William & Mary Bill of Rights Journal

Volume 19 (2010-2011)
Issue 1

Article 6

October 2010

Protecting Victims from Themselves, but not Necessarily from Abusers: Issuing a No-Contact Order Over the Objection of the Victim-Spouse

Robert F. Friedman

PROTECTING VICTIMS FROM THEMSELVES, BUT NOT NECESSARILY FROM ABUSERS: ISSUING A NO-CONTACT ORDER OVER THE OBJECTION OF THE VICTIM-SPOUSE

Robert F. Friedman*

INTRODUCTION

In response to the scourge of domestic violence,[1] law enforcement agencies and prosecutors have been armed with increasingly more aggressive tactics to combat the abuse. From implementing mandatory arrest policies for responding officers;[2] to the no-drop policies of prosecutors;[3] to the variety of protective orders available to victims;[4] the legal response to domestic violence has been expanding. With these innovations have come a great deal of advantages[5] and some successes in the fight against domestic violence.[6] But these advantages are not without their costs. This expansion and increasingly aggressive legal response has taken a toll on relationships[7] and victim autonomy.[8] This is not to say that these costs are per se unbearable, but the balance between personal and state interests must be vigilantly monitored. There is a line that cannot be crossed: the constitutionally protected interests of the victim.

When mandatory arrest policies, no-drop policies, and criminal protective orders combine into a single protocol,[9] there is a risk that a victim may be railroaded to the extent that her constitutional rights are violated. Envision a hypothetical couple married

---

* J.D., William & Mary School of Law, 2011; B.A., Vanderbilt University, 2007. This Note is dedicated to the memory of my father, Daniel J. Friedman, from whom I continue to learn.

[1] It has been estimated that one in four women will experience domestic violence in her life. NAT. COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS 1 (2007), http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf (citing PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 9 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/181867.pdf).

[2] *See infra* Part I.B.1.

[3] *See infra* Part I.B.2.

[4] *See infra* Part I.B.3.

[5] *See infra* Part I.

[6] *Id.*

[7] *See*, *e.g.*, Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1499–1501 (2008).

[8] *See*, *e.g.*, Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 946 (1999).

[9] *See* discussion *infra* Part I.B.4.

for twenty-five years, living in an apartment building with thin walls and neighbors on all sides. One night the wife's[10] husband yells at her, hits her, and throws her against the wall, prompting a neighbor to call the police. When the police arrive the wife tells them that she fell and to not arrest her husband, but the police arrest the husband pursuant to a mandatory arrest policy. Charges are brought against him, but when the prosecutor asks the victim for cooperation, the victim pleads with the prosecutor to drop the case. She refuses to testify for the State. In fact, the victim states that she will be testifying for the defense. Despite losing her star witness, the prosecutor informs the victim that she will be pursuing the case over the victim's objection, in accordance with the jurisdiction's no-drop policy.

Despite the lack of victim cooperation, the defendant is nevertheless found guilty. Then comes the sentencing, and with it a criminal protective order. The victim objects to the order, but the judge nevertheless hands it down. It is a full no-contact order, for ten years. If the victim and her husband of twenty-five years attempt to contact each other in the next ten years, they will be committing a crime. The victim, who did not invite the State into her home, and did not cooperate with the State's prosecution, is now being told by the State that she cannot see, speak to, or otherwise contact her husband for ten years. As the tactics used to fight domestic violence expand, a balance must be struck.

Issuing no-contact criminal protective orders over the objection of the victim-spouse severely limits the victim-spouse's autonomy while offering little protection. The State is effectively ending a marriage over the objections of the couple. This runs afoul of the victim-spouse's constitutionally protected fundamental right of marriage.[11] The growingly aggressive nature of the legal response to domestic violence should be welcomed with open arms, but also a watchful eye. The potential unconstitutionality of the situation described above is not a condemnation of criminal protective orders, but instead should serve as an indicator that prosecutorial methods have grown so aggressive that they have begun infringing upon the protected rights of parties other than the defendant.[12] If the State believes the protection is necessary, then it should provide it by focusing on the offender and seeking the maximum sentence.

---

[10] The hypothetical involves male on female domestic abuse, but this is not the only type. A 2000 study conducted by the Department of Justice suggests that in the United States 835,000 men are physically assaulted by an intimate partner annually. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (2000), *available at* http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm. Moreover, domestic violence is not limited to heterosexual couples. "The literature suggests that gay and lesbian couples are about as violent as heterosexual couples." Patricia Tjaden, *Extent and Nature of Intimate Partner Violence as Measured by the National Violence against Women Survey*, 47 LOY. L. REV. 41, 54 (2001).

[11] *See*, *e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (confirming that "the right to marry is of fundamental importance for all individuals").

[12] *See infra* Part III.A.3.

Part I discusses the evolution of the legal response to domestic violence in America and current policies. It discusses the use and effects of mandatory arrest, no-drop policies, criminal protective orders, and how these can be combined into a single response protocol. Part II discusses the constitutional issues that arise when these policies begin to go too far. This Note argues that no-contact orders issued over the objection of the victim-spouse are tantamount to "de facto divorce,"[13] and therefore implicate the fundamental right of marriage[14] and with it, heightened scrutiny.[15] It concludes by arguing that orders issued over the objection of the victim-spouse should be held as unconstitutional under heightened scrutiny. In conclusion, this Note puts the potential constitutional challenge in the context of the broader effort to fight domestic violence and recommends that this particular problem be fixed by requiring the consent of a victim-spouse before a full no-contact criminal protective order is issued. If the victim will not consent and the prosecutor believes repeated violence is likely, the focus should be on incarceration of the abuser.

I. DOMESTIC VIOLENCE PROSECUTION IN AMERICA

To understand the current state and methods of domestic violence prosecution, it is necessary to understand the development of the crime of domestic violence and the legal response.

A. History of the Legal Response to Domestic Violence

As with most of early American law,[16] the law regarding domestic violence was borrowed from England.[17] There is little chance that any ship sank under the weight of these volumes, however, as the early American legal response to domestic violence was the same as England's—nothing.[18] Under the doctrine of coverture, men had the power of "domestic chastisement"; that is, they were permitted to use force against their wives in order to control them.[19] In the middle of the nineteenth century some

---

[13] The term "de facto divorce" is taken from Jeannie Suk's 2006 article *Criminal Law Comes Home*, published in the Yale Law Journal. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 8 (2006), *reprinted in* JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009). A great deal of the following argument hinges on this concept. Moreover, Professor Suk's concerns regarding the effect of "de facto divorce" on the fundamental right of marriage has served as inspiration to this Note's thesis. For both, this Note and its Author are in debt to Professor Suk and her work.

[14] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[15] *See* O'Neill v. Dent, 364 F.Supp. 565, 579 (E.D.N.Y. 1973) (applying strict scrutiny to a regulation prohibiting marriage).

[16] 15A C.J.S. *Common Law* § 5 (2002).

[17] Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 195 (2008).

[18] *Id.*

[19] Goldfarb, *supra* note 7, at 1495 ("In this way, the doctrine of coverture did not merely condone domestic violence; it affirmatively permitted it."); *see also* EVE S. BUZAWA & CARL

courts begin to employ the "rule of thumb," which stated that "a husband could beat his wife with a rod no thicker than his thumb."[20] Regardless of the origin of the phrase,[21] the "rule" can nevertheless be found used in Mississippi as early as 1824.[22]

While there were modest improvements in the rights of women throughout the latter half of the nineteenth century and early parts of the twentieth century,[23] it was not until the late 1960s that domestic violence began to enter America's social conscience.[24] It would take until the 1970s for the criminal justice system to treat domestic violence cases as it would a fracas between strangers.[25] In 1984, the U.S. Attorney General's office presented President Reagan with a report on the failures of the legal system, addressing domestic violence and recommendations for future improvements.[26]

G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 62 (3d ed. 2003) (noting that in the infrequent occurrence that a husband did face a criminal charge for beating his wife, judges would dismiss the case because the husband was legally allowed to do so).

[20] *See* BUZAWA & BUZAWA, *supra* note 19, at 62.

[21] There is a great deal of controversy as to whether the term originates from this context (thus rendering the term offensive) or if it finds its origin elsewhere. The former theory remains popular, albeit seemingly discredited. *See* WILLIAM SAFIRE, NO UNCERTAIN TERMS: MORE WRITING FROM THE POPULAR "ON LANGUAGE" COLUMN IN *THE NEW YORK TIMES MAGAZINE* 189 (2003) (noting that the term actually first appeared as far back as 1692 in a work about fencing and has been mistakenly picked-up as offensive, being attributed to the domestic violence context).

[22] *See* BUZAWA & BUZAWA, *supra* note 19, at 62 (citing Bradley v. State, 1 Miss. (1 Walker) 156 (1824)); *see also* State v. Rhodes, 61 N.C. (Phil.) 453 (1868) ("His Honor was of opinion that the defendant had a right to whip his wife with a switch no larger than his thumb, and that upon the facts found in the special verdict he was not guilty in law.").

[23] *See* BUZAWA & BUZAWA, *supra* note 19, at 64 (noting that between 1882 and 1886, Maryland, Delaware, and Oregon passed laws making it a crime for a man to beat his wife, though it is believed that they were rarely enforced).

[24] Kohn, *supra* note 17, at 196. In reference to the advances made in the 1960's, Kohn notes that "[t]he first wave of domestic violence advocacy efforts focused on opening shelters for battered women, but legal recourse remained unavailable." *Id.*

[25] Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 13 (2004).

[26] *Id.* at 13–14 (citing U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE 10–16 (1984)). The opening paragraph of the report is especially pertinent to the discussion:

> As the Task Force conducted its hearings around the country, it became apparent that now is a time when much progress has been made from some perspectives—and very little from others. It is a time when police and prosecutors have become much more aware of the need for action—and yet the magnitude of the problem appears to be increasing. It is a time when society's range of responses has been broadening and becoming more sensitive—and yet much remains to be done before society resolves some extremely difficult issues involved in determining the appropriate role for government in dealing with family violence.

Id. at 11.

The next breakthrough came in 1994 when Congress passed the Violence Against Women Act (VAWA).[27] VAWA was the "first and most comprehensive federal legislation to address violence against women in the history of the United States."[28] VAWA significantly strengthened the criminal justice system's response to domestic violence by creating new felonies, compelling jurisdictions to enforce protective orders issued in other jurisdictions through the Full Faith and Credit clause, and helping immigrants who rely on their abusers to establish citizenship.[29] Moreover, VAWA included 1.6 billion dollars in federal funding to improve the response methods of law enforcement, victim services, domestic violence research, and other programs.[30] VAWA was reauthorized in 2000[31] and 2006,[32] and will be reviewed for reauthorization again in 2011.[33]

Although primarily identified as a part of a defense theory[34] and not a development in prosecution, battered woman syndrome is a large piece of the development of the perception and legal treatment of domestic violence in America[35] and warrants discussion. The term was coined by Lenore Walker in 1979[36] when she introduced the Walker Cycle Theory of Violence.[37] Walker's theory is a "tension-reduction theory that states that there are three distinct phases associated with a recurring battering cycle: (1) tension-building, (2) the acute battering incident, and (3) love-contrition."[38]

---

[27] Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994). VAWA was introduced in 1990, but took four years of lobbying and bipartisan work before it was enacted. ENCYCLOPEDIA OF DOMESTIC VIOLENCE 718 (Nicky Ali Jackson ed. 2007) (noting also that the Senate Judiciary Committee's investigation of the sexual harassment allegations against then Supreme Court nominee Clarence Thomas and the murders of Nicole Brown Simpson [former battered wife of O.J. Simpson] and Ronald Goldman may have been contributing factors in making the time especially ripe).

[28] ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 718.

[29] Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157, 157–58 (2005). It is also worth mentioning that the civil rights remedy provided for in the original act which gave women a civil cause of action was struck down by the Supreme Court in *United States v. Morrison* as an unconstitutional use of congressional power. *Id.* at 158–59 (discussing Morrison, 529 U.S. 598 (2000)).

[30] *See* Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 113 (2000). Notably, some of that federal funding goes to support no-drop policies, which will be discussed later on. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1188 (2002).

[31] ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 720.

[32] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (codified as amended in scattered sections of 42 U.S.C.).

[33] *See id.*

[34] *See* 23 C.J.S. *Criminal Law* § 1449 (2006).

[35] *See infra* note 42 and accompanying text.

[36] *See* ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 71.

[37] LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 126 (2d ed. 2000) (referencing her 1979 work).

[38] *Id.*

Dating back to the 1970s, battered woman syndrome has been used in criminal cases as part of a defense for the battered defendant.[39] "In essence, the claim is that, as a result of repeated beatings administered by the man, the woman finally reached the breaking point and assaulted or killed the man."[40] Although testimony of battered woman syndrome has become more widely accepted in courts throughout the country, there is still a great deal of controversy surrounding the subject, most notably in the area of expert witness testimony.[41] The appropriate use of battered woman syndrome testimony in the courtroom may still be unsettled, but its influence in the current perception and response to domestic violence is unquestionable.[42]

B. Current Prosecutorial Policies and Practices in Response to Domestic Violence

The developments of the past 30 years have resulted in jurisdictions taking a more aggressive stance in the fight against domestic violence. Many jurisdictions have created distinct departments that specifically handle domestic violence prosecution.[43] Out of this growing trend toward aggressive handling of domestic violence cases, three

---

[39] ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 70. It is important to note that the syndrome is often mistakenly referred to as a defense. It is not an affirmative defense in and of itself, but instead is used as evidence to support defense theories. 21 AM. JUR. 2D *Criminal Law* § 148 (2008) (stating that the syndrome "is some evidence to be considered in support of a defense, such as self-defense, duress, compulsion, and coercion.").

[40] 34 AM. JUR. 2D *Proof of Facts* § 3 (1983).

[41] *See* ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 74–75 (discussing the differing rules of the admissibility of expert testimony regarding battered woman syndrome); Erin M. Masson, Annotation, *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 A.L.R. 749, 763 (1998) ("The modern trend is to admit evidence of the battered-woman syndrome; however, many states limit the testimony to the issue of the defendant's credibility or to the defendant's subjective belief in the need to use force to defend herself."); *see also* Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979), *remanded to* 455 A.2d 893 (D.C. 1983). Decided by the D.C. Court of Appeals, *Ibn-Tamas* was the first case in which the admissibility of battered woman syndrome expert testimony was at issue. The Court held that expert witness testimony in regards to battered woman syndrome was admissible as it did not invade the province of the jury, that is, the subject matter was beyond the understanding of the layman. *Id.* at 639.

[42] *See* Kohn, *supra* note 17, at 208. "[S]yndrome evidence has 'focused on the passive, victimized aspects of battered women's experiences.' If women are perceived as being unable to take responsibility for their own actions . . . they will not be seen as active partners in domestic violence interventions." *Id.* (quoting Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 561 (1992)); *see also* Friedman & McCormack, *supra* note 30, at 1188–89 (noting that no-drop policies are partially derived from "a paternalistic realization that the complainant may face greater danger than she realizes from recurrent violence . . . .").

[43] *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1861 (1996) ("Specialized domestic violence units are being established throughout the country.").

ubiquitous policies have emerged: mandatory arrest, no-drop policies, and criminal protective orders.[44]

1. Mandatory Arrest Policies

Mandatory arrest policies, though better described as a police policy than as a prosecutorial policy, are a key component in understanding the criminal justice system's response to domestic violence. Oregon was the first state to enact such a policy, dating back to 1977.[45] In 1982, a study conducted by the Minneapolis Police Department and the Police Foundation determined that mandatory arrest policies decreased the rate of recidivism among offenders.[46] Today, almost all states allow officers to make a warrantless arrest if there is probable cause of domestic violence.[47] The degree of discretion conferred to police, however, is not uniform from state to state.[48] "These statutes can vary in the amount of discretion accorded to the police officer: (1) permissive arrest statutes afford police officers considerable discretion; (2) preferential arrest statutes limit police discretion; and (3) mandatory arrest statutes completely restrict police discretion. Currently, most states have implemented either preferential or mandatory arrest statutes."[49]

The effectiveness and consequences of mandatory arrest, however, are not without debate.[50] Mandatory arrest policies are tools of police and not prosecutors, but it is

---

[44] Kohn, *supra* note 17, at 199; O'Connor, *supra* note 8, at 946.

[45] ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 460. The original 1977 provision included a clause that arrest was not required if the victim objected to arrest. Interestingly, the clause was omitted in 1979, thus silencing the protest of the victim and requiring arrest regardless of the victim's wishes. *Id.*

[46] Kohn, *supra* note 17, at 213 n.106 (citing Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, *in* POLICE FOUND. REP. (Apr. 1984), *available at* http://www.policefoundation.org/pdf/minneapolisdve.pdf); *see also* ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 463–64 (discussing studies subsequent to the Minneapolis study as well as their results).

[47] Kohn, *supra* note 17, at 213–14.

[48] O'Connor, *supra* note 8, at 942.

[49] *Id.* Notably, many of these states passed this legislation in 1994. G. Kristian Miccio, *If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence*, 15 WASH. & LEE J. CIVIL. RTS. & SOC. JUST. 405, 415 ("In 1994, shortly after the indictment of O.J. Simpson for the murder of Nicole Brown and Ron Goldman, a plethora of states passed mandatory arrest. With great fanfare, politicians embraced the mantra of the BWM, 'Zero tolerance,' and in thirty-two jurisdictions across the United States law enforcement discretion was removed in domestic violence cases.").

[50] *See* Kohn, *supra* note 17, at 216 ("This legislation authorizes more arrests and, in some states where arrest is required, limits officer discretion. These policies, in turn, also limit victim discretion. While the victim's statement at the scene is relevant to the officer's assessment of probable cause, her wishes regarding arrest are irrelevant."); ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 463–64 (discussing the ongoing debate in regards to mandatory

important to recognize that the mandatory nature of these policies is the first step in the aggressive handling of domestic violence cases.[51] In some cases, the mandatory arrest will put wheels into motion that the victim herself did not initiate and cannot stop.[52] The next step in this process, and the natural outgrowth of mandatory arrest policies, is the development of no-drop policies.

2. No-Drop Policies

Coming on the heels of the mandatory arrest wave, the next major innovation in aggressive domestic violence case handling was the adoption of no-drop policies.[53] Put simply, a no-drop policy is a mandatory prosecution policy, which like mandatory arrest policies, limits the discretion of both the victim and law enforcement by pursuing all domestic violence cases where there is evidence of the commission of a crime.[54] This is to say the prosecutor will pursue a case with or without the cooperation of the victim.[55] Also, like mandatory arrest policies, no-drop policies vary in degree and definition from jurisdiction to jurisdiction.[56] "So-called hard no-drop policies never follow victim preferences to drop charges unless certain criteria are met; soft no-drop policies permit victims to drop charges under certain limited circumstances, such as if the victim has left the batterer."[57] Varied or not, the use of no-drop policies, both official and unofficial, is widespread.[58]

Several justifications have been put forward in support of pursuing prosecution over the objection of the victim. A common argument is that the State has an interest in prosecuting batterers that simply outweighs the interests of the victim.[59] Even if a

arrests and pointing to studies with differing results as to the effectiveness of the policies); *see also* Arthur L. Rizer, III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1, 11–23 (discussing the positive and negative impacts of mandatory arrest policies).

[51] *See* O'Connor, *supra* note 8, at 949.

[52] *See infra* Part I.B.4 for a discussion on protocols.

[53] O'Connor, *supra* note 8, at 942 ("With stronger arrest policies in place, anti-domestic violence advocates next turned their attention to reform of prosecution practices.").

[54] BUZAWA & BUZAWA, *supra* note 19, at 194.

[55] Even if the victim is uncooperative, however, the prosecutor still has tools to compel victim participation as a witness. *Id.* ("At its most coercive, this policy may compel a victim to serve as a witness. When carried to its logical conclusion, she may be subpoenaed, and if recalcitrant, held for contempt of court. Some courts sporadically do indeed issue contempt of court citations to victims.").

[56] *Id.*

[57] *Id.*

[58] *Id.* at 195.

[59] *Id.* (The focus is typically on public safety. "Many prosecutors believe that the goal of prosecution supercedes the victim's interests."); *see also* Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 183 (2003). Han gives a secondary justification for state interest other than public safety, asserting that the state interest argument "attempts to justify victim-coercive

victim does not wish to press charges and pursue the case, the governmental interest in prosecuting the batterer remains. Another rationale given for no-drop policies is more victim-oriented, focusing on victim safety and empowerment.[60] The argument for no-drop policies based on victim safety is multifaceted. Sanctioning batterers, even against the victim's wishes, resulting in incarceration or compulsory rehabilitation programs, can serve to "reduc[e] the likelihood of future battering incidents, let[ ] future potential victims know that they are consorting with a batterer, and increas[e] the likelihood for heavier sentencing in the event that a second prosecution occurs."[61] Moreover, there is a belief that if the batterer realizes that the victim has no control over the prosecution, they will cease to harm the victim.[62] The public interest and victim interest justifications are not the only rationales offered for no-drop policies,[63] but they are the most prevalent and compelling arguments in support of no-drop policies.

Powerful as the justifications for no-drop policies can be, they also face a great deal of criticism.[64] Much of the criticism focuses on the further disempowerment of the victim.[65] Critics argue that by disregarding the wishes of the victim in respect

---

no-drop policies on the grounds that they serve the general state interest of ending abusive relationships and because they encourage equality between men and women. Thus, the sacrifice of individual victim interests are regarded by these proponents as necessary for overall societal change." *Id.* at 182.

[60] *See id.* at 184 (discussing and rejecting theory that no-drop policies empower victim); *see also* Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 874 (1994).

[61] BUZAWA & BUZAWA, *supra* note 19, at 195.

[62] Corsilles, *supra* note 60, at 874.

[63] *See*, *e.g.*, *id.* Corsilles also refers to another possible rationale for no-drop policies:

> The so-called 'didactic' function of no-drop policies is also asserted to impart significant benefits. From the standpoint of legal inaction, no-drop policies convey to the prosecutor that the victim should not be the 'leader of prosecutorial efforts.' Additionally, it conveys to deputy prosecutors the strong state interest involved—that the state, and not just the victim, is harmed by the batterer's conduct.

Id.; BUZAWA & BUZAWA, *supra* note 19, at 196 (Buzawa & Buzawa note that productiveness is another rationale, stating that "although obviously rarely stated as a justification for a no-drop policy from an organizational perspective, such policies are 'productive.' At an organizational, more than at a societal, level no-drop policies limit unproductive dropped cases, thereby increasing clearance rates through convictions.").

[64] Not only do critics call into question the rationales put forward by no-drop advocates, but they also point to mixed results as to their effectiveness. *See* Kohn, *supra* note 17, at 237 ("Research also shows mixed results as to whether increased prosecutions and case retention enhances victim safety. While no-drop prosecution policies have generally increased the percentage of cases charged and decreased the percentage dismissed, it is not clear that these policies is to make women safer [sic].").

[65] There are other criticisms of the policies. Buzawa & Buzawa put forward an interesting argument in criticism of state interests, arguing in part that no-drop policies simply shift the resources of a prosecutor's office thereby "diminish[ing] [the] capacity of the organization to perform other tasks related either to domestic violence or other issues." BUZAWA & BUZAWA,

to how the case is handled (or pursued), prosecutors are further disempowering the victim, thereby exacerbating the effects of domestic violence instead of mitigating or reversing them.[66] "Some critics contend that no-drop policies serve to undermine battered women's attempts at empowerment. By denying a victim the ability to assess the danger and to make choices for herself and her children, no-drop policies may serve to further erode a victim's self-esteem and sense of control."[67] Although it is unlikely that the controversy regarding the effectiveness and appropriateness of no-drop policies will be settled anytime in the near future, it can be said that no-drop policies in effect take one more moving piece out of the legal response to domestic violence. This is to say, once the wheels of the justice system have been put into motion (possibly by a mandatory arrest) any policy that minimizes discretion will make it that much more difficult to stop—especially by the victim.

3. Protective Orders

In the domestic violence context, protective orders can refer to either civil or criminal orders.

a. Civil Protective Orders

Civil protective orders, though not the focus of this Note, are a major piece of the legal system's response to domestic violence, and as such, merit some discussion. Beginning in the mid-1970s courts gained the ability to issue a civil protective order which acts as an injunction between the parties.[68] For a civil protective order to be issued, the victim must petition the court and show that "the respondent has engaged in abusive behavior and is likely to do so again in the future."[69] Typically a court will require both parties to be present in order to grant a protective order,[70] but "[i]f the

---

supra note 19, at 197; *see also* Corsilles, *supra* note 60, at 875 (raising other criticisms of no-drop policies in reference to prosecutorial concerns).

[66] *See* Kohn, *supra* note 17, at 241 ("When the victim's preference diverges from the prosecution's agenda, these policies officially render the victim's voice irrelevant and can result in a profound sense of disempowerment."); *see also* Han, *supra* note 59, at 184–85 ("Disempowerment as a direct result of victim coercive policies can occur in a number of ways."). Han goes on to put forth a hypothetical in which a victim changes her story in response to a no-drop policy and is impeached on the stand by the prosecutor, thus further revictimizing and disempowering the victim. *Id.*

[67] Corsilles, *supra* note 60, at 876.

[68] Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 53 (2000).

[69] *Id.* at 54. The exact procedures vary jurisdiction to jurisdiction, but this is the general approach. As opposed to criminal orders, civil orders require a petitioner to insure that only interested parties are granted the injunctive relief. *See* O'Connor, *supra* note 8, at 949.

[70] BUZAWA & BUZAWA, *supra* note 19, at 234–35. Petitioners typically seek civil protective

matter is urgent . . . such as the threat of immediate violence, courts may authorize ex parte orders to remain in effect for a short time without the alleged offender being present . . . ."[71] Although there is no uniform protective order for all jurisdictions, they all share certain provisions[72] and a typical order will either fully or partially restrict the contact the parties may have.[73] Once an order is granted it is typically in effect for one to two years[74] and can be enforced even in jurisdictions outside of the issuing jurisdiction.[75] Although civil in nature, if an order is violated it can be a criminal offense.[76] Prior to the expiration of the order, however, the party protected by the order may petition the court to vacate the order.[77] Interestingly, some courts are beginning to deny petitions to vacate under certain circumstances.[78]

---

orders in a general purpose court or a family court and "rely on the civil powers of the court to judge disputes or a specialized family court's authority to resolve marital and familial matters." *Id.* at 234.

[71] *Id.* at 235.

[72] Protective orders will be enforced as valid if certain elements are present in the order. The order must name the parties, date of issuance, date of expiration, name of issuing court, signature of by or on behalf of a judicial officer, and the specific terms against the abuser. ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 583.

[73] *Id.* at 583 (In addition to contact restraints other restrictions can include "prohibitions of abuse, intimidation, and harassment; child custody determination and visitation issues, mandating counseling for the offender; and firearm possession.").

[74] Waul, *supra* note 68, at 54.

[75] *See* ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 584. This was guaranteed by VAWA and requires that the issuing jurisdiction have proper jurisdiction and that the offender be given notice and opportunity to be heard. *Id.*

[76] Waul, *supra* note 68, at 54; *see also* BUZAWA & BUZAWA, *supra* note 19, at 235 ("Although . . . customarily issued by civil courts, they are directly relevant to the criminal justice system. Violation in the context of domestic violence is now punishable not only by a contempt of court finding, it also constitutes an independent ground for justifying, or in many states mandating, a warrantless arrest.").

[77] *See* Kohn, *supra* note 17, at 225–26.

[78] *See* Stevenson v. Stevenson, 714 A.2d 986 (N.J. Super. Ct. Ch. Div. 1998) (refusing to vacate a civil protective order despite petition by the victim). The court lists its duties when determining whether to vacate the order:

> When considering a plaintiff's request to dissolve the Final Restraining Order, a court must not forget that it is the public policy . . . expressed by the Legislature . . . *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.

Id. at 992 (emphasis in original). The court goes on to attribute the victim's request for dissolution of the order to stage three of battered woman's syndrome (love-contrition). *Id.* at 993; *see also* Kohn, *supra* note 17, at 225–26 (discussing the recent trend in denying petitions to

b. Criminal Protective Orders

A criminal protective order, as the name suggests, is not sought by the victim in a civil capacity, but by the State as part of a criminal proceeding against the batterer.[79] Criminal courts have long been vested with the power to issue no-contact orders during an ongoing criminal proceeding.[80] Although these pretrial orders are not a recent development, they are not without controversy or criticism.[81] The evolution of criminal protective orders in some jurisdictions, however, gives rise to the very issues being expounded upon in this Note—specifically, "several jurisdictions have given criminal courts the power to issue permanent and preliminary injunctions and temporary restraining orders apart from an ongoing criminal case."[82] This means that criminal protective orders are not only available as a condition for pretrial release, but can also be used as part of the sentence upon disposition of the case.[83] In one New York jurisdiction, criminal protective orders are continued for up to three years in more serious cases and for one year in lesser cases.[84] The continued orders are typically limited orders,[85] but may remain as full orders[86] if the defendant does not agree to certain

---

vacate); Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 45–46 (2007) ("[C]ourts 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.").

[79] BUZAWA & BUZAWA, *supra* note 19, at 235.

[80] *Id.* (stating that because of that power, civil protective orders were rendered moot, but noting that while criminal orders in this form are an important part of the process, criminal courts should not be viewed as "an independent vehicle for victim protection" in this regard).

[81] *See* Christopher R. Frank, Comment, *Criminal Protective Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919 (1996) (scrutinizing criminal protective orders in the pretrial context).

[82] BUZAWA & BUZAWA, *supra* note 19, at 235.

[83] Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 322 (2004); *see also* NEAL MILLER, QUEENS COUNTY, NEW YORK, ARREST POLICIES PROJECT: A PROCESS EVALUATION, 10 (2003) (discussing continued protective orders).

[84] MILLER, *supra* note 83, at 10.

[85] A limited order of protection typically allows the defendant to have contact with the victim, but prohibits further abuse, harassment, or threats to the victim. *See* LEGAL INFORMATION FOR FAMILIES TODAY, ORDERS OF PROTECTION 2 (2009), http://www.LIFTonline.org/pdf/en_protection.pdf [hereinafter LIFT, PROTECTION ORDER]. Although abuse, harassment, and threats are also punishable crimes independent of the order, if they do occur again, additional charges may be brought for the violation of the order. "The availability of these orders is a critical component of the unit's efforts to prevent repeat offenses. This is because violation of a protective order by a second assault or threat to assault after conviction of a domestic violence assault is a felony." MILLER, *supra* note 83, at 10.

[86] A full order of protection is a complete stay-away order, meaning the defendant may not have any contact with the victim. *See* LIFT, PROTECTION ORDER, *supra* note 85, at 2.

conditions.[87] Moreover, since the victim is not a party to the criminal proceeding,[88] she lacks the ability to ask a judge to vacate the order.[89] The victim may implore the prosecutor to issue a limited protective order as opposed to a full protective order so that she may have contact with the defendant, but the prosecutor ultimately chooses the type of order sought.[90]

i. Advantages and Disadvantages of Criminal Protective Orders

Like mandatory arrest statutes[91] and no-drop policies,[92] criminal protective orders come with advantages and disadvantages. A major advantage of a protective order is the length of protection offered to the victim,[93] "Most arrested offenders are released in a matter of hours or days. A restraining [protective] order can be valid for an extended period of time. In most cases, it is valid for up to three years."[94] Moreover, a protective order is a judicial order, and as such, carries with it legal consequences if disobeyed,[95] possibly giving pause to offenders before they commit an act in violation

---

[87] MILLER, *supra* note 83, at 10. An example of a condition that may warrant the court maintaining the full order of protection is defendant's refusal to attend an intervention program. *Id.*

[88] *See* O'Connor, *supra* note 8, at 962 ("It is important to bear in mind that the victim of crime is not a party to the criminal prosecution—only the state and the accused stand as parties. As an alienated third party to the criminal proceedings, the victim and her rights are easily overlooked."). The fact that the victim is not a party to the case, however, can also be viewed as an asset to the prosecution of the case. "Some prosecutors and advocates also assert that no-drop policies have affected the batterer's conduct towards the victim. As several of them have observed, some batterers cease harassing their victims after they discover that the victim no longer controls the case." Corsilles, *supra* note 60, at 874.

[89] O'Connor, *supra* note 8, at 962.

[90] *See* LIFT, PROTECTION ORDER, *supra* note 85, at 5 ("In criminal court, only a prosecutor can [lift an order]. All the [victim] can do is ask the prosecutor to drop the charges."); *see also* Suk, *supra* note 13, at 17 ("The practice of criminal courts issuing protection orders pursuant to the criminal process shifts the decision to exclude an alleged abuser away from the victim and to the state.").

[91] *See supra* Part I.B.1 for a discussion on the pros and cons of mandatory arrest policies.

[92] *See supra* notes 64–65 and accompanying text (discussing the disadvantages of no-drop policies).

[93] ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 585.

[94] *Id.*

[95] The nature and degree of these consequences varies from jurisdiction to jurisdiction:

> [A] violation of a restraining order in one state may subject the offender to criminal charges such as invasion of privacy. Entering a house or building in violation of a restraining order may be considered a crime of trespassing in another state. In a few states, violation of restraining orders require the perpetrators to serve a minimum term of confinement.
>
> In other states, violations of restraining orders may affect other related criminal procedures or sanctions, including bail, pretrial release, probation revocation, imposition of supervision, and incarceration. Additionally,

of the order.[96] The weight of the court order "may cause some offenders to think twice before violating an order of the court . . . most offenders have not been issued a direct order from a judge stating that they shall not engage in certain conduct. This direct order from a judge may act as a deterrent."[97] There are other advantages to protective orders,[98] although some pertain only to civil orders.[99]

The most obvious disadvantage of the order is its form.[100] It will only act as a deterrent so long as the offender places value on the order itself, "If offenders do not attach any meaning or value to the orders, they become merely pieces of paper that carry little, if any, force and effect."[101] Further, in most cases a violation must be

---

> some states have created other types of sanctions, such as ordering the offender to attend counseling, requiring him to be subjected to electronic monitoring, or requiring him to pay court costs and attorney's fees incurred by the victim seeking a restraining order.

ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 583; *see also* Suk, *supra* note 13, at 22–40 for an interesting discussion of the way violations of protective orders can trigger burglary laws ("[Domestic Violence (DV)] policy, and in particular the idea of presence at home as a proxy for DV, is transforming burglary law, so that those accused or suspected of DV are increasingly prosecuted for burglary of their own homes or those of their intimates.").

[96] *See* ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 585.

[97] *Id.*

[98] These advantages are not to be taken as less valuable, but simply are not focused on the orders' deterrent effect. "[O]btaining a restraining order can provide victims with peace of mind. Restraining orders may be issued in response to the victim's fear of personal injury, past actual injury, or threat of financial harm." *Id.*

[99] Buzawa & Buzawa offer a non-exhaustive list of advantages to civil protective orders:

> First, the courts have far wider discretion to fashion injunctive relief, unlike strict sentencing restraints that are typically imposed on many judiciary proceedings. . . . Second, protective orders give the judicial system an opportunity for prospective intervention to prevent likely abuse. . . . Third, because violation of an order is now a criminal offense in all states, the existence of the order itself provides a potent mechanism for police to stop abuse—that is, the right to arrest and subsequently convict for violations of its terms. . . . Fourth, when the police respond to a protective order, they may be more inclined to take action to forestall their own legal liability. . . . Fifth, obtaining a protective order from a court may have the effect of empowering the victim. . . . Sixth, in many dimensions, civil protective orders incur far fewer victim costs than criminal prosecution. . . . Seventh, divorce-related injunctive orders have an additional unique role. . . . Eighth, relief can be far timelier than in criminal cases. . . . Ninth protective orders can be useful if criminal case prosecution would be problematic.

BUZAWA & BUZAWA, *supra* note 19, at 235–39.

[100] The order only acts as a deterrent if the defendant perceives it as one. An order will do nothing to stop a defendant intent on injuring the victim. *See* ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 585.

[101] *Id.*

reported in order to trigger the legal consequences.[102] The problem in reporting is that the offender is in a position to convince or coerce the victim to let the act go unreported.[103]

ii. The Effectiveness of Criminal Protective Orders

In addition to the many advantages and disadvantages of protective orders, there is also concern and controversy over their effectiveness.[104] Several studies have been conducted in an attempt to determine the effectiveness of orders, but the studies vary in their results.[105] Some studies suggest that while protective orders may have little positive impact in their ability to prevent reabuse, they are effective in the sense that "women feel 'empowered' or 'protected' by such orders, and the lifting of fear is itself valuable."[106] Effectiveness in that sense is a very real and important product of protective orders and should in no way be discounted or underestimated. It is important to note, however, that this definition of effectiveness does not include curtailment of future violence. It is safe to say that it remains "extraordinarily difficult to determine generally the efficacy of restraining orders."[107] When a criminal order is issued over the objection of the victim, however, whatever "effectiveness" an order can have from empowering the victim, is at best negated and at worst counterproductive.[108]

---

[102] It should be noted that certain jurisdictions do conduct random checks to ensure that the order is being obeyed in an effort to combat this drawback. "[T]he Dallas Police Department has begun randomly selecting a number of domestic violence victims who were issued protective orders, to whom detectives from the Domestic Investigation and Sex Crimes units mail letters and follow up with home visits." Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 219 (2003); *see also* Suk, *supra* note 13, at 50 ("Police officers then [after an order is issued] make routine unannounced visits to homes with a history of domestic violence. If a defendant subject to a protection order is present there, he is arrested.").

[103] *See* ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 585 ("If the offender convinces or threatens the victim not to report the violation to the police, law enforcement officials will be unaware that the offender has violated the order.").

[104] Note that the majority of the research and literature concerning the effectiveness of protective orders focuses on civil orders. Waul, *supra* note 68, at 53–54 ("The literature on protective orders has typically focused on the effectiveness of [civil protective orders] in deterring the batterer from future violence.").

[105] *See* BUZAWA & BUZAWA, *supra* note 19, at 242–43 (discussing the findings of studies done ranging back to 1985); ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 27, at 586 (discussing two such studies); Waul, *supra* note 68, at 54 (discussing the effectiveness of protective orders, noting that "[t]he research on this question has revealed mixed results"). One possible explanation for the mixed results is that the studies define effectiveness differently. BUZAWA & BUZAWA, *supra* note 19, at 243.

[106] BUZAWA & BUZAWA, *supra* note 19, at 243.

[107] *Id.* at 245.

[108] O'Connor discusses this at length in her Note, arguing that the issuance of protective orders over the objection of the victim can infringe on her autonomy rights, in some ways reversing the effects that these orders are meant to enhance. O'Connor, *supra* note 8, at 962.

4. Synthesis of Policies into a Single Protocol

Mandatory arrest, no-drop policies, and criminal protective orders are often treated independently when examined by legal scholars.[109] This can certainly be an appropriate approach in understanding how each policy operates in theory and practice, but can also run the risk of not seeing the forest for the trees. When these policies are employed together, as they are in the most aggressive jurisdictions,[110] they are not just independent developments in the evolution of domestic violence—they are the first, second, and third steps[111] in a domestic violence protocol.[112] When all three policies are employed in a protocol, the sum can be greater than their parts.[113] Taken as a protocol, there is a possibility that a victim, without inviting state intervention[114] or

---

[109] *See supra* Part II.B.1–3.

[110] *See*, *e.g.*, MILLER, *supra* note 83, at 8–13 (describing the domestic violence protocol in Queens County, New York).

[111] First, "police are required to arrest suspects in most domestic violence cases where they have probable cause to arrest." *Id.* at 6. Second, "[t]he arrest papers are then sent to the District Attorney's Intake Unit." *Id.* at 7. Third, "[t]he court's order of protection is continued after conviction." *Id.* at 10; *see also* O'Connor, *supra* note 8, at 956 ("Statutorily mandatory no-contact orders do not provide a mechanism or procedure for incorporating the concerns or wishes of the victim.").

[112] *See* Suk, *supra* note 13, at 42–50 (discussing enforcement protocol and criminal protective orders).

[113] There is a joke about passengers on an old four-propeller plane. During flight, one of the four engines goes out, prompting the captain to announce that due to the decrease in power, the flight will land an hour later than expected. Soon after, the second engine goes out and the captain announces that landing will now be two hours later than expected. Following that announcement, the third engine goes out and the captain announces that the flight is now three hours behind schedule. At this point a passenger turns to the man sitting next to him and says, "Gosh, if the fourth engine goes out, we'll be up here all day." Treating each engine failure independently is only appropriate up until a point. When discussing the remaining working engine, however, continuing to treat it independently of the other three is a failure to understand that in conjunction with the other three, the breakdown of the fourth has much greater implications (the plane will crash) than the consequences of one engine failure multiplied out by four.

Likewise, in the domestic violence context, a treatment of mandatory arrest policies may still allow the victim to control the prosecution or at least not be directly affected by the disposition of the case. A treatment of no-drop policies may assume that the victim invited state intervention at the arrest stage and may not be directly affected by the disposition of the case. A treatment of criminal protective orders at sentencing may assume invitation of state intervention and control over the prosecution. When all three are employed in conjunction, however, the implications are greater than the three measures taken independently, as the victim is at the full mercy of the State at every stage.

[114] A 911 call is a request for the State to intervene, but it does not always come from the victim. *See* Suk, *supra* note 13, at 59 ("The arrest may have come at the behest of neighbors rather than the victim herself. Or the victim may have called the police to seek specific intervention in that moment."). It is also worth noting that 911 calls from people other than the

controlling the manner of state intervention,[115] can be left protected by a criminal order that makes it impossible to see their spouse for years.[116] When all three policies are combined into a single protocol,[117] a unique problem is created as a result of the combination itself that cannot be seen by treating each policy independently. Mandatory arrest, no-drop policies, and criminal protective orders independently allow a victim to have some control over her relationship during state intervention at the pre-prosecution, prosecution, or post-prosecution stages.[118] Taken together, however, a victim could potentially be left completely voiceless during the pre-prosecution and prosecution stages, but nevertheless be left named on a criminal protective order, which lasts for years.[119] This means the State can effectively end a relationship[120] that the victim voluntarily wants to be a part of, without the victim having invited state intervention, participated in the manner of state intervention, or had a voice in the lasting legal consequences of state intervention.

---

victim are more likely to occur in urban areas. "The initial DV arrest . . . is much more likely to occur if people live in close quarters in buildings with thin walls, and neighbors can easily hear a disturbance and call the police." *Id.* at 59–60.

[115] No-drop policies mean that the prosecution can proceed irrespective of the wishes of the victim. *See* Han, *supra* note 59, at 181–85 (discussing the drawbacks of no-drop policies).

[116] *See*, *e.g.*, MILLER, *supra* note 83, at 10. Miller reports that in Queens County, New York, "[t]he court's order of protection is continued after conviction as a limited order of protection for a period of up to three years in Misdemeanor A cases and one year in lesser cases," and further notes how this limited order may become a full order if certain conditions are not met by the defendant. *Id.*

[117] New York City is an example of a jurisdiction which employs mandatory arrest policies, no-drop policies, and criminal protective orders in the sentencing stage all. *See* MILLER, *supra* note 83 (evaluating the domestic violence policies in Queens County, New York); *see also* Suk, *supra* note 13, at 42 ("I turn to a leading jurisdiction, New York County (i.e., Manhattan), that is considered to be 'in the forefront of efforts to combat domestic violence,' and that has seen significant changes in its enforcement approach in the last decade.").

[118] At the pre-prosecution stage, *i.e.*, when the police arrive at the scene, if not for a mandatory arrest policy the victim would have some control over whether the offender was arrested. *See* Hanna, *supra* note 43, at 1857–60 (discussing the history of the effect of victim objection to arrest). In the prosecution phase, no-drop policies are just one end of the spectrum. "On the other end of the spectrum, deferential drop jurisdictions defer completely to the wishes of the victims, routinely dropping charges according to victim desires." Han, *supra* note 59, at 181. At the post-prosecution phase, meaning the sentencing and beyond, "[t]he discretion accorded to the court with respect to the issuance of a criminal protective order, including which conditions to stipulate, varies by jurisdiction." O'Connor, *supra* note 8, at 947.

[119] *See* O'Connor, *supra* note 8, at 949 ("[M]ost criminal protective orders do not require that a specific petitioner be named. In some states, the victim's name will appear as the petitioner only because statutory requirements allow members of the criminal justice system to file in the victim's name." (citations omitted)).

[120] *See* Suk, *supra* note 13, at 42–64 (arguing that unwanted criminal no-contact orders issued in sentencing can operate as "de facto divorce").

II. CONSTITUTIONAL ISSUES ARISING FROM CRIMINAL PROTECTIVE ORDERS AS PART OF A DOMESTIC VIOLENCE PROTOCOL

A domestic violence protocol that potentially silences a victim at every stage not only gives rise to questions about its effectiveness and appropriateness,[121] but also its constitutionality. Although "[t]he Constitution does not specifically guarantee crime victims particular rights,"[122] the victim's Fourteenth Amendment rights[123] can still potentially be violated.[124]

A. A Fundamental Right Violated

If a criminal protective order which separates a married couple is viewed as state imposed "de facto divorce,"[125] then the fundamental right to marry is invoked.[126] Once a fundamental right is found to be inhibited, the court will use a heightened standard of review in its analysis as to whether the law is constitutional under the Fourteenth Amendment.[127]

1. "De Facto Divorce"

In her 2006 article *Criminal Law Comes Home,*[128] Jeannie Suk introduced the concept of "de facto divorce."[129] Suk argues the effect of a final criminal order of protection[130] is in essence an informal divorce:

---

[121] *See supra* Part I.B.4.

[122] O'Connor, *supra* note 8, at 962. O'Connor goes on to add some historical reasons for this:

> At the time of the Constitution's creation, private prosecution was the means of enforcing the criminal law, with the victim typically serving as both prosecutor and punisher. Thus, the Framers likely presumed that victim's rights would be protected by the role the victim played in the prosecutorial scheme. Public prosecutors replaced victims as the initiator of criminal investigation, providing a neutral participant, distant from the parties and facts of the particular case. Gradually displacing the belief that the wrong was done first to the victim and then to the state, public prosecution on behalf of the state became the norm and victim's rights, formerly secured by the victim's role in the prosecution, were left unprotected.

Id. at 962–63.

[123] *Id.* at 962–63.

[124] *See infra* Part II.A.3 (discussing a potential challenge).

[125] Suk coined the term and brought forth this theory of a constitutional challenge in her 2006 article that focuses on the same type of domestic violence protocol as this article. Suk, *supra* note 13.

[126] *Id.* at 64.

[127] *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (applying "critical examination").

[128] Suk, *supra* note 13.

[129] *Id.* at 8.

[130] The final order of protection is another name for a criminal protective order handed down at sentencing that remains in effect long after the criminal proceeding has ended. *See id.* at 53–54.

> The full and final order of protection prohibits contact between the parties, and violation of the order constitutes commission of a fresh crime. It is unlawful for the party subject to the order to see or to speak to his spouse, or to go to the home in which they reside together. Even a phone call, letter, or e-mail risks arrest and criminal charges. Regardless of whether parties are formally married, it is therefore criminal for them to continue, in any substantive way, their marital, domestic, or intimate relationship. With these prohibitions, the state—the prosecutor and the criminal court—effectively seeks to impose de facto divorce.[131]

Suk goes on to note that while de facto divorce is not de jure divorce[132] in that it is not a formal divorce, in many ways it goes further than a formal divorce.[133] Not only can there be no contact by either party,[134] but it "need not be initiated by either of the parties to the relationship. Unlike actual divorce, in which a general principle of autonomy governs so that one or both parties in the marriage must initiate it, here the separation is forced by the State. Neither party's consent is required."[135] It is, as Suk puts it, "super-divorce."[136]

In reality, some couples simply disregard the protective orders and continue to live together despite the criminal order.[137] Despite the decision of the parties to disregard the order,[138] they still run the risk of criminal consequences as police officers do make random checks and will arrest parties that are not in compliance with the order.[139] As a result, those couples that disregard the orders and continue in their relationships "live in marriages or intimate relationships whose practical continuation is criminal."[140] Viewing a criminal protective order as "de facto divorce" then, it follows that such orders can interfere with the fundamental right to marry.

---

[131] *Id.* at 56.

[132] Suk notes that unlike common law marriage, there is no common law divorce. *Id.* at 57 n.238.

[133] *Id.* at 58.

[134] Contact cannot occur "even by express permission of the protected party." *Id.*

[135] *Id.* Also note that parties cannot contract around the conditions as they would in a formal divorce. *Id.*

[136] *Id.*

[137] *Id.* at 60.

[138] Reasons to disregard the order may not always be simple. Suk notes how "sophisticated users of the DV and criminal justice systems could use the protective order as a strategic threat within the intimate relationship." *Id.* at 61–62.

[139] *Id.* at 60–61.

[140] *Id.* at 61.

2. The Fundamental Right to Marry and Heightened Review

In the seminal case of *Loving v. Virginia*,[141] the Supreme Court struck down Virginia anti-miscegenation laws after an interracial couple convicted under the laws brought a Fourteenth Amendment challenge.[142] In *Loving*, the Court defined the right to marry as a fundamental right.[143] The Court's decision focused on racial discrimination in violation of the Equal Protection Clause[144] and not the fundamental right of marriage in the Due Process Clause,[145] "[b]ut the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry."[146]

In the 1978 case *Zablocki v. Redhail*,[147] the Supreme Court struck down a Wisconsin statute[148] that provided that certain couples may not marry without a court's permission.[149] "The class is defined by the statute to include any 'Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment.'"[150] In determining the level of scrutiny, Justice Marshall, delivering the opinion of the Court, found that "critical examination" was the appropriate measure.[151] The Court began by discussing the Equal Protection Clause aspect of the case,[152] but then proceeded to discuss the fundamental right to marriage, and its bearing on the Due Process clause.[153] Having established that marriage is a fundamental right and a form of heightened review was the appropriate level of scrutiny,[154] the Court stated that a statute "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[155] The Court went on to find the statute insufficiently tailored to the state

---

[141] 388 U.S. 1 (1967).

[142] *Id.*

[143] *Id.* at 12.

[144] *Id.* at 11.

[145] *Id.* at 11–12.

[146] Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (commenting on *Loving*).

[147] *Id.* at 374.

[148] WIS. STAT. §§ 245.10 (1), (4), (5) (1973).

[149] *Zablocki*, 434 U.S. at 375.

[150] *Id.*

[151] *Id.* at 383.

[152] *Id.*

[153] *Id.* at 383–88. The Court also discussed marriage in the privacy context of the Due Process Clause. "More recent decisions have established that the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Id.* at 384. The Court went on to discuss *Griswold v. Connecticut*, 381 U.S. 479 (1965), the groundbreaking case that found a right of privacy implicit in the Fourteenth Amendment. *Zablocki,* 434 U.S. at 384.

[154] *Zablocki*, 434 U.S. at 388.

[155] *Id.*

interests and struck down the statute.[156] Interestingly, however, as Justice Stewart pointed out in his concurring opinion, the Court's opinion technically rested on Equal Protection grounds, and not substantive due process.[157] Moreover, Justice Marshall pointed out that not all regulations on marriage will be subject to strict scrutiny.[158] For a statute to trigger strict scrutiny, then, it seems that it must "interfere directly and substantially with the right to marry."[159]

Regardless of any "obfuscation"[160] in the majority's opinion in *Zablocki*, a concrete rule does seem to emerge: the Court considers the right to marry a fundamental right, and if that right is substantially interfered with, the Court will apply strict scrutiny in which it will determine if the law is narrowly tailored to state interests.

3. "De Facto Divorce" as a Constitutional Challenge

Return to the hypothetical posed at the beginning of the Note: a victim-spouse who did not call the police, did not participate in the prosecution of her husband, and objected to the no-contact criminal protective order. In this case the victim-spouse's autonomy over her family structure was disregarded as a result of a domestic violence protocol that included mandatory arrest, a no-drop policy, and the issuance of criminal protective order at sentencing. Is there a potential constitutional challenge?

Although constitutional challenges regarding protective orders and the right to marry are exceedingly rare,[161] Suk points to an unpublished decision from the

---

[156] *Id.* at 388–91. The Court pointed to evidence that the statute was originally enacted as a way to ensure that people with child-support obligations would receive counseling before entering into a new marriage, and once counseling was given, permission was automatically granted. *Id.* at 388. The Court was quick to point out, however, that there is nothing in the statute mentioning counseling, and is therefore not narrowly tailored to that end. *Id.* Another state interest put forward is that of the welfare of out-of custody children, but the Court found the statute as a means of collection to be overly broad. *Id.* at 389. The Court found that for those too poor to pay the child support, the statute simply served to prevent marriage, and did nothing to help collect. *Id.* at 389. The Court also noted that there are many other ways for the State to achieve its interest in collecting the funds that are far less intrusive than the marriage ban. *Id.* As to the argument that the statute prevents those who owe child support from taking on further financial obligations, the Court found the statute to be grossly underinclusive, as the statute did not limit assuming other financial obligations. *Id.* at 390.

[157] *Id.* at 395–96 (Stewart, J., concurring) ("The Court is understandably reluctant to rely on substantive due process. But to embrace the essence of that doctrine under the guise of equal protective serves no purpose but obfuscation." (citations omitted)).

[158] *Id.* at 386 (majority opinion) ("[R]egulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed [without triggering strict scrutiny].").

[159] *Id.* at 387.

[160] *See id.* at 396 (Stewart, J., concurring) (discussing the problems with the majority opinion).

[161] *See* Suk, *supra* note 13, at 64 n.265 ("One might expect extensive litigation on this question, [the constitutionality of state imposed 'de facto divorce'] but the opposite appears to be the case.").

Washington Court of Appeals that is on point, albeit raised by the defendant and not the victim-spouse.[162] In *State v. Ross,*[163] the defendant, convicted of felony harassment and two counts of assault,[164] argued on appeal, among other things,[165] that the no-contact order handed down in sentencing unconstitutionally violated his right to marry.[166] After Ross was convicted of the initial charges but before his sentencing, he married the victim,[167] thus violating the standing no-contact order.[168] In response, the judge issued a ten year no-contact order naming Ross's wife, which she opposed.[169] In determining the constitutionality of this order in the face of the defendant's right to marriage, the court correctly identified marriage as a fundamental right.[170] The court went on to identify the State's compelling interest as preventing future crimes.[171] With respect to the standard of review to be applied, the court seemed to use strict scrutiny, though not explicitly.[172] However, the court was extremely brief in its application and conclusory in its discussion, deeming that the lower court's decision to issue the no-contact order furthered the State's interest and no less intrusive alternative existed.[173] As to the defendant's assertion that assault statutes already serve the State's interest in preventing future violence,[174] the Court responded that no-contact orders go even further to accomplish this end.[175] Suk noted that "[t]he *Ross* court was strikingly nonchalant about the interference of the no-contact order with the right to marry because it accepted the imperative to separate couples when DV [domestic violence]

---

[162] Suk originally discussed this case, noting the fact that it has remained unpublished "notwithstanding its evident relevance to the areas of criminal law, family law, and constitutional law." *Id.* at 64–65 (discussing State v. Ross, 1996 WL 524116, at *1 (Wash. Ct. App. Sept. 16, 1996)).

[163] 1996 WL 524116 (Wash. Ct. App. Sept. 16, 1996).

[164] *Id.* at *1.

[165] Ross also argued that the court abused its discretion by improperly admitting hearsay and that the court lacked the authority to condition the length of the no-contact order on his completion of a counseling program. *Id.*

[166] *Id.*

[167] *Id.* at *2.

[168] *Id.* (the violated no-contact order was issued for the duration of the proceedings, and was not part of sentencing).

[169] *Id.* at *2. The court stated that "[t]he fact that Burke [Ross's wife] opposes the no-contact order in this case does not change th[e] fact" that the State's interests are furthered by the no-contact order. *Id.* at *4.

[170] *Id.* at *3. The court cited *Zablocki*, among other cases, as recognizing marriage as a "fundamental constitutional right." *Id.*

[171] *Id.* at *4 (citing Westerman v. Cary, 892 P.2d 1067 (Wash. 1994)).

[172] *Id.* at *3 ("The State may interfere with that right, however, when important state interests are at stake, the restriction actually furthers those interests, and no less intrusive alternative exists to advance those interests" (citing Vanu v. Rice, 524 F.Supp. 1297 (S.D. Iowa 1481))).

[173] *Id.* at *4; *see also* Suk, *supra* note 13, at 65.

[174] *Ross*, 1996 WL 524116 at *4.

[175] *Id.*

is involved."[176] Not only has the opinion remained unpublished, but "[t]he court's tone and brevity suggested that it perceived the case as a nearly frivolous claim of the kind that the courts constantly dispose of with cursory analysis."[177] Although the claim was brought by the defendant and not the victim, the case does confirm the standard of review that should be applied to a challenge based on "de facto divorce"-type reasoning. That said, the court dispenses of the argument far too heedlessly for a strict scrutiny review.

Returning to the hypothetical, the court should find the order in that situation unconstitutional. The court in *Ross* was far too hasty in its application of strict scrutiny. The court asked the right questions,[178] but answered them in conclusory fashion.[179] The court states that "[b]y making even non-assaultive contact unlawful and punishable, the no-contact order goes much further than the assault statute toward preventing violent acts."[180] The *Ross* court's ruling must have hinged on this assertion, since if the no-contact orders do not work to satisfy the State's interest in preventing future violence, they would be found unconstitutional under strict scrutiny.[181] Despite the assertion that no-contact orders prevent future violence serving as the crux of the court's reasoning, the court offered no empirical data or evidence to suggest that it was true.[182] The court simply relied on its own intuition that no-contact orders work, despite evidence that this may not be the case.[183]

Judicial intuitions aside, however, studies of the effectiveness of criminal protective orders have shown mixed results,[184] and in fact have shown that they do little to prevent reabuse.[185] Despite other positive effects of the orders,[186] if they do not prevent reabuse, then they cannot further the State's interest in preventing future violence. If they do not further the State's interest, then the orders should fail under strict scrutiny.[187] Even if a court faced again with the question will not go as far as to invoke

---

[176] Suk, *supra* note 13, at 65.

[177] *Id.*

[178] Namely, is the State's interest compelling and is it furthered by the restriction? *Ross*, 1996 WL 524116 at *3–4.

[179] The court simply stated what the order purports it will do, and nothing about whether it accomplishes this goal. *Id.* at *4.

[180] *Id.*

[181] *Id.* ("The State may interfere with that right [marriage], however, when important state interests are at stake, the restriction actually furthers those interests . . . . That interest [preventing future violence] is furthered by a no-contact order that prohibits a violent offender from contacting his victim for a period of time.").

[182] *See Ross*, 1996 WL 524116.

[183] *See supra* Part I.B.3.b.ii and accompanying text for the discussion on the questionable effectiveness of protective orders.

[184] See *supra* note 105 for a discussion of the results of different studies.

[185] *See supra* note 106 and accompanying text.

[186] *See* discussion *supra* Part I.B.3.b.i (discussing the advantages of the orders).

[187] *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1977) (stating that when a fundamental right

the studies that show that protective orders do not prevent reabuse,[188] at the very least they should acknowledge that the results are unquestionably mixed.[189] The discrepancy in results is indication enough that even if the no-contact orders *can* further the State's interest in *some* cases, it is not enough to satisfy strict scrutiny's requirement of a narrowly tailored means-ends nexus.[190]

Moreover, if there is a less intrusive alternative to furthering the State's interest, the challenged measure will be found unconstitutional under strict scrutiny.[191] The court in *Ross* suggests that the no-contact order is the method of preventing future violence that is the least intrusive to the fundamental right to marriage.[192] It dispenses with the defendant's arguments that assault statutes are already deterrent enough,[193] and that counseling would be less intrusive,[194] by stating that neither adequately achieves the goal of preventing future violence as well as no-contact orders.[195] But there is a rather obvious alternative the court overlooks: incarceration. As counterintuitive as this may seem, even jail would be less intrusive to the *relationship* than a mutually unwanted protective order.[196] "[P]risoners are normally allowed to have some contact through which they can maintain their relationships. For example, they can write and receive letters, make phone calls, and have visitors, all of which would be criminal under a no-contact order."[197] It would be implausible that any court would find a piece of paper a better means of preventing future violence than incarceration, yet incarceration would be less intrusive to a marriage.

There is little question that there are situations in which the risk of repeated violence is so clear that it appears almost inevitable. There is also little doubt that a victim

---

is interfered with, a statute "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests").

[188] See *supra* note 106 and accompanying text for a discussion of the results of different studies.

[189] *See supra* note 105 and accompanying test.

[190] *See Zablocki*, 434 U.S. at 388.

[191] *Ross*, 1996 WL 524116 at *3 (describing the requirements of passing a heightened review standard).

[192] *Id.*

[193] *Id.* at *4. The court stated that defendant's argument that existing assault statutes serve as a less intrusive alternative "ignores the broader scope of no-contact orders." *Id.* Adding that "[b]y making even non-assaultive contact unlawful and punishable, the no-contact order goes much further than the assault statute toward preventing violent acts." *Id.*

[194] *Id.* The court stated that counseling in lieu of a no-contact order would "allow Ross to contact Burke before he had successfully completed treatment." Thereby "creat[ing] a greater risk of reoffense than the arrangement Ross challenges." *Id.*

[195] *Id.*

[196] *See* Suk, *supra* note 13, at 65–66 (discussing incarceration's effect on the right to marriage).

[197] *Id.* at 65. Suk goes on to note that "even incarceration, which undoubtedly burdens the relationship, does not seek to end it." *Id.*

will not always be able or willing to remove herself from the relationship. But if it is the case that reabuse is almost certain and the victim refuses to consent to a no-contact order, then the answer lies in incarcerating the offender, not disregarding the voice of the victim. Not only does this respect the constitutional rights of the victim-spouse, but focuses on punishing the responsible party. It is unlikely the victim-spouse will support incarceration, but the State need not pay heed to every preference of the victim. It is the State's duty and prerogative to punish violent offenders as long as it does so without abridging the rights of an innocent party.

It is important to recall that this discussion and standard of review is only relevant to the "de facto divorce" scenario in which the order is issued over the objection of the victim-spouse. The court in *Ross* stated that the victim's opposition to the order is irrelevant,[198] but this misses the mark. It is only because the victim opposes the order that strict scrutiny must be applied in the first place. Strict scrutiny is only applied because the victim-spouse's fundamental right to marriage is being infringed upon by State mandated "de facto divorce." If it is not a "de facto divorce"[199] scenario, in that the victim-spouse consents to the order, then a fundamental right is not encroached upon since there is no fundamental right to be married to someone who does not wish to be married to you.[200] Given the above hypothetical, however, using Suk's theory of "de facto divorce,"[201] strict scrutiny should be applied and the victim-spouse should be successful in her constitutional challenge. Under strict scrutiny, criminal protective orders lack a sufficiently narrowly tailored connection to the State's interest in preventing future violence.

CONCLUSION

The constitutional issues discussed above are limited to certain hypothetical conditions that oblige some explanation. First, this Note expounds upon the constitutional rights of the victim-spouse yet criticizes the opinion in *Ross*, a case in which the defendant raised the claim.[202] This is because the arguments used in *Ross* and the manner in which the court frames them are the same as those that would be used in a hypothetical claim brought by the victim-spouse. As to whether the defendant, as in *Ross*, has reciprocal rights and potential challenges are questions for another

---

[198] *Ross*, 1996 WL 524116, at *4.

[199] *See* Suk, *supra* note 13, at 8.

[200] The cases that establish the right to marry as a "fundamental right," *e.g.*, *Loving* and *Zablocki*, deal with the mutual assent to marry. *See* Zablocki v. Redhail, 434 U.S. 374 (1977); Loving v. Virginia, 381 U.S. 1 (1967).

[201] This is consistent with *Ross* in that the court in *Ross* found it appropriate to apply strict scrutiny as the fundamental right to marriage was invoked. *Ross*, 1996 WL 524116 at *3.

[202] *Id.* at *1.

day.[203] Second, the potential challenge outlined above assumes that children are not involved in the domestic violence.[204] Finally, the above situation addresses criminal protective orders as part of a domestic violence protocol that includes mandatory arrest and no-drop policies, in which the victim did not participate at any level. It very well may be the case that the constitutional challenge would be successful even if the victim did participate earlier in the process, but it may also be that this would change the analysis since the victim in some sense initiated[205] or ratified[206] the state interference. As it stands, however, this Note has the luxury of loading the victim-spouse's deck with hypotheticals and potentialities. How far the argument put forth can stray from the controlled hypothetical conditions is uncertain, but the fact that this potential challenge exists should give rise to some very real concerns.

The potential constitutional challenge outlined in the previous section is not meant to serve as an indictment of current prosecutorial methods, but instead as a measuring stick of how far they have come. The fix for the outlined challenge is simple: require that the victim-spouse consent to the no-contact order, and if the victim-spouse does not, seek the statutorily allowable jail sentence. This may limit prosecutors more than they would like in certain circumstances, but the outlined challenge shows that the prosecutor may be constitutionally compelled to accept such a compromise.

Domestic violence is an extremely serious problem and the aggressiveness with which some jurisdictions have begun combating it should be applauded. Regardless, being on the forefront of increasingly more aggressive policies comes with responsibilities. The potential constitutional challenge described is a strong indication that the expansion of prosecutorial methods to combat domestic violence has gotten to the point where it may begin infringing upon other protected rights.[207] As with any expanding practice, those on the vanguard must be vigilant in asking: how far is too far? Criminal protective orders mandating no-contact over the objection of the victim-spouse is too far.

---

[203] Whether the defendant's crime affects the constitutional analysis is a broader question than this Note purports to answer.

[204] Sadly, it is all too often the case that children are involved. A 2002 study estimates that between 3.3 million and 10 million children in the United States are exposed to domestic violence each year. SHARMILA LAWRENCE, NAT'L CTR. FOR CHILDREN IN POVERTY, DOMESTIC VIOLENCE AND WELFARE POLICY: RESEARCH FINDINGS THAT CAN INFORM POLICIES ON MARRIAGE AND CHILD WELL-BEING 5 (2002), *available at* http://www.researchforum.org/media/DomVio.pdf. When children are involved, the analysis set forth in this Note does not apply, as there are so many other interests to consider.

[205] The victim initiated the interference in the sense that the victim called the police or requested that the spouse be arrested.

[206] The victim ratified the interference in the sense that the victim participated in the prosecution.

[207] *See* O'Connor, *supra* note 8 (raising similar concerns but framing her argument as a claim based on the victim's right to privacy).

This is not to say the effort is misplaced or criminal protective orders are a misguided method, but it is a red flag that prosecutorial methods have begun to cross their constitutional bounds. Mandatory arrest, no-drop policies, and criminal protective orders are all valuable tools in a prosecutor's effort to fight domestic violence, but the effect these tools can have on a victim should not and cannot be taken lightly. A society free of domestic violence is as worthy a cause as exists in the world of law enforcement, but the current methods of achieving this goal can come at the cost of victim autonomy. The task of balancing those sometimes competing interests is not easy, but the constitutional concerns discussed in this Note serve as a reminder of the importance of finding that balance.