civil injunction litigation, if neither party wants the injunction, and particularly if the plaintiff no longer wishes to enjoin the defendant, the court is hard-pressed to justify continued intervention in the relationship. Instead, the court defers to the parties' wishes, except in the rare circumstance in which it finds that vacatur would be detrimental to the public interest.¹³

This policy of deference to the parties, and particularly to the plaintiff's decision to halt the litigation she initiated, recognizes the value placed on litigants' autonomy in civil, private rights of action. Autonomy is particularly critical for litigants who are also victims of domestic violence. While judges may feel that it is better to "be safe than sorry" by keeping a protection order in place rather than granting the victim's motion to vacate, recent research suggests that the opposite may be true. Victims

ture regarding challenges faced by victims because of their ethnicity, race, class, and religion).

13. See, e.g., *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983). Before a federal court weighs the public's interest against that of the named parties, it first determines whether the statute underlying the injunction evinces a clear legislative intent that the public's interest is at issue. Statutes are not always explicit with regard to whether they regulate a matter of public concern, or a controversy more private in nature. Courts often must infer the intent of the law by examining its purpose and legislative history. *Id.* The inquiry is critical because, as stated by the Supreme Court, courts do not have "broad license to promote the general welfare" when invoking the public interest, and must therefore use care to advance the purpose of the statute, rather than their own ideologies. *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 666 (1976).

who feel that officials listen, consider and respond to their needs are less at risk of re-assault.¹⁴ When viewed in light of the fact that data regarding the effectiveness of CPOs at preventing re-assault is largely inconclusive,¹⁵ maintaining orders against the wishes of victims may be over-relying on their efficacy and underestimating the value of the victim's feelings of personal choice and empowerment to her physical safety.

While many CPO laws are explicit that their purpose is not limited to preventing violence against the individual victim, but to protecting the public as well,¹⁶ state legislators have never ex-

14. See *infra* notes 257-58 and accompanying text.

15. See Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 TRAUMA, VIOLENCE & ABUSE 141 (2005) (conducting an extensive investigation of published research from January 1990 to September 2003, the authors concluded that studies examining the effectiveness of civil protection orders varied so greatly in their methodology that it was impossible to draw many conclusions with regard to what legal interventions are effective at preventing re-assault, and of those that could be drawn, little should be translated into practice at this point).

16. See ARK. CODE ANN. § 9-15-101 (2002) ("The General Assembly of the State of Arkansas hereby finds that this chapter is necessary to secure important governmental interests in the protection of victims of abuse and the prevention of further abuse through the removal of offenders from the household and other injunctive relief for which there is no adequate remedy in current law. The General Assembly hereby finds that this chapter shall meet a compelling societal need and is necessary to correct the acute and pervasive problem of violence and abuse within households in this state."); COLO. REV. STAT. § 13-14-101(2) (2005) (protection orders of paramount importance because they promote safety, reduce violence, and prevent serious harm and death); IDAHO CODE ANN. § 39-6302(2002) ("The purpose of this act is to address domestic violence as a serious crime against society and to assure the victims of domestic violence the protection from abuse which the law and those who enforce the law can provide It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior in the home is criminal behavior and will not be tolerated."); 750 ILL. COMP. STAT. 60/102 (1999) (underlying purposes of act include recognition that "domestic violence is a serious crime against the individual and society which produces family disharmony in thousands of Illinois families . . . which frequently culminates in intra-family homicide" and recognition that "the legal system has ineffectively dealt with family violence in the past . . . and has not adequately acknowledged the criminal nature of domestic violence . . . in practice there is still widespread failure to appropriately protect and assist victims."); LA. REV. STAT. ANN. § 46:2131 (1999) (official response of law enforcement to protect the victim and communicate the attitude that violent behavior will not be excused); ME. REV. STAT. ANN. tit. 19A, § 4001 (1998) (recognition that domestic violence is a serious crime against the individual and society that frequently results in intrafamily homicide); W. VA. CODE ANN. § 48-27-101 (2004) (recognition that domestic violence is a crime and major health problem with enormous costs to the state in terms of money and lives; purpose of act is to assure victims maximum protection from abuse and that domestic violence will not be excused or tolerated).

pressed the intent that the public interest should trump that of the individual victim in maintaining a CPO against her will. If it did, the distinction between the criminal and civil justice systems' responses to domestic violence would be largely inconsequential.¹⁷

In the criminal system, statutes mandating the arrest of batterers (such as the statute at issue in *Castle Rock*) and policies requiring aggressive or "no-drop" prosecution of batterers direct police and district attorneys to arrest and prosecute perpetrators of domestic violence. These imperatives apply even when the victim disagrees, to protect the safety not just of the victim, but also of society generally.¹⁸ On the civil side, protection orders provide an alternative to criminal charges, or an additional remedy, to give victims a degree of control over their cases that is lost when the criminal justice system intervenes.¹⁹ Statutory schemes and legislative histories express the importance of victim autonomy, especially in light of the mandatory interventions in place in the criminal context.²⁰

Though the distinction between civil and criminal remedies is critical, it is often blurred by the large-scale involvement of the criminal justice system in CPO cases, and particularly in their enforcement. The quasi-criminal nature of CPOs, as compared with traditional civil injunctions, may cause a judge to take a more interventionist, rather than deferential, approach.

Judges may be influenced by a number of other factors intrinsic to cases involving domestic violence that are not present in other kinds of civil injunctions. For example, victims of domestic violence, compared with other groups of litigants, have

17. See, e.g., DC Council Rep. of May 12, 1982 on the Amendments to the DC Intrafamily Offenses Act at 11 (1982) (stating that the Intrafamily Offenses Act "was intended to provide family members with access to special court remedies without interposing criminal sanction in the family circle," and further that "criminal sanctions should not be the only avenue for correcting such abuses, because . . . threats to the long-term stability of the family or home may arise in the seeking of criminal sanctions.").

18. See Hanna, *supra* note 9.

19. See Peter Finn & Sarah Colson, Civil Protection Orders: Legislation, Current-Court Practice, and Enforcement, 1990 National Institute of Justice 2-343 (NCJ 123263). See also, DC Council Rep., *supra* note 17 (stating that the Intrafamily Offenses Act "was intended to provide family members with access to special court remedies without interposing criminal sanction in the family circle," and further that "criminal sanctions should not be the only avenue for correcting such abuses, because . . . threats to the long-term stability of the family or home may arise in the seeking of criminal sanctions").

20. See Finn & Colson, *supra* note 19.

tremendous credibility issues in court.²¹ In addition, the psychological dynamics of domestic violence are complex, and judges are not provided with sufficient time, information or training to be able to adequately address them.²² Judges become frustrated with victims who appear to want to stay in abusive relationships, with batterers who appear to flout court orders, and with the problem of domestic violence generally.²³ Finally, judges may assume that battered women, by definition, are unable to make rational decisions with regard to what is in their best interest. These factors may inappropriately skew judicial decision-making.

Yet other factors unique to domestic violence cases may legitimately cause judges to depart from the normal standard of deference to litigants. Chief among these is the risk that the batterer is coercing the victim to vacate the order. Feminist activists have argued for years that coercion is a fundamental component of domestic violence, and that batterers use coercion to control victims' behavior.²⁴ Given the possibility that a victim is being coerced to vacate her order, supporting her autonomous decision-making in court is complex.

Though the differences between traditional civil injunctions and protection orders complicate their comparison, application of federal principles of vacatur to state court protection orders nonetheless provides a useful gauge for assessing the legitimacy of a judge's decision to depart from the normal standard of deference to the petitioner. State judges analyze batterers' motions to vacate in accordance with the standards of law applied to traditional civil injunctions. Perhaps victims' motions should be analyzed similarly, despite the differences in their structure and content.

Whatever approach a judge takes to a victim's motion to vacate, there will be a risk. Women who are victims of domestic violence will be threatened or hurt or even killed, and the danger of this happening may increase or decrease based in part on the judge's decision. In the face of such risk, this article argues that

21. See generally Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733 (2003).

22. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 39-44 (1999).

23. *Id.*

24. SUSAN SCHECHTER, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES 4 (1987).

on balance, the cost of sacrificing victim autonomy in these cases is too great, and that courts should defer to the victim's decision to vacate, except in the limited circumstance in which doing so is detrimental to an identifiable third party – specifically, the victim's child. Absent this exceptional circumstance, deferring to the victim's wishes furthers the dual goals of the public policy underlying protection order statutes: safety and autonomy.

Part II of this article reviews these policy goals and the intent of the drafters of protection order legislation. It then describes the challenge for judges created by broad public policies, in the absence of specific statutory criteria for determining vacatur. Part III reviews federal standards of law governing traditional civil injunctions, and Part IV applies these principles to state court CPO decisions for the purpose of analyzing the reasoning of some judges' reluctance to defer to victims' wishes to vacate orders. It illustrates how this reasoning is skewed by factors that, while unique to CPO litigation, may not justify denial of victims' motions to vacate.

Part V explores whether the public has an identifiable interest in the vacatur of an individual victim's CPO. While domestic violence is a problem of enormous magnitude in this country, and therefore impacts the public, this section suggests that the drafters of CPO legislation did not intend for the public's interest to trump that of the victim's when she chooses to vacate her order. It recognizes an important exception, however. Specifically, the interests of a child may outweigh that of the individual victim's, if the child is at risk of danger by the dissolution of the protection order. Nonetheless, the article concludes that even if the public or a child has an interest in CPO litigation, deferring to a victim's decision to vacate her order may be more likely to protect her and her child from future assault, and thus better serve the public and third party interests, while simultaneously supporting the individual victim's autonomy.

II. CIVIL PROTECTION ORDERS

Consideration of the purposes of CPO statutes is critical to a clear understanding of the dilemmas inherent in the existing remedial system for domestic violence. This section reviews the underlying purpose and history of protection order legislation. A principal goal of the drafters was autonomy for victims of domestic violence. Thus, in addition to prevention of physical violence, victim autonomy ought to be considered by judges when victims

ask that their orders be vacated. But very few state statutes set forth this or any factor for a judge to consider when presented with a victim's motion to vacate. Instead, judges are left with broad policy mandates to take domestic violence seriously and to convey the message that domestic violence is a crime that will not be tolerated, with scarce further direction. As noted earlier, in the absence of specific criteria to apply, these policies create a tension between respecting the victim's autonomy as a civil litigant in a private right of action, and protecting her as a victim of the crime of domestic violence. The section concludes by summarizing the handful of existing state statutes governing vacatur of victims' motions.

A. *Purposes Underlying Civil Protection Orders*

Though traditional civil injunctions have deep historical roots, dating back to the Court of Chancery in England,²⁵ the first CPO legislation was not passed until 1970.²⁶ Before that, the only civil remedy available to victims of domestic violence was a restraining order within the context of a larger lawsuit – most commonly, a divorce.²⁷ Only married women, and of them, only those who could afford representation by an attorney, were eligible for this relief.²⁸ Even for this narrowly defined group of litigants, the cost, time, and complexity of seeking the court's protection proved prohibitive, and the only available relief within the order was limited to a provision instructing the batterer to stay away.²⁹

Battered women's advocates were aware that much more was going on in battering relationships than individual acts of assault. They knew that batterers were coercing victims, not just physically hurting them, in order to control their behavior.³⁰ As early as 1976, Susan Schechter, a pioneer of the Battered Women's Movement, defined battering as "a pattern of coercive control that one person exercises over another. Abusers use

25. See OWEN M. FISS, *INJUNCTIONS* 74 (1972).

26. The District of Columbia Intrafamily Offenses Act was adopted by Congress on July 29, 1970. D.C. CODE ANN. § 16-1001, *et seq.* (2005).

27. See Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J. L. & POL'Y 157, 161 (2003).

28. *Id.*

29. *Id.*

30. See *Wife Beating: Government Intervention Policies and Practices*, (Testimony of Marjorie Fields before the U.S. Commission on Civil Rights), Washington, D.C., January 30-31, 1978.

physical and sexual violence, threats, emotional insults and economic deprivation as a way to dominate their partners and get their way."³¹

When crafting protection order statutes in the 1970s, advocates knew that victims' autonomy of decision-making, free from batterers' coercion, must be a central goal of legislation.

A new remedy was needed. One that would enjoin the perpetrator from future abuse. One that would not displace the abused woman from her home but could compel relocation of the abuser. One that could constrain the abusing husband from interfering with and disrupting the life of the abused woman and children. One that could provide stability and predictability in the lives of women and children. One that would give the mother authority to act as primary caretaker of her children; limiting the risk of abduction by the father to coerce reconciliation or to penalize the abused woman from revealing the violence or terminating the relationship. One that could afford economic support so that the abused woman would not be compelled to return to the abuser to feed, clothe and house her children. One that would sharply limit the power of the battering husband or partner to coerce reconciliation. One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders were this new remedy.³²

In 1970, the District of Columbia³³ passed the first CPO statute. By 1980, forty-five states implemented similar legislation.³⁴ Today all jurisdictions in the United States provide CPOs for victims of intimate or family violence.

As statutory remedies have been honed over the past thirty years, CPOs have come a significant way to provide victims with the autonomy that the drafters had in mind. Expansion of the relief available within the order provides women with far more options than they had previously. A victim may be able to: oust the batterer from a shared residence; obtain child custody and visitation; get child support and other financial support; require the batterer to participate in domestic violence counseling; and obtain other relief unique to her situation that the court, in its discretion, finds will prevent further abuse. The wide array of relief available to victims – relief not available in the context of a

31. SCHECHTER, *supra* note 24 at 4.

32. Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 3, 23 (1992).

33. See *supra* statutes cited note 26.

34. See CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 498 (2001).

criminal prosecution of domestic violence – provides victims reasons, in addition to preventing physical assault, to obtain these orders.³⁵

Indeed, research indicates that victims who obtain CPOs do so for many reasons other than, or perhaps in addition to, preventing future assault. Karla Fischer and Mary Rose found that victims obtained orders for three primary reasons: 1) to have control in their lives; 2) to have the law act as a "loud-speaker" that society was intolerant of the abuse; and 3) to create a public record documenting the abuse³⁶ so that should the batterer commit more violence, including homicide, there would be evidence of the batterer's past conduct, and the batterer would not just "get away with it."³⁷

Fisher and Rose found that 86% of the victims they interviewed thought that the batterer would violate the order, yet 98% reported feeling more in control of their lives and 89% felt more in control of their relationships after obtaining a temporary protection order.³⁸ Similarly, in a study conducted by Adele Harrell and Barbara Smith, less than half the women believed the batterer would obey the order, yet 79% said it was helpful in sending her partner a message that his actions were wrong.³⁹

While a judge in a CPO case may see the primary purpose of the order as preventing the batterer from physically abusing the victim, the petitioner may believe this result to be one of several, though perhaps not even the most critical or realistic, purposes of the order. Understanding the victim's real reasons for obtaining the protection order ought to be critical to judges' analyses when determining whether to vacate that order later. For example, at a vacatur hearing, it may appear to a judge that the CPO did not accomplish the goal of prohibiting the batterer from contacting

35. See Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 214, 218 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996). In the context of temporary protection orders, 25% of women wanted specifics about visitation of their partner with their shared children; 19% wanted provisions prohibiting the partner from coming to her place of work and parents' homes; 7% wanted property held by their partner returned. *Id.* The authors found that these provisions were desired by but not awarded to victims who obtained temporary orders). *Id.*

36. See Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 *CRIME & DELINQ.* 414, 423 (1995).

37. *Id.* at 420-22.

38. *Id.* at 417.

39. See Harrell & Smith, *supra* note 35, at 218.

the victim. From the point of view of the victim, however, the order may have helped her achieve her primary goal of taking control of the relationship, or of conveying to the batterer that she will seek help from the legal system when she needs it, and that the system will respond.

Data show that even temporary protection orders, typically in place for only a couple of weeks, help victims achieve their goals. Significant numbers of victims who obtain temporary orders do not return to court to convert them to final orders, but let them expire.⁴⁰ In describing their reasons for dropping, most women simply said that the order had given them what they needed.⁴¹

Although judges hearing motions to vacate may not consider the array of reasons the victim obtained the order, beyond that of preventing future violence, this limitation is understandable. While state statutory schemes explicitly state the specific criteria that victims must meet in order to obtain an order, few explain, or even mention, what if any showing a victim must make in order to vacate it.

B. *The Problem: Lack of Guidance for Analyzing Victims' Motions to Vacate CPOs*

When a victim chooses to vacate a CPO, she must obtain leave of the court to do so.⁴² Though almost all state statutes provide standards of law for modification or reconsideration of an order,⁴³ less than half mention vacatur of a final order⁴⁴ and

40. See Fischer & Rose, *supra* note 36, at 427 (explaining that approximately 50% of women nation wide do not convert the temporary order into a final order).

41. *Id.*

42. Although petitioners may not vacate orders without leave of court, in some states, the petitioner's conduct has been held to nullify the enforceability of the order.

43. However, Connecticut, North Carolina, Wisconsin and Wyoming have no explicit statutory provision governing modification or reconsideration of orders.

44. ARIZ. REV. STAT. ANN. § 13-3602(I) (2001) provides that after hearing, the court may quash the order, but the statute is ambiguous with regard to whether this language refers only to the continuation of the *ex parte* order, or if it means that a permanent order may be vacated; CAL. FAM. CODE § 6345(a) (2004) provides that upon written stipulation of the parties or upon motion of a party, the order is subject to termination; COLO. REV. STAT. § 13-14-102(17.5) (2005) provides that nothing shall preclude the protected party from applying to the court at any time for dismissal of a permanent order; D.C. CODE ANN. § 16-1005(d) (2005) provides that the court may, upon motion of a party, rescind a protection order for good cause shown; DEL. CODE ANN. tit. 10, § 1045(d) (1999) says that the protective order may be rescinded during the term of the order upon motion; FL. STAT. § 741.30(10) (2005)

of these, only six jurisdictions set forth rules specifically applicable to a victim's motions for vacatur.⁴⁵ This paucity of legislation leaves courts with almost no guidance in determining these motions.

Even in the fraction of jurisdictions that have laws specifically addressing victims' motions, most give judges enormous discretion. For example, Montana provides that an order *may* be terminated upon the petitioner's request.⁴⁶ In South Carolina, if the parties reconcile the petitioner *may* obtain a dismissal of the

provides that either party may move the court to dissolve an injunction at any time; 750 ILL. COMP. STAT. 60/224(f) (1999) provides that other provisions in the statute do not limit a party's ability to vacate an order; IND. CODE § 34-26-5-12 (1998) provides that if a petitioner files a written request or makes an oral request on the record to dismiss the case in open court the court shall without delay or any conditions dismiss the case without prejudice; ME. REV. STAT. ANN. tit.19A § 4006(7) (1998) does not limit the means for obtaining dissolution or discharge of an order; MD. CODE ANN., family § 4-507 (2004) states that a protective order may be rescinded during its term; MA. GEN. LAWS ch. 209A, § 3 (2003) refers to vacating orders, but provides only that the fact abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient grounds for allowing the order to be vacated; MICH. COMP. LAWS ANN. § 600.2950(c) (2002) provides that a court may offer an advocate to assist a victim in rescinding a personal protection order; MO. REV. STAT. § 455.060(5) (2003) states that an order shall terminate upon the filing of a motion to terminate by the petition except in cases where custody of a minor child is granted to the respondent the order will terminate only upon consent of the respondent or failure by the respondent to file a timely objection to the dismissal; MONT. CODE ANN. § 40-15-204 (2006) states that the order may be terminated upon the petitioner's request that the order be dismissed; NEV. REV. STAT. ANN. § 33.080 (2002) provides that the restrained party may move to dissolve or modify the temporary order; N.H. REV. STAT. ANN. § 173-B:5 (2002 & Supp. 2006) says that either party who wishes the defendant to be excused from any provisions of an order may petition the court; N.J. STAT. ANN. § 2C:25-29(d) (2005) provides that upon good cause shown a final order may be dissolved; N.M. STAT. § 40-13-6(B) (2006) states that injunctive orders shall continue until modified or rescinded upon motion by either party or until the court approves a subsequent consent agreement entered into by the parties; OKLA. STAT. ANN. Tit. 22, § 60.4(G)(3) (2005) states that either party may file a motion to vacate, that a hearing will be set and that the court will take "such action as is necessary under the circumstances"; OR. REV. STAT. § 107.720(2)(b) (2005) provides that a restraining order shall not be terminated upon a motion for dismissal by the petitioner unless the motion is notarized; S.C. CODE ANN. § 20-4-70(A) (Supp. 2005) provides that an order may be terminated upon motion by either party showing good cause, and that if the parties reconcile, the court may grant an order of dismissal without a hearing if the petitioner appears personally at the offices of the issuing court, shows proper identification and signs a written request to dismiss based on the reconciliation; UTAH CODE ANN. § 30-6-4.2(10) (1998 & Supp. 2006) states that a court may vacate; VA. CODE ANN. § 16.1-279.1(F) (2003 & Supp. 2006) provides that either party may at any time file a written motion requesting a hearing to dissolve an order.

45. *Id.* Indiana, Colorado, Montana, Missouri, Oregon, and South Carolina mention procedures applicable specifically to the protected party's desire to vacate.

46. MONT. CODE ANN. § 40-15-204 (2006).

order upon written request.⁴⁷ Similarly in Oregon, an order *may* be vacated if the petitioner submits a notarized motion so requesting.⁴⁸ New Jersey and the District of Columbia permit the movant to vacate a final protection order for good cause shown, but neither statute specifies whether this burden is the same for a petitioner as for a respondent seeking vacatur.⁴⁹

Only two states mandate what action a judge must take when presented with a victim's motions to vacate. In Indiana, if a petitioner files a written request or makes an oral request on the record to dismiss the case, "the court shall without delay or any conditions dismiss the case without prejudice."⁵⁰ In Missouri, the court "shall terminate" the order upon "the filing of a motion to terminate . . . by the petitioner."⁵¹

The dearth of statutes addressing motions to vacate and the broad discretion expressed in most of those that do, leaves judges with little guidance in reaching decisions.⁵² One judge's statements regarding her approach to vacatur so reflect. Explaining how difficult these decisions are, she stated

I think you have to balance the realities of a judicial obligation (which presumably is a statute that says "may" vacate) with an understanding of the dynamics that must allow a historically disempowered victim the opportunity and information to make a self-choice. I would be hard pressed to think about

47. S.C. CODE ANN. § 20-4-70(A) (Supp. 2005).

48. OR. REV. STAT. § 107.720 (2)(b) (2005).

49. In the District of Columbia, the court may, upon motion of a party, rescind a protection order for good cause shown. D.C. CODE ANN. § 16-1005(d) (2005). The New Jersey Prevention of Domestic Violence Act provides that upon good cause shown, a final restraining order may be dissolved so long as the judge who dissolves the order is the same judge who entered it or has a complete record of the underlying hearing available to him or her. N.J. STAT. ANN. § 2C:25-29(d) (2005).

50. IND. CODE § 34-26-5-12 (1998).

51. MO. ANN. STAT. § 455.060(5) (West 2006).

52. *See, e.g., Mitchell v. Mitchell*, 821 N.E.2d 79 (Mass. App. Ct. 2005) in which the court was presented with an appeal from the denial of a batterer's motion to vacate. To determine what standard of law applied, the court first looked to the state abuse of prevention statute, but found that no standard was articulated. *See id.* at 85. Next the court looked to case law, but found "scant authority discussing the specific standard for modifying or terminating" *Id.* at 87. It then examined case law interpreting other aspects of the statute, finding only that the court's authority is broad and that "judicial discretion involves making a circumstantially fair and reasonable choice within a range of permitted options." *Id.* The court also reviewed cases and statutes governing modification of divorce and child custody orders, finding modification to be appropriate upon a showing of a substantial or "material and substantial" change in circumstances. *Id.* at 88. It then turned to and applied federal principles of modification and vacatur of traditional civil injunctions. *Id.*

what might trump her self-choice (only protecting a vulnerable child, maybe, or a significantly impaired victim). The choice doesn't have to be "right" since victims like anyone else are allowed to make "wrong" choices, but I want to feel that the petitioner has some minimal level of insight – which level I can't define. I'm just wanting to make sure she has accurate information and understands it – and then she can make the choice.⁵³

The problem illustrated in this quotation can be understood as a tension between respecting "battered women as experts in their own lives, and in knowing how a particular institutional response is likely to affect their safety" and judges' charge of "making immediate decisions that affect the safety of each individual battered woman who comes before them, decisions that also have implications for batterer accountability and broader public safety." In response to this dilemma, the National Council of Juvenile and Family Court Judges and the Battered Women's Justice Project convened a round table discussion in September 2005.⁵⁴

Advocates and attorneys with expertise in civil and criminal protection orders discussed how judges should approach victims' motions to "drop" protection orders.⁵⁵ Their responses to specific factual scenarios in which a petitioner sought to vacate fell along a continuum, and moved back and forth depending on the circumstances, with "drop the order" at one end and "do not drop" at the other.⁵⁶ The only overarching agreement was that "there can be no single, universal response to a victim's request to dismiss a civil protection order . . . The 'stereotypical battered woman' does not exist, and protocols and decisions based on sim-

53. Email from Hon. Maureen McKnight, Multnomah County Circuit Court Judge, Portland, Oregon to author (May 23, 2003, 01:41pm EST) (on file with author). See also Interview with Judge Richard Halloran, Wayne County Circuit Court Judge, Detroit, Mich. (Mar. 22, 2005) (stating that he always tries to convince victims to modify before allowing them to vacate their orders, and that if they won't modify, he makes them wait two weeks before allowing them to vacate) (on file with author); Interview with Judge J. Wesley Saint Claire, King County Superior Court Judge, Seattle, Wash. (Mar. 22, 2005) (explaining that the victim is the person who can best assess whether she is in danger, not the judge, and that given the fact that the state statute is silent, if the victim feels that continuance of the order will put her in more danger, he will vacate) (on file with author). The author acknowledges the anecdotal nature of these interviews.

54. National Council of Juvenile and Family Court Judges and The Battered Women's Justice Project, Critical Issues Seminar: You be the Judge, in Minneapolis, MN (Sept. 26-27, 2005) [hereinafter *Discussion Notes*].

55. *Id.* at 2.

56. *Id.* at 2-3.

plistic categories or rigid formulas will yield misleading and potentially dangerous results.”⁵⁷

While there is little legislative guidance to assist courts in these decisions, there is also an absence of appellate case law.⁵⁸ Only two reported opinions directly address the specific scenario in which a victim moved to vacate her CPO, and these were trial court decisions.⁵⁹ In the absence of statutes and common law on point, some judges have relied upon the principles applied by federal court judges analyzing vacatur of injunctions.

III. MODIFICATION AND VACATUR OF CIVIL INJUNCTIONS

A. *Civil Protection Orders Are Civil Injunctions*

An injunction is a civil court order that, at its most basic, directs a defendant to do something or not do something.⁶⁰ The plaintiff must prove that this “something” – typically a directive to cease some activity – is necessary to prevent continued or future injury. In this way, an injunction has been described as “the judicial ordering of a relationship in conflict” in which the authority and power of the court are placed at the service of the

57. *Id.* at 23.

58. Several factors may explain this scarcity of case law. Given that protection order statutes are designed for litigants to represent themselves in these cases, and the fact that most victims of domestic violence do indeed appear *pro se*, it may be that victims whose motions are denied do not possess the legal knowledge or skill to file appeals. In many states the time for filing an appeal runs very quickly, making it challenging for litigants to learn the process or find, let alone afford, an attorney who can assist. Victims may feel disempowered and revictimized by the denial of their motions at the trial court level, and hence lack the motivation to file an appeal. Alternatively, victims may feel that because the order does not restrain their actions, but instead restrains the batterer's actions, appealing a trial court's decision may not be worth the time, energy, and risks inherent in continued litigation. These victims may instead decide to ignore the protection order by having contact with, or allowing contact by, the batterer. It should be noted that such a decision may have serious, detrimental consequences, however. *See generally*, DALTON & SCHNEIDER, *supra* note 34 at 537-38 (describing cases in which victims have been criminally charged with aiding and abetting, have been found in contempt of the civil protection order despite the fact that they have not violated it but the batterer has). Additionally, victims who reconcile without first vacating may not be taken seriously by the police when they call for help, or may be admonished by child protective services.

59. *See* *Stevenson v. Stevenson*, 714 A.2d 986 (N.J. Super. Ct. Ch. Div. 1998); *I.J. v. I.S.*, 744 A.2d 1246 (N.J. Super. Ct. Ch. Div. 1999), discussed in Section V, *infra*.

60. *See, e.g.*, Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101 (1986).

victim to compel someone else – the violator – to respect the victim's rights.⁶¹

Although generally treated as a unique class of remedy, CPOs are conceptually no different than other civil injunctions, as several state court opinions have recognized.⁶² They are civil court orders directing the respondent both to do something and not to do something.⁶³ They direct the respondent to stay away from the victim, and they direct him not to abuse, harass, annoy or molest her. In so doing, CPOs are a classic example of "the judicial ordering of a relationship in conflict."⁶⁴

Because a CPO is an equitable remedy, judges presiding over CPO cases retain broad discretion to issue, modify and vacate these orders. This discretion includes conducting the cost-benefit analysis that judges would conduct for any other type of injunction.⁶⁵ For instance, if the victim and batterer have a child in common, the court will weigh the benefit of restraining the batterer from having any contact with the victim against the cost to the batterer of not being allowed to visit his child, who may live with the victim or of whom the victim has legal custody. It will also weigh the costs and benefits to the child, a third party to the litigation, of not having visitation with his father. After conducting this analysis, the court may tailor the protection order to provide a visitation plan between the father and child that maximizes the safety to the victim while preserving the interests of both the batterer and child. The court may ultimately determine that visitation is in the best interest of the child, but may limit the location, time and frequency of visitation to assure that these factors do not put the victim at risk.

61. *Id.*

62. *See, e.g.,* Cruz-Foster v. Foster, 597 A.2d 929, 930 (D.C. 1991); Mitchell v. Mitchell, 821 N.E.2d 79, 87 (Mass. App. Ct. 2005) (noting a number of published decisions in which states treated CPOs as they would any other civil injunction).

63. *See* Finn & Colson, *supra* note 19, at V (defining a civil protection order as "a legally binding court order that prohibits an individual who has committed an act of domestic violence from further abusing the victim").

64. Jost, *supra* note 60.

65. Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-313 (1982). The classic example of this balancing of remedies is Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970), in which a judge, in the case of a factory that has been shown to pollute the environment, may consider ordering that the factory be closed until the pollution is controlled. Before issuing this order, the judge may consider factors such as the loss of jobs to the factory workers, as well as the benefit to the public of the cessation of the pollution. Inquiry with regard to third parties and the public interest is necessary because injunctive relief frequently impacts them.

The court may also consider the interest of the public, often defined by the public policy underlying the state's CPO statute. For example, the statute may explicitly state that domestic violence is a crime that will not be tolerated by the state against its citizens. Such a policy consideration may influence the decisions that state court judges, like their federal court colleagues, make at all stages of protection order litigation, including issuance, modification and vacatur.

The Supreme Court has decided a number of cases involving the modification and vacatur of injunctions under federal law, and has articulated standards applicable to these motions. Though state law, not federal, governs vacatur, the scarcity of state statutes and published decisions has caused some courts to rely upon the standards set forth by the Supreme Court for guidance in interpreting their own statutory schemes,⁶⁶ and others to directly apply these standards to CPO cases.⁶⁷ Because a plaintiff's uncontested motion to vacate a traditional injunction provides the closest analogy to a victim's motion to vacate a protection order,⁶⁸ this discussion turns first to this procedural posture.

B. *Uncontested Motions for Modification/Vacatur*

When the protected party seeks to vacate an injunction, it seeks to remove altogether the conditions imposed upon the defendant. Hence it is rare that defendants contest plaintiffs' mo-

66. See cases cited *infra* note 68.

67. See, e.g., *Cruz-Foster*, 597 A.2d, at 930, in which the victim moved to extend her CPO under the Intrafamily Offenses Act in D.C. The relevant provision of the statute stated that an order may be extended, modified, or rescinded upon good cause shown, but the court noted that "good cause" was not defined in the statute. *Id.* at 929. The court applied the federal principles regarding injunctions, holding that in a motion to extend a CPO, the victim must meet the same burden of proof required of a party seeking an initial injunction under federal law, explaining: "This is the normal standard in civil cases, and we see no reason to apply a different one here." *Id.* at 930. Similarly, in *dicta*, the court stated: "A party moving to dissolve an existing injunction has the burden to demonstrate an unforeseen change of circumstances which would render it unjust to keep the court's order in effect." *Id.*

68. Recently, in *Mitchell v. Mitchell*, 821 N.E.2d 79, 87 (Mass. App. Ct. 2005), the appellate court created a test for batterers' contested motions to vacate Massachusetts abuse prevention orders based on Supreme Court doctrine. See also *Sjomeling v. Stuber*, 615 N.W.2d 613, 616 (S.D. 2000), in which the court applied the test for modification and vacatur of injunctions set forth by the Supreme Court in *United States v. Swift*, discussed *infra* Section IIIC.

tions to vacate.⁶⁹ In analyzing uncontested, or agreed upon, motions for vacatur, courts customarily defer to the parties' wishes.⁷⁰ The exception to this standard of deference is when the court finds that the law underlying the injunction concerns a public interest, and the parties' desire to vacate or modify the injunction has a detrimental impact on that interest.⁷¹ This section focuses on how federal courts analyze whether the public interest is implicated in a given case.

First, the court examines whether the legislature intended that the law underlying the injunction regulate a matter of public interest. In antitrust cases, the subject of much federal court doctrine involving injunctive relief, the regulatory legislation is the Antitrust Procedures and Penalties Act ("APPA," also known as the Tunney Act).⁷² The Act explicitly states that before a court may approve a consent decree, it must make an independent determination that entry of the judgment is in the public interest.⁷³

69. An example of an exception might be when a state actor wants to comply with the conditions imposed by the injunction, such as reform of a public school, but because of budgetary reasons cannot do so without a court order mandating such compliance.

70. See *United States v. W. Elec. Co.*, 900 F.2d 283, 305 (D.C. Cir. 1990); see also John D. Anderson, Note, *Modifications of Antitrust Decrees: Over a Double Barrel*, 84 MICH. L.R. 134, 135 (1985) (explaining that the standard for modification in contested cases is significantly more difficult to meet than the standard in consent-to cases); William M. Kelly, *Construction and Modification of Antitrust Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 COLUM. L.Rev. 296, 304 (1977) (where the parties have agreed to modification, judicial approval tends to be *pro forma*).

71. See *Western Electric*, 900 F.2d at 305, made clear that the common law approach to modification and vacatur of a decree requires "a less demanding standard of review" when the motion is uncontested. Specifically, "when all parties to a decree assent to a particular modification, the relevant inquiry is whether the result comports with the public interest." *Id.* In this case, the trial court should have, but did not, consider the impact of vacatur on the public, given the far-reaching impact of the injunction. The initial decree was between the government and AT&T to break up the monopoly of the telecommunications equipment industry created by AT&T. *Id.* at 291. Because vacatur might have left in tact many of the same anti-competitive advantages AT&T enjoyed prior to its break-up, which in turn would have affected literally thousands of people, the court remanded, directing the trial court to consider this impact. *Id.* at 309.

Western Electric relied upon *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), another case involving an antitrust consent decree. After reiterating that the standard for determining an uncontested motion to vacate or modify is deference plus no detriment to the public, the Second Circuit cautioned that the term "public interest" should be limited to how it is defined in the law underlying the injunction. *Id.* at 565.

72. Anti-trust Procedures & Penalties Act, 15 U.S.C. §§ 16(b)-(h) (1982).

73. Anti-trust Procedures & Penalties Act, 15 U.S.C. § 16(e)(2) (1982). Although this Act only requires a public interest inquiry when the court enters the

and defines the criteria courts should use in determining the public interest, including the competitive impact of the judgment generally and the impact upon individuals alleging specific injury from the violations set forth in the complaint.⁷⁴

In contrast to the Tunney Act, however, the laws underlying many injunctions are not explicit with regard to whether the public has an interest, or how that interest should be analyzed. State CPO laws are illustrative. The text of the statutes and the policies behind them explain that their goals are to protect individual victims and the safety of the public. The courts are thus left to infer whether the protection order is a matter of public interest or a matter of autonomy for the individual victim.⁷⁵

Federal courts must also make this inference, in the absence of explicit text within the underlying statute stating that the public interest is an issue. *NAACP v. Federal Power Commission*⁷⁶ is an example of how the Supreme Court has conducted this analysis. The NAACP petitioned the Federal Power Commission to require the companies it regulated to provide equal employment opportunities. The Court held that although the underlying law, the Power and Gas Acts, used the words "public interest" in its text and the law was "affected with a public interest," the Act was really about regulating the transmission and sale of natural gas.⁷⁷ Eliminating discrimination, although an important national goal, was not contemplated in the statute: "This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation."⁷⁸

Federal judges also examine the nature of the conduct being regulated by the underlying law and the number of people affected in analyzing whether the public interest is implicated. In *Virginian Ry. Co. v. System Federation No. 40*,⁷⁹ the defendant railway argued that an injunction could not prohibit it from con-

decree, one scholar has noted that since passage of the Act, courts are more likely to make this inquiry in the modification posture. Anderson, *supra* note 70, at note 59.

74. *Id.*

75. See Section VI, *infra*.

76. 425 U.S. 662, 667 (1976). Though this case does not involve an injunction, both *Western Electric* and *American Cyanamid*, see *supra* notes 70 and 71, rely upon it.

77. *NAACP*, 425 U.S. at 667.

78. *Id.*

79. 300 U.S. 515 (1937).

tracting with employees other than those designated as union representatives because the law underlying the injunction, the Railway Labor Act, did not impose this obligation.⁸⁰

The Supreme Court disagreed, finding that Congress expressed that the peaceable settlement of labor controversies, especially when those controversies involved interstate carriers, was a matter of public concern.⁸¹ Because more was involved "than the settlement of a private controversy without appreciable consequences to the public,"⁸² courts could compel conduct that they might traditionally not compel in furtherance of the public interest.⁸³ The operation of railroads,⁸⁴ buses,⁸⁵ and public utilities⁸⁶ has long been identified with the public interest.

The same is true for the reform of public institutions. For example, in cases involving the reform of prisons, the Court has found that release of prisoners into the general public would be contrary to the public interest⁸⁷ and that the public has an interest in the effective operation of its institutions.⁸⁸ Similarly, the reform of hospitals and public schools⁸⁹ has been found to clearly implicate the public interest.

As the above cases make clear, the public interest is a significant factor that courts may weigh in determining whether to grant or deny injunctive relief.⁹⁰ But absent an explicit legislative statement that the public interest is at issue, explicit mention

80. *Id.* at 544.

81. *Id.* at 551.

82. *Id.* at 552.

83. *Id.*

84. *Joy v. City of St. Louis*, 183 U.S. 1, 47 (1891).

85. *See, e.g., Sexton v. Pub. Serv. Coordinated Transp.*, 68 A.2d 648 (N.J. Super. Ct. Ch. Div. 1949) (no injunction against bus company; public interest was involved).

86. *See, e.g., Edison Illuminating Co. v. E. Pa. Power Co.*, 98 A. 652 (Pa. 1916) (power company was public service corporation and there was a public interest).

87. *See, e.g., Duran v. Elrod*, 760 F.2d 756, 761 (7th Cir. 1985) ("To loose 500 accused felons, most with felony records, on the people of Cook County within a period of seven weeks is to launch a crime wave, and thereby imposes a greater cost on society than the cost to the inmates' expectations, and to the sanctity of consent decrees, of allowing the limited modification that the County sought.").

88. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992), *citing Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989) (institutional reform decrees "reach beyond the parties directly involved in the suit and impact on the public's right to the sound and efficient operations of its institutions").

89. *Rufo*, 502 U.S. at 381, *citing New York State Assn. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2nd Cir. 1983).

90. *See Duran*, 760 F.2d at 759 ("This is true whether the judge is being asked to approve a decree . . . or it seems evident, modify a decree.").

or definition of "public interest" in the statute, or explanation of how that interest should be analyzed, courts must use care not to equate "public interest" with "general welfare."⁹¹

The inconsistency with which courts invoke the public interest as a justification to allow or deny relief has led some scholars to characterize its use as purely results-oriented,⁹² and to caution that courts must not "adopt a concept of the public interest contrary to that found in a statute or the Constitution, or one primarily motivated by a political judgment not recognized by the substantive law."⁹³

This caution applies with equal force to state court judges hearing CPO cases. If state courts determine that protection order statutes regulate a matter of public interest, they must also determine whether that interest outweighs the individual petitioner's. When courts depart from the normal standard of deference given parties in uncontested motions, they, like federal court judges, should have well-founded, rather than results-oriented reasons for so doing.

In one protection order case, the court did not merely depart from the normal standard of deference; it did the polar opposite.⁹⁴ It imposed upon the victim the same burden of proof required of a restrained party filing a contested motion to vacate.⁹⁵ And it did so in the name of the public interest.⁹⁶

Because CPO statutes do not evince a clear legislative intent that the public has an interest in the litigation, and because most statutes are silent with regard to whether the same standard of law applies to a victim's uncontested motion as to a batterer's contested motion to vacate, this discussion turns to federal courts' analyses of contested motions. These principles make clear that any burden imposed upon a protected party, even in the circumstance in which the protected party seeks to tighten

91. NAACP v. Fed. Power Comm'n, 425 U.S. 662, 667 (1976).

92. Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 390 (1983).

93. Jost, *supra* note 60 at 1149.

94. See *Stevenson v. Stevenson*, 714 A.2d 986 (N.J. Super. Ct. Ch. Div. 1998). See *infra* Section V.

95. *Id.*

96. *Id.* at 994 (explaining that when a victim of domestic violence is unable to make a decision in her own best interest, public policy dictates that the court, in assuring the maximum protection from abuse the law can provide, must make independent factual findings based on objective evidence regarding the future need for the order, rather than deferring to the victim's stated desire).

the restrictions of the injunction, must be significantly less onerous than that placed on a restrained party seeking vacatur.

C. *Contested Motions for Modification/Vacatur*

The leading Supreme Court case setting forth the standard of law applicable to a contested motion to modify is *United States v. Swift & Co.*⁹⁷ The defendants, five meat-packing companies, monopolized the meat industry.⁹⁸ They moved to modify restrictions imposed on them, alleging that conditions in the industry had changed to such an extent that the dangers sought to be remedied by the decree were no longer present, and that to continue the order would constitute extreme hardship.⁹⁹

The Court disagreed: "Life is never static The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."¹⁰⁰ Justice Cardozo's opinion was unambiguous in its articulation of a very heavy burden of proof for defendants. Only a substantial change in circumstance – plus a showing that the conduct prohibited in the initial order had become virtually non-existent – would suffice.¹⁰¹

Although courts of equity always have the power to modify injunctions to adapt to changing conditions, they distinguish between cases in which the facts or circumstances are likely to change, and thus are provisional in nature, and those in which the facts are "so nearly permanent as to be substantially impervious to change."¹⁰² CPOs are the former. Cases governing family and intimate relationships are not "impervious to change." These relationships are not static, but dynamic. This is true particularly in relationships characterized by intimate violence, in which victims may separate from, and return to, their abusive partners several times.

97. 286 U.S. 106 (1932).

98. *Id.* at 110.

99. *Id.* at 118.

100. *Id.*

101. In the years following *Swift*, this "grievous wrong" standard for modification has been characterized as Draconian. See Jost, *supra* note 60, at 1110.

102. *Swift*, 286 U.S. at 114.

Not only do protection orders govern the relationship between the petitioner and respondent, but also between the parties and their children. Thus "myriad circumstances arise . . . during the pendency of an abuse prevention order"¹⁰³ that bear not only on the safety of the protected party, but also on child custody, visitation, and child support. Indeed, given the many forms of relief that protection orders provide, including financial awards and property possession, to name only two, the order may need to be modified several times. This need is especially true in states where protection orders are of infinite duration.

Many traditional civil injunctions are subject to changing circumstances as well. The Supreme Court so recognized when it revisited *Swift* in *Rufo v. Inmates of Suffolk County Jail*,¹⁰⁴ the most cited decision supporting a less onerous burden on a party moving to modify an injunction.¹⁰⁵ The injunction at issue was structural; it compelled the institutional reform of a jail by prohibiting the double-celling of inmates and the housing of pre-trial detainees.¹⁰⁶

Five years after issuance, when the court ordered the government to comply with the injunction or close the jail, the government entered into a consent decree to build a new jail.¹⁰⁷ When the government later asked for modification because of construction delays, the trial court held that the government failed to meet the grievous wrong showing required by *Swift*.¹⁰⁸

The Supreme Court held that a "less stringent, more flexible standard" was permitted, as the Court's decisions since *Swift* reflect.¹⁰⁹ Particularly in institutional reform cases, in which decrees remain in place for significant periods of time, there is an increased likelihood of facts and circumstances changing.¹¹⁰ A

103. *Mitchell v. Mitchell*, 821 N.E.2d 79, 89 (Mass. App. Ct. 2005).

104. 502 U.S. 367 (1992).

105. The Supreme Court's later decision in *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004), a case in which a plaintiff was enforcing a consent decree against the state of Texas, cites *Rufo* as precedent for the proposition that a court's traditional equitable powers allow modification of consent decrees due to a change in circumstances.

106. *Id.* at 373.

107. *Id.* at 374.

108. *Id.* at 376. Construction on the jail did not start until 1987, and in 1989 the government moved to modify the consent decree to allow double celling of a subset of inmates, on grounds that work on the jail was delayed and the inmate population outpaced initial projections.

109. *Id.* at 380.

110. *Id.*

more flexible test accommodated two other characteristics of institutional reform litigation: achieving the underlying goals of the litigation, and serving the public interest.¹¹¹ The moving party was not required to meet the grievous wrong test, but instead could obtain modification if it established a significant change in fact or law, and after doing so, showed that the proposed modification was suitably tailored to the new circumstances.¹¹²

Since *Rufo*, lower courts have struggled to determine whether this flexible test should be limited to structural injunctions that affect the public interest, or whether it also ought to apply to private disputes affecting only the parties appearing in the case.¹¹³ The circuits are split.¹¹⁴ Some apply the *Rufo* test to all injunctions and consent decrees, regardless of the underlying purpose of the law, while others limit *Rufo's* application to cases involving the public interest, rather than private disputes.¹¹⁵

Swift and *Rufo* articulate two distinct standards of law (or one standard of law applicable to two widely disparate factual situations)¹¹⁶ applicable to the modification and vacatur of civil injunctions. However in both cases, the restrained party, not the protected party, moved for relief. Left unanswered is what bearing the identity of the moving party – protected, or restrained –

111. *Id.* at 381.

112. *Id.* at 384.

113. See Bernard T. Shen, *From Jail to Cellular Communications: Should the Rufo Standard Be Applied to Antitrust and Commercial Consent Decrees?*, 90 Nw. U.L. Rev. 1781, 1786 (1996).

114. *Id.* at 1816.

115. *Id.* at 1815-1829. The First and Third Circuits do something different. In comparing *Swift* with *Rufo*, the First Circuit concluded that the two decisions did not create a dichotomy, but a continuum, on which *Swift* is at one end and *Rufo* the other: *Swift* applies to decrees "protecting rights fully accrued upon facts so nearly permanent as to be substantially impervious to change" whereas *Rufo* applies to decrees involving "the supervision of changing conduct or conditions and are thus provisional and tentative." *Alexis Lichine & Cie. v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995). The job of the court is to locate the case before it on this continuum. *Id.* The Third Circuit has approved a "factor analysis" similar to that of the First, in which each case must be evaluated according to the particular sets of circumstances it presents, making one universal formula – either *Swift* or *Rufo* – inapplicable. See *Bldg. & Constr. Trades Council v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995).

116. See *Lichine*, 45 F.3d at 586.

has on the Court's analysis.¹¹⁷ This distinction is critical to state courts' treatment of victims who move for vacatur in CPO cases.

The Supreme Court shed some light on this question in *United States v. United Shoe Machinery Corp.*,¹¹⁸ another case involving an unlawful monopoly, in which the plaintiff United States government sought to tighten the restrictions on a defendant shoe manufacturer. The trial court read *Swift* to say that even a plaintiff could not modify its injunction without a showing that some unforeseen circumstance arising since the issuance of the injunction had caused a grievous wrong.¹¹⁹

The Supreme Court disagreed with this stringent reading of *Swift*: "Swift teaches that a decree may be changed upon an appropriate showing, and it holds that it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved."¹²⁰ The case supports the proposition that a more flexible test applies when it is the party protected by the injunction who seeks to modify its terms. The flexible standard applies even when, as in *United Shoe*, the plaintiff wishes to strengthen the order enjoining the defendant.¹²¹

No Supreme Court case sets forth a burden of proof for a protected party's motion to modify its injunction to ease the burdens imposed on the defendant, or to vacate its own injunction entirely.¹²² All tests, regardless of where they fall on the *Swift* to *Rufo* continuum, contemplate only one of two scenarios: 1) the protected party seeks to modify the conditions imposed on the restrained party for the purpose of making the injunction more restrictive (as in *United Shoe*), or 2) the restrained party seeks to

117. Because of the unlikelihood that a restrained party would challenge a protected party's motion to vacate, the Court's analysis of this issue is focused on modification of an injunction by the protected party, rather than vacatur.

118. 391 U.S. 244 (1968).

119. The trial court denied the plaintiff's motion, based on its reading of *Swift* as limiting a court's power to modify an injunction to cases "involving '(1) a clear showing of (2) a grievous wrong (3) evoked by new and unforeseen conditions.'" *United Shoe*, 391 U.S. at 247.

120. *Id.* at 248.

121. The Court distinguished *Swift*, a case in which "the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their impact," whereas in *United Shoe*, it was the plaintiff who made the motion, and did so for the explicit purpose of achieving the goals of the initial decree. *Id.* at 249.

122. As discussed previously, such a case would likely be uncontested by the defendant, and the standard of law that applies (according to the federal courts) is whether and how such a motion affects the public interest.

vacate the order, or modify the conditions imposed, to make its burden less onerous (as in *Swift* and *Rufo*). In both instances, the protected party desires the continuance of the injunction.

If applying federal principles to CPO cases, and specifically to the scenario where the victim moves to vacate and the batterer does not contest, state court judges should defer to the victims' wishes. Deference to the parties' wishes is the norm in uncontested motions, absent a finding that the public or a third party's interest is at stake. Determining whether the public interest is implicated in a given case requires the court to examine the underlying purpose of the law and the intent of the legislators, and to construe the public interest accordingly.

When the public has an interest in the litigation, the court weighs its interest against that of the named parties, who have the burden of persuading the judge that either the public interest is not implicated, or that if it is, the impact on the public is inconsequential. While federal law provides that courts of equity may compel relief they might not otherwise in the name of the public interest,¹²³ it does not provide support for imposing a *Swift* like burden of proof on the victim. Instead, if a test were justified – in the name of the public interest – it must be flexible, taking into account factors such as the likelihood of circumstances changing during the pendency of the order; that the protection order is a preventive, not structural or an institutional reform injunction; that the moving party is the protected party, not the respondent; and that the moving party seeks to terminate the burden on the restrained party, not tighten it. The next section applies these principles to the reasoning articulated by state judges when deciding motions for vacatur.

IV. MODIFICATION AND VACATUR OF CIVIL "PROTECTION ORDERS

Similar to federal doctrine, almost no state court opinions discuss what burden of proof, if any, should be imposed on a protected party seeking vacatur. Because there are so few opinions, this section focuses primarily on one jurisdiction, New Jersey, in which two trial court decisions analyzing the specific scenario in which a victim moved to vacate were, in fact, published. In one, the judge deferred completely to the wishes of the victim, mirroring federal court analysis. In the other, the judge took the oppo-

123. See *Virginian Ry. Co. v. System Fed.*, 300 U.S. 515 (1937).

site approach, holding the victim to a *Swift*-like burden of proof in denying her motion to vacate. This section reviews a handful of other New Jersey decisions analyzing batterers' uncontested and contested motions to vacate, showing how these analyses mirror federal standards, and reviewing pertinent *dicta* addressing how much deference should be afforded victims' wishes.

The cases were decided in the years following major reforms in New Jersey's civil and criminal court responses to domestic violence. On the civil side, the state's Prevention of Domestic Violence Act of 1990 was amended¹²⁴ and the New Jersey Attorney General and Supreme Court jointly issued a *Domestic Violence Procedure Manual*. The statute was amended to, among other things, add language clarifying that the purpose of the act was "to assure the victims of domestic violence the maximum protection from abuse the law can provide."¹²⁵ A primary purpose of the Manual was to reaffirm the state's commitment to vigorously enforce the protection order statute.¹²⁶ In the four years prior to these reforms, batterers killed two victims of domestic violence. In both cases, CPOs were in effect and criminal proceedings were pending. Both cases made headlines, and judges' handling of the cases was sharply criticized.¹²⁷

A. *Uncontested Motions for Vacatur*

1. When the Victim Moves to Vacate

In *I.J. v. I.S.*,¹²⁸ a case decided at the trial court level, the victim moved to vacate her protection order because she no longer feared the respondent and because he had proven himself to be a good father to the parties' daughter.¹²⁹ She testified that he had been participating more in his daughter's life, paying child support, working and "pulling his life together."¹³⁰ The victim mistakenly believed the protection order expired after one year. When the parties resumed contact, the respondent was arrested for violating the order.¹³¹ While he was incarcerated, the victim

124. N.J. STAT. ANN. § 2C:25-17-35 (2005).

125. N.J. STAT. ANN. § 2C:25-18 (2005).

126. See Lisa Memoli & Gina Plotino, *Enforcement or Pretense: The Courts and the Domestic Violence Act*, 15 WOMEN'S RTS. L. REP. 39, 45 (1993).

127. *Id.* at 126.

128. 744 A.2d 1246 (N.J. Super. Ct. Ch. Div. 1999).

129. *Id.* at 1249.

130. *Id.* at 1289.

131. *Id.* at 1249.

moved to vacate to "get this matter straight so that he can go home and continue working and doing the rite [sic] thing."¹³²

Although there was no statutory provision specifically governing how the court should analyze a victim's motion, the general law set forth a "good cause" standard to be applied to a restrained party's motion to vacate.¹³³ The court chose not to apply that standard to the victim's motion. It reasoned that the principles underlying the distinction between criminal and civil actions necessitated the interpretation that petitioners in civil cases must be afforded complete autonomy of decision-making.

The state's involvement in civil actions is usually limited to the creation of procedures and remedies. The State normally is not a participant in civil disputes . . . The dispute exists between the plaintiff and defendant, whereas the restraining order governs the future of the private relationship between those two parties. While there may be a criminal element to a domestic violence dispute, the action from which a restraining order evolves is civil. If a plaintiff wishes to dissolve the restraining order, the Act requires no further justification from plaintiff other than a showing that there is a lack of coercion, voluntariness and that plaintiff understand the 'cycle of violence' and the consequences of dismissing a restraining order.¹³⁴

In fact, the Act did not require an evidentiary showing by the victim at all. When it stated that the plaintiff must show a lack of coercion and an understanding of the consequences of vacatur, the court referred to the *Domestic Violence Procedure Manual*, not the statute.¹³⁵ The *Manual* set forth a specific procedure for state court judges when presented with a victim's motion to vacate: "The judge, after reviewing the file . . . should reiterate to the victim the information given . . . by the domestic violence staff person. If the judge thereafter is convinced that

132. *Id.*

133. *Id.* at 1250 (explaining N.J. STAT. ANN. § 2C:25-29d provided: "Upon good cause shown, any final order may be dissolved or modified upon application . . . but only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based.").

134. *Id.* at 1252. Similar to *I.J. v. I.S.*, in *Tobkin v. Florida*, 777 So.2d 1160, 1164 (Fla. Dist. Ct. App. 2001), a Florida appellate court held that the petitioner had a right to voluntarily dismiss her temporary protection order. The court reasoned that the protection order was a private action and thus the petitioner could terminate the case as in any other civil action. *Id.* In fact, the appellate court found that the lower court lacked subject matter jurisdiction to continue the case without the petitioner's participation. *Id.*

135. *I.J. v. I.S.*, 744 A.2d. at 1250.

the request for withdrawal is an informed one and is not made under duress, the withdrawal should be granted . . . ”¹³⁶

Noting that the protection order statute had been amended twice for the specific purpose of restricting the defendant's ability to vacate, but added no language restricting the victim's ability to do so, the court concluded that when read in light of the overall policy behind the legislation – to give victims maximum protection – the legislature intended that there be no impediment in the way of the victim when she chose to vacate.¹³⁷ Nor did the legislature intend the judiciary to create such an impediment.¹³⁸

The analysis conducted by the court in *I.J. v. I.S.* mirrors that conducted by federal courts hearing uncontested motions to vacate civil injunctions. Federal courts defer to the parties' wishes, so long as those wishes comport with the public interest.¹³⁹ The *I.J.* court examined the policy expressed in the substantive law underlying protection orders to determine whether the statute was intended to resolve a matter between two individual litigants, like other private, civil causes of action, or if it had a broader public impact.

The court first unequivocally concluded that the public was not impacted, as it would be if the case were criminal. In the criminal context, providing broad protection to a victim might mean that the state has an interest in restricting her ability to decide whether to terminate court orders designed to protect her. In civil cases, in which only the parties to the litigation were affected, and specifically where the victim no longer sought the court's intervention, providing “broad protection” meant something different. It meant that there should be no impediment placed in the victim's way when she chooses to vacate her order. The legislature made clear in the statute that the victim's decision should be afforded complete deference, so long as that decision was informed and made voluntarily.

In *Stevenson v. Stevenson*,¹⁴⁰ a trial court held the opposite. The petitioner had been severely assaulted by the respondent in the past, and he had a history of violence outside of the relationship.¹⁴¹ At the hearing, the victim testified that she wanted the

136. *Id.* at 1251.

137. *Id.*

138. *Id.* at 1252.

139. See *United States v. W. Elec. Co.*, 900 F.2d 283, 305 (D.C. Cir. 1990).

140. 714 A.2d 986 (N.J. Super. Ct. Ch. Div. 1998).

141. *Id.* at 993.

order vacated because she had reconsidered her relationship with the respondent and wanted him to be a part of their child's life.¹⁴²

The court denied the victim's motion, finding that she did not prove good cause to vacate,¹⁴³ the standard of law that the court in *I.J. v. I.S.* found inapposite to petitioners' motions for vacatur. The *Stevenson* court reasoned that it must impose a burden of proof on the petitioner, rather than deferring to her wishes, because she suffered from Battered Woman Syndrome. "Plaintiff has gone through the battering cycle with defendant at least twice. Through this dissolution request she seeks to remain in the situation. She thus meets the definition of a 'battered woman.'"¹⁴⁴ As a battered woman, the victim could not reasonably assess what was in her best interest.¹⁴⁵

The court explained that if a victim is unable to make a decision in her best interest, it must look at the objective evidence in the case and make a decision for her.¹⁴⁶ The purpose underlying the state's protection order statute so required.

Without making an independent finding based on the objective evidence, a court does not meet the public policy dictates of the Act that victims of domestic violence must be assured the maximum protection from abuse the law can provide; that the official response to domestic violence, including that of the courts, shall communicate the attitude that domestic violent behavior will not be excused or tolerated; and that it is the responsibility of the courts to protect victims of domestic violence by ordering those remedies and sanctions that are available to assure the safety of the victims and the public.¹⁴⁷

The court held that "given the uncontroverted evidence of defendant's brutality against his wife, his history of violence both within and without the domestic arena, his alcohol abuse and uncontrolled assaultive behavior when under the influence, and the reports before the court . . . a reasonable, objective and independent determination of the facts leads to the inescapable conclusion that a real threat of recurrence of domestic violence by defendant upon his battered wife will exist" if the order was vacated.¹⁴⁸

142. *Id.* at 989-90.

143. *Id.* at 995.

144. *Id.* at 993.

145. *Id.*

146. *Id.* at 994.

147. *Id.*

148. *Id.* at 995.

Reflective of federal court analysis, the judge in *Stevenson* chose not to defer to the petitioner's wish to vacate because it found that the policy underlying the protection order statute dictated otherwise. This conclusion was not insupportable. In fact, New Jersey's *Domestic Violence Procedure Manual* quoted by *I.J. v. I.S.* was on point. It explicitly provided that the court must be assured that the victim, in moving to vacate, was acting voluntarily and that she understood the cycle of violence. Based on the same facts from which it found that the victim, as a "battered woman," was incapable of making a decision in her own interest,¹⁴⁹ *Stevenson* could have denied the motion in accordance with the Manual.¹⁵⁰

Instead, the *Stevenson* court undertook a flawed analysis to justify application of the most stringent burden of proof to the victim's motion. Examining principles applied by federal courts, even in contested motions to vacate, and even when it is the restrained party who files the motion rather than the protected party, illustrates the court's stretch in logic.

Assuming for the sake of argument that a federal court found, as did *Stevenson*, that the public interest required an uncontested motion for vacatur to be analyzed, as would a contested motion to vacate, it would look to the standards set forth in *Swift*, *Rufo* and *United Shoe* in determining what specific test for vacatur to apply. *United Shoe* instructs that the protected party's burden – even when attempting to make an injunction more onerous on the defendant – must be less stringent than that imposed on the restrained party.¹⁵¹ *Stevenson* does not comport.

149. *Id.*

150. It should be noted that determining whether a victim of domestic violence has been coerced to drop her order is a formidable task. For years, feminist scholars and activists, including (to name but a few) Susan Schechter, Barbara Hart, Martha Mohoney, and Evan Stark, have recognized the centrality of coercion in domestic violence. Batterer treatment programs grounded in feminist theory do the same. All agree that coercion is a key element, if not the fundamental element, that distinguishes domestic violence from other forms of violence between partners in relationships. Yet almost no empirical studies have measured coercion, and even advocates for domestic violence have not been in agreement on its definition. See Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *SEX ROLES* (2005). The enormously challenging task of measuring coercion in the context of vacating civil protection orders when victims so request is beyond the scope of this article, but the subject of a work in progress by this author.

151. A minority of courts have read *United Shoe* more narrowly. See *Jost*, *supra* note 60, at n. 84. Although *United Shoe* explicitly states that the identity of the moving party – plaintiff or defendant – is crucial, it does so in the context of a

The court explicitly stated that policy required it to impose the same standard of law on the victim as it would on the restrained party, even in the circumstance in which the victim sought to loosen – indeed, terminate – rather than tighten the restrictions imposed on the respondent.

The next step in the federal court analysis would be to determine what standard – a *Swift* grievous wrong test, or a more flexible *Rufo* test – would apply. *Stevenson* applied a *Swift*-like test. In requiring the victim to prove the nonexistence of even a threat of recurrence of domestic violence,¹⁵² it imposed the very heavy burden articulated by Justice Cardozo: showing that “dangers, once substantial, have become attenuated to a shadow.”¹⁵³ Because the court discredited the victim as a “battered woman,”¹⁵⁴ she could not meet the very high burden of proof imposed on her.

Recently the Appeals Court of Massachusetts analyzed whether the *Swift* or the *Rufo* test applied to a batterer’s motion to vacate a CPO. In *Mitchell v. Mitchell*,¹⁵⁵ the court found that *Swift*’s grievous wrong test was inapposite. It found that “myriad circumstances” arise during the pendency of a CPO, requiring a flexible approach to vacatur.¹⁵⁶ The court situated CPOs on a continuum between *Swift*’s “facts impervious to change”¹⁵⁷ and

plaintiff seeking to effectuate the underlying decree, not vacate it. Given that the Court explicitly noted that the plaintiff’s motive for modification was to enforce the initial decree, the case could be interpreted as authority for the proposition that victims seeking to vacate their civil protection orders must prove that the underlying goal of the initial protection order has been achieved.

Accordingly, if a victim of domestic violence testified that the batterer had not contacted her since the initial order was issued, that she no longer feared him (and that this lack of fear was reasonable), that he had complied with all provisions of the order and that there was no risk to her safety, the court could find that the underlying purposes of the order were achieved and hence vacate it. However, in *Stevenson*, the court found that the order had not accomplished its goals. Since its issuance, the batterer had attempted to contact the victim and had failed to attend counseling. *Stevenson*’s assessment that the underlying protection order had not achieved its primary purposes may have been correct, if the primary purpose of the order was defined by the judge, rather than by the victim.

To the extent that this conclusion was accurate, and to the extent that *United Shoe* is interpreted as a minority of federal courts do, in accordance with federal civil injunction doctrine the motion to vacate should be analyzed under the same standard of law as would a restrained party’s motion.

152. See *Stevenson*, 714 A.2d at 995.

153. See *United States v. Swift & Co.*, 286 U.S. 106, 118 (1932).

154. See *Stevenson*, 714 A.2d at 993.

155. See *Mitchell v. Mitchell*, 821 N.E.2d 79, 89 (Mass. App. Ct. 2005).

156. *Id.* at 89.

157. See *Swift*, 286 U.S. at 106.

Rufo's "changing conduct or conditions that are thus provisional and tentative"¹⁵⁸ and devised a flexible, factor test, akin to that adopted by the First Circuit.¹⁵⁹

The *Mitchell* court made explicit, however, that even this standard of law would not be applied to a petitioner's motion to vacate her order.¹⁶⁰ Though the court did not discuss what standard of law it would apply, both the text of the decision and state judicial policies governing domestic violence cases lead to the conclusion that the burden on the victim would have been less onerous, not more, than its newly created flexible test.¹⁶¹

Why did the *Stevenson* court impose such an onerous, *Swift*-like burden on the victim? One explanation is that it did so to reach the result it wanted: to make the point that this victim, as a battered woman, was not capable of making a rational decision on her own.

The opinion is replete with statements, both explicit and implicit, indicating that the court did not find the victim, in asking that the order be lifted, was acting as a reasonable person.

Whether or not this plaintiff would agree, it is clear that *from the standpoint of objective fear*, that a reasonable victim of such a brutal beating by a husband, who has assaulted her in the past and has a history of other violent behavior, and is the subject of experts' findings of uncontrolled anger and excessive use of alcohol, would have a reasonable fear that future violence by her husband would occur, were the restraining order dissolved.¹⁶²

158. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

159. See *supra* Section IVC and accompanying notes.

160. See *Mitchell*, 821 N.E.2d at 87, n.14: "This opinion does not address the circumstances in which the parties jointly seek an application to terminate the order."

161. See, e.g., Commonwealth of Massachusetts, *Guidelines for Judicial Practice: Abuse Prevention Proceedings Guidelines*, <http://www.mass.gov/courts/formsandguidelines/domestic/dvg5.html#5.08> ("[A] plaintiff who wishes to terminate the order should be permitted to do so, regardless of the reason given or the presence of children.") [hereinafter *Massachusetts Guidelines for Judicial Practice*]. The Commentary to Guideline 5:08 further provides: "The courts alone cannot protect a victim of family violence from an abuser who is undeterred by the threat of arrest or incarceration. A victim of such abuse is in the best position to decide what course of action will provide more safety. At a given time, a restraining order might exacerbate the plaintiff's danger. Thus, the plaintiff's decision to vacate an order must be respected." *Id.*

162. See *Stevenson v. Stevenson*, 714 A.2d 986, 994 (N.J. Super. Ct. Ch. Div. 1998) (emphasis in original). The court further stated that the defendant's perceived control over the victim "may attenuate the victim's ability to act in the best interest of the children. Moreover, fear might attenuate the ability of the victim to act in his or her own best interests." *Id.*

The court began its application of the law with the statement Plaintiff's dissolution request, made despite the latest brutal beating she suffered at the hands of a drunken husband who has a past history of wife-beating and an alcohol abuse problem, is consistent with phase three of 'the battered woman's syndrome'. . . . [Petitioner] thus meets the definition of a 'battered woman.'¹⁶³

Use of the label "battered woman" to describe a victim of domestic violence is controversial. Feminist scholars argue that it reduces the victim to a stereotype, while simultaneously de-emphasizing the conduct of the batterer. As summarized by Professor Elizabeth Schneider,

In contrast with other descriptions of harm to women, "battered woman" describes the victim and focuses on her qualities. A woman is or is not a 'battered woman.' The phrase is reductive in that it implies the total life experience of the particular woman: a 'battered woman.'¹⁶⁴

The *Stevenson* court not only viewed the victim as a "battered woman," but also found that she suffered from Battered Woman Syndrome. Professor Schneider further observes,

Public experience of the term "battered woman" has been shaped by association with the concept of "battered woman syndrome" . . . which has been commonly understood to define battered women as suffering from a kind of helplessness that renders them incapable of leaving their batterers. Thus, the term "battered woman" conjures up images of helplessness and defeat rather than survival and resistance.¹⁶⁵

It is within this framework that the court in *Stevenson* analyzed the victim's motion to vacate. The first paragraph of the opinion implies that the victim must have wanted to be abused: "Plaintiff has gone through the battering cycle with defendant at least twice. Through this dissolution request she seeks to remain in the situation."¹⁶⁶ This statement encapsulates the view of the court throughout the opinion.

It also reveals the challenges faced by judges hearing CPO cases, as compared to federal court judges hearing traditional civil injunctions. First, judges often misinterpret victim behavior due to a lack of understanding of the psychological trauma induced by extended abuse.¹⁶⁷ Survivors of prolonged or severe

163. *Id.* at 993.

164. SCHNEIDER, *supra* note 5, at 61-62.

165. *Id.*

166. *Id.*

167. *See* Epstein, *supra* note 22, at 40.

domestic violence often exhibit some symptoms or meet the full diagnostic criteria for post-traumatic stress disorder.¹⁶⁸ As one example, a symptom such as dissociation may cause victims to testify about emotionally charged incidents with an entirely flat affect.¹⁶⁹

Because these psychological phenomena may differ greatly from the behavior and demeanor that a judge encounters with other witnesses, they often are incorrectly interpreted as indications of lack of credibility.¹⁷⁰ Women who appear to change their stories over time about the abuse are particularly likely to be discredited. In the context of vacating protection orders, where victims have had time to reflect on the abuse since initially telling the story to the judge, this problem may be compounded. The very fact of change may be used as evidence that the changed stories cannot possibly be true.¹⁷¹ But victims frequently have exactly this response: they repress what happened; they cannot speak; they hesitate, waver and procrastinate; they hope the abuse will go away; they cover up for their abusers; they try harder to be "good" girls and they take the blame for the abuse upon themselves.¹⁷²

Even victims' lawyers have suggested that victims' testimony be questioned: a woman's testimony "should be accorded great deference when [the victim] wants the law to take action against the batterer, but should be given less weight when [the victim] says she wants to protect him."¹⁷³ Because a victim "is far more likely to minimize her husband's brutality than exaggerate it . . . [she has] more credibility when she is making charges against him than when she is refusing to complain."¹⁷⁴

When compared with traditional civil injunctions, credibility of the protected party is a challenge unique to CPOs that may skew judicial decision-making. Additionally, judges may feel frustrated with victims for several reasons. First, they may feel that victims are not telling the truth. The same victims may come into court repeatedly to obtain a protection order, only to vacate it later. Judges may lack information about the dynamics of do-

168. *Id.*

169. *Id.* at 41.

170. *Id.*

171. *See id.*

172. *See id.*

173. Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 307 (1985).

174. *Id.*

mestic violence, and like the court in *Stevenson*, perceive victims as refusing to leave the abuse.¹⁷⁵

Judges also feel frustrated with batterers. The *Stevenson* opinion revealed this to be true. It called the batterer "a drunken husband" who committed a "brutal battering" and who could "savagely" the victim again.¹⁷⁶ The court found that the respondent "flouted" the order.¹⁷⁷ It concluded: "This court will not be an accomplice to further violence by this defendant, by wholly dissolving at this point the restraints that have been entered against him."¹⁷⁸

In *Stevenson*, the judge's frustration seemed to include how to handle the issue of domestic violence as a whole. Judges hearing protection order cases often fear that no matter what they do, or do not do, a batterer will commit more violence.¹⁷⁹ In this way, judges (and advocates, social workers and attorneys) indirectly experience the double binds under which many women negotiate their daily lives.¹⁸⁰ James Ptacek describes this dilemma as "emotional blackmail": by empathizing with the victim, the judge indirectly feels the batterer's threat and fears that providing the woman with assistance may further endanger her.¹⁸¹

Such fear may skew decision-making. Judges making predictions of future violence receive highly negative feedback when they predict an individual will not be violent and that individual is later violent.¹⁸² In contrast, they receive far less negative feedback when they predicted an individual would be dangerous but that individual was not, in fact, later dangerous.¹⁸³ The differential in feedback biases decision-making in the direction of predictions that the individual in question will be violent, even in cases in which the decision-maker actually remains uncertain.¹⁸⁴

175. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1865 (2002).

176. *Stevenson v. Stevenson*, 714 A.2d 986, 993 (N.J. Super. Ct. Ch. Div. 1998). The court reiterated that the case involved the commission of "the vicious beating of a woman by her husband during a drunken rage." *Id.* at 994.

177. *Id.* at 989.

178. *Id.* at 995.

179. JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 14 (1999).

180. *Id.* at 63.

181. *Id.*

182. Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 45 (2000).

183. *Id.* at 46.

184. *Id.*

The feedback is often delivered publicly. This intensifies the political pressure on judges. Particularly in the context of domestic violence, men's violence toward women is more public than ever¹⁸⁵ and judges' decisions in domestic violence cases are consequently becoming increasingly public. New Jersey courts handling domestic violence cases were publicly criticized in the years prior to *Stevenson*.¹⁸⁶

Seeing hundreds of abused women each year in protection order hearings and reading the daily news, judges may fear the potential consequences of making a mistake. "No judge wants to be the one who didn't grant a restraining order to the woman found face down in the morning."¹⁸⁷ Likewise, in the vacate posture, no judge wants to be the one who vacated a woman's order, only to be greeted the next day with news of the same fatal result.¹⁸⁸

Such a result dramatically emphasizes the challenges unique to CPOs that may skew judicial decision-making, especially when that decision-making is compared to federal court judges' in traditional civil injunction cases. But when comparing *I.J. v. I.S.* and *Stevenson*, both CPO cases relying on the same underlying public policy in their analyses, and both facing the same challenges unique to domestic violence litigation, their reasoning and holdings greatly diverged. *I.J. v. I.S.* concluded that what the legislature meant when it directed the court to provide maximum protection to the victim was that it should defer to her decision and assure that no restriction be imposed upon her ability to vacate. In contrast, *Stevenson* interpreted the same policy as requiring the most restrictive burden of proof before terminating the victim's order – that which would be imposed upon a batterer filing the motion.

Though the New Jersey Appellate Division has not spoken to the issue of how a victim's motion to vacate should be analyzed, it has discussed the significance placed on a victim's con-

185. PTACEK, *supra* note 179, at 67.

186. Memoli & Plotino, *supra* note 126, at 45.

187. PTACEK, *supra* note 179, at 6.

188. *Id.* at 60. James Ptacek interviewed judges regarding the onslaught of media coverage by the *Boston Globe* after the murder of woman by her husband in 1986. One judge stated that media attention created a "sea change" on the bench in terms of the attitudes of judges with regard to domestic violence cases; another made clear that judges' motivation to do a good job in domestic violence cases is the knowledge that it would come back to haunt him in the press. *Id.*

sent to a batterer's motion to vacate, the next best analogous situation.

2. When the Batterer Moves to Vacate (with Victim Consent)

*Sweeney v. Honachefsky*¹⁸⁹ was the first appellate decision regarding analysis of motions to vacate after the amendment to New Jersey's statute and promulgation of its Manual. In *Sweeney*, the victim consented to the batterer's motion to vacate. She testified that she was reassured by the fact that the respondent completed anger management, that she wanted to get on with her life, and that she wanted no further involvement in any court procedures. The court was satisfied that her testimony amounted to consent, and found nothing in the record showing any risk to the victim if the order was vacated.¹⁹⁰ Instead, the court focused on prejudice to the respondent if the order remained in effect. Finding that he would be severely prejudiced, the court vacated, stating: "That, in our view, is what good cause is all about."¹⁹¹

Sweeney raised the critical issue of due process for the restrained party. Though it is true that when courts find the public interest is implicated, they may compel relief they might not otherwise compel, what effect does continuing a protection order that the victim no longer wants have on the batterer? In the context of temporary injunctions, courts grant plaintiffs' motions to dismiss so long as the defendant is not prejudiced.¹⁹² It is the restrained party's rights, rather than the victim's, that are protected.

The erosion of due process rights for batterers in both the criminal and civil systems is problematic not only on a theoretical level, but also a pragmatic one. Professor Deborah Epstein convincingly argued that less procedural due process for batterers may, in fact, decrease victims' safety.¹⁹³ Social science data confirms that process counts.¹⁹⁴ Litigants, who feel as though they have been treated fairly, even when the results of a court's decision were not what they had hoped for, feel more satisfied with the court system.¹⁹⁵ In turn, they are more likely to obey or-

189. *Sweeney v. Honachefsky*, 712 A.2d 1274 (N.J. Super. Ct. App. Div. 1998).

190. *Id.* at 1277.

191. *Id.*

192. FED. R. CIV. P. 41.

193. Epstein, *supra* note 175.

194. *Id.* at 1875, citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-4 (1990).

195. *Id.* at 1846. Professor Epstein states that social science research regarding why people obey the law indicates that "the likelihood of a person's compliance with

ders.¹⁹⁶ Batterers, who feel that they have been treated poorly, or have not been heard, may be more likely to disobey the mandates of orders issued against them. This may be particularly true when, as in *I.J. v. I.S.*, the victim has consented to contact with the batterer and wants to continue a relationship with him.

When a court departs from the principle of deference to the parties in uncontested motions, it risks that both parties may feel as though they have been treated unfairly.¹⁹⁷ When refusing to defer, the judge must choose some other standard of law to apply. If that standard is unjustifiably onerous, the risk that the parties feel poorly treated is that much greater. This discussion turns next to the standards applied to batterers' contested motions to vacate, arguing that the law should not impose a higher burden on the petitioner in an uncontested posture than that imposed on the restrained party in a contested case.

B. *Contested Motions for Vacatur*

After the amendment to New Jersey's CPO statute in 1991, several published opinions analyzed batterers' contested motions to vacate.¹⁹⁸ In the leading case, *Carfagno v. Carfagno*,¹⁹⁹ the court emphasized the primacy of the wish of the victim to continue or vacate her protection order. The respondent moved for vacatur, alleging there had been no further incidents between the parties in over a year, that the petitioner no longer needed the order, and that she opposed the motion to vacate in bad faith to prevent him from obtaining employment with a local police department.²⁰⁰

The court first noted that New Jersey's statute provided that an order could be vacated for good cause shown, but that no decisions had been published applying that standard.²⁰¹ It then

the dictates of police and probation officers, or with court orders issued in civil or criminal cases, is at least as firmly rooted in his perception of fair process as in his satisfaction with the ultimate result" and that as a result, advocates for victims of domestic violence, in crafting a long term strategy for victim safety, must not lose sight of the procedural rights of batterers.

196. *Id.* at 1875-76.

197. As Professor Epstein points out, victims who feel that the court treated them fairly will be more likely to access the court in the future. *Id.*

198. *See, e.g.,* *Torres v. Lancellotti*, 607 A.2d 1375 (N.J. Super. Ct. Ch. Div. 1992); *Carfagno v. Carfagno*, 672 A.2d 751 (N.J. Super. Ct. Ch. Div. 1995); *Kanaszka v. Kunen*, 713 A.2d 565 (N.J. App. Div. 1998).

199. 672 A.2d at 757.

200. *Id.* at 755.

201. *Id.* at 756.

crafted a “framework of legal analysis” by delineating eleven factors for courts to consider when presented with a defendant’s motion to vacate.²⁰² It placed victim consent at the top of the list.²⁰³ In fact, it stated that this factor was dispositive.²⁰⁴

Although presented a batterer’s motion to vacate, *Carfagno* reached its conclusion that victim consent was dispositive by first examining what the legislature intended with regard to victims’ motions to vacate.

The Legislature intended that the courts should follow the victim’s request to dissolve a domestic violence order or dismiss a domestic violence complaint without further legal analysis. When construing a statute, the court must follow the legislative intent, considering the policy underlying the statute. . . . The policy of the Act is to provide broad protection for the victim. The court notes that the Legislature provided that a restraining order would be a civil remedy, and that the victim – not the state – files the complaint to obtain the restraining order . . . Thus, when looking at the entire Act, the court concludes that the Legislature intended to provide broad protection to the victim.

If judges disregard the victim’s wishes in determining whether to dismiss a complaint or dissolve a restraining order on the victim’s request, this has the effect of discouraging victims from filing complaints when necessary. If the victim perceives that the courts would not be responsive to their [sic] request to dismiss the action, that victim or other victims may refrain from filing a domestic violence complaint in the future. Certainly, this is not what the Legislature intended (citations omitted).²⁰⁵

If the legislature intended that the victim’s wishes be respected when she moves the court for vacatur, it must also intend that her wishes be respected when the respondent so moves. In *Carfagno*, the victim opposed vacatur. But had she consented, the court would have granted the defendant’s motion to vacate without further legal inquiry. This standard of law and analysis reflects that of federal courts deciding uncontested motions.

Carfagno’s application of a factor test to the respondent’s motion to vacate also mirrors federal court analyses of contested motions made by the restrained party. The test falls somewhere

202. *Id.* at 756-57.

203. *Id.* at 757.

204. *Id.*

205. *Id.*

between *Swift's* "grievous wrong" standard and *Rufo's* "less stringent, more flexible standard."²⁰⁶

To accomplish the goal of protecting the victim, courts should consider a number of factors when determining whether good cause has been shown that the final restraining order should be dissolved upon request of the defendant: (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant; (9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.²⁰⁷

Upon applying this test to the batterer's motion to vacate, the court held that the respondent did not prove good cause to vacate and denied his motion.²⁰⁸

The divergence of statutory and policy interpretations within the same jurisdiction reflects the tension between respecting autonomy and protecting victims that motions to vacate protection orders present. On one end of a continuum are those courts that defer to the victim's wish to vacate, allowing them complete autonomy of decision making.²⁰⁹ Recognizing their status as civil litigants, and specifically, their status as petitioners in civil cases, these courts have made clear that it would be inappropriate to analyze petitioners' uncontested motions to vacate as they would restrained parties'. In so doing, these courts reasoned that disregard for victims' wishes would not only be contrary to the public policy underlying the statute, but may even put victims at risk because it would deter them from seeking help from the courts when they needed it.²¹⁰

On the other end of the continuum are those courts that deny a victim's motion to vacate unless she proves through objective evidence that the order is no longer necessary for her protec-

206. *Id.*

207. *Id.* at 756-57.

208. *Id.* at 760.

209. *I.J. v. I.S.*, 744 A.2d 1246 (N.J. Super. Ct. Ch. Div. 1999); *Torres v. Lancelotti*, 607 A.2d 1375 (N.J. Super. Ct. Ch. Div. 1992); *Carfagno*, 672 A.2d at 751.

210. *Carfagno*, 672 A.2d at 757.

tion.²¹¹ Despite the fact that the motion was uncontested and that the movant was the petitioner, the *Stevenson* court held her to the same standard it would use to analyze a batterer's contested motion to vacate, justifying its holding through the same public policy: if the court is to convey that it takes domestic violence seriously, it must apply the law equally to victims and respondents.

Does the public have an interest in the outcome of CPOs independent of the desire of the victim? If so, what is that interest? Is it to treat male intimate violence against women as a crime, thereby requiring judges to maintain CPOs against victims' wishes, or does some other judicial action better serve the public interest? The next section addresses these questions.

V. SHOULD THE PUBLIC AND THIRD PARTIES' INTERESTS TRUMP THE VICTIM'S IN CPO CASES?

This section explores whether the public's undifferentiated interest in preventing domestic violence is implicated in the specific context of vacatur of an individual victim's CPO. It recognizes the enormous impact of domestic violence on society, which finds expression in CPO policy and legislation. Yet neither battered women's activists who drafted CPO laws, nor the legislators who passed them, expressed a clear desire that the public's interest trump that of the individual victim's when she, as a plaintiff in a civil lawsuit, chooses to halt the litigation. While acknowledging that a public interest argument could be relevant to CPOs, this section asserts that this interest neither requires, nor is best served by, judges' departure from the long-established principle of deference to the parties' wishes. Instead, it argues that deferring to a victim's wish to vacate more effectively accomplishes the important public policy goal of providing maximum protection to the victim, precisely because it promotes her autonomy.

The argument recognizes one exception, in accordance with federal doctrine regarding vacatur. When children, third parties directly affected by the protection order, are in imminent danger, their interests may trump that of the individual victim's. Even in this circumstance, however, judges may be able to tailor the or-

211. See *Kanaszka v. Kunen*, 713 A.2d 565 (N.J. App. Div. 1998); *Stevenson v. Stevenson*, 714 A.2d 986 (N.J. Super. Ct. Ch. Div. 1998).

der both temporally and substantively to support the autonomy of victims' decision making in this private right of action.

A. *Is the Public Interest Implicated in CPOs?*

As discussed extensively in Part II, to determine whether vacatur of an injunction implicates the public interest, federal courts look to the stated purpose of the law underlying the injunction²¹² to ascertain whether the injunction involves the settlement of a private controversy or a matter with more appreciable consequences to the public.²¹³

1. The Purposes Underlying CPO Statutes

The *Stevenson* decision, discussed at length above, began by quoting the preamble of the New Jersey's Prevention of Domestic Violence Act:

The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses and cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. It is therefore the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.²¹⁴

Several states' CPO statutes express a similar concern for the safety of not just the victims who are the parties to the proceedings, but for the public as well.²¹⁵ For example, in Arkansas, the CPO statute states:

The General Assembly hereby finds that this chapter is necessary to secure important governmental interests in the protection of victims of abuse and the prevention of further abuse through the removal of offenders from the household

212. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992); *Duran v. Elrod*, 760 F.2d 756 (7th Cir. 1985); *New York State Assn. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983).

213. See *Virginian Ry. Co. v. System Fed.*, 300 U.S. 515, 552 (1937).

214. *Stevenson*, 714 A.2d at 992 (citation omitted).

215. COLO. REV. STAT. § 13-14-101(1); FLA. STAT. § 741.2902; IDAHO CODE ANN. § 39-6302; 750; ILL. COMP. STAT. 60/102; LA. REV. STAT. ANN. §46:2131; ME. REV. STAT. ANN. tit. 19A §4001; NEB. REV. STAT. § 49-902; W. VA. CODE § 48-27-101.

and other injunctive relief for which there is no adequate remedy in current law. The General Assembly hereby finds that this chapter shall meet a compelling societal need and is necessary to correct the acute and pervasive problem of violence and abuse within the households in this state.²¹⁶

Characterization of domestic violence as a "pervasive problem" affecting households across the state signifies the legislature's intent that domestic violence be considered a serious problem, affecting more than the two people involved in the intimate relationship. Describing the protection of victims as both a matter of governmental interest and as a "compelling societal need" reinforces this view. When interpreting such policy, it is reasonable for judges to conclude that the legislature intended CPOs to protect not just the individual parties named in the case, but the public at large.

However, in *NAACP v. Federal Power Commission*,²¹⁷ the Supreme Court warned that protection of the general welfare is not sufficient language in a regulatory statute to implicate the public interest.²¹⁸ The Court explained that to give content and meaning to the public interest mentioned in the statute, one must look to the principal purpose for which the statute was adopted.²¹⁹ Though a number of states' CPO statutes provide that domestic violence is a crime affecting society as a whole, this language may be symbolic, rather than literal. The language symbolizes the states' changed perception of domestic violence as a serious problem, deserving of a serious governmental response.

Close examination of these statutes reveals that legislators intended for courts to protect victims by treating them as civil litigants, rather than victim-witnesses, as they are treated in criminal cases. Most states' protection order statutes explicitly state that CPOs are a remedy in addition to, and not precluded by, the criminal prosecution of the batterer for the conduct at issue.²²⁰ For example, the District of Columbia Intrafamily Offenses Act states that the "institution of criminal charges . . . shall be in addition to, and shall not affect the rights of the complainant to seek

216. ARK. CODE ANN. § 9-15-101.

217. 425 U.S. at 666.

218. *Id.*

219. *Id.*

220. *See, e.g.* ALA. CODE § 30-5-4(c) (2005); ALASKA STAT. §18.66.130(e) (2004); ARK. CODE ANN. §9-15-201 (2002).

any other relief under this subchapter.”²²¹ The legislative history provides further clarification. The Intrafamily Offenses Act “was intended to provide family members with access to special court remedies without interposing criminal sanction in the family circle,”²²² and further states that “criminal sanctions should not be the only avenue for correcting such abuses, because . . . threats to the long-term stability of the family or home may arise in the seeking of criminal sanctions.”²²³

A number of states' CPO statutes provide victims with the choice of pursuing a civil remedy in addition to criminal prosecution. These provisions indicate the legislatures' understanding of the differences between the criminal and civil justice systems' responses to domestic violence. Legislators intended that victims have the benefit of both. Recommendations made at the national level reflect the same intention. In a well-known study funded by the U.S. Department of Justice, Peter Finn and Sarah Colson found that CPOs can provide “a workable alternative to criminal charges or an additional remedy for many victims seeking protection from further domestic abuse.”²²⁴

Policy makers and drafters of protection order legislation were aware that the criminal justice response may not consider the victim's wishes with regard to arrest and prosecution of the batterer, and consequently may cause turmoil in the lives of the victim and her family. CPOs, on the other hand, could provide greater control, flexibility and autonomy for the individual victim. Drafters of CPO legislation had these precise purposes in mind when they lobbied for both civil and criminal legal remedies for victims.²²⁵

Historically, violence in the home was considered a family matter in which the state should not intervene.²²⁶ In the 1970s, the Battered Women's Movement defined the problem of “wife abuse” in much broader terms.²²⁷ First, activists recast it as a public problem, not just a private harm. In conjunction with this recharacterization of the problem as a public issue, the definition

221. D.C. CODE ANN. § 16-1002(c) (2001).

222. DC Council Report, *supra* note 17, at 4.

223. *Id.* at 10.

224. National Institute of Justice, “Legal Interventions in Family Violence: Research Findings and Policy Implications”, available at www.ncjrs.gov/pdffiles/171666.pdf.

225. Hart, *supra* note 32, at 23.

226. SCHNEIDER, *supra* note 5, at 13-23.

227. *Id.* at 22.

of wife abuse, which activists renamed "battering," included not just the acts of physical violence perpetrated by one man against one woman in an intimate relationship, but the broader social and political contexts within which the violence occurred.²²⁸

An important piece of this recharacterization was persuading the state to view domestic violence as a crime. Consequently, legal reform within the criminal justice system became a priority for activists. Activists wanted more, and appropriate, state intervention. They wanted the state to take domestic violence seriously.

Police, like the public, considered domestic violence to be a private matter, and consequently failed to respond to "domestic disturbance" calls.²²⁹ Often by the time police arrived on the scene, most incidents of domestic violence had already ended.²³⁰ Police did not make arrests but separated the parties, taking one of them on a walk around the block.²³¹ In fact, until the 1970s, police were formally trained to "mediate" family disputes; officers counseled rather than arrested.²³²

As with all allegations of violence to which police respond, police had discretion to make an arrest without an arrest warrant only if they had probable cause to believe that a felony occurred. Or if they had probable cause to believe a misdemeanor occurred, they could arrest without a warrant if the offense was committed in the presence of an officer.²³³ Due to the aggressive lobbying campaigns of battered women's advocates, a landmark study funded by the National Institute of Justice in 1984 showing that arrest was a deterrent to battering, and a recommendation of the U.S. Attorney General's Office that states enact arrest laws,²³⁴ many state statutes now provide for warrantless arrests

228. *Id.*

229. G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 157-59 (2000) (discussing congressional findings that police fail to respond adequately to calls concerning domestic violence).

230. Epstein, *supra* note 175, at 1851.

231. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 269 (2005).

232. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 157, 161 (1982).

233. Epstein, *supra* note 175, at 1853.

234. *Id.* (describing the "Duluth experiment" that concluded that arrest of a batterer was an effective deterrent to a crime of violence against the same woman. Shortly thereafter, the U.S. Attorney General issued a report recommending arrest in cases of misdemeanor domestic violence).

in misdemeanor cases as well,²³⁵ giving police much wider discretion than they have in crimes involving violence between strangers.

At the same time that advocates lobbied for wider police discretion in making warrantless arrests,²³⁶ they lobbied for police to have less discretion in responding to calls alleging violations of CPOs. In all states, police are now statutorily required to make an arrest when they have probable cause to believe a violation of a CPO has occurred.²³⁷

While battered women's advocates have been successful in persuading the state to treat domestic violence as a crime, CPOs are nonetheless civil remedies.²³⁸ However, much of the criminal justice system's overall response to domestic violence is focused on CPOs.²³⁹ This large-scale involvement of the criminal justice system may cause judges to over-rely on criminal justice system rationales – those of protecting not just the individual victim, but society at large – when determining whether to grant or deny victims' motions to vacate their CPOs.

In contrast to other types of civil injunctions, CPOs implicate the criminal justice system in a number of phases of this litigation, from the moment the order is issued through enforcement of it. For example, unlike most civil lawsuits in which the petitioner is responsible for the cost of filing the case and for effecting service on the opposing party, in CPO cases, there is no filing fee, and the state serves the order at its own expense on the restrained party.

When either a temporary or permanent CPO has been issued, it is recorded in a central registry created and maintained by the state for the purpose of making the order easily accessible to police, thereby facilitating the process of enforcement. On the

235. *Id.* at n.42; Miccio, *supra* note 230, at n.2.

236. Miccio points out that not all advocates were in favor of mandatory arrests. *Id.* at 265-67.

237. Hanna, *supra* note 9, at 1858.

238. They are issued in civil court. The civil rules of procedure apply. As in other civil injunction litigation, the individual petitioner may obtain a temporary, *ex parte* restraining order, and the respondent is entitled to notice and a hearing on the merits if he objects to the order becoming permanent. The burden of proof is by a preponderance of the evidence. The respondent is not entitled to court-appointed counsel if he cannot afford to retain it privately, nor is he entitled to a jury trial. None of the constitutional guarantees afforded defendants in criminal cases are provided to respondents in civil protection order cases.

239. ANDREW R. KLEIN, THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE 67 (2004).

national level, the Federal Bureau of Investigation maintains a data bank to increase the likelihood of enforcement of protection orders across state lines.²⁴⁰

Like other injunctions, protection orders may be enforced via civil and criminal contempt. In addition, in a number of jurisdictions, violation of a CPO, in and of itself, constitutes a crime. A restrained party may thus be subject not only to civil and criminal contempt, and to arrest and prosecution if the underlying act constitutes a crime (such as assault), but also subject to the separate criminal charge of violating a protection order.²⁴¹

When activists drafted CPO legislation, they were cognizant of the distinct goals of the civil and criminal justice systems' responses to domestic violence. They knew that in addition to criminal prosecution of batterers, victims needed easily accessible civil remedies that could be obtained on an emergency basis.²⁴² They were aware that victims needed individualized relief tailored to their particular needs, and that this relief must be far more comprehensive than anything that could be obtained in a criminal case.²⁴³ Finally, advocates understood that victims needed a civil remedy that would complement the reforms occurring in the criminal system.²⁴⁴ Victims would need greater autonomy of decision making, given that the criminal response would be to arrest and prosecute batterers, with or without the consent or cooperation of victims.

Many battered women's activists were opposed to mandatory interventions in the criminal justice system precisely because they decreased victim input and discretion. In fact, feminist scholars and battered women's advocates have debated the effectiveness of mandatory policies for the past fifteen years. Two critical strands of this debate have included whether state intervention into victims' lives actually makes them safer, and whether such interventions intolerably sacrifice their autonomy.²⁴⁵

240. *Id.*

241. For example, if a restrained party threatens a petitioner via telephone, he could be subject to four distinct actions: civil contempt, criminal contempt, misdemeanor or felony harassment, and misdemeanor violation of a protection order.

242. See Hart, *supra* note 32, at 23-24.

243. *Id.*

244. *Id.*

245. See *infra* Section V and accompanying notes for discussion of the debate among feminist scholars and lawmakers regarding the efficacy of mandatory interventions in the criminal justice system.

The longstanding debate regarding the effectiveness of mandatory interventions underscores the careful consideration by feminist lawmakers of the effects of decreasing victim autonomy in the criminal justice system. The drafters of CPO laws did not intend that a "no-drop" policy, or any policy decreasing victim autonomy for the sake of the public at large, be applied to victims' motions to vacate. If they had, the civil and criminal justice systems' responses to domestic violence would not complement, but would replicate, each other.

Fundamental distinctions between the overall goals of the criminal system and the civil system also make this clear. Because protection orders are civil, private rights of action, victims who file protection orders must by definition be afforded greater autonomy of decision-making than victims who are witnesses in criminal cases. The victim, not the state, is the "prosecuting" party. The petitioner seeks a specific remedy, tailored to her unique needs and circumstances, without regard for whether the CPO will deter or punish the batterer – goals of the criminal justice system, and decidedly not goals of a civil injunction.²⁴⁶

The characterization of domestic violence as a crime, the quasi-criminal structure of CPOs and the extent to which the criminal justice system has become involved in the enforcement of orders blurs the distinction between the civil and criminal justice systems' responses to domestic violence. While this blurring may justify a judge's consideration of the public interest in the context of a victim's motion to vacate, it does not follow that the public's interest should outweigh that of the individual litigant's, particularly to the extent that the obscurity between civil and criminal remedies is merely fallout, or an inadvertent consequence of the recharacterization of domestic violence as a crime, rather than the explicit intent of the drafters of CPO statutes. This article argues that when a judge decides to depart from the long established principle of deference to a civil litigant's wishes, she must have more than a generalized concern for the public to do so, in accordance with federal doctrine regarding vacatur of injunctions. General concern for the safety of the public ex-

246. Injunctions are meant to protect the victim, not punish the restrained party. Civil protection orders have the same purpose. *See, e.g.,* Carfagno v. Carfagno, 672 A.2d 751, 757 (N.J. Super. Ct. Ch. Div. 1995) ("The Legislature intended to protect the victims – not punish the person who committed the act of domestic violence.") (citation omitted).

pressed in broad public policy goals underlying CPO statutes may not be enough.

2. Who is Affected: Protection of Children

While it is arguable whether the public's interest is implicated in the context of vacating an individual victim's CPO, the protection of children is, *per se*, a matter of public concern. Because CPOs frequently contain provisions regulating the conduct of the batterer toward the victim's children, this discussion turns to their interests.

Studies show that child abuse occurs most frequently in families where there is also marital or partner violence.²⁴⁷ Children may be victims of intentional physical abuse, and they may be accidentally injured if they are present during a violent incident, especially if they intervene to protect the victim. In addition, some data suggest that children who are exposed to, but not direct victims of, domestic violence may experience a variety of negative developmental problems.²⁴⁸

Because children living in violent homes may be at risk, judges are always justified in considering their interests when determining whether to continue or to vacate a CPO. Indeed, when judges are presented with evidence suggesting that children have been physically abused, judges are not merely justified in protecting them, but have a legal obligation to do so. In all states, judges are statutorily mandated to report the abuse of children to the state's child protective services agency so that a full screening and investigation can be conducted with regard to whether the children are in imminent danger of harm.²⁴⁹

Making a report is one thing; what happens in reality may be something entirely different. Problems with the child protection system have been well documented.²⁵⁰ It is understandable, and

247. PETER G. JAFFE, ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* 21-23 (2003).

248. Jeffrey L. Edleson, *Should Childhood Exposure to Adult Domestic Violence Be Defined as Child Maltreatment under the Law?*, in *PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION* 8 (Peter G. Jaffe, Linda L. Baker & Alison J. Cunningham eds., 2004).

249. Whether children are actually protected when referred to child protection services, and how child protection services treat battered women, are topics that have been widely discussed in the literature and are beyond the scope of this article.

250. See generally Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13 (1995); Joan S. Meier, *Domestic Violence*,

in accord with federal principles regarding the protection of third parties' interests in determining whether to vacate injunctions, that judges might decide to maintain an order of protection despite the petitioner's wishes to the contrary. If the court believes the order will be effective at keeping the batterer away from the child, it may decide that the child's interests supersede the petitioner's.

Whether extension of a CPO against the wishes of the children's mother is an effective way to protect children presents a more difficult question. In the context of the juvenile justice system's response to domestic violence, Professor Jeffrey Edleson has emphasized the importance of the family's voluntary, rather than forced, participation in early intervention services.²⁵¹ He explains that for most children (those who are exposed to but not in imminent danger as a consequence of domestic violence), early interventions that focus on strengthening existing personal, social and economic resources are effective, rather than referral of the family to child protection services agencies²⁵² that are under-funded and simply do not have the resources to effectively help families.²⁵³

Judges have options in addition to making a report to child protective services, and beyond denying outright a victim's motion to vacate. For example, if the judge finds that the batterer has abused the child, it could hold the batterer accountable, rather than penalize the victim. A judge could both find the batterer in contempt for violating a provision of the order, and also vacate the order, for example. Alternatively, the judge could maintain the protection order for a finite period of time, rather than denying the vacatur whole cloth, until assured that a child protection services investigation was under way. The court could vacate some provisions of the order, while leaving others intact. For example, the judge could vacate the "no contact" provision as it relates to the batterer's contact with the petitioner, while leaving in place the provisions of the order relating to children.

For those cases in which children are exposed to, but not victims of the violence, judges are faced with the challenge of conducting a more extensive factual inquiry into the presence of

Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003).

251. Edleson, *supra* note 248.

252. *Id.*

253. *Id.* at 19.

additional risk factors, before assuming that the children are in danger. Even in the context of child protective services, however, Edleson cautions against forced intervention by the state.²⁵⁴ Denying a victim's motion to vacate may be perceived as such, and therefore not an effective intervention to decrease the risk to the children. Instead, voluntary participation in programs – programs in which child protection and domestic violence advocates collaborate to help women and children find safety and recover from the trauma of the violence – must be an option. Edleson notes that many battered women's shelters and community based domestic violence programs have long been a resource for children who have witnessed violence.²⁵⁵

While risk of harm to children certainly justifies state court judges' departure from the normal standard of deference to the parties' wishes, the difficult question of whether the court should depart from that standard re-emerges. Assuming that the judge finds a risk of danger to the children, is denying the victim's motion to vacate an effective way to alleviate that risk? Or is supporting victim autonomy by deferring to her decision a more effective strategy?

B. *Supporting Victim Autonomy Increases Victims' and Children's Safety*

Just as voluntary participation by families in domestic violence programs, rather than participation forced by the state, has been recommended for cases in which children are exposed to domestic violence,²⁵⁶ the same may be true in CPO cases. Deference to victims' autonomy of decision making is the rule in federal court doctrine regarding vacatur. It should be the rule in CPO cases as well. But if judges in protection order cases defer to victims' wishes, how can they simultaneously send the message, as public policy requires they must, that they do not tolerate men's violence against women?

James Ptacek argued that this question poses a crisis of judicial authority: if judges are seen as tolerating men's violence against women, courts lose legitimacy.²⁵⁷ Perhaps one way to address this concern could be to reframe the question itself. Perhaps, as the drafters of protection order legislation believed,

254. *Id.* at 21.

255. *Id.*

256. *Id.*

257. PTACEK, *supra* note 179, at 7.

victim autonomy and safety are not at odds, but instead go hand in hand.

Some research regarding the efficacy of mandatory interventions within the criminal justice system has borne out the link between the victim's personal choice and her safety, requiring policymakers to re-think criminal approaches. For example, in one study, victims who voluntarily participated in the prosecution of the batterer were less at risk of further violence only if they made a personal choice to participate, rather than being coerced into doing so.²⁵⁸ Other research has shown that when victims feel that government officials listen and respond to their individual needs, rather than dismiss them, they were more likely to feel treated fairly and as a result to cooperate with prosecutors.²⁵⁹

Research regarding the effectiveness of CPOs is at its very early stages. Of the research that exists, the findings are greatly disparate, providing little conclusive evidence that protection orders are effective tools to stop further physical and psychological abuse of women.²⁶⁰

Victims who obtain orders already know this to be true. Many victims, anticipating that the orders will not prevent re-assault but will help them accomplish other goals, decide to obtain these orders nonetheless.²⁶¹ Empirical evidence supporting this fact has led some feminist scholars to conclude that a protection order best serves to end domestic violence if it gives the woman a new sense of control over her own life.²⁶² To the extent that judges do not vacate orders based solely on the fact that they believe the orders will prevent future assault, they may be overly reliant on the effectiveness of these orders, and underestimating the value of the victim's feelings of personal choice and empowerment, and her particular goals in obtaining the order in the first place.

258. David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 157-60 (N. Zoe Hilton ed., 1993).

259. Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE & VICTIMS 251, 264 (1998).

260. DALTON & SCHNEIDER, *supra* note 34, at 499.

261. See *supra* notes 35 and 36, discussing results of studies by Harrell & Smith and Fisher & Rose.

262. Tarr, *supra* note 27, at 169; DALTON & SCHNEIDER, *supra* note 34.

A CPO is potentially one of many steps in the victim's decision-making process regarding the course of her relationship with the batterer.²⁶³ Viewing orders in this way may provide another answer to the question of how courts can simultaneously respect a victim's autonomy while facilitating her safety. A number of studies have suggested that victims use the law as part of a strategic, long-term process to promote their safety.²⁶⁴ Having achieved their goal of managing the violence, they disengage from the legal system.²⁶⁵

If protection orders are viewed as part of a process, what may be most critical is access to, rather than maintenance of, these orders. As some judges hearing protection order cases have stated, when a court denies a victim's motion to vacate, it discourages victims from applying for protection orders when they need them.²⁶⁶ By respecting the victim's wish to vacate, and encouraging her to return to court when necessary, the court furthers the policy goal of sending the message that it will not tolerate domestic violence while simultaneously respecting victim autonomy.

One state's judicial guidelines regarding vacatur of protection orders embraces both of these answers to the question of how courts can simultaneously promote victim autonomy and public policy, and the guidelines do so even in the instance in which protection of children is at issue.

The courts alone cannot protect a victim of family violence from an abuser who is undeterred by the threat of arrest or incarceration. A victim of such abuse is in the best position to decide what course of action will provide more safety. At a given time, a restraining order might exacerbate the plaintiff's danger. Thus, the plaintiff's decision to vacate an order must be respected. Similarly, a plaintiff may feel compelled for economic or family reasons to seek to vacate a protective order. There can be no guarantee of adequate support for families in

263. Jo-Anne Wemmers & Marie-Marthe Cousineau, *Victim Needs and Conjugal Violence Do Victims Want Decision-Making Power?*, 22 CONFLICT RESOLUTION QUARTERLY 493, 494 (2005).

264. *Id.* The authors summarize several studies.

265. Lauren Bennett, Lisa A. Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner*, 14 J. OF INTERPERSONAL VIOLENCE 761, 769 (1999) (explaining that some victims leave the court process because it has served their needs).

266. See *IJ v. IS*, 744 A.2d 1246 (N.J. Super. Ct. Ch. Div. 1999), discussed *supra* Section VA, and *Carfagno v. Carfagno*, 672 A.2d 751 (N.J. Super. Ct. Ch. Div. 1995), discussed *supra* Section VB.

all situations, and the court cannot ensure that children or others will not suffer if the protective order is maintained . . .

If the judge has reason to believe that vacating the protective order will place minor children in danger of physical harm or other abuse, the judge should advise the plaintiff that a report [to child protective services] . . . would be filed immediately.

Once a plaintiff has appeared before the court to vacate an order, it may be difficult to return no matter how great the danger. The judge should anticipate this by assuring the plaintiff that he or she may always return to the court to seek a new order or to bring criminal complaints for criminal activity.²⁶⁷

If mandatory interventions in the criminal justice system diminish victim input and autonomy, but autonomy in the form of personal choice regarding their cases is critical to victims as part of a process of determining the course of their relationships, the civil justice system's response to domestic violence must provide procedures that allow victims to express their needs, and that take their views into consideration.

The above court guidelines present one possibility for accommodating these needs. At the same time, the guidelines do not dilute the seriousness with which the state views domestic violence. They recognize the prevalence of domestic violence, but also acknowledge that the existence of a CPO alone, without the input of the victim regarding its effect and her assessment of danger, is an insufficient remedy for preventing that violence.

Ptacek described protection order litigation as an interactive process, "a negotiation between women and the state over protection from violent and abusive men."²⁶⁸ Mandatory interventions in the criminal system are not interactive; they do not allow room for victims to negotiate with the state. If the civil system fails to provide this room, victims may be left with no effective legal recourse against batterers, because they may be too discouraged to access those that are available. This cannot be what policymakers, legislators and the drafters of protection order legislation intended when they directed the state, through its courts, to convey the message that domestic violence will not be tolerated.

267. *Massachusetts Guidelines for Judicial Practice*, *supra* note 161.

268. PTACEK, *supra* note 179, at 7.

VI. CONCLUSION

The drafters of protection order legislation intended that victims have autonomy of decision-making in their CPO cases. They also wanted the state to take domestic violence seriously, to treat it as a public problem, and to convey the message that the state will not tolerate domestic violence.

When victims seek to vacate their CPOs, these policies may collide. Judges understandably struggle with the inherent tension between them. In the absence of state law, this article suggested that one place a state court judge might find guidance is in the federal doctrine regarding vacatur of traditional injunctions. There, deference to the parties' decision to vacate, when that decision is uncontested, is a longstanding principle.

The problem with the analogy is that CPOs are not antitrust cases, largely the subject matter of traditional injunctions. Nonetheless, they provide a yardstick by which judges may measure how greatly their decisions are skewed by legitimate factors, such as the coercion of a victim of domestic violence by her abusive partner, or by illegitimate factors, such as victim blaming or over-reliance on the efficacy of protection orders. These factors may be influencing judges' decisions, even subconsciously, toward being safe rather than sorry.

Paradoxically, this bias may put victims in greater danger, given the importance of victim autonomy to victim safety. By failing to listen and respond to victims' needs, judges may jeopardize, rather than promote, their safety and the safety of their children. Given that the criminal justice system already diminishes victim input and autonomy, this article argues that, despite the risk inherent in vacating victims' orders, judges in the civil system must respect victim autonomy by deferring to the victim's decision to vacate.

