SEEING THE WRECKING BALL IN MOTION: EX PARTE PROTECTION ORDERS AND THE REALITIES OF DOMESTIC VIOLENCE

Debra Pogrund Stark[*]
&
Jessica Choplin[*]

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INTRODUCTION

One of the most fundamental norms in our judicial system is that courts need to hear from both parties on a legal issue before granting any form of legal relief. Nevertheless, rules of civil procedure permit a vulnerable party to appear in court *ex parte* (without prior notice to the other party), to obtain a temporary order prohibiting a wrongful action about to be taken that will cause irreparable harm. A classic example of this is when a person runs into court because a demolition crew is starting to set up to demolish a building they have built and claim to own. Due to the time it would take to provide prior notice of the hearing for the requested relief to the party responsible for this action, the harm to be avoided would likely take place. Consequently, in this instance, a court would be

[*] Debra Pogrund Stark is a Professor of Law at The John Marshall Law School and Founder and Director of the school's Domestic Violence Clinical Advocacy Program. Professor Stark thanks Margaret McWhorter, J.D. The John Marshall Law School, Shari Stewart, J.D. The John Marshall Law School, and Andrew Scott, of The John Marshall Law School, for their excellent research assistance. She also thanks Dean John Corkery, Associate Dean Anthony Niedwiecki and Associate Dean Julie Spanbauer for their support of this research.

[*] Jessica Choplin is an Associate Professor of Psychology at DePaul University.

willing to hold an ex parte hearing to determine whether to grant a temporary restraining order.[3] This Article focuses on *ex parte* orders in the context of domestic violence. It is easy to see the potential imminent harm—to see the "wrecking ball in motion"—in cases where demolition crews are starting to demolish buildings, but what happens in domestic violence cases when the court is unable to *see* the imminent harm—the "wrecking ball in motion"—or how giving notice can set-off that wrecking ball into motion?

In the context of domestic violence, ex parte orders of protection are intended to protect survivors of domestic violence from further acts of abuse, including violence, when they attempt to safely leave an abusive intimate partner. This Article explores the critical question of the extent to which judges "see the wrecking ball in motion" when they make their rulings in this context. We contend that when judges do not understand the realities of domestic violence, in particular, the counter-intuitive aspects of domestic violence, or when a victim acts in a manner against a held gender stereotype, the judges are much less likely to see the "wrecking ball in motion" and are more likely to deny ex parte orders of protection that they should be granting.

In Section I, we note the general laws that apply to obtaining ex parte restraining orders in non-domestic violence cases, the strong norm against ex parte orders, and consider how these norms may impact how judges rule in ex parte order of protection cases for survivors of domestic violence.

In Section II, we explore the various statutory standards applied among the fifty states as conditions for survivors of domestic violence to obtain ex parte orders of protection. We compare these requirements to the general laws on ex parte restraining orders and consider the possible reasons for the different approaches. We also briefly touch upon which of these statutory standards best address the realities of domestic violence laid out in Section III.

In Section III, we discuss the often counter-intuitive realities of domestic violence. We analyze how that, gendered stereotypes, and other cognitive phenomenon can hinder how judges assess the credibility of those who allege they are "survivors of domestic violence"[4] in need of an ex parte order of

3. Randy Wilson, *From My Side of the Bench: Restraining Orders*, THE ADVOCATE, xii 2013 Judge noted this example. Another classic example, is, if a person is in the process of trying to embezzle money from various accounts and the injured party seeks to prevent this by freezing her/his bank accounts. If you give notice of the intended action, the person trying to embezzle the money might rush to commit the very act you are trying to prohibit and then flee the country. This was another example cited by the Judge who explained that once a year he and the other civil judges hear all the ex parte temporary restraining orders for half a month, with typical cases relating to foreclosures, covenants not to compete, trade secrets and stopping a building from being razed.

4. In this Article, at times, we refer to the intimate partners who engage in abuse to coercively control a current or former intimate partner as the "Abusive Partner" and refer to the survivor of this abuse as the "Target of the Abuse" to emphasize the deliberate and coercive nature of domestic violence and distinguish it from an anger management problem. We also refer to survivors of domestic violence with the pronouns "she" and "her" and abusive intimate partners with the pronouns "he" and "him" based on statistics showing that intimate partner violence is committed primarily against women. Callie Rennison Ph.D. & Sarah Welchans, BUREAU OF STATISTICS: SPECIAL REPORT, DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE,

protection. We also analyze how these realities and cognitive phenomenon can thwart judicial assessment of the likelihood of future abuse.

In Section IV, we focus on cases among the fifty states where the petitioner has alleged abuse that raises a danger of further abuse and analyze how judges have interpreted and applied the different statutory standards for an ex parte order of protection in those cases. We also share the results from a survey of domestic violence service providers in Chicago, Illinois, on the extent those service providers observed judges to deny an ex parte order of protection due to a delay in seeking the order of protection and due to the petitioner failing to state that he/she "feared" the respondent. We also consider how certain cognitive phenomena such as uncertainty discounting, gendered stereotyping, following scripts, and other forms of heuristics may be causing judges in the cases reviewed, and in the empirical study, to fail to grant orders of protection as they should in these cases.

In Section V, we propose law reforms to better protect survivors of domestic violence seeking ex parte orders of protection in light of the realities of domestic violence and the cognitive heuristics judges use when ruling in these cases. We also consider in this section the due process rights of those alleged to be abusive intimate partners, and what is appropriate and fair in light of what is at stake for each of the parties from an adverse ruling.

I. PRECONDITIONS FOR AN EX PARTE ORDER IN NON-DOMESTIC VIOLENCE CONTEXTS

Before reviewing the statutory standards for an ex parte order of protection in a domestic violence context, it is illuminating to first review the statutory preconditions for an ex parte temporary restraining order in other contexts and how courts have applied those preconditions to the cases before them. The *Digital Generation, Inc. v. Boring*[5] case provides a good example.

The court in this case first noted that under the federal rules of civil procedure, in order for a court to issue an ex parte temporary restraining order (TRO), it must be shown that *immediate* and *irreparable injury* will result *before*

NCJ 178247, (2000). For example, according to the Department of Justice Report, in 1997 7.5 women per 1,000 experienced intimate partner violence; while only 1.5 men per 1,000 men experienced intimate partner violence. Another example is that while 24% of women report being a victim of severe physical violence by an intimate partner during her lifetime, 14% of men report being a victim of severe physical violence by an intimate partner during his lifetime. CENTERS FOR DISEASE CONTROL & PREVENTION & NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010 SUMMARY REPORT 43-44 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf. While there is the issue of possible under-reporting or over-reporting, it is illuminating to note that, according to the Department of Justice report, three times more women are murdered by an intimate partner versus men murdered by an intimate partner.

5. Dig. Generation, Inc. v. Boring, Civ. A. No. 3:12-CV-00329-L, 2012 WL 315480 (N.D. Tex. Feb. 2, 2012).

the adverse party can be heard.[6] Digital Generation sought a temporary restraining order to prevent a former employee from soliciting clients and releasing confidential information. The company argued that if they provided notice to the former employee of their petition for a restraining order that the company would suffer immediate and irreparable harm, based on the release of the confidential information.

The court declined to issue the TRO for two reasons. First, the company failed to explain why they thought the employee would take these actions and how the employment contract was currently violated. Second, the company waited 45 days to argue for a TRO, so the court concluded that the company did not perceive an immediate risk.[7]

As will be discussed in Sections III and IV *infra*, judges raise very similar questions, concerns, and conclusions as described above in order of protection cases for survivors of domestic violence. They will want to know why the petitioner thinks that their former intimate partner will take the actions that the petitioner fears, and, when the petitioner does not appear in court right after violence or threatened violence has occurred, judges may also conclude it is "evident" that the petitioner does not perceive an immediate risk necessitating an ex parte order.

Due to the strong norm against ex parte orders in general and consequential judicial reluctance to issue such orders (as one judge stated: "While the rules envision ex parte TROs, most courts are reluctant to grant ex parte applications. Judges want to hear from both sides."[8]), a court will likely require strong

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6. The District of Columbia and 42 states' rules of civil procedure similarly condition temporary, ex parte orders on a finding of "immediate and irreparable" injury or harm: Alabama [Ala. R.Civ. P. Rule 65], Alaska [A.S. § 09.40.230], Arizona [Ariz. R. Civ. P. 65(d), Arkansas [Ark. R.C.P. 65], Colorado [Colo. R.Civ. P. 65], Delaware [Del. Ch. Ct. R. 65], Florida [Fla. R. Civ. P. 1.610], Georgia [Ga. Code Ann. Section 9-11-65], Hawaii [Hi. R. Civ P. 65], Idaho [I.R.C.P. 65], Illinois [735 ILCS 5/11-101], Indiana [Ind. R. Trial P. 65(B)], Kansas [Kan. Stat. Ann. Section 60-903], Louisiana [La. Code Civ. Proc. Ann. Art. 3603], Maine [Me. R. Civ. P. 65], Maryland [MD R SPEC P Rule 15-504], Massachusetts [Mass. R.C.P. 65], Michigan [Mi. R. Spec. P. M.C.R. 3.310], Minnesota [Minn. St. R.C.P. 65.01], Mississippi [Miss. R. R.C.P. 65], Missouri [Mo. Sup. Ct. R. 92.02], Montana [Mont. Code Ann. Section 27-19-315], Nevada [Nev. R. Civ. P. 65], New Hampshire [N.H.R. Prob. Ct. R. 161], New Jersey [N.J. Ct. R. R. 4:52-1], New Mexico [N.M.R.A. 1-066], New York [N.Y.C.P.L.R. 6301], North Carolina [N.C. Gen. Stat. Ann. 1A-1, 65], Ohio [Oh. St. R.C.P. 65], Oklahoma [Okla. Stat. Ann. Tit. 12 Section 1384.1], Oregon [Or. R. Civ. P. 79], Pennsylvania [Pa. R.C.P. No. 1531], Rhode Island [Super. R. Civ. P. 65], South Carolina [S.C.R.C.P. 65], South Dakota [S.D. Codified Laws Section 15-6-65(b)], Tennessee [Tenn. R. Civ. P. 65.04], Texas [Tex. R.C.P. 680], Utah [Utah R. Civ. P. 65A], Vermont [Vt. R. Civ. P. 65], Washington [Wash. Super. Ct. Civ. R. 65], West Virginia [W. Va. R. Civ. P. 65], and Wyoming [Wyo. R. Civ. P. 65]. Seven States instead require only "irreparable" or "great" harm: California [add cite to 527.6(b)(70(d)], Connecticut [Conn. Gen. Stat. Ann. Section 52-473], Iowa [Iowa R. Civ. P. 1.1502], Kentucky [Ky. R. Civ. P.65.07], Nebraska [Neb. Rev. Stat. Ann. Section 25-1063], North Dakota [N.D.R. Civ. P. 65], and Wisconsin [Wis. Stat. Ann. Section 813.025]; Virginia takes a different approach [Va. Code Ann. Section 8.01-629].

7. Dig. Generation, 2012 WL 315480.

8. Randy Wilson, J., *From My Side of the Bench: Restraining Orders*, 62 THE ADVOCATE XIII (2013).

evidence of the claimed "imminent" and "irreparable" harm sought to be avoided, and will deny a TRO when that evidence has not been presented to the court's satisfaction as exemplified in the *Digital Generation* case.

We also begin our analysis with the law on ex parte orders outside of the context of domestic violence cases to help explain a judicial puzzle that we consider in Section IV. Some judges in jurisdictions with order of protection statutes that do not require that the petitioner show "immediate and present danger of harm," still focus on how imminent the future harm will be.[9] And, problematically, they do so by focusing on when the last act of violence has taken place. These courts have denied ex parte orders of protection when the last act of violence took place more than a few days ago.[10] When the petitioner fails to appear in court seeking relief shortly after abuse has occurred or been threatened, some judges view such time delay as evidence that even the petitioner does not really believe there was an immediate harm that needed to be handled by the court ex parte. As contrasted with a judge trained in the dynamics of domestic violence recognizing the numerous reasons survivors of domestic violence have for delaying in seeking legal help as explained in Section III. It thus appears that judges have created a "timing requirement" for ex parte orders of protection due in part to the fact that "immediate" harm is such a key concept for ex parte orders in other more general contexts and due to their lack of understanding of the dynamics of domestic violence. In Section IV *infra*, we discuss how judges may be subconsciously following the "script" used in ex parte orders in other contexts when they have a domestic violence case before them, even when the legislative language purposefully differs from that script. In Section III, we also explain how failure to understand the realities of the dynamics of domestic violence can cause judges to fail to "see the wrecking ball in motion."

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9. For example, the trial court in Lewis v. Lewis, 728 S.E.2d 741, 43-44 (Ga. Ct. App. 2012)., denied a protective order because the wife failed to establish that her husband had committed a "reasonably recent" act of family violence against her, even though the statute in Georgia does not require a showing of an immediate and present danger of abuse and instead only requires that family violence has occurred in the past and may occur in the future (the appellate court properly reversed this denial of a protective order). Similarly, some judges in Illinois have been observed to deny an emergency order of protection due to the time that has passed between the last act of abuse and when the petitioner seeks the order of protection, in some cases when the delay is just a few days or one week after the last act of abuse. *See* Debra Stark, *Survey of Lawyers and Domestic Violence Advocates on Application of the IDVA* (2013) (on file with author, hereinafter *Survey of Lawyers and D.V. Advocates*). This is the case even though the Illinois Domestic Violence Act does not include a requirement that the petitioner promptly file for an order of protection after the last act of abuse and instead requires a very different test. A test more consistent with the realities of domestic violence, that further abuse is likely to occur if notice of the order of protection hearing is given to the respondent. Hence a temporary, ex parte order is granted which the respondent can defend against in a later hearing after notice of the granted order is provided through service of summons.

10. *See* Stark, *supra* note 9.

II. PRECONDITIONS FOR EX PARTE ORDERS OF PROTECTION; ARE THEY CONSISTENT WITH THE REALITIES OF DOMESTIC VIOLENCE?

States differ in the preconditions survivors of domestic violence need to satisfy to obtain ex parte orders of protection[11] as well as the remedies available under state statutes.[12] Despite these differences, there are two basic remedies that are available in virtually every state: the remedy for the abusive intimate partner to stay away from the petitioner and to stop abusing the petitioner;[13] and there are two basic preconditions in virtually every state: that there has been past abuse and a danger of future abuse.[14]

The key differences among the statutory approaches on preconditions to obtaining an ex parte order of protection are:

i. what types of abuse qualify for the order of protection (requiring physical violence or threats of physical violence,[15] versus including other forms of harmful abuse too[16]);

ii. to what degree of certainty the petitioner must show the danger of future abuse (that it "will" occur,[17] is "likely"[18] to occur versus

11. Also, sometimes called herein: "protection order", "protective order", or "restraining order".

12. Debra Stark, *What's Law Got To Do With It? Confronting Judicial Nullification of Domestic Violence Remedies*, 10 NW. J. L. & SOC. POL'Y 130, 180-81 (2015).

13. *Id.*

14. ABA COMM'N ON DOMESTIC VIOLENCE, STANDARDS OF PROOF FOR DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE (2009), http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards_of_Proof_by_State.pdf.

15. *See, e.g.*, Margaret Johnson, *Redefining Harm, Reimagining Remedies and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1111-12 (2009). Johnson states that all states provide an order of protection based on physical violence, most states do so for what amounts to criminal acts, but only 1/3 do so for coercive control, false imprisonment, restricting liberty, or based on psychological, emotional or economic abuse. *Id.* at 1113 and 1134-38; Jeffrey Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Realities of Domestic Abuse*, 11 J.L. & FAM. STUD. 35 (2008). According to Baker, most states define the requisite abuse for an order of protection to be physical injury or imminent tangible threat of violence. *Id.* at 35. Only five states include non-violence, emotional or psychological abuse for the abuse to lead to an order of protection remedy. *Id*. at 43.

16. Johnson, *supra* note 15; Baker, *supra* note 15.

17. *See* Mich. Comp. Laws Ann. § 600.2950 (West, Westlaw through P.A.2016, No. 563 of the 2016 Reg. Sess., 98th Leg.) ("immediate and irreparable injury, loss, or damage *will* [emphasis added] result from the delay required to effectuate notice or notice will itself precipitate adverse action before a personal protection order can be issued").

18. *See* Mass. Gen. Laws Ann. ch. 209A, §4 (West, Westlaw through Chap. 5 of the 2017 1st Annual Sess.) (plaintiff must "demonstrate[ ] a substantial likelihood of immediate danger of abuse"); and South Dakota (S.D. Codified Laws Section 22-19A-12 (2017))("immediate and irreparable injury, loss, or damage is *likely* [emphasis added] to result before an adverse party or the party's attorney can be heard in opposition").

"may"[19] or "could"[20] occur or there is a "danger" of further abuse[21]);

iii. whether the future abuse must be "imminent" or an "immediate and present danger"[22], or whether the order of protection must be "necessary" to protect the petitioner,[23] or both[24]; and

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19. *See* Montana (Mont. Code Ann. § 40-15-201 (West, Westlaw through 2017 Sess.)(". . .if the court finds, on the basis of the petitioner's sworn petition or other evidence, that harm *may* [emphasis added] result to the petitioner if an order is not issued before the 20-day period for responding has elapsed"); and Ohio (Ohio Rev. Code Ann. § 2919.26 (West, Westlaw through 2017 the 132nd Gen. Assemb.)("the court. . . may issue a temporary protection order as a pretrial condition of release if it finds that the safety and protection of the complainant, alleged victim, or other family or household member of the alleged offender *may* [emphasis added] be impaired by the continued presence of the alleged offender")).

20. *See* Washington (Wash. Rev. Code Ann. § 26.50.070 (West, Westlaw through 2016 Reg. Sess.)) (". . .irreparable injury *could* [emphasis added] result from domestic violence if an order is not issued immediately without prior notice to the respondent").

21. *See* Wyo. Stat. Ann. § 35-21-104 (West CURRENT).

22. *See* Arizona (Ariz. Rev. Stat. Ann. § 13-3624 (Westlaw through the First Regular Session of the Fifty-Third Leg. (2017)), Arkansas(Ark. Code Ann. § 9-15-206 (West, Westlaw through the end of the 2016 Third Extraordinary Sess. of the 90th Ark. Gen. Assemb.)),Colorado(Colo. Rev. Stat. Ann. § 13-14-104.5 (West, Westlaw through First Regular Sess. of the 71st Gen. Assemb. (2017)), Connecticut (Conn. Gen. Stat. Ann. § 46b-15 (West, Westlaw through Gen. Statutes of Conn., Revision of 1958, Revised to January 1, 2017)), Delaware (Del. Code Ann. tit. 10, § 1043 (West, Westlaw through 81 Laws 2017, ch. 2.)), District of Columbia (D.C. Code Ann. § 16-1004 (West, Westlaw through Mar. 12, 2017)), Florida (Fla. Stat. Ann. § 741.30 (West, Westlaw through Mar 13, 2017)), Hawaii (Haw. Rev. Stat. Ann. § 586-4 (West, Westlaw through Act 1 of the 2016 Second Special Sess.)), Idaho, (Idaho Code Ann. § 39-6308 (West, Westlaw through Chapter 58 of the First Reg. Sess. of the 64th Leg.)), Kansas (Kan. Stat. Ann. § 60-3106 (West, Westlaw through laws enacted during the 2017 Reg. Sess. of the Kan. Leg. effective on or before March 9, 2017)), Kentucky (Ky. Rev. Stat. Ann. § 403.740 (West, Westlaw through Ch. 151 of the 2017 Reg. Sess.)), Michigan (Mich. Comp. Laws Ann. § 600.2950 (West, Westlaw through No. 563 of the 2016 Reg. Sess., 98th Leg.)), Minnesota (Minn. Stat. Ann. § 518B.01 (West, Westlaw through chap. 10 of the 2017 Reg. Sess.)), Mississippi (Miss. Code. Ann. § 93-21-13 (West 2017)), Nebraska (Neb. Rev. Stat. Ann. § 42-925 (West, Westlaw through the 1st Reg. Sess. of the 105th Leg. (2017)), North Carolina (N.C. Gen. Stat. Ann. § 50B-2 (West, Westlaw through the end of the 2016 Reg. Sess.)), North Dakota (2017 North Dakota Laws S.B. 2309 (West's No. 94)), Oregon (Or. Rev. Stat. Ann. § 107.718 (West, Westlaw through End of the 2016 Reg. Sess.)), South Carolina (S.C. Code Ann. § 16-3-1760 (Westlaw through the 2016 Sess.)), Vermont (Vt. Stat. Ann. tit. 15, § 1104 (West, Westlaw through Law No. 3 of the First Sess. of the 2017-2018 Vt. Gen. Assemb.)), Virginia (Va. Code Ann. § 16.1-253.1 (West, Westlaw through the End of 2016 Reg. Sess.)), and West Virginia (W. Va. Code Ann. § 48-5-512 (West, Westlaw through leg. of the 2016 Reg. Sess.)).

23. Alabama (Ala. Code § 30-5-6 (Westlaw through Act 2017-81 of the 2017 Reg. Sess.)),Alaska (Alaska Stat. Ann. § 18.66.110 (West, Westlaw through the 2016 Second Reg. Sess. through Fifth Special Sess. of the 29th Leg.).), Georgia (Ga. Code Ann. § 19-13-3(b) (West, Westlaw through Act 10 of the 2017 leg. sess.)), Iowa (Iowa Code Ann. § 236.4 (West, Westlaw through the 2017 Reg. Sess.)), New Jersey (N.J. Stat. Ann. § 2C:25-28 (West, Westlaw through 2017)), Utah (Utah Code Ann. § 78B-7-106 (West, Westlaw through 2016 Fourth Special Sess.)), and Virgin Islands (16 V.I.C. § 98 (Westlaw through Act 7895 of the 2016 Reg. Sess.)).

24. Louisiana (La. Stat. Ann. § 46:2135 (West, Westlaw through the 2017 First Extraordinary sess.)), Maine (Me. Rev. Stat. tit. 19-A, § 4006 (Westlaw through the 2017 First

iv. how the "imminence" of the future abuse can be determined (requiring a recent act of abuse[25], recognizing how the giving of notice itself can trigger the violence[26], or explicitly stating that length of time between an act of abuse and the filing of the petition for an order of protection should not be the basis for denial of the protection order[27]).

In this Section, we discuss these different approaches and consider which best take into account the realities and dangers of domestic violence.

Approximately two-thirds of the state statutes require an act of physical violence or threatened violence to obtain an order of protection.[28] But as explained in Section III *infra*, there are many other forms of abuse that coercive intimate partners use to cause their intimate partner to become dependent upon them, including severe emotional and financial abuse.[29] These other forms of abuse should be actionable with an order of protection, not only due to the serious harm they cause, but also because the presence of these other forms of abuse makes it more likely that the abuse is part of a pattern to achieve coercive control, increasing the risk of separation assault.[30] Unlike solely financial harm (as in a business context) that can typically be remedied with damages, death cannot be later remedied and severe physical and emotional harm can take years to recover from, if ever.

Since one of the key goals of civil order of protection legislation is to try to *prevent* death and serious physical injury, these laws should also provide protection from the other forms of abuse that are often precursors to serious

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Reg.Sess. of the 128th Leg.)), Massachusetts (Mass. Gen. Laws Ann. ch. 209A, §4 (Westlaw through Chap. 5 of the 2017 1st Annual Sess.)), Oklahoma (Okla. Stat. Ann. tit. 22, § 60.3 (West, Westlaw through Chapter 1 of the First Reg. Sess. of the 56th Leg. (2017))), and Rhode Island (15 R.I. Gen. Laws Ann. § 15-15-4 (West, Westlaw through Chap. 542 of the Jan. 2016 sess.)).

25. Idaho (Idaho Code Ann. § 39-6308 (West, Westlaw through Chapter 58 of the First Reg. Sess. of the 64th Leg.)), North Dakota (2017 North Dakota Laws S.B. 2309 (West's No. 94)), and Virginia (Va. Code Ann. § 16.1-253.1 (West, Westlaw through the End of 2016 Reg. Sess.)).

26. Michigan (Mich. Comp. Laws Ann. § 600.2950 (West)), Puerto Rico (8 L.P.R.A. § 625 (West, Westlaw through the 2010 Leg. Sess.)), and Illinois (750 Ill. Comp. Stat. Ann. 60/217 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.)).

27. Colo. Rev. Stat. Ann. § 13-14-104.5 (West, Westlaw through First Regular Sess. of the 71st Gen. Assemb. (2017)).

28. *See, e.g.*, Johnson, *supra* note 15. Johnson indicates that all states provide an order of protection based on physical violence, most states do so for what amounts to criminal acts, but only 1/3 do so for coercive control, false imprisonment, restricting liberty, or based on psychological, emotional or economic abuse. *Id*. at 1113 and 1134-38; and Baker, *supra* note 15. According to Baker, most states define the requisite abuse for an order of protection to be physical injury or imminent tangible threat of violence. Only five states include non-violence, emotional or psychological abuse for the abuse to lead to an order of protection remedy. *Id*. at 43.

29. *See infra* Section III.

30. *See infra* Section III.

physical abuse.[31] Consistent with this, approximately one-third of the states have expansively defined what types of abuse qualify for an order of protection and cover forms of abuse in addition to physical violence and threats of physical violence.[32] The approach of more expansively defining the forms of abuse that enable a survivor of domestic violence to obtain an order of protection is more consistent with an understanding of the realities of domestic violence,[33] and thus better achieves the goal of the legislation to protect survivors of domestic violence from further harmful abuse.

In addition, most states require that the future abuse to be prevented will occur "*immediately*" (that there is an "immediate" and/or "present" danger of abuse or "imminent danger").[34] The next largest grouping of states require

31. *See infra* Section III.

32. *See* Stark, *supra* note 12.

33. *See, e.g.*, COLO. REV. STAT. ANN. § 13-14-100.2 (West, Westlaw through Chapter 1 of the First Regular Session of the 71st General Assembly 2017) ("The general assembly further finds and declares that domestic abuse is not limited to physical threats of violence and harm but also includes mental and emotional abuse, financial control, document control, property control, and other types of control that make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs.); IDAHO CODE ANN. § 39-6302 (West, Westlaw through Chapter 58 of the First Regular Session of the 64th Legislature) ("[T]he legislature finds that a significant number of homicides, aggravated assaults, and assaults and batteries occur within the home between adult members of families. Furthermore, research shows that domestic violence is a crime which can be deterred, prevented, or reduced by legal intervention.").

34. *See* ARK. CODE. ANN. § 9-15-206 (West, Westlaw through the end of the 2016 Third Extraordinary Session of the 90th Arkansas General Assembly), COLO. REV. STAT. ANN. § 13-14-104.5 (West, Westlaw through Chapter 1 of the First Regular Session of the 71st General Assembly 2017), CONN. GEN. STAT. § 46b-15 (West, Westlaw through General Statutes of Connecticut, Revision of 1958, Revised to January 1, 2017), DEL. CODE ANN. tit. 10, § 1043 (West, Westlaw through 81 Laws 2017, Ch. 2), D.C. CODE ANN. § 16-1004(b)(1) (West, Westlaw through March 12, 2017), FLA. STAT. ANN. § 741.30(1)(a) (West, Westlaw through chapters from the 2017 First Regular Session of the 25th Legislature in effect through March 13, 2017), HAW. REV. STAT. ANN. § 586-4(c) (West, Westlaw through Act I (End) of the 2016 Second Special Session), IDAHO CODE ANN. § 39-6308(1) (West, Westlaw through Chapter 58 of the First Regular Session of the 64th Legislature), KAN. STAT. ANN. § 60-3106 (West, Westlaw through laws enacted during the 2017 Regular Session of the Kansas Legislature effective on or before March 9, 2017), KY. REV. STAT. ANN. § 403.740 (West, Westlaw through Chapter 124 of the 2017 Regular Session), MICH. COMP. LAWS ANN. § 600.2950(12) (West, Westlaw through P.A. 2016, No. 563 of the 2016 Regular Session 98th Legislature), MINN. STAT. ANN. § 518B.01(15)(i) (West, Westlaw through chapter 10 of the 2017 Regular Session), MISS. CODE ANN. § 93-21-13(1)(a) (West, Westlaw through laws from the 2017 Regular Session effective upon passage as approved through March 22, 2017), NEB. REV. STAT. § 42-925(1) (West, Westlaw through legislation effective Feb. 16, 2017 of the 1st Regular Session of the 105th Legislature 2017), N.C. GEN. STAT. ANN. § 50B-2(b) (West, Westlaw through the end of the 2016 Regular Session, with the addition of S.L. 2016-125 from the 2016 Fourth Extra Session and through 2017-1 of the 2017 Regular Session of the General Assembly), N.D. CENT. CODE ANN. § 1-07.1-03(1) (West, Westlaw through 2017 Regular Session of the 65th Legislative Assembly approved through March 24, 2017), OR. REV. STAT. ANN. § 107.718(1) (West, Westlaw through End of the 2016 Reg. Sess. And ballot measure approved at the 11/8/16 General Election), P.R. LAWS ANN. tit. 8, § 625(c) (West, Westlaw through all acts translated by the Translation Office of the Puerto Rico Government through the 2010 Legislative Session and various acts from 2011 to Sept. 2016), S.C. CODE

instead a showing that the ex parte order of protection is "*necessary"* to protect the plaintiff.[35] And several other states require both of these preconditions.[36] And the statutory language normally does not provide guidance on how to determine when those standards have been met. To determine whether there is imminent harm, some statutes explicitly require courts to focus on when the last act of physical injury or threat of physical injury has occurred and require a "recent" act of domestic violence.[37] By contrast, one state statute takes the opposite approach explicitly stating that relief should not be denied based solely on the length of time between the last act of abuse and when a petitioner seeks the order of protection.[38] The majority of the states' legislation do not expressly cover the issue of the impact of the amount of time that passes between the last act of required type of abuse and when the petitioner files for an order of protection.

As discussed in Section IV, some courts deny ex parte orders of protection when they fail to find an immediate and present danger of violence due to a delay in seeking legal help, even when the prior abuse in the past has included physical violence.[39] They tend to look for a recent act of physical violence, and if none, deny the order. This is particularly likely to occur when the statute narrowly defines the abuse required for an order of protection to be physical violence or a clear threat of physical violence. Under this narrow definition, other typical forms of abuse that Abusive Intimate Partners use to control the Target of the

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ANN. § 16-3-1760(A) (West, Westlaw through the 2016 session, subject to technical revisions by the Code Commissioner as authorized by law before official publication), VT. STAT. ANN. tit. 15, § 1104(a)(1) (West, Westlaw through Law No. 3 of the First Session of the 2017-2018 Vermont General Assembly 2017), VA. CODE ANN. § 16.1-253.1(A) (West, Westlaw through the End of 2016 Reg. Sess. And includes 2016 Reg. Sess. Cc. 1 to 3, 32, 62, 82, 147, 156, 180, 181, 197, 287, & 314), W. VA. CODE ANN. § 48-5-512(1) (West, Westlaw through the 2016 Reg. Sess., the 2016 First Extraordinary Session, and the 2016 Second Extraordinary Session).

35. *See* ALA. CODE § 30-5-6(b) (West, Westlaw through Act 2017-81 of the 2017 Regular Session), ALASKA STAT. ANN. § 18.66.110(a) West, Westlaw through the 2016 Regular Session through Fifth Special Session of the 29th Legislature), GA. CODE. ANN § 19-13-3(b) (West, Westlaw through Act 10 of 2017 legislative session), IOWA CODE ANN. § 236.4(2) (West, Westlaw through 3/27/17 from the 2017 Regular Session), N.J. STAT. ANN. § 2C-25-28(f) (West, Westlaw through L.2017, c. 34 and J.R. No. 1), UTAH CODE ANN. § 78B-7-106(a) (West, Westlaw through 2016 Fourth Special Session), V.I. CODE ANN. tit. 16 § 98(b) (West, Westlaw through Act 7895 of the 2016 Regular Session).

36. LA. STAT. ANN. § 46:2135(A) (West, Westlaw through the 2017 First Extraordinary session), ME. STAT. tit. 19-a, § 4006(2) (West, Westlaw through Chapter 1 of the 2017 First Regular Session of the 128th Legislature), MASS. GEN. LAWS ANN. ch. 209A, § 4 (West, Westlaw through the 2016 2nd Annual Session and Chapter 1 of the 2017 1st Annual Session), R.I. CODE R. § 15-5-4 (West, Westlaw through Chapter 542 of the January 2016 session).

37. *See* IDAHO CODE ANN. § 39-6308(3) (West, Westlaw through Chapter 58 of the First Regular Session of the 64th Legislature), N.D. CENT. CODE. ANN. § 14-07.1-03(1) (West, Westlaw through 2017 Regular Session of the 65th Legislative Assembly), VA. CODE ANN. § 16.1-253.1(A) (West, Westlaw through
Virginia (VA Code Ann. Section 16.1-253.1) (West, Westlaw through the end of 2016 Regular Session).

38. *See* COLO. REV. STAT. ANN. § 13-14-104.5(b) (West, Westlaw through Chapter 1 of the First Regular Session of the 71st General Assembly 2017).

39. *See* Tosta v. Bullis, 943 A.2d 824, 829 (N.H. 2008); M.D.L. v. S.C.E., 391 S.W. 3d 525, 531 (Mo. Ct. App. 2013); *But see* In re Sawyer, 8 A.3d 80, 84 (N.H. 2010).

Abuse are less likely to count in the judges' eyes in their assessment of whether there is an immediate and present danger of violence.[40] Requiring a recent act of abuse is less harmful when abuse is broadly defined (such as causing a disruption at the petitioner's place of employment or repeatedly texting after being asked to stop), because judges trained on the dynamics of domestic violence, including the "escalation of violence" stage, will see the imminent danger of harm. They can then issue an ex parte order based on these acts, since they will be picked up under the broader definition of "abuse."

The emphasis on how the harm to be avoided is imminent is consistent with the general laws on ex parte orders. It is also consistent with the underlying rationale for granting ex parte orders: that there is insufficient time to give notice because during that time the harm that is intended to be avoided will occur (i.e. necessary to stop the wrecking ball in motion). But due to the dynamics of domestic violence and the cycle of violence as described in Section III a long period can run between one act of physical violence and the next one. During that interim period, the Target of the Abuse may be engaged in acts to mollify the Abusive Intimate Partner and the Abusive Intimate Partner may be using other forms of abuse to control their partner.[41] In addition, the act of separating oneself from an abusive partner often triggers separation assault.[42] Obtaining a court order requiring one's former intimate partner to stay away is a strong attempt to end an abusive relationship, leaving survivors of domestic violence particularly vulnerable. For this reason, when there has been coercive abuse, notice of the fact that an order of protection has been sought should create a presumption of imminent danger. Indeed, there is a recognition in other situations where ex parte orders are granted that the giving of prior notice of a temporary restraining order can itself trigger the harm sought to be avoided.[43]

Perhaps due to these realities of domestic violence and the difficulty in demonstrating the likelihood of imminent, future abuse, several legislatures have not required a showing of imminent harm, and instead focus on the abuse that has already occurred as the basis for granting the ex parte order of protection. Some state statutes on ex parte orders of protection appear to only require that abuse as defined by their statutes has occurred and do not require evidence beyond that on the likelihood of future abuse as a precondition to an ex parte order.[44] Others only require a finding that harm *may* result to the petitioner if an

40. *See infra* Section III.

41. *See infra* Section III.

42. *See infra* Section III.

43. Hon. Randy Wilson, *From My Side of the Bench: Restraining Orders*, ADVOCATE, Spring 2013, at 13 ("There are some situations, however, where it is essential to hear an application ex parte. For example, if the defendant has embezzled money and the plaintiff is trying to free bank accounts, you have to proceed ex parte. If you give notice, the defendant will undoubtedly commit the very act you are trying to prohibit.").

44. *See* IND. CODE ANN. § 34-26-5-9(a) (West, Westlaw through legislation of the 2016 Second Regular Session of the 119th General Assembly), MD. CODE ANN. § 4-505(a)(1) (West, Westlaw through Chapter 2 from the 2017 Regular Session of the General Assembly), N.M. STAT. ANN. § 40-13-3.2(A) (West, Westlaw through Chs. 3, 19 of the 1st Regular Session

order is not issued until after notice was given.[45] Others condition the ex parte order on a finding that the safety and protection of the petitioner *may* be impaired by the continued presence of the alleged offender.[46] Others condition the ex parte order on a finding that irreparable injury *could* result from domestic violence if an order is not issued immediately without prior notice to the respondent.[47] Others only require a finding that "there exists a *danger* of further domestic abuse."[48]

The above-described statutes mark a major departure from the normal approach taken in general ex parte TRO type cases (as reflected in the federal rules of civil procedure) that *immediate* and irreparable injury *will* result before the adverse party can be heard.[49] This loosening of the standard, that must be met to obtain an ex parte order in a domestic violence case, may be due to several reasons. First, the harm to the petitioner when the ex parte order in a domestic violence case is not granted could be death or serious bodily injury, while the harm to the petitioner in non-domestic violence cases, typically is only a financial loss. Second, legislatures that loosened the standard may have done so because they were made aware of the nature and dynamics of domestic violence; that when the violence and other forms of abuse are used to exercise coercive control over the petitioner, there is both an ever-looming danger of further violence and a likely trigger of that violence from the act of separating and seeking an order of protection. Knowing that there are tremendous barriers to safely leaving an abusive intimate partner[50] and that it is common for survivors of domestic violence to experience years of physical violence and other forms of abuse before seeking an order of protection, educated legislatures may have opted not to require a "recent" act of violence as a proxy for the requirement of "imminent" harm.

III. THE COUNTER-INTUITIVE REALITIES OF DOMESTIC VIOLENCE, STEREOTYPES, HEURISTICS AND OTHER COGNITIVE PHENOMENON THAT IMPACT JUDICIAL DECISION-MAKING

In 1984, staff at the Domestic Abuse Intervention Project convened focus groups of women who were battered, and after listening to their stories, they documented the most common abusive behaviors and tactics used against these women and created the "Power and Control Wheel" based on what they learned. While each individual and each story of abuse is unique, there are certain strong

of the 53rd Legislature 2017), WIS. STAT. ANN. § 813.12 (West, Westlaw through 2017 Act 2).

45. *See* MONT. CODE ANN. § 40-15-20(4) (West, Westlaw through chapters effective March 15, 2017 session).

46. OHIO REV. CODE ANN. § 2919.26(C)(1) (LexisNexis 2015).

47. WASH. REV. CODE § 26.50.070 (2016).

48. WYO. STAT. ANN. § 35-21-104 (2016) (emphasis added).

49. *See* discussion *supra* Section I.

50. *See infra* Section III.

patterns of abuse described and illustrated in the Power and Control Wheel,[51] many of which would not appear to make sense if one were not already trained on the dynamics of domestic violence. It is important to identify and explain these counter-intuitive aspects of domestic violence because when someone's story does not make sense to a judge, then the judge is less likely to believe their story.[52]

When the goal of intimate partner violence is to exert power over and coercively control the survivor of this violence (the "Target of the Abuse"), versus solely an anger management issue,[53] there is typically a "Cycle of Violence,"[54] and a pattern of inflicting various forms of abuse calculated to create dependence on the Abusive Partner.[55] Surprising to those not trained in the dynamics of domestic violence, the non-physical abuse can be even more harmful to the Target of the Abuse than the physical violence,[56] and the deadliest time for the Target of the Abuse is when that person attempts to permanently leave the Abusive Partner.[57]

Those assisting battered women in the shelters learned that typically there was no physical abuse early on in the relationship, but to the contrary, the Abusive Partner would appear to be very attentive, protective, and loving towards the Target of the Abuse (the "honeymoon" stage).[58] The Targets of the Abuse typically do not initially realize how their intimate partner is trying to isolate them from family and friends and attempting to control their every move

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51. *See Why was the Power and Control Wheel created?*, DOMESTIC ABUSE INTERVENTION PROGRAMS, https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/, (last visited April 3, 2017).

52. *See* Jacqueline R. Evans et al., *Validating a new assessment method for deception detection: Introducing a Psychologically Based Credibility Assessment Tool*, 2 J. APPLIED RES. MEMORY & COGNITION 33 (2013).

53. Abuse is more likely to be due to an anger management issue when the abusive person is abusive to people in addition to that person's intimate partner and children (i.e. engages in road rage, acts out at the person's place of employment, etc.). When a person is only abusive towards an intimate partner, it is likely due to an attitude that they are *entitled* and *should* behave this way and desire to exercise coercive power and control over their intimate partner. Debra Stark, CENTER FOR ADVANCING DOMESTIC PEACE, INC., presentation on Mar. 26, 2016 (on file with the author).

54. *See The Cycle of Domestic Violence*, DOMESTIC VIOLENCE ROUNDTABLE, http://www.domesticviolenceroundtable.org/domestic-violence-cycle.html, (last visited April 3, 2017) (describing the cycle of violence where many survivors of domestic violence describe experiencing a tension building phase, followed by an acute battering episode, followed by a "honeymoon" phase, and then repeating itself over and over).

55. *See The Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/, (last visited April 4, 2017).

56. *See* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, FACTS ABOUT DOMESTIC VIOLENCE AND PSYCHOLOGICAL ABUSE (2015).

57. Jana Kasperkevic, *Private Violence*, THE GUARDIAN: US PERSONAL FINANCE (Oct. 20, 2014, 3 PM), https://www.theguardian.com/money/us-money-blog/2014/oct/20/domestic-private-violence-women-men-abuse-hbo-ray-rice (up to 75% of abused women who are murdered are killed after they leave their abusive intimate partner).

58. *See* Domestic Violence Roundtable *supra* note 54.

in a coercive fashion.[59] Over time, the Targets of the Abuse would develop feelings of love and loyalty towards the Abusive Partner and extreme dependence upon them as well.[60] The stories told indicated that various forms of emotional abuse, over time, would escalate into physical abuse, and the emotional abuse tended to be calculated to demean the targets, cause them to question themselves, and to wonder if they were to blame for their partner's statements and actions. This "post-honeymoon" stage has been referred to as the "tension building phase" stage, which could last for days, months or even years if the Targets of the Abuse found ways to mollify their Abusive Partners.[61] But, eventually, this tension would erupt into physical violence by the Abusive Partner against the Target of the Abuse.[62] After the first act of physical violence, to keep the targets with them, the Abusive Partners would initially follow the physical violence with apologies and promises that it would never happen again, and a new "honeymoon" period could begin, which eventually would be followed with "escalation" and then finally "eruption" with further physical violence.[63] By the time many targets realized that the person they had loved was not going to change, the targets might already have become highly dependent on the intimate partner (often having lost their jobs due to the abuse and lacking the money to pay for a roof over their heads or childcare) making leaving them very difficult.[64]

Another important, counter-intuitive phenomenon that is well documented is that Abusive Partners do not stop trying to control the Target of Abuse after that person leaves them, but instead continue to try to control them thereafter, either through promising to change (earlier in the relationship) or by engaging in various forms of abuse to coerce this return.[65] This explains why on average it takes seven attempts of leaving an Abusive Partner for the Target of the Abuse to ultimately be successful at separating.[66] Further underscoring the counter-intuitive nature of the realities of domestic violence, it is not uncommon for an Abusive Partner to kick the Target of the Abuse out of the family home. A judge may mistakenly focus on that occurrence as evidence that the Abusive Partner

59. Lisa Aronson Fontes, *When Relationship Abuse Is Hard to Recognize*, PSYCHOLOGY TODAY: INVISIBLE CHAINS (Aug. 26, 2015), https://www.psychologytoday.com/blog/invisible-chains/201508/when-relationship-abuse-is-hard-recognize.

60. *Id.*; Melinda Smith & Jeanne Segal, *Domestic Violence and Abuse: Are You or Someone You Care About in an Abusive Relationship?*, HELPGUIDE.ORG (April, 2017), https://www.helpguide.org/articles/abuse/domestic-violence-and-abuse.htm.

61. *See The Cycle of Domestic Violence*, DOMESTIC VIOLENCE ROUNDTABLE, http://www.domesticviolenceroundtable.org/dvcycle (last visited Mar. 30, 2017).

62. *Id.*

63. *Id.*

64. *See Barriers to Leaving*, DOMESTIC VIOLENCE ROUNDTABLE, http://www.domesticviolenceroundtable.org/abusestay (last visited Mar. 30, 2017).

65. *See* Post-Separation Power and Control Wheel, DOMESTIC ABUSE INTERVENTION PROGRAMS, https://www.theduluthmodel.org/cms/files/Using%20Children%20Wheel.pdf (last visited Mar. 30, 2017).

66. *See* Kathryn Robinson, *50 Obstacles to Leaving*, THE NATIONAL DOMESTIC VIOLENCE HOTLINE, http://www.thehotline.org/2013/06/50-obstacles-to-leaving-1-10/ (Jun. 10, 2013).

no longer wants to have any contact with the Target of the Abuse and that there is no longer any clear danger. But when an Abusive Partner knows that the Target of the Abuse is completely dependent on them, the act of kicking that person out of the home is actually another form of abuse designed to coerce the Target of the Abuse to bend to their will in order to regain a roof over their head and over their children's head.[67]

Most important, perhaps the harshest reality of domestic violence is that many Targets of Abuse face the quandary of trying to calculate what is more dangerous, staying with the Abusive Partner or leaving them. Abusive Partners threaten Targets of Abuse in multiple ways about what will happen if the Targets of Abuse try to leave them. These threats include at the most severe level: killing them, killing or taking away their children, killing other family members or beloved pets, and getting them kicked out of the country if they are undocumented.[68] Targets of Abuse take these threats very seriously, having seen that other threats of violence and other forms of abuse have been carried out in the past.[69] But when judges are not aware of "separation assault" and do not realize the tremendous danger that continues after separation, then the Targets of Abuse are less likely to obtain the legal remedies they need to be safe.[70]

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67. *No Room at the Shelter, Now What?*, DOMESTICSHELTERS.ORG, https://www.domesticshelters.org/domestic-violence-articles-information/no-room-at-the-shelter#.WNwHzlXyuM8 (Apr. 26, 2015) [hereinafter *No Room At the Shelter*]. Although there are shelters for survivors of domestic violence, there are more survivors seeking this shelter than available spaces. As reported in *No Room at the Shelter*, for every six requests that were filled for shelter for survivors of domestic violence, one request was not. They calculated this statistic based on the fact that more than 167,000 requests for emergency shelter by domestic violence survivors went unmet during one fiscal year, while 1 million other requests for shelter were fulfilled (citing statistics compiled by the National Network to End Domestic Violence). In addition, the housing provided is temporary in nature and if at the end of their residency they still lack the funds to pay for housing, and they have nowhere else to go, they are likely to return to the abusive partner for shelter. It has been reported that, 50% of women who are homeless report that domestic violence was the cause of their homelessness.

68. *See* Post-Separation Power and Control Wheel, *supra* note 65.

69. Statistics collected by the government reflect that abuse not only continues after separation from an abusive intimate partner, but actually increases. According to the Bureau of Justice Statistics' National Crime Victimization Survey, about 75% of the visits to the emergency rooms by battered women occur after separation and about 75 percent of the calls to law enforcement for intervention and assistance in domestic violence occur after separation from batterers. *See Domestic Violence: Disturbing Facts about Domestic Violence*, LOS ANGELES POLICE DEPARTMENT, http://www.lapdonline.org/get_informed/content_basic_view/8891 (last visited Mar. 30, 2017).

70. *See* Jacqueline Clarke, *(In)Equitable Relief: How Judicial Misconceptions about Domestic Violence Prevent Victims from Attaining Innocent Spouse Relief under I.R.C. Sec. 6015(f)*, 22 AM. U. J. GENDER SOC. POL'Y & L. 825, 840 (2014) (discussing O'Neil v. Commissioner of Internal Revenue, 104 T.C.M. 724 (2012), a case where the court ruled that the petitioner for tax relief did not fear retaliation if they did not sign the tax return credible because she was legally separated from her husband when the return was signed and there was no documentation of the abuse).

The purposes section of some state order of protection statutes explicitly address some of the dynamics of domestic violence such as the fact that there are phases to the domestic violence,[71] an escalation of violence,[72] the problem of hesitating to get help and being trapped in abusive relationships due to fear of retaliation and stigma,[73] and due to financial dependence.[74]

Victims of sexual assault who do not report the crime, as well as victims who do report but whose case is not prosecuted, still need and deserve protection from future interactions with the perpetrator, as many victims experience long-lasting physical and emotional trauma from unwanted contact with the perpetrator.

Even when state statutes are well-written and recognize the realities of domestic violence, it is very important for judges who preside over orders of protection to understand these realities to see the "wrecking ball in motion." They need to understand the cycle of violence, the likely escalation of abuse, and the use of multiple forms of abuse to coercively control the Target of Abuse, causing that person to become highly dependent on the Abusive Partner. It is also critical that the judge understands that Abusive Partners do not stop trying to control the Target of Abuse after that person leaves them, but instead seek to continue, and in some cases escalate, the abuse as a means to continue to control them and get them back. When judges (or any other decision maker on a legal matter) fail to understand the above counterintuitive phenomenon they are likely to not believe the Target of Abuse when that person seeks an order of protection, or seeks other forms of legal relief.[75]

These documented phenomena provide answers to typical questions judges have that cause these judges to not believe what they are hearing or not recognize the looming danger of the situation:

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71. VA. CODE ANN. § 63.2-1611 (LEXIS through the 2016 Reg. Sess. and Acts 2017, cc. 1-3, 32, 55, 58, 82, 107, 110, 147, 156, 168 and 181).

72. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 60/102(1) (LexisNexis, LEXIS through the end of the 2016 Reg. Legis. Sess.) ("Recognize domestic violence as a serious crime. . .which. . .promotes a pattern of escalating violence which frequently culminates in intra-family homicide and creates an emotional atmosphere that is not conducive to healthy childhood development.); *see also* ME. REV. STAT. Tit. 19-A § 4001(1) (LexisNexis, LEXIS through Ch. 2 of the 1st Reg. Sess. of the 128th Legis.).

73. 750 ILL. COMP. STAT. ANN. 60/102(4) (LexisNexis, LEXIS through the end of the 2016 Reg. Legis. Sess.); NEB. REV. STAT. ANN. § 29-4301 (LexisNexis, LEXIS through the 2017 105th First Sess., LB1 through LB5, LB22, LB45, LB56, LB74, LB80, LB119, LB131 and LB132).

74. 750 ILL. COMP. STAT. ANN. 60/102(4) (LexisNexis, LEXIS through the end of the 2016 Reg. Legis. Sess.).

75. *See, e.g.*, Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 246 (1992); Laurie Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 733 (2003); Clarke, *supra* note 70 at 828 (showing a lack of knowledge on the dynamics of domestic violence, its causes, and impacts, affect judicial decisions not only on orders of protection, but other areas of law as well such as tax liability relief, course custody/visitation orders in a divorce/parentage case, self-defense claims in a criminal case, etc.).

1. "If all these terrible things really happened in the past, why didn't she leave or seek an order of protection sooner?"[76]
2. "If those things had really happened, why didn't she call the police to report the crime[77] or, when the police were called, why wasn't an arrest made; why didn't she press charges?"[78]
3. "If those things really happened, why didn't she tell family, friends or co-workers?"[79]
4. "If those things really happened why didn't she go to the hospital?"[80]

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76. Carol E. Jordan et al, *Denial of Emergency Protection: Factors Associated with Court Decision Making*, 23 Violence and Victims 603 (2008) (reviewing 2,205 petitions denied by a Kentucky court solely based on the pleadings). *See* Tosta v. Bullis, 943 A.2d 824, 826-27 (N.H. 2008). *See also* Stark, *supra* note 9 (finding 81.8 percent reported that they observed a judge state that he/she would not grant an ex parte emergency order of protection because the last incident of abuse took place "too long ago" in the court's judgment).

77. O'Neil v. Comm'r of Internal Revenue, 104 T.C.M. (CCH) 724, 725 (2012). (noting there was no documented evidence of abuse, no police reports, no witness statements, only her words he bullied her emotionally and psychologically and threatened her with trouble if she didn't sign the return; court thus ruled she was not abused and therefore not entitled to relief for tax liability based on a fear of retaliation if she failed to sign the joint tax return).

78. Sotuyo v. Comm'r of Internal Revenue, No. 25692–10S., 2012 WL 1021306, at *6 (T.C. March 27, 2012) (ruling there was insufficient evidence of abuse even though the police report identified the wife as a victim and the wife testified to the abuse, finding that each spouse's testimony was 'self-serving' so not accepting it, and finding that wife did not press charges nor was an arrest made; court also noted that the parties sought joint legal and physical custody and the court did not order supervised visitation. Consequently, she failed to show that she failed to challenge the omission in the tax return due to a fear of retaliation). *Id*. at 5. *See also* Tosta v. Bullis, 943 A.2d 824, 829 (N.H. 2008).

79. In re J.D. v. N.D., 652 N.Y.S.2d 468, 469 (N.Y. Fam. Ct. 1996) ("Respondent, when confronted with the question of her remaining so long with the Petitioner and why she didn't tell anyone about her plight, replied that she was stupid, afraid and embarrassed about her personal life. She also stated that the Petitioner stripped her of everything as a person." *Id*. at 471 (reflecting an understanding of the dynamics of domestic violence, the lower court stated in the custody case before it that "While Petitioner tried to show that Respondent was a loner with no friends, he failed to explain how she came to be that way. No extended analysis is needed to conclude that Respondent significantly withdrew from the outside world as a direct result of Petitioner's dominance over every aspect of her life. Petitioner turned Respondent into a virtual prisoner by his own acts, and is now seeking to blame her for it.").

80. Pratt v. Wood, 620 N.Y.S. 2d 741, 553 (N.Y. App. Div. 1994) (ruling that family court erred when it excluded testimony on the psychological and behavioral characteristics typically shared by victims of abuse in a familial setting that are not generally known by the average person: "Family court's ruling was particularly prejudicial to petitioners since it found Wood's testimony to be incredible because she never went to a hospital or sought treatment. In fact, Wood's failure to tell anyone about the abuse or to seek help is a characteristic typically shared by victims of domestic violence. Thus, had Family Court admitted McGrath's testimony, it is conceivable that its resolution of Wood's credibility might have been different." *See also*, McKnight v. Commissioner of Internal Revenue, 92 T.C.M. (CCH) 76, 81 (2006) (ruling that "The abuses outlined in the claimant's arguments do not appear to have been more than her willingness to hold a subservient role in the

5. "If those things really happened, why did she recant and not help with the criminal prosecution?"[81]
6. "If those things really happened, why did she drop the order of protection she had?"[82]
7. "If those things really happened, why did she return to him repeatedly after leaving him?"[83]
8. "If those things really happened, why did she minimize or deny the violence to the police?"[84]
9. "Since so much time has passed since that happened, where is the emergency necessitating an ex parte order?"[85]
10. "Since so much time has passed since that happened, what is the likelihood there will be further abuse?"[86]
11. "He only struck her once, so is it really "domestic violence" (necessary to issue an order of protection)?"[87]

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relationship." But the court ruled: "We disagree. The material petitioner submitted to respondent and which is found in the administrative record in this case, as well as vivid and credible trial testimony herein, thoroughly establishes the extensive and severe abuse petitioner suffered from John."). *Id*. at 77 (noting that the petitioner did not go to a hospital after her husband cut her throat with a broken wine glass because she feared he would be arrested and then might seek to kill her so she did her best to stop the bleeding).

81. *See also* Kohn, *supra* note 75, at 737-739.

82. First author has frequently observed judges ask the petitioner why she dropped a prior emergency order of protection (i.e. obtained the emergency order and failed to re-appear in court to obtain the plenary order of protection in the order of protection court call at the specialized domestic violence court in Cook County, Illinois). These judges did not specifically preface this questions with: "If those things really happened. . ." but, it seemed implied. There are many reasons why a person might not appear in court for the plenary order of protection even though the prior alleged abuse did in fact occur. These include: threats from the respondent to commit worse abuse, promises from the respondent to stop the abuse, appearing in court for the return date but the case is continued for lack of service, problems with taking time off from work to attend the next hearing, fearing to see the respondent at the plenary order of protection hearing, and lacking legal representation for the plenary order of protection and not knowing what to do and what to say if the respondent appears and challenges the petitioner.

83. *See* McKnight, 92 T.C.M. at 77. (rejecting the IRS finding of insufficient evidence of abuse and explained why the petitioner returned to her abusive husband noting she did not have a job, credit, nearby family, or other means of support and only a few articles of clothing in her possession).

84. *See* Bowman, *supra* note 75, at 248.

85. First author has heard judges make this remark in court cases, leading her to document this issue further in the *Survey of Lawyers and D.V. Advocates*, where nine of ten organizations responding to the survey indicated that they had heard the same remark from judges. Of the nine reporting they observed this, one reported "countless" times, one reported "unknown," two reported four times, one reported fifty times, one reported three times, one reported five times, one reported two to five times, two reported ten times. *See* Stark *supra* note 9.

86. *See* Tosta v. Bullis, 943 A. 2d 824, 826-27 ; M.D.L. v. S.C.E., 391 SW 3d 525, 530 (Mo. Ct. App 2013); and Lewis v. Lewis, 728 S.E. 3d 741, 743 (Ga. App. 2012) (discussing the lower court ruling).

87. *See* Bowman, *supra* note 75, at 244.

12. "If she is still married to him, they share joint custody, or they are in regular contact with each other, how serious could the abuse be?"[88]

Judges who have not received prior special training (or not benefitted from hearing expert testimony in the case before them), may also be strongly affected by stereotypes they hold as to who is a victim of domestic violence, how they are affected by this experience, and how they should react to it.[89] For example, one stereotype is that victims of domestic violence are poor and not educated.[90] But domestic violence can happen to anyone, including graduates of Harvard College with successful careers.[91] A judge might presume that all victims of domestic violence will react in court by breaking down into tears while on the stand relaying their story and state that they fear the Abusive Partner.[92] But some survivors of domestic violence will instead appear impassive on the stand,[93] or angry and defiant, and not say that they fear the Abusive Partner.[94] This is because there are numerous and divergent reactions to the trauma of domestic violence.[95] When a judge possesses firmly held views of who is a likely victim of domestic violence and how that person should react when telling their story, this will affect the credibility of the person seeking the order of protection in the judge's eyes and/or diminish their assessment of the level of danger in the situation, and can lead to an improper denial of the order of protection sought.[96]

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88. *See* Clarke, *supra* note 70, at 841 (discussing a case where the court stated that the abuse was not serious if the petitioner was still married, shared joint custody, or the parties maintained regular contact with one another: Bruen v. Comm'r of Internal Revenue, 98 T.C.M. 400, 403 (2009)).

89. *See* Bowman, *supra* note 75, at 247; *See also*, Kohn, *supra* note 70, at 734. (discussing how preconceptions of how survivors of domestic violence will react to the abuse damages credibility when the survivor witness presents themselves on the stand in an atypical and non-paradigmatic fashion. Kohn focused on those who refuse to admit, cannot access or does not experience fear of the batterer, and the victim who feels anger towards her assailant).

90. *See* Bowman, *supra* note 75, at 242-43 (stereotype that only those from a lower socio-economic status are victims of domestic violence and only those from a lower socio-economic status are batterers).

91. *See* Leslie Morgan Steiner, *Why domestic violence victims don't leave*, TED TALK (Nov. 2012), https://www.ted.com/talks/leslie_morgan_steiner_why_domestic_violence_victims_don_t_leave/transcript?language=en.

92. *See* Bowman, *supra* note 75, at 247. *See also* Kohn, *supra* note 75, at 733-34.

93. *Id.* at 734-35.

94. *Id.*

95. There are a wide range of common reactions to the trauma of domestic violence, including: feeling detached, numb, having trouble concentrating or making decisions, feeling on guard and constantly alert, feeling angry, and becoming easily upset or agitated. *See Common Reactions After Trauma,* NATIONAL CENTER FOR PTSD, https://www.ptsd.va.gov/public/problems/common-reactions-after-trauma.asp (last visited August 28, 2016).

96. *See* Stark, *supra* note 9 (54.5% of those surveyed stated that they observed a judge deny an ex parte emergency order of protection because the judge asked the petitioner if she feared the respondent and the petitioner said no). And it is important to realize that just

Similarly, if a judge expects a victim of abuse to cower during a beating or to attempt to flee an assault, but not fight back, the judge might view a fighting back response as evidence that the victim of abuse is not really a victim, not afraid of the abuse, and instead engaging in "mutual fighting".[97] Judges who engage in any of this thinking are likely not to grant an order of protection when the petitioner before them fails to conform with the judge's preconceptions.[98]

Finally, judges are unlikely to see how certain innocuous appearing actions by an Abusive Partner are in fact evidence of imminent danger unless they have learned of the importance of according weight to the pattern of abuse in the case before them. For example, in one case, police on the scene responding to a 911 call noticed at one point that the Abusive Partner was moving his hands up and down on an iced water bottle as the victim was answering police questions on what had happened.[99] They found out later when they took the victim outside of the Abusive Partner's range of sight that he would use an iced water bottle to beat her.[100] His holding the bottle and calling her attention to it was his way to signal to her that she would be beaten if she told the police what had happened.[101] In a similar vein, if a judge hears that a victim of domestic violence shot her husband after he approached her with one fist clenched and said to her "What are you going to do, call up the white man?" with an angry expression, the judge or jury might not, conclude that she was in imminent danger of serious physical injury.[102] But if the judge or jury learned that the husband had in the past severely beaten her, that after one of those beatings she had called the police and he was arrested, and that he warned her that if she ever called the white police on him again he would kill her, the judge and jury would better understand why the wife reasonably feared imminent serious (potentially deadly) injury from her husband.[103]

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because a domestic violence survivor fails to state that she/he feels afraid and instead acts angry or defiant (perhaps because they have been taking steps to regain control of their life) does not mean that there is not looming danger necessitating and order of protection to become safer**.**

97. The first author observed this when speaking with a judge on why the judge would have denied an emergency order of protection in a simulated emergency order of protection hearing that the judge presided over for first author's students in Cook County Circuit Court. The impact of "fighting back" is addressed in Section 214(e) of the Illinois Domestic Violence Act, which states that "a denial of any remedy shall not be based, in whole or in part, on evidence that (3) Petitioner acted in self-defense. . .provided that, if petitioner utilized force, such force was justifiable under Article 7 of the Criminal Code of 2012." 750 ILL. COMP. STAT. 60/214(e).

98. Catherine M. Naughton et. al, *'Ordinary decent domestic violence': A discursive analysis of family law judges' interviews*, 26(3) DISCOURSE & SOCIETY 349, 360-61 (2015).

99. Conversation of first author with Aileen Robinson, Program Development Coordinator, Domestic Violence Program, Chicago Police Department, in Chicago, Illinois during a guest lecture by Ms. Robinson to first author's Domestic Violence Clinic class.

100. *Id.*

101. *Id.*

102. Petition for Executive Clemency at 13, *In re* Rosa M. Williams (Ill. filed Oct. 1990) (on file with the first author).

103. *Id.* at 3.

Cognitive science and social psychological research on how people make evaluations and judgments have identified numerous factors that can help us understand how judges decide whether to grant orders of protection. In the remainder of this Section, we introduce four of these cognitive and social psychological factors: (i) script following, (ii) decision-making shortcuts such as heuristics and reason-based or justification-based decision-making, (iii) gendered stereotypes, and (iv) uncertainty discounting. In Section IV, we analyze judicial cases and the role of these factors when judges fail to believe those who allege they are survivors of domestic violence in need of an ex parte order of protection. We look at these cases to analyze how these stereotypes and cognitive phenomenon can impede a judge's accurate assessment of the danger of future abuse.

First, judges—like all people—make sense of situations and stories and interpret them using cognitive scripts (i.e., preconceived notions about how event sequences unfold) and schemas (i.e., assumptions about how things work) which organize incomplete data and fill in missing information to make sense of information that would otherwise be incomprehensible.[104] The problem is that these cognitive scripts and schemas can also lead to systematic misunderstandings. Bartlett (1932)[105] demonstrated how this works in a famous study in which he had his British participants read a Native American story called the "War of the Ghosts." The story followed scripts and schemas indigenous to Native American culture that his participants did not know. They only knew their own British scripts and schemas.[106] When they later retold the story from memory, they misremembered the story in systematic ways that reflected Western stories and scripts, rather than Native American stories and scripts.[107] Causal relationships were changed and there were omissions, distortions, and sequence inversions.[108] Likewise, judges also impose their own scripts and schemas on the cases that they see in their courtrooms.[109] One researcher who interviewed a judge found that the judge interpreted requests for therapeutic counseling in child custody hearings as a manipulative ploy to gain advantage for custody, reinterpreting a self-care script to make it fit a manipulation script.[110]

Another example of applying inappropriate scripts to domestic violence situations is when judges apply general ex parte scripts or anger management scripts to domestic violence cases. Imposing these scripts causes some judges to impose "timing requirements," requiring that petitioners show a recent act or threat of physical violence even when this requirement is contrary to some of the

104. Robert P. Abelson, *Psychological status of the script concept,* 36(7) AM. PSYCHOLOGIST 715, 717 (1981).

105. Erik T. Bergman & Henry L. Roediger III, *Can Bartlett's repeated reproduction experiments be replicated?* 27 MEMORY & COGNITION 937, 945 (1999).

106. *Id.*

107. *Id.*

108. Jean M. Mandler & Nancy S. Johnson, *Remembrance of Things Passed: Story Structure and Recall*. COGNITIVE PSYCHOLOGY. 9, 140 (1977).

109. L.L. Berger, *How embedded knowledge structures affect judicial decision making: An analysis of metaphor, narrative, and imagination in child custody disputes,* S. CAL. INTERDISC. LAW J. (2009).

110. Naughton et al., *supra* note 98, at 356.

express terms of the domestic violence statute and is inconsistent with the dynamics of domestic violence. Misunderstanding the dynamics of domestic violence and applying their own scripts of what an "emergency" or "immediate harm" is, and what makes "future violence likely" many judges assume that for these to exist a recent act of violence must have taken place. They seem to interpret violence within domestic relationships as being due to anger that flares up, but then dissipates, and then is no longer a threat. Since they lack the scripts to understand the dynamics of domestic violence wherein behavior is motivated by the desire for power and control, many judges do not understand why there is an emergency or likelihood of imminent abuse when the Target of the abuse seeks an order of protection even when the most recent flare up of violence may have been quite some time ago. Those who have scripts to understand the dynamics of domestic violence will recognize that the "honeymoon" stage can in some relationships last for a long time and that the "escalation of tension" stage signals that the "eruption" stage is imminent and that, therefore, there is an emergency. They will also understand about "separation assault" and how the act of separating and seeking an order of protection is likely to trigger heightened abuse.

In addition, judges—like all people—make decisions by utilizing heuristics and reason-based or justification-based decision making, which narrow decision-making criteria down to just a few criteria, maybe even a single criterion. These strategies provide shortcuts to answers and decisions.[111] Because judges like all people have limited cognitive resources and working memory capacity, they need to rely on these forms of decision making. Given these limited cognitive resources, it is not practical or possible to take all possible relevant factors into account, so these forms of decision making are inevitable. Heuristics are preset decision making "tools"[112] that use just a few simple criteria to make decisions or sometimes even a single criterion. If the right criteria are used, they are often surprisingly effective;[113] but if the wrong criteria are used, decisions can be problematic. For example, looking at how recent the latest violence was as a heuristic criterion to decide whether or not to grant emergency orders of protection can and does lead to poor decisions as described in Section IV. Perhaps judges use this criterion, because they are thinking in terms of anger management scripts. Given anger management scripts, this criterion can serve as a shorthand for whether anger is likely to have dissipated which gets judges to an answer on whether to grant an ex parte order of protection right away, but is problematic given the dynamics of domestic violence.

Another decision-making shortcut is reason-based decision-making wherein decision makers make complex decisions by finding one or more justifications up to working memory capacity for their decision.[114] This form of

111. *See, e.g.*, A. Tversky & D. Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974). *See also* A. Tversky & D. Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 4 COGNITIVE PSYCHOL. 207, 232 (1980).

112. *See, e.g.* GERD GIGERENZER, PETER M. TODD & THE ABC RESEARCH GROUP, SIMPLE HEURISTICS THAT MAKE US SMART (Oxford University Press, New York, NY, 1999).

113. *Id.*

114. Eldar Shafir et. al, *Reason-Based Choice*, 49 COGNITION 11, 36 (1993).

decision-making is more ad hoc than heuristics in that the criteria are not preset, but rather involve searching for any criteria that can quickly justify the decision. Having justification(s) in hand for a given decision frees the decision maker from the necessity of making a more complex deliberative decision. The challenge is to find the right criteria to justify the decision. Judges need to have the right criteria in mind to justify their decisions, if they are going to make good decisions. So, in the context of legislation spelling out the criteria for an ex parte order of protection, while there are certain criteria established (such as the requirement of a finding of a "clear and present danger of likely future violence") what facts pose a "clear and present danger" and present a "danger of likely future violence" are not typically spelled out in the legislation. In Section IV, we provide examples from reported cases on how some judges have engaged in heuristics and reason-based or justification-based decision making that lead to failing to adequately protect petitioners who have requested ex parte emergency orders of protection. In Section V, we discuss how to address this problem, and design shortcuts at the ex parte order stage that take into account the dynamics of domestic violence, and provide opportunities for the respondent to tender evidence rebutting the conclusions of these heuristics at the subsequent hearing that takes place after the respondent is served.

Judges also often rely on gendered stereotypes when making decisions.[115] Petitioners who fit the stereotype of a helpless feminine victim in need of protection are more likely to win the sympathy of a judge than are petitioners who are seen as aggressive and assertive. Consistent with this view, analyses of judicial decisions and interviews with judges have found that many judges idealize the traditional nuclear, patriarchal family.[116] Women who are too assertive or otherwise violate notions of traditional passive femininity are at risk of being blamed for their own victimization or even of being judged as the aggressors[117] or pathologized.[118] One example of this in many order of protection statutes, and in some of the cases described in Section IV below, is the focus on whether the petitioner "fears" the alleged abuser or "fears" further abuse. Fear is more consistent with feminine than with masculine stereotypes and using this criterion will cause biases to favor those who fit conventional gendered norms.[119] Judges use criteria such as these, because knowing whether a petitioner fears the perpetrator can serve as a proxy for more difficult judgments, such as the likelihood that the perpetrator will commit violence during the period of the emergency order of protection. But, as explained earlier, under certain circumstances a petitioner may believe or think they are in danger of further abuse and in fact be in such danger, but not willing to state that she/he "fears"

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115. R.J. COOK & S. CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES, 78-84 (2010).

116. Diane Crocker, 11 VIOLENCE AGAINST WOMEN 2, 197 (2005); Naughton et al., *supra* note 98.

117. Naughton et al., *supra* note 98, at 356.

118. *Id.* at 356.

119. *C.f.* Kathleen M. Dillon et al., *Sex Roles, Gender, and Fear*, 119 THE JOURNAL OF PSYCHOLOGY 355 (1985).

the respondent or even "fears" further abuse from the respondent. The petitioner's judgment is not irrelevant, however, in that the petitioner is in a better position than strangers to judge whether further abuse is likely to occur. Consequently, in Section V below, we propose that the wording of order of protection statutes that require that the petitioners "fear" the respondent or "fear" further abuse, be amended to instead state that the petitioner "thinks" or "believes" that the respondent is likely to continue the past pattern of abuse.[120]

Temporal and uncertainty discounting, where decision makers under value the likelihood and severity of future uncertain events[121] could cause some judges to not fully consider the possibility of future violence in some situations. The negative effects of granting an order of protection are immediate and certain for respondents. Respondents will have their freedom of movement immediately curtailed if an order of protection is granted.[122] By contrast, the negative effects of denying a request for an order of protection are delayed and uncertain for petitioners. As discussed in Section IV, this can lead to judges discounting the likelihood of future abuse. For example, in *Cloeter v. Cloeter*,[123] discussed in more detail below, the court denied the petitioner's request for an order of protection on the grounds that the petitioner failed to provide evidence of the risk of imminent bodily injury, "at any moment." The fact that violence was not necessarily immanent and uncertain led the court to underweight the likelihood of violence and maybe even the severity of the future possible violence. And, to the contrary, some judges take the view that it is better to be safe than sorry and deliberately overweight the possibility of violence.[124] Due to the difficulty with predicting with certainty whether future abuse is likely to occur soon or due to the order of protection, in Section V, we argue that judges should focus on whether there has been violence or a pattern of abuse in the past when ruling on an order of protection. If there has been violence or a pattern of abuse in the past, then we argue that there should be a presumption (that can be rebutted) that future imminent abuse is likely and there should be no need to make a further probability judgment regarding the likelihood of future abuse at the ex parte order of protection stage.

120. This reform has been proposed by other commentators. *See* Kohn, *supra* note 75, at 739-41 (recommending substituting the word "fear" with the word "believe" or doing away with this altogether and just having the judge make the determination if the petitioner is in danger of the type of abuse under the statute that leads to the granting of an order of protection (danger of imminent bodily harm in most states)).

121. *See* Sara J. Estle et. al., *Differential Effects of Amount on Temporal and Probability Discounting of Gains and Losses*, 34 MEMORY & COGNITION 914, 914 (2006).

122. *See infra* Section V. Furthermore, orders of protection could have delayed negative effects on respondents. For example, the order of protection is something of record that employers or landlords would learn about because the order of protection will be on the respondent's permanent record.

123. Cloeter v. Cloeter, 770 N.W.2d 660, 666-67 (Neb. Ct. App. 2009).

124. David N. Heleniak, *Erring on the Side of Hidden Harm: The Granting of Domestic Violence Restraining Orders*, 1 PARTNER ABUSE 1, 4-5 (2010).

IV. A CRITIQUE OF HOW JUDGES HAVE RULED IN ORDER OF PROTECTION CASES:

In this section, we examine a variety of cases where judges have denied or granted orders of protection. We start by examining cases where the petitioner has alleged facts that raise a danger of future violence, but the judge has denied the order of protection due in large part to: (i) the applicable statutory pre-conditions and/or (ii) the judge's lack of understanding of the counter-intuitive aspects of dynamics of domestic violence. We highlight where this lack of understanding appears to have negatively impacted the judge's findings on credibility, forecasting of future abuse, and application of the statutory conditions. To examine why these judicial decisions sometimes differ from statutory language as well as why statutory language sometimes reads as it does, this analysis will probe how the cognitive and social psychological phenomena discussed in section III may have affected how the judges applied the facts presented to them to the statutory pre-conditions for obtaining an order of protection. At the end of this section, we note examples where judges have granted orders of protection based on their better understanding of the dynamics of domestic violence and/or based on statutes with broader pre-conditions for obtaining an ex parte order of protection. We also consider in this Section the situation in Illinois and report on the results from a survey of domestic violence service organizations in Chicago (and a nearby suburb) on the extent to which they have observed judges deny ex parte orders of protection based on what we characterize as the judge created "timing" and "fear" requirements. We critique these requirements as being inconsistent with the realities of domestic violence, and in the case of Illinois, inconsistent with the statutory standard for an ex parte order of protection, and the expressed statutory purposes.

The first case we analyze comes from New Hampshire and illustrates the impact that the timing of seeking the order of protection can have on obtaining it. Cases wherein there are delays between when violent acts occur and when petitioners file for orders of protection are of particular interest, because they seem to violate many judges' scripts for what constitutes an emergency as well as how they expect petitioners to act during emergencies, especially when the court lacks an understanding of the counter-intuitive realities of domestic violence. In addition, these cases violate many judges' scripts for appropriate uses of ex parte orders. The plaintiff in *Tosta v. Bullis*,[125] alleged that the defendant struck her during an argument on June 18, 2006, causing her to bleed, that she contacted the police to report the assault, but no charges were filed. She also stated that they subsequently began divorce proceedings, argued over custody of their daughter, and that the defendant had driven around her house and her sister's house saying he had a big, long knife in his car.[126] Had the plaintiff filed for a protection order the day after the incident, she likely would have been granted the order since the statement implies a serious threat to use

125. *See* Tosta v. Bullis, 943 A.2d 824, 826 (N.H. 2008).

126. *Id.*

that knife.[127] The plaintiff, however, did not file for a protection order until nine months after the June 18th events.[128] During that time, she continued to live with the defendant, with no further violence occurring during that period.[129] What was happening during those nine months and why she chose to stay after she was struck and later threatened is not covered in the opinion and likely was not addressed at the hearing.[130] Consistent with many other cases of domestic violence, however, the authors speculate that during those nine months the plaintiff likely tried to mollify her abusive and controlling husband to avert further abuse, similar to what many survivors of domestic violence do.[131] As explained in Section III above, survivors of domestic violence may at times feel safer living with their abusive partner than leaving them, so they can mollify them to prevent violence, or to get a sense of when the next abuse might occur and how bad it will be. So, this not only may explain why she stayed with her husband after the abusive acts, but also why she thought that she needed to petition for an order of protection when he suddenly left without explanation: leaving with no explanation could be a sign of escalated danger to the plaintiff. The plaintiff tried to explain to the court why she now felt she needed a protective order:

> "I came this court this week because he left out of the house the day before and he don't do anything. I was at work and he just go inside the house. He's go all the stuff without talk to me, he was going to leave to the house you know. It was a surprise and I really scared what he thinking, why he wants to do it. So I know he being violence before and I want to get be safe me and my childrens, especially my first son."[132]

The petitioner stated how surprised and scared she was that her husband had left the home suddenly with no explanation (i.e. was he planning to do something terrible to her and her children or leaving for another reason) and how she could not be safe without a protective order.[133]

Untrained in the counter-intuitive aspects of domestic violence, this description of events violated the sequence of events that the court expected during an emergency, their cognitive scripts of what constituted an emergency. The court, perhaps conceptualizing domestic violence as an anger management problem did not expect violence to erupt from a quiet distance after the abuser had left the home. They expected that in a true emergency, an abuser would have more recently lashed out in anger and might still be angry—thereby endangering the petitioner—when she approached the court. The court was unable to see how

127. This threat, if made just one day earlier, would likely have satisfied the statutory test of "immediate and present danger of abuse" required in the New Hampshire statute for obtaining an ex parte order of protection. N.H. S.B. 69 (2013).

128. *See Tosta*, 943 A.2d at 826.

129. *Id.* at 826.

130. *Id.*

131. *See infra* Section III.

132. *Tosta*, 943 A.2d at 826-27.

133. *Id.*

the abusive partner's action of *leaving* could be a sign of future danger as the plaintiff did. Applying domestic violence scripts in which abusers engage in patterns of coercive behavior designed to exercise power and control over victims, one would readily see how his suddenly leaving could be a sign that he no longer felt that he was in control. From the perspective of this script, it is easy to see how he could be planning to engage in even greater, possibly, lethal violence. Furthermore, because the potential subsequent violence was uncertain and not necessarily imminent, the court likely discounted the likelihood of further violence.

The defendant moved to dismiss the petition arguing that it failed to allege conduct presenting a "credible threat" to plaintiff's safety, emphasizing the nine-month gap between the assault at issue and the plaintiff's decision to seek a restraining order.[134] The Supreme Court of New Hampshire denied the plaintiff a domestic violence protective order.[135] The court noted several facts in denying the order. First, the court noted that while the plaintiff contacted the police to report the assault, no charges were filed.[136] Second, in discussing the divorce proceedings the court stated: "Nevertheless they continued to live together without any further instances of physical violence until March 2007."[137]Most importantly the court emphasized the nine-month gap period between when the abusive events occurred and her filing for a protective order and the requirement for "ongoing" abuse.

> "In short, domestic violence protective orders are to be utilized when a victim has shown a need for protection from an ongoing credible threat to her safety. Given this statutory objective, we have required that the threshold misconduct prompting a domestic violence petition be neither 'too distant in time' nor 'non-specific.' [citing to prior New Hampshire cases so ruling]. . .We have also required a plaintiff to show more than a generalized fear for personal safety based upon past physical violence and more recent non-violent harassment to support a finding that a credible threat to her safety exists." [138]

Alarmingly, the requirement that the threshold misconduct prompting the petition be "neither too distant in time nor non-specific" was one created by the courts not the legislature, perhaps because they were thinking in terms of anger management scripts, rather than domestic violence power and control scripts[139] It serves as a decision-making shortcut to justify the decision or as a criterion in a heuristic, but it is inconsistent with the realities of domestic violence, and inconsistent in the case of New Hampshire, with the statutory language directing

134. *Id.* at 826-28.
135. *Id.* at 829.
136. *Id.*
137. *Id.* at 826.
138. *Tosta*, 943 A.2d at 828-29.
139. *Id.* at 829.

courts to consider evidence of acts "regardless of their proximity in time to the filing of the petition."[140]

Tosta thus reflects how a court untrained in the counter-intuitive aspects of domestic violence can fail to see the "ongoing credible threat," when such a threat does in fact exist (i.e., failing to see the wrecking ball in motion and the looming danger of future violence). The case also underscores the problem with the statutory standard requiring a "credible *present* threat to the plaintiff's safety" when the plaintiff who seeks an order of protection[141] has failed to seek this remedy immediately or very soon after an act of abuse. This is so even when the statute also states: "The court may consider evidence of such acts *regardless of their proximity in time to the filing of the petition*, which in combination with recent conduct, reflects an ongoing pattern of behavior which reasonably causes or has caused the petitioner to fear for his or her safety or well-being. [emphasis added]."[142] Without a deep understanding of the dynamics of domestic violence a court is likely to apply scripts and expectations that are inappropriate to domestic violence cases, such as scripts for individuals with anger management problems. Perhaps due to temporal and uncertainty[143] discounting and their failure to understand the patterns of power, control, and violence that occur in domestic violence situations, courts will have a tendency to discount the very real possibility of subsequent violence, especially after a delay. Finally, courts will take decision-making short-cuts to justify their decisions and use heuristics in interpreting statutory language such as conflating "present" threat to the plaintiff's safety with present acts of violence.

The New Hampshire Supreme Court in *Fillmore v. Fillmore*,[144] also affirmed the denial of an order of protection, and, as will be explained, their decision contained certain dicta that is very problematic. In *Fillmore*, the plaintiff alleged that her husband had struck her in anger eleven years ago, and had pushed her into a slide during an argument that took place eight years ago. She also testified that he made a recent threat to "make her life a living hell" causing her to fear that her husband, the defendant, might become violent again.[145] The New Hampshire Supreme Court ruled that these incidents were too distant in time and non-specific to rise to the level of misconduct required for an ex parte domestic violence protective order.[146] Without presenting evidence of a pattern of abuse to

140. N.H. REV. STAT. ANN. § 173-B (WEST 2017).

141. Even after notice to the defendant.

142. N.H. Rev. Stat. § 173-B (2017).

143. The negative effects of orders of protection on respondents are immediate and certain, if granted. Respondents have their freedom of movement limited immediately. By contrast, the beneficial effects of orders of protection on petitioners are delayed and uncertain. Violence may come later, perhaps, or never at all. Thus, the effects of temporal and probability discounting, well-studied by judgment and decision-making researchers, are likely to operate when judges make decisions regarding orders of protection; S.J. Estle, L. Green, J. Myerson, D.D. Holt, *Differential Effects of Amount on Temporal and Probability Discounting of Gains and Losses*, 34 MEMORY & COGNITION 914–928 (2006).

144. Fillmore v. Fillmore, 786 A.2d 849 (N.H. 2001).

145. *Id.* at 850.

146. *Id.* at 851.

exercise coercive control, and what appears to be a lack of any form of abuse for over eight years after the past violence, it could be that this past violence was more of an anger management problem than domestic violence. The court, therefore, may have been correct that future violence was unlikely to occur. On the other hand, the petitioner had appeared to have angered the respondent recently, leading to the threat to "make her life a living hell," which might in fact lead to future violence based on the prior acts of violence reflecting what appears to be an anger management problem.[147] More facts would need to be known to better analyze the question of the likelihood of future violence. Having said that, we focus on the Fillmore case due to the problematic dicta in the case.

The court in *Fillmore* stated that the fact that the defendant was away in Canada when the plaintiff sought the protective order was a factor in the court's decision that she was not in immediate and present danger of abuse.[148] This would be problematic if there was a pattern of abusive control in this case, because this time and distance provides a rare opportunity for survivors to take steps to escape the abuse, including obtaining an order of protection. The court's dicta, if it were to become a well-known practice, could discourage survivors of domestic violence from timing their seeking of an order of protection in a safe maner. Survivors of domestic violence should be able to time their seeking of legal protection to when they are safer to seek this protection, such as while the abusive partner is temporarily away, and not be penalized for doing so. If there was a pattern of coercive abuse, or even of an anger management problem, the fact that the plaintiff sought the protective order while the defendant was temporarily away more likely evidences the fear the plaintiff felt, rather than serving as evidence that there was no immediate and present danger of abuse. The court also likely misinterpreted the plaintiff's request in her petition that her husband be allowed to contact her at reasonable times to discuss child visitation and marriage counseling. The court took this request as evidence that the plaintiff must not have really considered herself to be in immediate and present danger of abuse needing a protective order. This dictum problematically evidences a lack of the cognitive scripts necessary to understand the dynamics of domestic violence, because there are many other reasons why a survivor of domestic violence might seek continuing contacts with an abusive intimate partner, especially relating to the children they share. These reasons can persist, even if she needs an order to prohibit all other contacts. First, she may have sought this exception to mollify her husband and stay safe. Second, she may have truly thought that he was a good father even if she feared further abuse from him. Finally, she may have been advised to do this so that in a divorce case she would not be perceived as an alienating parent. Instead of examining whether there had been a pattern of various forms of abuse, the court focused on certain facts in a way that did not take into account the complex dynamics of domestic violence. In addition, from the perspective of traditional, non-domestic violence ex parte orders described in Section I, the physical absence of the defendant would likely

147. We lack information on if there was a pattern of non-violent, but coercive, abuse here which is helpful in forecasting future violence.

148. *Fillmore*, 786 A.2d at 850.

be construed as negating a finding of a current emergency, justifying the denial of the requested order of protection.

The Nebraska Court of Appeals decision in *Ditmars v. Ditmars*,[149] provides an example of a court denying an order of protection due to a combination of a narrow definition of abuse in Nebraska's statute and a judicial interpretation of the statute that creates an even stricter requirement, making it even more difficult for petitioners, who are in danger of significant future abuse, to successfully obtain ex parte protection orders.

The petitioner in *Ditmars* alleged among other things that her husband would threaten her if she refused to have sex with him, would insist that she and her son go shooting with him and when she refused and stayed in the home, he pretended to shoot at the house and laugh, he monitored her phone usage all the time, kept her isolated in a rural area (she and her 12-year-old son were immigrants from Ukraine) and would spin out on dirt roads when the three were traveling together in the car.[150] Put together, these behaviors constitute a pattern of abusive behavior motived by a desire to obtain and maintain power and control. The district court granted her an ex parte protection order finding she had stated facts showing that the respondent had attempted to cause bodily injury to her and her son by "physical menace," placing them in fear of imminent bodily injury (the statutory language in Nebraska).[151] But the Nebraska Court of Appeals reversed, noting that this statutory language was recently interpreted to require a showing that bodily injury is likely to occur "*at any moment*."[152]The fact that in their view it was theoretically possible that the abuse might have already ended and that subsequent abuse was uncertain may have caused the court to discount the likelihood of subsequent abuse despite the previous pattern of abuse, demonstrating uncertainty discounting on the part of the court. Furthermore, as in the cases above, the court demonstrated their lack of the cognitive scripts necessary to understand the dynamics of domestic violence by noting that the petitioner waited months after these incidents (six months from the first incidents alleged and two months after the latter incidents alleged) before filing for the protection order. The Nebraska Court of Appeals ruled that the incidents alleged were too remote in time to support entry of a protection order.[153] The Court of Appeals also noted as reasons or justifications for their decision not to grant the ex parte order of protection that the petitioner and her son had already moved away from the respondent's home, that there was no recent contact, and she was planning a divorce.[154] The court's reaction may have been appropriate, if counterfactually the abuse were due to an anger management problem, but this pattern of abuse is not consistent with anger management scripts. Rather this pattern of abuse is consistent with domestic violence scripts under which the abuse is used for purposes of attaining and maintaining power and control. As

149. Ditmars v. Ditmars, 788 N.W.2d 817 (Neb. Ct. App. 2010).
150. *Id.* at 819.
151. *Id.* at 820.
152. *Id.* at 820-21.
153. *Id.*
154. *Id.*

such, courts need to have the cognitive scripts necessary to understand the dynamics of domestic violence, apply that understanding to cases such as this one, and not impose timing requirements that are inappropriate for this type of abuse.

The Nebraska court case establishing the judicial requirement of bodily injury likely to occur "*at any moment*" was the *Cloeter v. Cloeter* case,[155] where the respondent sent text messages to the petitioner that combined spelled out the word "behead" and had placed boards on the petitioner's driveway (two years earlier the respondent had threatened to beat her with a board). The court ruled these actions did not constitute evidence of fear of imminent bodily injury because there was no evidence the respondent was there when the petitioner saw this, so bodily injury was not shown to occur "at any moment" as contrasted with another case where the respondent was holding a pitchfork at the time he threatened the petitioner with bodily injury (see the *Contreras v. Contreras* case[156]). As in *Ditmars*, this case demonstrates that the court lacked the cognitive scripts necessary to understand the dynamics of domestic violence. The fact that violence was uncertain in these cases may have triggered the phenomenon of uncertainty discounting, which can cause the court to discount the likelihood of future violence.

The Supreme Court of North Dakota also engaged in a strict reading of what satisfies the statutory requirement of "fear of an imminent harm" as a precondition to issue an order of protection. In *Ficklin v. Ficklin*,[157] the respondent had threatened that he would burn the house down if he did not get to keep it. The petitioner also alleged that he treated her like a child, had been verbally abusive and had hit her. The court ruled that having a perceived threat of domestic violence does not constitute a reasonable fear of actual or imminent harm as required by the statute.[158] Focusing on the word "would" in his threat that he would burn it down if he did not get to keep it, the court saw the subsequent violence as uncertain and, therefore, discounted the likelihood of imminent harm in the form of subsequent violence.[159] The trial court found that the husband represented a credible threat to the safety of the petitioner and children living with her and that if he goes home, based on the conduct of both parties (she had struck him as well) "there is a danger of domestic violence."[160] The Supreme Court of North Dakota rejected this reasoning: "Rather than basing the order on fear of imminent harm, the court's focus appears to be the elimination of the possibility of harm by removing the respondent form the home."[161] The court also noted that the petitioner stayed in the home after the respondent made the threat and did not attempt to leave as part of the reason for

155. Cloeter v. Cloeter, 770 N.W.2d 660 (Neb. Ct. App. 2009).
156. Contreras v. Contreras, No. A-09-871, 2010 Neb. App. LEXIS 36, at *13-14.
157. Ficklin v. Ficklin, 710 N.W. 2d 387 (N.D. 2006).
158. *Id.* at 392.
159. *Id.*
160. *Id.* at 389.
161. *Id.* at 390.

their conclusion that the petitioner did not fear imminent harm.[162]This conclusion reflects a lack of understanding of the dynamics of domestic violence and its impact on survivors described in Section III.

The Supreme Court of North Dakota contrasted the facts in *Ficklin* with the facts in the *Locik.* In *Locik,* the petitioner alleged that the respondent had choked the petitioner while holding a baby, pushed petitioner to the ground, pushed her against the wall and had made several angry and threatening phone calls.[163] The court agreed that those facts create a reasonable fear of imminent physical harm.[164] The Supreme Court of North Dakota then reasoned that *Ficklin* before them was analogous to the *Lawrence v. Delkamp* case where there were serious and reprehensible threats (to "beat the crap out of the mother" and a threat to "eliminate" the son in a boating accident and "not see her son again") but no finding of physical violence or fear of immediate or soon to be inflicted physical harm, "Because the threats were of future conduct, even though the remarks were 'serious and reprehensible' we held that the court was clearly erroneous when it determined that the threats could be defined as actual or imminent domestic violence."[165] This hyper-technical judicial interpretation of the statutory requirement of "imminent physical harm "reflects a callous disregard for the safety of those seeking orders of protection. Furthermore, had the North Dakota statute not so narrowly defined the type of abuse that can serve as the basis for an order of protection (i.e. not recognizing forms of abuse beyond physical violence), the outrageous and emotionally harmful acts of abuse described in *Ditmars, Cloeter, Ficklin,* and *Lawrence* should have led to the granting of orders of protection in their own right (to cause a cessation of the acts of harassment and interference with personal liberty)[166] and based on the possible escalation of violence they portended.

The Missouri Appellate Court decision in *M.D.L. v. S.C.E.*,[167] provides an example of how some courts—lacking the cognitive scripts to understand the dynamics of domestic violence—discount a long history of abuse and physical violence when the last act of serious abuse has occurred months or years before. Instead of looking at the long history and pattern of abuse as the basis for the statutorily required showing of subjective and reasonable fear of future harm from the person committing the abuse, the court looked at whether the petitioner demonstrated fear of the abused as a heuristic or shortcut for their decision making. The case is also informative for expressly raising a concern that other courts might be influenced by, but rarely explicitly raise, the stigma to the defendant if the order is granted. This concern likely served as an important

162. *Id.* at 391.

163. Ficklin v. Ficklin, 710 N.W. 2d 387, 391-92 (N.D. 2011).

164. *Id.*

165. *Id.* At 392.

166. *See* 750 Ill. Comp. Stat. 60/103. The facts in each of these three cases (if alleged by a petitioner seen as credible) would have led to the issuance of an ex parte order of protection under the more expansive law in Illinois of what constitutes "abuse" that serve as a precondition for an order of protection.

167. M.D.L. v. S.C.E., 391 S.W. 3d 525,(Mo. Ct. App. 2013).

reason for the decision, and may explain why some courts, as noted above, engage in an overly technical and narrow interpretation of their order of protection statutes as the basis to deny an order of protection when the judge fails to see the looming danger of violence.

The plaintiff in *M.D.L.* testified to a large number of incidents of abuse. The most recent acts of abuse were that the defendant had drugged her and slashed her boyfriend's tires while his car was parked in her driveway.[168] The plaintiff was currently seeking an order of protection based on "stalking" defined as "purposely and repeatedly engaging in an unwanted course of conduct that causes alarm to another person, when it is reasonable in that person's situation to have been alarmed by the conduct."[169]

The plaintiff also testified to many other prior acts of abuse that were physical in nature that took place eight months earlier: defendant had punched her in the face, pulled a gun on her, tried to run her off the road, kicked her, hit her, and given her a black eye; she also testified that even earlier than that he had held her down by the neck and head while telling her he was going to kill her.[170] She also testified that occasionally he deserted her without any transportation and locked her out of the home in the cold.[171]

The statute in Missouri requires for an order of protection based on stalking[172] a showing of subjective fear of physical harm (when there has been no prior physical violence) and must show that a reasonable person under the same circumstances also would have feared physical harm.[173] Applying this law to the facts, the Court of Appeals reversed the stalking order of protection.[174] The court noted that the defendant had not threatened the plaintiff with physical harm in the eight months prior to seeking the stalking order of protection.[175] The court then found that the plaintiff had failed to testify as to why she feared physical harm in response to any specific actions taken by her former boyfriend. Instead, the plaintiff testified that she was always in fear of her safety with the defendant based on the numerous acts of violence he had engaged in years earlier. The court responded to this by stating "We acknowledge Respondent's [the plaintiff] wide range of testimony listing Appellant's [the defendant] untoward conduct. However, we find dispositive the absence of testimony from Respondent or any other witness that Appellant's conduct caused her to fear physical harm."[176]

It is stunning that the Missouri Court of Appeals did not find that the recent coercively abusive acts of the defendant (drugging the plaintiff and slashing the tires of her boyfriend's car while parked in her driveway) were the basis for the

168. *Id.* at 531.
169. *Id.* at 529.
170. *Id.* at 528.
171. *Id.*
172. Plaintiff had earlier received a full order of protection against defendant. Defendant appeals the automatic renewal of the protection order and challenges that there was substantial evidence to support a finding of stalking.
173. M.D.L., 391 S.W.3d at 529.
174. *Id.* at 530.
175. *Id.*
176. *Id.*

petitioner to have a real and reasonable fear of future physical violence from the defendant, especially in light of the horrific, prior physical violence, and deadly threats by the defendant against the plaintiff. This pattern of abuse is consistent with a desire to coercively control an intimate partner and raises a significant danger not only of further abuse, but also of an escalation of the abuse. In explaining the court's hyper-technical requirement that the plaintiff testify as to precisely *which* conduct caused the plaintiff to fear future physical violence from the defendant, the court, candidly, noted the court's need to "exercise great care to ensure that sufficient evidence exists to support all elements of the statute before entering a full order of protection" due to the stigma that may attach to a person who is labeled a "stalker."[177] It appears from this confession that the judge was more concerned with and focused on the harm to the defendant's reputation from issuing a stalking order than with considering how the facts alleged did in fact create a real and reasonable fear of future violence and the importance of focusing on the entire pattern of abuse rather than isolate each instance. We wonder how often judges consider (without saying so) the stigma to the respondent from granting an order of protection, when applying the statutory requirements, even when the statutory language does not call for courts to consider that factor when deciding whether to grant an order of protection.

The forgoing review of reported appellate court decisions illustrate the various reasons why judges sometimes fail to see the wrecking ball in motion and deny ex parte orders of protection that they should have granted.

Conversely, we next report on examples of cases where: (i) the courts demonstrated an understanding of the dynamics of domestic violence, saw the looming danger of further abuse and violence even when a violent act had not recently taken place, and granted the ex parte order of protection sought and/or (ii) where the statutory preconditions better enabled the courts to grant an ex parte order of protection by only requiring that violence "may occur" in the future (versus that the future violence was "imminent" or in the "near" future).

In *Lewis v. Lewis*,[178] the wife petitioned for a protective order against her husband. The lower court dismissed her petition finding she failed to establish that her husband committed a "reasonably recent" act of family violence against her. The Court of Appeals held that the Georgia statute does not absolutely require a petitioner to show a "relatively recent" act of family violence; the statute only requires a showing that family violence "has occurred in the past and may occur in the future."[179] This court noted that while the "recency" of past violence may bear upon the likelihood of future violence, there may be a good reason in some cases to believe that past violence, although fairly remote, is now

177. *Id.*

178. Lewis v. Lewis, 728 S.E.2d 742 (Ga. Ct. App. 2012).

179. *Id.* at 70. The court noted in footnote 3 to the opinion: "It appears that the court below found the 'reasonably recent' requirement in a form order that then was used widely in Gwinnett County in cases involving OCGA Section 19-13-3. The form, unlike the statute, purports to require the petitioner to show a 'reasonably recent' act of family violence. The form also erroneously requires a petitioner to demonstrate a reasonable likelihood that an act of family violence 'may occur in the *near* future.' [Emphasis supplied]"

likely to recur.[180] As an example, the court noted the situation where someone has been gone far away for a long time but now has returned. In ruling on the matter, the Georgia Court of Appeals highlighted the following facts in this case.[181] The parties had married in 2007 and separated in 2010. The marriage was marked by harassment, threats, and violence by the husband against the wife according to the court of appeals.[182] The wife tried to hide from the husband several times but he would find her and harass and threaten her.[183] In October 2010 he assaulted her and drove off with her car and the children.[184] A warrant for his arrest was issued and he ended up agreeing to stay away and not contact her except on visits with the children. But he moved back to Georgia in March 2011 and on July 18th he came to her home enraged because he had been served with a lawsuit for child support.[185] Of most interest for our line of inquiry, the Court of Appeals placed weight on the wife's testimony that based on her past experience with her ex-husband she feared that he was about to become physically violent toward her, mostly "because of the look on his face and his demeanor" and the comments he made to her about his child support payments to another woman, and that she believed this violence would happen if and when he was ordered to pay child support.[186] Based on this belief, on July 20th she applied for an ex parte temporary protective order.[187]

Some judges lacking the cognitive scripts necessary to understand domestic violence would not have seen the looming danger based on: (i) violence and abuse that took place five months earlier, (ii) the only recent acts being the "look on" the respondent's face, the respondent's "demeanor" and comments that the respondent made about his child support payments to another woman, and (iii) the assertion by the petitioner that she believed the respondent will attack her physically if and when he is ordered to pay child support. Consider, for example, the court in *Tosta*,[188] which did not put weight on a petitioner's testimony of fear based upon what might be considered ambiguous events. But because the court understood domestic violence and looked for the patterns of behavior seen in domestic violence scripts it did see the looming danger. The court understood the importance of placing weight on the history of abusive conduct and recognized the abuse as taking place in a pattern versus as a series of isolated incidents. It also helped here that the statutory language in Georgia merely required prior family violence and that future violence "may occur" versus that a recent act of violence has occurred and that future violence is imminent. We will discuss which criteria and the optimal number of criteria given constraints on judges'

180. *Id.* at 743-44.
181. *Id.* at 742-43.
182. *Id.*
183. *Id.*
184. *Lewis*, 728 S.E.2d at 742-43.
185. *Id.* at 742.
186. *Id.*
187. *Id.*
188. Tosta v. Bullis, 943 A.2d 824, 829 (N.H. 2008).

working memory capacity necessary for deciding ex parte order of protection in Section V.

The trial court granted, and the Indiana Court of Appeals, affirmed the granting of a protective order in *Cunningham v. Rains*.[189] The Respondent argued that the petitioner failed to show that respondent was a "credible threat" to her because she did not file her petition for a protective order when he first threatened her so she must not have found his threats credible.[190] The trial court and the appellate court rejected this argument. The Court of Appeals cited to the statute which directs a court not to deny a protective order "solely because of a lapse of time between an act of domestic or family violence and the filing of a petition."[191] Although the Court of Appeals acknowledged that this lapse of time can be considered, the court also noted that the petitioner had filed a police report after the initial threat. Perhaps equally important, the nature of the threats in this case were so extreme,[192] that it did not take a special knowledge of domestic violence scripts to find a credible threat in this case.

The New Hampshire Supreme Court, *In the Matter of Sawyer*,[193] held that the complainant's allegations raised a reasonable inference that she was in immediate danger of domestic abuse even though there was a nine-month delay between when the defendant had been physically violent towards her and when she sought the protective order, and a nine-day delay between when the defendant had followed her while armed, and her seeking the protective order. The defendant claimed that complainant had failed to show she was in immediate and present danger justifying the issuance of a temporary protective order due to this nine month and nine-day delay.[194] The defendant cited to *Fillmore* and *Tosta* where the court imposed a requirement that the incidents serving as the basis for the protective order not be too distant in time and be specific.[195] The Supreme Court disagreed with the defendant, distinguishing the facts in this case from those in *Fillmore*. The court pointed to a delay of only nine months in *Sawyer* versus a delay of years in *Fillmore* from when the defendant had struck and strangled the plaintiff, and a delay of only nine days from when the defendant had followed the plaintiff around while armed as the most recent event in *Sawyer* versus the insufficient evidence of any recent abuse by the defendant in *Tosta*.[196]

189. Cunningham v. Rains, 948 N.E. 2d 868 (Ct. App. Ind. 2011) (Memorandum Decision—Not for Publication).

190. *Id.*

191. Ind. Code Ann. § 34-26-5-13 (West 2017).

192. The respondent threatened to get someone to rape the petitioner; that he would throw acid in her face, would run her over with a truck, that he would cause her to lose her job, and that he would slice her head open with a machete. 948 N.E. 2d 868.

193. In Re Sawyer, 8A.3d 80 (N.H. 2010).

194. *Id*. at 83-84.

195. *Id*.

196. The court distinguished the *Tosta* case, where the precipitating event was the defendant's leaving the home without explanation, versus here where the armed defendant nine days earlier followed the plaintiff and the plaintiff's statement that the defendant needs medical attention and would not get help, finding the latter constituted abuse warranting a protective order, but not the former. *Id*. at 84.

Without overruling the judicially created requirement that the last incident of misconduct justifying the protective order be not too distant in time to when the plaintiff files for the protective order,[197] the court still ruled that the incidents that occurred nine months and nine days earlier, "permit one to reasonably infer plaintiff at risk of further abuse and that plaintiff was in "immediate danger of abuse by the defendant" justifying the issuance of a temporary protective order.[198]

We conclude our review of case law on orders of protection with the State of Illinois due to the enigma it presents and the policy implications from this. Similar to the courts in New Hampshire, some trial courts in Illinois have been observed to impose a requirement that the most recent act of abuse occur not too distant in time from when the petitioner sought the order of protection,[199] even though there is no such requirement in the statutory language. And, there is no Illinois Supreme Court decision sanctioning this interpretation of the Illinois Domestic Violence Act as the New Hampshire Supreme Court has. Nevertheless, trial court judges in Illinois have been observed to ask, "where is the emergency?" when the most recent act of abuse took place more than a week before the petitioner has come into court and then deny an ex parte order of protection in those cases due to this delay. The first author sent a survey in March of 2013 to 27 organizations located in Chicago, Illinois, and a nearby suburb, who represent or otherwise assist survivors of domestic violence (the "Service Provider Survey").[200] The purpose of the survey was to gain a sense of how domestic violence advocates and attorneys assess judicial application of the Illinois Domestic Violence Act ("IDVA") in granting ex parte orders of protection, and to explore their experience with some potential problem areas. Nine organizations filled in and returned the surveys. Question 3 of the survey asked if they ever observed a judge state that she/he would not grant an emergency order of protection because the last incident of abuse took place "too long ago" in the court's judgment, and if yes, how many times they observed this happen. Eight of the nine organizations reported observing this and 1 reported they did not observe this. Of the eight that observed this, one reported "countless" times, one reported "not know the number of times," one reported that over the past month, four times, one reported twenty-four times, three reported between three-five times and one did not specify how many times.[201]

This was the case even though the statutory standard for an ex parte order of protection in Illinois does not require a showing of an "immediate and present danger of future violence" and instead requires issuing an ex parte order when the giving of notice would likely lead to the harm that the petitioner was trying

197. *Id.* at 83-84. The court did decline, however, to read a requirement into the relevant statutory scheme that plaintiffs seeking a temporary protective order must set forth the specific dates upon which he or she allegedly suffered abuse.

198. *Id.*

199. *See* Stark, *supra* note 9.

200. *Id.*

201. *Id.*

to avoid through seeking the order of protection.[202] As Section 217 of the IDVA states:

> "An emergency order of protection shall issue if petitioner satisfies the requirements of this subsection for one or more of the requested remedies. For each remedy requested, petitioner shall establish that: 1. [reference to jurisdiction]; 2. [reference to the requirements in Section 214 describing the 18 remedies]; and 3. There is a good cause to grant the remedy regardless of prior service of process or of notice upon the respondent because: (i) For the remedies of [identified 214(b) 1,3,8,9,11,14,15, and 16], the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's effort to obtain judicial relief."[203]

In addition, Section 214(c) of the IDVA states, consistent with the cycle of violence, and problem of separation assault, the following are relevant factors in determining whether to grant the remedies sought through an order of protection: "(i) the nature, frequency, severity, pattern, and consequences of the respondent's past abuse. . .and the likelihood of danger of future abuse. . ."[204] These factors are in keeping with the dynamics of domestic violence, by considering the nature and pattern of abuse that has taken place in determining whether to grant the remedies sought in the petition for an order of protection.[205] And while the IDVA refers as noted above to the "likelihood of danger of future abuse" as a relevant factor,[206] neither of these sections state that the likelihood of future abuse must be "imminent" or a "clear and present danger" as most other order of protection statutes do.[207] So, it is an enigma as to why some trial courts

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202. 750 ILL. COMP. STAT. 60/217. This language focuses on how providing notice to the respondent that the petitioner is seeking an order of protection can itself make it likely that the respondent will in reaction harm the petitioner, and should logically also encompass, but not require, the situation where there is an immediate likelihood of future abuse even without the seeking of an order of protection.

203. *Id.*

204. 750 Ill. ILL. COMP. STAT. 60/214.

205. *Compare* 750 ILL. COMP. STAT. 60/214 *with The Cycle of Domestic Violence*, DOMESTIC VIOLENCE ROUNDTABLE (2016) http://www.domesticviolenceroundtable.org/dvcycle, *and Power and Control Wheel*, THE DULUTH MODEL (2011), http://www.theduluthmodel.org/pdf/PowerandControl.pdf.

206. And in Section 214 (c)(3)(ii) focuses on whether the respondent's conduct or actions "unless prohibited will likely cause irreparable harm or continued abuse." 750 ILL. COMP. STAT. ANN.60/214.

207. It should be noted, however, that certain of the remedies potentially available with an order of protection in Illinois, such as the remedy of "exclusive possession of the residence" require additional elements, such as a balancing of the hardships to the petitioner and the respondent from granting or not granting the remedy, which includes considering whether there is an "immediate danger of further abuse." But these additional requirements are not required for many other remedies such as an order prohibiting further abuse, or an order to stay away from the petitioner (although there is a balancing of hardship test required

in Illinois place so much emphasis on when the last act of abuse has occurred, de-emphasize the prior pattern of abuse, and deny orders of protection based on a judicially created "timing" requirement. We hypothesized that the trial courts might have been following scripts for ex parte orders in non-domestic violence domains (which normally require a showing of an immediate and present danger of irreparable harm) and were also struggling to deal with the complexity of determining the likelihood of future abuse, which requires a sophisticated understanding of domestic violence, and used a simple heuristic (requiring that the last act of serious abuse had happened recently) to make that decision making easier.

A further enigma is why some trial courts in Illinois require the petitioner to state that she "feared" the respondent or "fears" future abuse, even though the Illinois Domestic Violence Act statutory language does not refer to "fear" as a precondition to obtain an order of protection.[208] The IDVA authorizes the granting of an ex parte order of protection based on a judgment by the court that the conduct or actions of the respondent, unless prohibited, will likely cause irreparable harm "or continued abuse."[209] Abuse under the Illinois statute is broadly defined to include not only physical violence but also many other forms of abuse, including "Harassment" which is defined as causing severe emotional distress by conduct calculated to cause such distress that has no legitimate purpose and includes things like repeatedly calling someone at work or otherwise contacting a person after being told not to do so.[210] In cases of harassment such as repeatedly calling someone at work, a person might not yet "fear" the respondent even though the abuse might escalate in the future without the order of protection. And even when a petitioner has experienced physical abuse at the hands of the respondent, there are many reasons why some petitioners may be reluctant to say she is in fear of the respondent. First, a survivor may be in denial of the degree of danger she faces from her intimate partner. Second, a petitioner (especially if male) may be ashamed or too proud to admit that she/he fears the respondent. Some survivors (especially if seeking the order of protection on their own without any legal assistance) may be confused as to why they are being asked if they are afraid of the respondent, when they may have been told by friends "don't be afraid, go get help." The proper question of the petitioner in Illinois should be whether the petitioner "thinks" or "believes" that the respondent is likely to abuse her/him if he/she learns that she/he is seeking an order or protection. It would also be appropriate for the petitioner to state she/he "fears" this future abuse when that is the case, but the failure to state the

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for stay away orders when a respondent is being ordered to stay away from areas where the petitioner would otherwise have a right to be at such as a school the respondent attends or a church the respondent is a member of). 750 ILL. COMP. STAT. 60/217.

208. As contrasted with states like North Dakota, whose legislation requires a "fear of an imminent harm" as a precondition for an order of protection when there has not been prior physical harm, bodily injury, or sexual activity compelled by physical force. N.D.CENT.CODE § 14-07.1-01(2).

209. 750 ILL. COMP. STAT. 60/ 214(c)(3)(ii).

210. 750 ILL. COMP. STAT. 60/103(7).

petitioner feels "fear" of the future abuse should not be the basis to deny an ex parte order of protection under the language in the statute.

Nevertheless, trial courts in Cook County, Illinois have been observed to routinely ask the petitioner if she fears the respondent or fears further abuse from the respondent. And denying an order of protection when the petitioner fails to so testify. Question 5 of the Service Provider Survey asks if the organization ever observed a judge deny an emergency order of protection because the judge asked the petitioner if she "feared" the "petitioner" [a typo it should have said "respondent"] and the petitioner said "no" and if so, how many times. Four of the organizations reported "yes" (responding: one time, seven times, "a couple times", and ten times), three responded "no," and two left the question blank (perhaps because of the typo).[211] In addition, certain forms posted on the Cook County, Illinois website also include questions asking the petitioner whether she/he fears the respondent and fears further abuse if an ex parte order is not issued.[212]

In trying to understand these two puzzles, and check if our hypotheses were correct, we researched for reported Illinois Appellate Court and Illinois Supreme Court decisions that involved ex parte orders of protection to see if any of them shed light on where the judicially created requirements might have come from. In particular, we looked at "timing" requirements (including the "where is the emergency?" question)—which we hypothesized might be due to inappropriately applying ex parte scripts from non-domestic violence domains (for example, the wrecking ball about to demolish a building or confidential information about to be released) and the "fear" requirement—-which might be a proxy and short-cut for determining the likelihood of further abuse and follows gendered scripts of how a survivor of domestic violence would react to dangerous abuse.[213] We found some insights on the first puzzle in the Illinois Appellate Court decision in *Sanders v. Shepard*,[214] an early case applying and interpreting the IDVA. The court in *Sanders* referred to the general laws on ex parte orders in analyzing whether the ex parte orders of protection under the IDVA were Constitutional.[215] Perhaps because of that, the court in *Sanders* used the phrase "exigent circumstances" when referring to the standard for an ex parte order of protection

211. *See*, *supra* note 203 and accompanying text.

212. *See*, CIRCUIT COURT OF COOK COUNTY, DOMESTIC VIOLENCE DIVISION, ORDER OF PROTECTION PRO BONO REPRESENTATION, MODEL SCRIPT FOR EMERGENCY ORDERS OF PROTECTION 42-44 available at https://www.illinoislegalaid.org/sites/default/files/attachments/Order%20of%20protection%20pro%20bono%20representation.pdf.

213. *Id.*

214. Sanders v. Shephard, 541 N.E. 2d 1150 (Ill App Ct 1st Dist. 1989) (respondent alleged to have concealed the petitioner's child and petitioner sought an ex parte order of protection for child's return; petitioner argued that prior notice likely lead to the child being further concealed and the destruction of evidence of the whereabouts of the child and respondent argued, among other things, in challenge of the trial court's granting of the ex parte order of protection that the IDVA's ex parte order deprived the respondent of due process of law).

215. *Id*. at 1155.

under the IDVA, (even though the phrase "exigent circumstances" is not used in the IDVA). The court then cited to the full statutory language for an ex parte order of protection, and thus, it appears that the phrase "exigent circumstances" was not intended to create a new requirement but just a shorthand for the lengthy statutory language.[216] Yet, courts thereafter may have been influenced by the dicta in *Sanders* where the court referred to "exigent circumstances" and discussed case law from ex parte orders in other contexts, and may have been influenced to follow those scripts, especially when they had not received extensive training on the dynamics of domestic violence such as the phenomenon of "separation assault." As for the requirement that some trial court judges impose, that the petitioner testify that she "fears" the respondent or "fears" that further abuse will occur to obtain an ex parte order of protection, there is no clue from the reported cases on where that practice developed. But the practice is evidenced not only by the Survey of Lawyers and Advocates, but also by the fact that certain practice forms posted on the Cook County Court webpage contains that language.[217] The presence of fear can serve as a reasonable shorthand or heuristic to assess the degree of danger that a petitioner may be in. The petitioner is in a better position to assess the degree of danger than anyone else and, if there is a high degree of danger, it would be expected that a petitioner would likely fear the defendant. However, because being fearful is inconsistent with masculine gender norms, consistent with feminine gender norms, and is also associated with weakness,[218] petitioners will differ in the degree to which they are willing to admit that they "fear" the defendant. An alternative shorthand or heuristic that avoids these problems would be to look to whether petitioners "think" or "believe" that they are in danger.

We also hypothesize that these two requirements were imposed because courts need easily applied decision-making criteria when considering complex factors that need to be applied: heuristics and "reason-based" decision making. Judges have limited cognitive resources to expend when making decisions regarding ex parte orders of protection. They do not have a lot of time to devote to studying each case that comes before them nor do they have expertise on assessing the likelihood of further abuse as these assessments are very complicated. To get a sense of how complicated this assessment is, consider that a research group found twenty-three significant psychological and social factors that judges would need to consider to evaluate the likelihood of further abuse.[219] Judges do not have the time, cognitive resources, or multiple forms of expertise to consider all of these factors at the emergency order stage and, in fact, the group

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216. While the caption for the ex parte order section of the IDVA is labelled "Emergency order of protection", there is no reference in the substance of the text of this section that an "emergency" must exist for an ex parte order of protection to be granted.

217. *See supra* note 212 at 25, 36.

218. Dillon, *supra* note 119 at 355-58.

219. Mary Ballou, et al. *Initial Development of a Psychological Model for Judicial Decision Making in Continuing Restraining Orders*, 45 FAM. CT. REV. 283 (2007). Note that in these authors' estimation this list of factors was too complicated for the emergency order stage and they only proposed these factors for careful consideration in contested hearings over continuations of orders of protection. The research group noted in the text included the following professionals: psychologists, neuro psychologists, clinicians, and judges.

of researchers only proposed considering these factors in contested hearings over continuations of orders of protection. Without well-designed easily applied decision-making criteria, judges who have not been extensively trained on the dynamics of domestic violence are particularly likely to rely on ill-conceived criteria to determine the likelihood of further abuse. Without the cognitive scripts necessary to understand the dynamics of domestic violence, judges are likely to apply scripts that do not apply to domestic violence situations, understand "emergencies" as one time, rather than cyclical events or apply anger management scripts where power and control scripts are more appropriate.

We thus argue that in light of the cognitive difficulties judges face when determining whether future abuse is likely to happen, legislation should be reformed to create a better heuristic for judges to use, one that is more consistent with the realities of domestic violence. We describe in detail our proposed legislative reforms in Section V below.

V. PROPOSED LAW REFORMS

In this section, we set forth our proposed reforms to the law to address the deficiencies in the legislation and the judicial decision making we described in earlier sections of this Article. As noted earlier, in its most basic form, virtually all order of protection statutes require at least two things for an order of protection to be granted: that "abuse" (as defined in the state statute) has occurred, and that further abuse or violence may or will occur (with the vast majority requiring a "clear and present danger of violence", but some seeming to only require that abuse has occurred[220]).We thus focus our reform proposal on these two basic elements of the laws on orders of protection, and then address related complicated issues, including creating a fair process for respondents. We do so, keeping in mind what is at stake when petitioners are denied an order of protection even though they have been abused and are in danger of escalating violence, and what is at stake for respondents when they are subject to an order of protection based on false accusations of abuse.

First, because domestic violence is commonly the result of power and control dynamics, we propose, as others have before us,[221] that the definition of what types of actions and conduct (i.e. abuse) can serve as the predicate for an order of protection be broadly defined. The definition of the requisite abuse should include the multiple forms of coercive abuse that creates dependence on the abusive intimate partner that characterize domestic violence. This type of abuse is very harmful to the target of the abuse and it often escalates over time, especially when the target seeks to separate from the abusive intimate partner. In Section IV, we reviewed several examples where courts denied an order of protection where the petitioner was clearly in danger of serious abuse, even of violence, because the statute's definition of abuse was too narrow.[222] Consequently, we recommend that not only physical violence, sexual assault,

220. *See supra* notes 22-23.

221. *See* Stark, *supra* note 13, at 137.

222. *See* Ditmars v. Ditmars, 788 N.W.2d 817 (Neb. Ct. App. 2010); Cloeter v. Cloeter, 770 N.W.2d 660 (Neb. Ct. App. 2009).

rape, and threats to commit the same should serve as the basis for obtaining an order of protection, but also a pattern of respondent engaging in various other forms of abuse that are coercive in nature or a pattern of emotional abuse calculated to cause dependence on the abusive intimate partner. A good example of a state with this type of broad definition of "abuse" that can lead to an order of protection and that takes into account the realities of domestic violence, is Illinois.[223]

As noted earlier, in one jurisdiction it appears that the finding that statutory abuse has occurred is all that is needed for an ex parte order of protection to be granted; and in some jurisdictions all that is needed is a finding that further abuse "could" or "may" occur.[224] This may be the case because of the recognition by some that if an abusive intimate partner has engaged in abuse in the past, they are likely to continue to do so in the future.[225] And in light of the problems detailed earlier with judges trying to determine whether abuse is likely to occur in the future, we would support legislation that does not require anything further for the granting of an ex parte order of protection other than a showing of statutory abuse, since the respondent would have the opportunity to rebut this (that abuse has in fact occurred or that it is likely to continue) at the contested hearing that would take place after the respondent is served.

But, we recognize that doing away with inquiry into the second element of "likelihood of future abuse" may be too dramatic a change for the many jurisdictions that require a showing of not only statutory abuse, but also a "clear and present danger of imminent irreparable harm." So, an alternative reform approach, and the one we recommend, would be for the legislation to provide that once the requisite level of abuse has been testified to by the petitioner,[226] and the judge views this testimony as credible,[227] a presumption is created that further abuse by the respondent against the petitioner is likely to occur if the petitioner testifies either that: (i) she thinks, believes, or fears that future abuse is likely to occur or (ii) thinks, believes, or fears that if the respondent were given notice that the petitioner was seeking an order of protection that the respondent would try to stop her or further abuse her. This testimony by the petitioner is highly predictive, perhaps more so than any other factor. This is because a petitioner who has been a target of abuse is the most knowledgeable of the history and pattern of that abuse and in the best position to know what sets off the abusive intimate partner. And, for the reasons detailed in Section III and IV, the legislation should make clear that this presumption at the ex parte stage cannot be overcome due to the time that has lapsed between the last act of abuse and when the petitioner appears in court for the ex parte order of protection.

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223. 750 ILL. COMP. STAT. ANN. 60/103(1).

224. *See* statutes cited *supra* notes 17-18.

225. Frank v. Hawkins, 891 N.E. 2d 522, 535 (Ill App 4d 2008) ("The best indicator of a person's future conduct is his past conduct.").

226. If the petitioner is *pro se*, judges should be required to ask the petitioners if they have experienced any recent abuse from the respondent or abuse during the course of their relationship with the respondent. They should also be asked to include all forms of abuse they experienced, not only physical violence or threat of physical violence.

227. *See supra* note 72 and accompanying text.

We are thus proposing two reforms to the pre-conditions for the granting of ex parte orders of protection in the domestic violence context: (1) that the forms of statutory "abuse" be expanded as noted above and (2) that a presumption of the likelihood of further abuse be based upon the past abuse (unless the judge properly finds that testimony to not be credible) and the testimony from the petitioner as described above. Once this presumption has been created, the judge would be required to grant an ex parte order of protection. The respondent would then have the opportunity to rebut this presumption at the contested hearing after service of the respondent.

But there are still several thorny and important details to grapple with to address additional problems with judicial decision making in this area of law and the problem of petitioners who falsely claim abuse. We thus set forth below our analysis of and proposals for how to deal with these issues.

The first of these thorny issues is whether a judge should be required to grant an order of protection if the only evidence of the abuse is the petitioner's testimony and the judge hears testimony that makes the judge doubt the credibility of the petitioner's story. Unfortunately, as described earlier, when judges are not adequately trained in the dynamics of domestic violence they might not find a petitioner's testimony credible due to inappropriate grounds. For example, portions of the testimony that are inconsistent with the judge's intuitions but consistent with the counterintuitive aspects of domestic violence should not be the basis to find a petitioner's testimony not credible. Similarly, to the extent the testimony or demeanor of the petitioner do not conform with gendered stereotypes, this should not be the basis to find the petitioner's testimony not credible. We propose that the order of protection legislation identify these types of misconceptions about domestic violence and prohibit a judge from using these misconceptions as the basis to find that the petitioner's testimony is not credible.[228] We also propose that judges be required to undergo extensive training in domestic violence, as described below, before they preside over order of protection cases to reduce the incidences of judges viewing a petitioner's testimony as not credible due to ignorance of the dynamics of domestic violence. Due to some judges improperly doubting the credibility of the stories that survivors of domestic violence tell in their pleadings and in court, we propose that at the ex parte stage the petitioner's story should be accorded a presumption of truth. The judge would need to have, and state for the record in writing their decision, the reasons they are denying the ex parte order of protection and, if applicable, why they do not find the petitioner's testimony to be credible that abuse has occurred (which cannot be based on the reasons listed in the statute as improper reasons) before denying an ex parte order of protection.

On a related issue, we have two specific recommendations to improve the training on domestic violence that judges should receive so they will be less

228. Examples of misconceptions that should not be permitted to serve as the basis to find a petitioner credible include: the petitioner engaged in self-defense or failed to engage in self-defense; the petitioner was impassive on the stand or was angry on the stand; the petitioner did not seek an order of protection soon after the abuse alleged; and the petitioner would not state that she feared the respondent. *See* 750 ILL. COMP. STAT. 60/214(e)(3)(5).

likely to incorrectly deny an order of protection due to their mistaken intuition not to believe the petitioner. First, we propose that the training on domestic violence use the "In Her Shoes" exercise[229] to enable judges to better empathize with the challenges to safely leaving that survivors of domestic violence experience so that the survivor of the violence does not experience additional abuse from the judge.[230] We also propose that in addition to the existing educational programs on domestic violence, a new cognitive test be created for the judges to take to assess the scripts and schemas judges apply to the domestic violence cases. It will let them know after they complete the test the extent to which the judge follows personal biases, stereotypes, and heuristics that are inconsistent with the realities of domestic violence. We are currently developing such tests in the second author's laboratory based on the "moving windows" paradigm.[231] The American Bar Association recently used the Implicit Attitudes Test with some volunteer judges to identify for them unconscious racial biases they had and the judges afterwards commented on how helpful this test was and how they will keep the results in mind (and strategies to overcome these biases) in their future cases.[232]

The second complicated issue is what grounds would serve as the basis for the respondent to rebut at the contested hearing the presumption of the likelihood of further abuse, based upon all of the alleged prior abuse. In considering this question we begin with the assumption that before this issue is addressed the question of whether statutory abuse has occurred has already been determined by the preponderance of the evidence. To the extent the respondent attempts to

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229. *See* "In Her Shoes: Living with Domestic Violence," WSCADV Against Domestic Violence, https://wscadv.myshopify.com/ (last visited Mar. 31, 2017).

230. For example, in Seminole County, Florida, Judge Jerri L. Collins lacked all empathy for the victim of the violence by harshly berating a domestic violence victim for failing to testify against the assailant. The victim was sentenced to three days in jail even though she apologized and pleaded with the judge not to imprison her because she did not have childcare provider for her one-year-old child and the victim herself was experiencing anxiety and depression. *See* Lesile Salzillo, "Judge who berated and jailed a domestic abuse victim gets her day in court—and it's not pretty," Daily Kos (Sept. 01, 2016, 6:12 PM), http://www.dailykos.com/story/2016/9/1/1565935/-Judge-who-berated-and-jailed-a-domestic-abuse-victim-gets-her-day-in-court-and-it-s-not-pretty; *See also* Rene Stutzman, "Seminole County judge reprimanded by Florida Supreme Court," Orlando Sentinel (Aug. 30, 2016, 5:36 PM), http://www.orlandosentinel.com/news/breaking-news/os-judge-jerri-collins-scolded-by-florida-supreme-court-20160826-story.html.

231. In the moving windows paradigm, participants see a few words at a time and press a key to advance to the next few words. Reading a story about domestic violence, we predict that participants will slow down when described events that are consistent with the dynamics of domestic violence violate the participants' scripts. *See Effects of Lexical Frequency and Syntactic Complexity in Spoken-language Comprehension: Evidence from the Auditory Moving-window Technique.* 22(2) J. OF EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, AND COGNITION 324-335. *See also* Just, Carpenter & Woolley, *Paradigms and Processes in Reading Comprehension,* 111 J. OF EXPERIMENTAL PSYCHOLOGY: GENERAL 228-238 (1982).

232. *See* "Judges: 6 strategies to combat implicit bias on the bench," Am. Bar Ass'n (Sept. 2016), http://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html.

raise the misconceptions that the statute lays out as inappropriate, the judge should not place weight on those factors in determining if abuse has occurred. So on what basis then could a respondent successfully rebut the presumption at the ex parte stage that the abuse has occurred and is likely to continue? One possibility would be to first identify the reasons for the prior abuse (for example, a desire for coercive control, an anger management problem, a substance abuse problem, or a mental illness problem) and then demonstrate that those reasons no longer exist (for example through successful completion of a partner abuse intervention program, an anger management program, a substance abuse program, or the treatment of the mental illness). Then, the respondent could present evidence that while the respondent had the opportunity to continue to engage in abuse after the last act of abuse, the respondent had not done so for a long period of time (at least one year). Finally, when the prior acts of abuse were coercive in nature, reflecting a need for power and control over the petitioner, the respondent must also show that the parties have been living apart for at least one year. We propose this last requirement, because if the parties have been living together while no further abuse has occurred it could be because the petitioner has been engaging in conduct to mollify the respondent to prevent such further abuse, and once the petitioner ceases to do so, the danger of further abuse increases.[233]

Finally, there is the problem of how to balance the petitioner's need for safety against the respondent's need for a fair process, including that some petitioners falsely accuse respondents of committing abuse. The concern that one or both parties to a civil lawsuit might lie about what happened exists for any case and is not unique to order of protection cases.

Before considering appropriate safeguards to respondents in the order of protection context, it is important to first assess the likelihood of false accusations of abuse taking place and the harm to the respondent when that happens.

In most circumstances, a petitioner has little to gain from seeking an order of protection based on false allegations of abuse and a lot to lose. For example, if the parties are not married and have no children in common, and the petitioner seeks the basic remedies of: stay away,[234] no further contact, and stop the abuse, the only thing the petitioner might "gain" from falsely accusing the respondent is to harm the respondent's reputation.[235] To the contrary, however, survivors of

233. The court should also check for evidence of continuing abuse by the respondent of others during this period (in a new intimate partner relationship) by checking for order of protection or criminal charges against the respondent. And if that has occurred, this should be a strong factor counted against the respondent's claim that future abuse is not likely.

234. If a "stay away order" includes public areas that the respondent has a right to enter (such as a church both parties attend), then the statute can create a balancing test of the hardship on each party that takes into account the danger to the petitioner if the remedy is not granted. 750 ILL. COMP. STAT 60/214(3).

235. False allegation also has a negative impact on their employment and housing if protection order records are picked up in a standard criminal background check or credit check. It appears it does not. It can also potentially affect respondent's ability to lawfully possess a firearm. See the Federal Gun Control Act, 18 U.S.C. § 925(a)(1) (2012), which

domestic violence often turn to this civil form of protection, in contrast to a criminal action, because they do *not* want the abusive intimate partner to be harmed by a criminal action but still want to be protected from further abuse. They may fear the respondent's reaction to their pressing criminal charges. They may still love the respondent but want the respondent to stop harming them. They may be financially reliant on the respondent and thus not want the respondent to lose their income while in prison or thereafter due to the imprisonment.

It is still possible, and occasionally happens, that a petitioner might fabricate the abuse because they are jealous that their former intimate partner has moved on or otherwise angry with a former intimate partner. But this should be rare, especially when judges make clear, at the beginning of their court call, of the possibility of doing jail time for lying on the stand. Having the judge inform both parties of the laws of perjury and possibility of jail time for lying is a practice we recommend be required in the order of protection legislation.[236]

In states that allow more expansive remedies,[237] a person may have an incentive to lie that abuse has occurred, or to exaggerate the extent of the abuse, to take advantage of the favorable position they might have if the court finds that abuse has occurred.[238] Having said that, if there is insufficient evidence of the

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makes it a felony for respondents under certain protective orders to possess or receive any firearm shipped or transported in interstate or foreign commerce. There is an exemption under this statute for law enforcement officers for weapons carried on duty. So the only "gain" to the petitioner in those circumstances is causing harm to the respondent. In addition, there must have been a hearing that the respondent had an opportunity to participate in and a finding that the respondent represents a credible threat to the physical safety of the intimate partner or child.

236. Two studies have examined rates of substantiated allegations of domestic violence in the context of family law proceedings, and they find that allegations are substantiated in 63-74% of cases. Martha Shafer & Nicholas Bala, Wife Abuse, Child Custody and Access in Canada, IN THE EFFECTS OF INTIMATE PARTNER VIOLENCE ON CHILDREN 253, 259 (Robert A. Geffner, Robyn Spurling Ingelman, & Jennifer Zellner eds., 2003); and Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAMILY COURT REVIEW 283, 290 (2005). The remainder were not substantiated based on insufficient information or where there is a determination that the allegation is false.

237. For example, the remedy of exclusive possession of (but not title to) the shared residence or remedies relating to children such as temporary physical custody, sole power to make major decisions relating to the children, or imposing restrictions on the respondent's parenting time, or financial remedies such as payment of child support or spousal maintenance. All of these and additional remedies are available under the IDVA 750 ILL. COMP. STAT. ANN. 60/214(b) and by some other state statutes.

238. For example, under the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") abuse of a parent is a factor in determining the best interest of the child on how to allocate parental rights on decision making and parenting time. 750 ILL. COMP. STAT. 5/602.5(c)(13) and 5/602.7(b)(14) (West 2016). Under the Illinois Domestic Violence Act, however, if one parent has been abusive to the other parent it creates a rebuttable presumption that it is in the best interest of the child to be in the physical care of the non-abusive parent. 750 ILL. COMP. STAT. 60/214(b)(5 - 6). In addition, under the IMDMA if a parent seeks restrictions on the parenting time of the non-custodial parent, the custodial parent must show serious endangerment of the child from non-restricted parenting time. 750 ILL. COMP. STAT. ANN. 5/602.8(a) (West 2016). However, under the IDVA, there is not a

abuse, once the case is transferred to the divorce or parentage court, false allegations of abuse (to obtain exclusive possession of the home or favorable temporary custody/visitation) will likely backfire, and the court may view the petitioner who lacks corroborating evidence of the abuse alleged, as an "alienating" parent. If the court finds that the petitioner has failed to foster a good relationship between the child and the other parent, the court is likely to not only override the order of protection relating to those remedies, but may also impose restrictions on the petitioner's parenting time![239] Due to this, a petitioner would be making a very big mistake in fabricating abuse to gain a temporary advantage on these issues. Some father's rights groups have claimed that under broad based definitions of abuse (i.e. when abuse includes more than physical abuse and threats of physical abuse), if a respondent shouts at his spouse he will lose his house. But this claim of unfairness is inaccurate[240] and dismissive of the various forms of abuse, including emotional, that are very harmful and dangerous due to the danger of escalation of violence and separation assault. The claim that petitioners lie about abuse in an order of protection to gain financial leverage in the divorce or parentage case is belied by the fact that, if the parties have children in common, seeking temporary child support (if a remedy under the order of protection[241]) would not go beyond what petitioners would be entitled to under laws relevant to that. Furthermore, the temporary order for support, if beyond what the law would require in the divorce or parentage case, could also be later modified in the divorce or parentage case.

In light of the foregoing, including the fact that petitioners have little to gain from making false accusations but much to lose (going to prison for perjury), we believe that the vast majority of petitioners seeking orders of protection are

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requirement of substantial endangerment of the child to restrict the non-custodial parent's parenting time and restriction can be based on among other things when the respondent uses visitation as an opportunity to abuse or harass the petitioner or petitioner's family or household members. 750 ILL. COMP. STAT. 60/214(b)(7).

239. For example, under the IDVA, one of the factors in determining the best interests of the child in determining parental decision making and parenting time is "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." 750 ILL. COMP. STAT. 5/602.5 (c)(11), 602.7(b)(13). If judges feel that a parent is alleging abuse falsely, they will likely see that parent as an alienating parent and if they consider the alienation to be strong they may determine that unsupervised parenting time could substantially endanger the child.

240. This claim is inaccurate. First, simply shouting at your spouse would not satisfy the conduct for what is "abuse" under the IDVA. *See* 750 ILL. COMP. STAT. 60/103(1). Second, even if among the other forms of serious abuse in a specific case, there are additional preconditions to obtaining the remedy of exclusive possession of the residence, including that the court first balance the hardship to the respondent in losing possession of the residence to the hardship to the petitioner in moving to become safe and a showing of an immediate danger of further abuse. 750 ILL. COMP. STAT. 601/214(b)(2)(B). And, ownership rights to the dwelling are not affected by the remedy, with who takes title to the dwelling to be determined by the court in the divorce case and the possibility of who ends up in possession of the home being modified by the divorce court.

241. 750 ILL. COMP. STAT. 60/214(b)(12) referring to the Illinois Marriage and Dissolution of Marriage Act for how to calculate child support.

truthfully in need of an order of protection to prevent further abuse. This belief is supported by empirical evidence.[242] Having said that, there will be occasional situations where petitioners fabricate or exaggerate the abuse they allege, consequently safeguards should be in place to address this.[243]

In addition to the possibility of jail time for perjury, there are two additional safeguards we recommend be available to respondents when they have been proven to have been falsely accused of statutory abuse. First, the order of protection statute should include civil liability for the respondent's reasonable attorney's fees and court costs if the petitioner is proven to have provided material, false statements of abuse in their pleadings or court testimony, knowing the statements were not true.[244] Second, procedures should be in place to expunge or seal the public record of the petition and the ex parte order of protection, if the respondent provides evidence at the contested hearing that the allegations of abuse were false and that statutory abuse did not occur.[245]

Related to the possibility that the petitioner may file false allegations of abuse is the situation that a person who is in fact the abusive intimate partner, might race to court seeking an order of protection against the target of the abuse. They may do so as a further means of abuse or to try to make it difficult for the target of the abuse to obtain an order of protection. For this reason, we also propose that before a judge rules on any ex parte order of protection case, the clerk of the court be required to perform a computer search for any prior orders of protection or criminal charges relating to domestic violence, against the petitioner or respondent. If those searches show that the petitioner has been convicted of or charged with a domestic violence related charge in the past or has had an order of protection granted against the petitioner, this could be the basis for the judge to find the petitioner not credible and to deny the order of protection sought.

The order of protection statutes should also provide the respondent with the opportunity to rebut the claims of abuse, or of the likelihood of further abuse, as

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242. *See* comments *supra,* note 179. *But see, The Use and Abuse of Domestic Restraining Orders,* Stop Abusive and Violent Environments (Feb. 2011), http://www.saveservices.org/downloads/VAWA-Restraining-Orders, which alleged higher percentages of "unsubstantiated" claims of abuse, but their calculation included not only cases of false allegations but also cases where the petitioner did not allege any physical violence, viewing the other forms of abuse alleged as the equivalent of making a "groundless" allegation of abuse.

243. *Id.*

244. *See*, 750 ILL. COMP. STAT 60/226 which provides that allegations and denials made without reasonable cause and found to be untrue subjects the party pleading them to payment of reasonable expenses incurred thereby including reasonable attorney's fees.

245. This would be in contrast with the situation where the case was dismissed when the petitioner fails to appear on the return date since petitioners in abusive relationships are likely to receive threats if they do not drop the case and when that happens the respondent should not be rewarded with a complete clearing of the record and instead the record should simply state that the case was dropped. A petitioner also sometimes drops a case when they think obtaining the ex parte order was enough to stop the abuse or when they have difficulty returning to court, especially if they have to keep returning to court as they wait for the respondent to be served.

soon as possible after the respondent has been served, as a means to mitigate the harm from a false accusation. In Illinois, for example, the order of protection statute provides for the return date to take place three weeks after the ex parte order is granted, but with opportunity for the respondent to seek a hearing upon just two days notice to the petitioner.[246]

Another aspect to the fairness of the order of protection laws towards respondents relates to how long the order of protection (granted after the respondent is served) is initially effective, when it can be renewed, and when it will terminate. An entire article could be devoted to this topic. For our purposes, in this Article, we note that orders of protection after a contested hearing rarely run indefinitely, but are limited to a set period such as one year, and are renewable upon a showing that there is still a risk of further abuse. We believe, that after a long period of non-abuse has occurred (even when the respondent had the opportunity for such abuse) and the respondent has addressed the underlying causes for the prior pattern of abuse or physical violence as described earlier, the order of protection, and the record of the order of protection could be sealed and not available as a public record. If further abuse then occurs, the record would be re-opened.

One final issue to address is the argument that since orders of protection are merely a piece of paper and cannot stop a bullet, they are of little value in helping protect survivors of domestic violence from further abuse. If this is correct, then it might suggest that the harms from false accusations outweigh the benefits to survivors of domestic violence from obtaining the orders of protection. While it is true that an order of protection is a piece of paper that cannot stop a bullet; it is still more than just a piece of paper. For example, if an order of protection includes an order to stay away from a specific location (such as the place where the petitioner works) then once the respondent has been served with the order, if thereafter the respondent sets foot in the place of employment, the police can be immediately called and the respondent charged with the crime of violation of the stay away order.[247] This is a valuable order because without it, the respondent would need to engage in actual violence or other crimes for the police to be called and the respondent arrested. If the petitioner sees the respondent anywhere near her, she can call the police for help and have the respondent arrested for violating the stay away order *before* violence has occurred.[248] While orders of protection do not guarantee safety to a petitioner, they are a valuable protection, when combined with other safety steps, in many cases.[249] And for respondents who have a good job, or other reasons to try to avoid going to jail, once they are made aware of the order of protection and the consequences for violating it, they will have a strong incentive to comply with the order.

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246. 750 ILL. COMP. STAT. 60/224(d).

247. *See* 750 ILL. COMP. STAT. 60/223(a)(1). To the extent any other jurisdictions do not have similar legislation, then they should enact such legislation.

248. *Id.*

249. If the respondent has a long history of convictions for crimes and time in jail, would unlikely be deterred by the order of protection, and would be enraged by it, then obtaining an order of protection would likely not be the best route for the petitioner, who might need to go into hiding and move to a new state.

CONCLUSION

The dynamics of domestic violence are counterintuitive and do not follow the same patterns as other domains where petitioners seek *ex parte* emergency orders. Thus, judges sometimes fail to see that further abuse and an escalation of violence is likely to occur, (i.e. "see the wrecking ball in motion") when petitioners appear before them for ex parte orders of protection from domestic violence. Many state statutes fail to take into consideration the dynamics of domestic violence, and consequently, as illustrated in this Article, fail to adequately protect survivors of domestic violence from further abuse or an escalation of violence. But even in states with statutes that succeed in considering some of the counterintuitive dynamics of domestic violence, we found that judges have nevertheless interpreted the statutory language in ways that are more intuitive to judges based on their personal experiences, stereotypes, and biases, thereby again sometimes missing the wrecking ball in motion.

In this Article, we provided numerous examples where judges have required that the petitioner seek the order of protection very soon after the most recent, serious, act of abuse, even when this is not required in the legislation. We hypothesized that judges do this as an intuitive heuristic to determine the likelihood of further abuse, even though we noted the many reasons why a survivor of domestic violence might be unable to take swift action to obtain an order of protection after severe abuse. We also found cases where a judge denied an order of protection because the petitioner did not express that she "feared" the respondent or that she "feared" (versus "believed" or "thought") that without the order of protection, further abuse would occur. This was the case even though some survivors of domestic violence do not feel, or are reluctant to express, the *emotion* of fear, notwithstanding that the danger of further abuse existed and should have been apparent to the judge. As noted in the Article, judges sometimes require that the petitioner express "fear" even when this is not in the statutory language. We believe, this is occurring due to judges' gendered stereotypes, and, as a heuristic to determine if there is a "clear and present danger" of future violence.

Another key point raised is that it is very difficult to determine the likelihood of further abuse with the precision that many statutes seem to require. And judges lack the time and expertise to perform a thorough, multi-factor assessment of the likelihood of continued abuse at the ex parte hearing stage. Like all people, judges rely upon decision-making shortcuts such as heuristics and simple reason-based decision criteria when they are faced with such difficult judgments, but when they fail to understand the dynamics of domestic violence the criteria they use in these shortcuts are inappropriate.

We thus propose legislation that lays out easier to apply criteria for whether ex parte orders of protection should be granted in domestic violence situations that take into account the counter-intuitive realities of domestic violence. We propose a two-step decision-making process for the initial ex parte order of protection that we believe will enable judges to overcome the cognitive barriers noted earlier and enable them to better protect survivors of domestic violence from future, escalating abuse. We also propose numerous safeguards to respondents, some of which are designed to deter petitioners from making false

allegations in the first place, and other safeguards that would come into play after a respondent has been falsely accused of domestic violence or after the respondent has made changes in attitudes and behavior so that further abuse is no longer likely. We further recommend domestic violence training that enables judges to better understand and empathize with survivors of domestic violence. We also recommend the development of a "sliding windows" paradigm test for judges to use to determine the extent to which they are biased against domestic violence realities in their decisions as part of the training to overcome such biases.

While it is inevitable that judges will sometimes get it wrong (granting an order of protection when abuse has not occurred or will not re-occur; or denying an order of protection when abuse has occurred and will occur again), we believe that the reforms we propose better balance what is at stake for the petitioner and the respondent from a wrong decision and make it more likely that judges will make the right decision.