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The False Promise of Custody in Domestic Violence Protection Orders

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THE FALSE PROMISE OF CUSTODY IN DOMESTIC VIOLENCE PROTECTION ORDERS

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INTRODUCTION

Across the country, survivors of domestic violence are leaving court with what often amounts to false assurances as well as illusory custody and parenting time orders. For many survivors, these rulings, which are part and parcel of domestic violence protection rulings, are the only court orders they will obtain regarding the care of their children. These rulings set forth a vital structure for how children will be raised and create concrete expectations for parents and children alike. Increasingly, however, it is becoming evident that these parenting and custody orders are challenging, if not impossible, to enforce, leaving survivors with false hope and ill-placed reliance.

In all fifty states and the District of Columbia, victims of domestic violence can seek civil protection orders[1] that direct the abusive party

1. Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1042–43, 1093–98 (2014) ("By 1993, each state had enacted a protection order statute."); *Domestic Violence*, 10 GEO. J. GENDER & L. 369, 409 (Sarah Lorraine Solon ed. 2009) ("All fifty states and the District of Columbia permit Domestic Violence Victims to petition the court for civil protection orders.").

to refrain from further violence[2] and adjudicate custody and visitation.[3] If parties share a child, the court may resolve issues of physical and legal custody for the duration of the order in an expedited hearing.[4] Because domestic relations cases that adjudicate long-term cus-

2. *See, e.g.*, ALA. CODE § 30-5-7(b)(1) (2011) (stating that a court may prohibit a defendant from abusing the plaintiff, children, or any person indicated in the civil protection order); MD. CODE ANN., FAM. LAW § 4-506(d)(1) (LexisNexis 2012) (permitting a court to "order the respondent to refrain from abusing or threatening to abuse any person eligible for relief"); OHIO REV. CODE ANN. § 3113.31(E)(1)(a) (LexisNexis 2015) (stating that a court may grant an order that "directs the respondent to refrain from abusing. . . family or household members"); TEX. FAM. CODE ANN. § 85.022(b)(5) (West 2014) (noting that with the issuance of a protective order, a court may order the defendant to refrain from committing acts of family violence, which include acts causing physical injury, against the plaintiff); VA. CODE ANN. § 16.1-279.1(A)(2) (2010) (stating that when the court issues a protection order, the order may prohibit the respondent from committing acts of abuse or acts that may otherwise injure petitioner).

3. ALA. CODE § 30-5-7(c) (2011); ALASKA STAT. § 18.66.100(c)(9) (2014); ARK. CODE ANN. § 9-15-205(a)(3)(A) (2009); CAL. FAM. CODE § 6340(a) (West 2013); COLO. REV. STAT. § 13-14-105(1)(e) (2013); CONN. GEN. STAT. § 46b-15(b) (2015); DEL. CODE ANN. tit. 10, § 1045(a)(5) (2013); D.C. CODE §§ 16-1005(c)(6)–(7) (2013); FLA. STAT. § 741.30(6)(a)(3) (2015); GA. CODE ANN. § 19-13-4(a)(4) (2003); HAW. REV. STAT. § 586-5.5(a) (2006); 750 ILL. COMP. STAT. 60/214(b)(5)–(7) (2010); IOWA CODE § 236.5(1)(b)(5) (2016); KAN. STAT. ANN. § 60-3107(a)(4) (West 2014); LA. REV. STAT. ANN. § 46:2136(A)(3) (2015); ME. REV. STAT. tit. 19-A, § 4007(1)(G) (2015); MD. CODE ANN., FAM. LAW §§ 4-506(d)(7)–(8) (2012); MASS. GEN. LAWS ch. 209A, § 3(d) (2014); MINN. STAT. § 518B.01(6)(a)(4) (2014); MISS. CODE ANN. § 93-21-15(2)(a)(iv) (2013); MO. REV. STAT. §§ 455.050(3)(1)–(2) (2013); NEV. REV. STAT. § 33.030 (2013); N.H. REV. STAT. ANN. §§ 173-B:5(I)(b)(5)–(6) (2014); N.J. STAT. ANN. § 2C:25-29 (b)(3), (11) (West 2015); N.M. STAT. ANN. § 40-13-5(A)(2) (2013); N.Y. FAM. COURT LAW § 842 (McKinney 2010); N.C. GEN. STAT. §§ 50B-3(a)(4), (1) (20015); N.D. CENT. CODE § 14-07.1-02(4)(c) (2009); OHIO REV. CODE ANN. § 3113.31(E)(1)(d) (LexisNexis 2015); OR. REV. STAT. §§ 107.718(1)(a), (3) (2015); 23 PA. CONS. STAT. § 6108(a)(4) (2006); S.C. CODE ANN. § 20-4-60(C)(1) (2014); S.D. CODIFIED LAWS § 25-10-5.3 (2013); TENN. CODE ANN. § 36-3-606(a)(6) (2014); TEX. FAM. CODE ANN. § 85.021(3); UTAH CODE ANN. §§ 78B-7-106(2)(f), (3)(b) (LexisNexis 2012); VT. STAT. ANN. tit. 15, §§ 1103(c)(2)(C)–(D) (2010); VA. CODE ANN. § 16.1-279.1(A)(8) (2014); WASH. REV. CODE § 26.50.060(1)(d) (2014); W. VA. CODE § 48-27-503(3) (2014); WYO. STAT. ANN. § 35-21-105(b)(i) (2013). In some states, courts are authorized to adjudicate only the issue of custody, not parenting time. *See* IDAHO CODE ANN. § 39-6306(1)(a) (2011); KY. REV. STAT. ANN. § 403.750(1)(f) (West 2015); NEB. REV. STAT. § 42-924(1)(f) (2008); R.I. GEN. LAWS § 15-15-3(a)(3) (2013).

4. *See, e.g.*, FLA. STAT. § 741.30(5)(c) (permitting the court to order a full hearing within fifteen days of the issuance of an ex parte temporary injunction); MASS. GEN. LAWS ch. 209A, § 4 (stating that when a court grants a temporary order of protection to a petitioner, the court must hold a full hearing within ten days); OHIO REV. CODE ANN. § 3113.31(D)(2)(a) (noting that if the court grants a protection order to the petitioner during an ex parte hearing, the court must hold a full hearing within seven days); W. VA. CODE § 48-27-402(e)(1) (stating that if the magistrate issues an order, the family court must hold a hearing "on the matter" within ten days). One study concluded that almost 57% of ex parte plaintiffs in protection order cases share a child in common. N.C. CRIMINAL JUSTICE ANALYSIS CTR., N.C. GOVERNOR'S CRIME COMM'N, SYSTEM STATS: DISPOSITIONAL OUTCOMES OF DOMESTIC VIOLENCE EX-PARTE AND DOMESTIC VIOLENCE PROTECTIVE ORDERS 4 (2002), https://www.nccrimecontrol.org/div/GCC/systemstats/winter02.pdf. Another study concluded that rural women were more likely than their urban counterparts to share children with their abuser. T.K. LOGAN ET AL., THE KENTUCKY CIVIL PROTECTIVE ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTEC-

tody and visitation are time-intensive, and because many parents with children never even seek court intervention to resolve custody, this expedited relief can be essential to the safety of domestic violence victims and to the well-being and stability of children during this chaotic time for a family.[5]

In the best-case scenario, a party subject to a protection order will comply with the order, but ample evidence has shown that protection orders are frequently violated[6] despite the hopes of the petitioner and the court. Protection orders can be enforced in a variety of ways. Statutes across the country characterize the violation of a protection order as a misdemeanor.[7] Orders can also be enforced through criminal or civil contempt actions.[8] When the violation of the order involves violence or nonpayment of a monetary obligation, this enforcement system can be effective. Government prosecutors may

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TIVE ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COSTS 86 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf; Nikki Hawkins, *Perspectives on Civil Protective Orders in Domestic Violence Cases: The Rural and Urban Divide*, OFF. JUST. PROGRAMS: NAT'L INST. JUST. (2010), http://www.nij.gov/journals/266/pages/perspectives.aspx. . . States authorize protection orders that last for varying lengths of time. *See* Stoever, *supra* note 1, at 1046–50, 1049 fig.1 (analyzing data illustrating that the average duration of a protection order is one year).

5. *See* Suzanne Reynolds & Ralph Peeples, *When Petitioners Seek Custody in Domestic Violence Court and Why We Should Take Them Seriously*, 47 WAKE FOREST L. REV. 935, 940–50 (2012) (based on empirical data noting that "many families experiencing violence and custody issues never made it to family court; they were in domestic violence court instead").

6. *See, e.g.*, ANDREW R. KLEIN, U.S. DEP'T OF JUSTICE, NIJ SPECIAL REPORT NO. 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 57 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf (finding varying violation rates for protection orders—"ranging from 23 percent over two years, 35 percent within six months, to 60 percent within twelve months, and in between at 48.8 percent within two years"); TK LOGAN ET AL., NAT'L INST. OF JUSTICE, GRANT NO. 2005WGBX0008, THE KENTUCKY CIVIL PROTECTION ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTION ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COST 97 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf (concluding that 50% of protection orders were violated); Melissa Jeltsen, *These Abusers Aren't Allowed To Own Guns. So Why Aren't States Removing Them?*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/10/14/domestic-violence-guns-restraining-orders_n_5982774.html (last updated Oct. 24, 2014, 5:59 PM) (citing Brian H. Spitzberg, *The Tactical Topography of Stalking Victimization and Management*, TRAUMA, VIOLENCE & ABUSE 261–288 (2002)) (revealing research indicating that "restraining orders are violated around 40 percent of the time").

7. *See infra* note 31 and accompanying text (e.g., Alabama, Arkansas, Delaware and Minnesota).

8. *See, e.g.*, ALA. CODE § 30-5A-3 (2010) *amended & republished as* § 13A-6-142 (2011); DEL. CODE ANN. tit. 10, § 1046; FLA. STAT. § 741.30(9)(a); GA. CODE ANN. § 19-13-6 (2010); 750 ILL. COMP. STAT. 60/223 (2014); LA. REV. STAT. ANN. § 46:2137; N.M. STAT. ANN. § 40-13-5(B) (2008); TENN. CODE ANN. § 36-3-606(a)(8). All of these statutes set forth both criminal and civil contempt enforcement remedies. Civil and criminal contempt actions can also be brought absent statutory authorization as equitable actions. *See* Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 351-53 (2000) (describing various categories of contempt actions and their use as actions in equity).

enforce orders criminally when the respondent violates the order by, for example, assaulting or threatening the petitioner, especially when the violation can be corroborated.[9] The enforcement system also functions somewhat effectively when a party fails to meet a concrete obligation, such as making a payment or surrendering documents. After this type of breach, an aggrieved party can bring a civil contempt action to coerce compliance with that obligation.

However, enforcement is far more problematic when the violation involves custody of a child or a visitation provision of a protection order.[10] Legally, the actors who hold the power to criminally enforce the no assault and no harassment provisions of the order also have the power to enforce the domestic relations provisions of the order. However, in practice, the power to enforce those remedies through criminal actions is often declined or elusive, leaving the provisions themselves with minimal significance.[11] Protected parties, consequently, have been misled into thinking that they have been granted something of value.

Civil enforcement is similarly problematic in this context. Civil contempt cases often do not offer remedies that can compensate the aggrieved party for her[12] losses. At the same time, those remedies that

9. *See, e.g.*, State v. Williams, 2012-Ohio-3384, at ¶ 3 (Ct. App.) (involving the prosecution for violation of a protection order based on a felony assault); State v. Weaver, 2002 S.D. 76, ¶ 3, 648 N.W.2d 355, 357 (per curiam) (involving a defendant who violated a protection order by assaulting the victim). Statistics supporting this claim are unavailable because jurisdictions fail to keep records of the type of allegations related to enforcement actions. In this Article, I do not discuss the willingness of the police to enforce protection orders, which is notoriously problematic. *See, e.g.*, Gonzales v. City of Castle Rock, 366 F.3d 1093, 1097–98 (10th Cir. 2004) (considering a case in which the police failed to enforce a protection order against a father who kidnapped and later murdered his children), *rev'd*, 545 U.S. 748 (2005). Instead, I discuss only the prosecution and its willingness to enforce a protection order for a violent violation.

10. Once again, due to lack of record keeping on this issue, data are unavailable to support this claim. However, anecdotal evidence gathered from practitioners across the country supports the claim that prosecutors' offices are far more likely to pursue violent breaches of protection orders and nonpayment of child support within protection orders than parenting time breaches. *See infra* notes 92–96 and accompanying text (discussing how prosecutors are reluctant to take on violations of protective orders).

11. *See Gonzales*, 366 F.3d at 1109 (stating that the failure to provide a holder of a protection order the right to enforcement "render[s] domestic abuse restraining orders utterly valueless").

12. In this Article, I generally refer to those who receive protection orders by the feminine pronoun and the respondents by a masculine pronoun. This choice is not intended to suggest that all recipients of protection orders—or recipients of sole legal custody—are women and that all respondents or those who breach court orders granting custody and visitation are men. These gender pronouns merely align with the statistics regarding protection orders and allow for more consistency in describing scenarios. *See* MATTHEW J. BREIDING ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, INTIMATE PARTNER VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS 1 (2015), http://www.cdc.gov/violenceprevention/pdf/intimatepartnerviolence.pdf (finding that one in five women (about 29 million U.S. women)

are available may fail to adequately convey the seriousness of the breach and fail to deter the contemnor from continuing violations.

This Article reveals the disconnect between the power and the will to enforce the custody and parenting time provisions of protection orders through criminal mechanisms, and it explores the further infirmity of civil enforcement by illustrating the shortcomings of available relief. Together, these barriers to effective enforcement threaten to render this court-granted protection meaningless and dangerously misleading. The barriers also undermine the many years of advocacy invested to secure these protections in the first place—reforms aimed at protecting victims and children from abusive parents.[13]

These challenges to enforceability have been previously unrecognized and unanalyzed. Scholarship has been devoted to the general value of protection orders in arresting violence in intimate relationships.[14] Others have considered the bewildering landscape of civil and

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and one in seven men (about 16 million U.S. men) will experience intimate partner violence at some point in their lifetime); MATTHEW J. BREIDING ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011, at 2 (2011), http://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf ("22.3% of women and 14.0% of men [have experienced intimate partner violence]. . . . [W]omen, in particular . . . are heavily impacted by [sexual violence, stalking, and intimate partner violence] over their lifetime.").

13. *See* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1064–71 (1991) (analyzing the law's treatment of domestic violence as it relates to custody and calling for courts to give weight to domestic violence in analyzing the "best interest of the child" standard); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 AM. U.J. GENDER SOC. POL'Y & L. 657, 661 (2003) (arguing that "[c]hildren's safety and well-being are often just as much at stake in litigation for civil protection orders" as in child welfare cases on which more attention had been focused); Reynolds & Peeples, *supra* note 5, at 935–40 (discussing judges' historic resistance to handling custody issues in the context of domestic violence and the advocacy efforts to overcome that resistance).

14. *See, e.g.*, Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1490, 1504–06 (2008) (explaining how civil protection orders can be an effective tool both when a victim wants complete separation from her partner and when a victim wishes to tailor the order to preserve the relationship); Kellie K. Player, *Expanding Protective Order Coverage*, 43 ST. MARY'S L.J. 579, 589–91 (2012) (stating that protection orders remain an effective tool both for preventing further domestic abuse as well as signaling to society at large that that violence is culturally and morally unacceptable); Stoever, *supra* note 1, at 1021–22 (arguing that protection orders are so effective that victims of domestic violence should be entitled to protection orders that last for the duration of the victim's life). *But see, e.g.*, Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* Deshaney*?*, 65 N.Y.U. L. REV. 1280, 1293 (1990) (explaining how protection orders can be ineffective because law enforcement inconsistently enforces them, and they can often serve to further agitate the abuser into hunting down and hurting his victim); Jenny Woodson, *Sanctioned Indifference: Addressing Domestic Violence in the Courts and Beyond*, 10 GEO. J. GENDER & L. 1037, 1041

criminal contempt enforcement generally.[15] Although these are important areas for scholarly analysis, these articles have left unexplored the practical and legal barriers to enforcing the custody and parenting time provisions of protection orders that threaten to render these provisions meaningless. This Article analyzes this phenomenon and explores ways to bring together the will and the power to enforce all aspects of protection orders criminally and to shore up the relief available through civil contempt so that the family law provisions of protection orders are more than illusory. In keeping with a recent thread of domestic violence scholarship, this Article focuses on the ways by which the hard-fought system reforms now fail to offer protection to survivors in previously unforeseeable ways.[16] However, this Article pushes further by seeking to explore and resolve the lack of reliable enforcement remedies in this area in a way that not only keeps survivors safe but contemplates the important interests of children at issue and the enhanced enforceability of civil injunctions generally.

In Part II, this Article presents the legal and practical context of this issue. The Article analyzes the three avenues available to enforce family law remedies in protection orders, which include criminal prosecution as well as criminal and civil contempt. Against that backdrop,

(2009) (stating that civil protection orders can be ineffective because they only minimally increase the potential for arrest and often serve to further infuriate the abuser).

15. *See, e.g.*, Robert H. Whorf, *The Boundaries of Contempt: Must the Court's Power Yield to Due Process?*, 46 R.I.B.J. 9, 10, 49–50 (1998) (arguing that criminal contempt can be an important and necessary tool for courts but noting that it becomes problematic when penalties for criminal contempt are not statutorily limited and can lead to overly severe penalties); Jacob R. Fiddelman, *Protecting the Liberty of Indigent Civil Contemnors in the Absence of a Right to Appointed Counsel*, 46 COLUM. J.L. & SOC. PROBS. 431, 432, 453 (2013) (arguing that civil contempt can be problematic because indigent contemnors are not entitled to publicly funded counsel); Jennifer Fleischer, *In Defense of Civil Contempt Sanctions*, 36 COLUM. J.L. & SOC. PROBS. 35, 38–39 (2002) (demonstrating the multiple opinions that exist within scholarship because contempt remedies provide an effective tool for judges while simultaneously granting them too much power and not providing civil contemnors with enough procedural protections); Paul A. Grote, Note, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1261–63, 1274 (2011) (arguing that the law surrounding contempt remains overly complicated and that many individuals do not realize that they the risk being found in contempt of court even outside of a courtroom).

16. *See, e.g.*, LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 1 (2008) (detailing the achievements of the battered women's movement and the current unforeseen challenges presented); Hannah Brenner, *Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 327–28 (2013) (arguing that the criminal approach to domestic violence fails to adequately respond to all of a particular victim's needs or to the needs of all victims); Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 452–54 (2015) (critiquing the ineffective and insufficient "one size fits all" model of criminalization that was initially advocated by domestic violence advocates).

the Article looks to a Washington, D.C. protection order action as a case study that illustrates the unpredictability of custody and parenting time relief in protection orders.[17]

Part III seeks to locate the nexus of power and the will to enforce the domestic relations provisions of protection orders criminally by looking specifically at the court, the prosecution, and protected parties. This Part considers the implications that the state actors, who hold truly reliable power to enforce the family law remedies of the order criminally, have either little incentive or are severely curtailed in their ability. In this Part, the Article also looks at civil contempt actions, considering why the power to enforce domestic relations provisions of protection orders through civil contempt often results in foreclosed or ineffective remedies that fail to redress the violation. Finally, this Part more broadly analyzes the enforcement, considering whether the power to enforce other civil injunctions through criminal mechanisms is equally elusive and whether civil contempt remedies are similarly largely unresponsive. This Part analyzes what makes the enforcement of these provisions particularly complex and worthy of consideration.[18]

Finally, in Part IV, the Article considers legal, procedural, and structural mechanisms that could bring together the power and the will to enforce domestic relations provisions of protection orders through criminal contempt. This Part also considers how to improve existing forms of civil relief to make all aspects of protection orders and domestic relations orders more meaningful and to render the court's promise of resolution real and concrete. The legal and structural reforms analyzed in this Part seek to fortify the enforceability of parenting time and custody relief in protection orders, but they also have far-reaching implications for domestic violence, domestic relations, and civil injunction enforcement generally.[19]

II. Legal and Factual Context

Three legal mechanisms permit enforcement of protection orders, which provide different relief and pose varying challenges for aggrieved parties. This legal structure comes to life *infra* through a case litigated in the District of Columbia, which illustrates the gaps in enforceability that arise when the legal rules and prosecutorial discretion are applied in the context of an actual case.

17. *See infra* notes 34–66 and accompanying text.
18. *See infra* notes 67–174 and accompanying text.
19. *See infra* notes 175–222 and accompanying text.

A. Three Avenues To Enforce Protection Orders

Criminal and civil contempt are two enforcement mechanisms that the U.S. Supreme Court first distinguished in the early twentieth century when it noted that criminal contempt cases are "prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders."[20] Criminal contempt punishes a contemnor for violating a court order. For example, if a father violates a custody provision of a civil protection order by enrolling a child in a new school when the mother has been granted sole legal custody, the mother could file for criminal contempt to punish the father for violating the court order. A criminal contempt action is designed to vindicate the court's authority.[21] The threat of criminal contempt is intended to deter future violations.[22] To prevail in a criminal contempt action, the prosecutor must prove beyond a reasonable doubt that the contemnor willfully violated a court order.[23] If proven, the contemnor may face jail time, a fine, or both.[24] The distinction between criminal and civil contempt hinges on the remedy sought and the purpose of the suit.[25]

A civil contempt action, on the other hand, is intended to protect, enforce, and administer the rights and remedies that courts have set forth.[26] Civil contempt remedies seek to bring the contemnor into compliance and to compensate the aggrieved party rather than to pun-

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20. Bessette v. W.B. Conkey Co., 194 U.S. 324, 328 (1904) (quoting *In re* Nevitt, 117 F. 448, 458 (8th Cir. 1902)).

21. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911); United States v. Schine, 260 F.2d 552, 557 (2d Cir. 1958).

22. LOGAN ET AL., *supra* note 6, at 156 (stating that, based on a broad study of civil protection order enforcement, the effectiveness of the order depends on the respondent's fear of enforcement).

23. Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 353–54 (2000) ("[Criminal contempt] requires a showing of willful disobedience of the court order.").

24. *Id.* at 353; *see, e.g.*, LA. REV. STAT. ANN. § 46:2137(A) (2014) ("Upon violation of a . . . protective order, . . . the court may hold the defendant in contempt of court and punish the defendant by imprisonment in the parish jail . . . or [impose] a fine."); MD. CODE ANN., FAM. LAW § 4-508(a)(2) (LexisNexis 2012) (stating that if an individual violates a civil protective order, the violation may result in imprisonment or require the payment of fines); MINN. STAT. § 518B.01(f) (2014) (stating that if there has been a violation of a civil protective order, the court may require the respondent to pay fines issued as a bond, and if the respondent does not comply, then the court may place the respondent in jail).

25. *In re* Stewart, 571 F.2d 958, 963 (5th Cir. 1978) (reasoning that the purpose of relief is determinative of the nature of contempt proceeding as criminal or civil); *In re* Marini, 28 B.R. 262, 265 (Bankr. E.D.N.Y. 1983) (distinguishing the two types of the contempt by analyzing whether they seek to effectuate collection or uphold the court's dignity).

26. *In re Stewart*, 571 F.2d at 963.

ish for past violations.[27] So, for example, if a mother were required by a protection order to provide the petitioner-father with copies of birth certificates and subsequently failed to do so, the father might pursue a civil contempt suit to coerce the mother into compliance. To prevail in a civil contempt action, the plaintiff must prove the breach by clear and convincing evidence.[28] A contemnor, once convicted, can be sentenced to jail time just like a criminal contempt contemnor.[29] However, in a civil contempt case, the contemnor may be detained in jail only until he comes into compliance, or, as courts have explained: "he carries the keys to his prison in his own pocket."[30]

Finally, all jurisdictions have created a separate statutory crime for the violation of a protection order, constituting the third avenue by which to enforce a protection order.[31] In Mississippi, for example, a statutory provision enables the government to bring a misdemeanor prosecution for violation of the order.[32] Like any ordinary criminal case, the victim has a limited role in the prosecution and no right to bring the action or to determine whether it is pursued.[33]

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27. Morgan v. Barry, 596 F. Supp. 897, 899 (D.C. 1984) (reasoning that civil contempt exists as a remedial sanction intended to coerce compliance with a court order or to compensate for damages sustained as a result of noncompliance.); *In re Marini*, 28 B.R. at 265 (citing the common law distinction between types of contempt actions that seek to impose a fine to uphold the court's authority and those that seek to effectuate the judgment).

28. *E.g.*, ME. R. CIV. P. 66(d)(2)(D) (noting that a party seeking a finding of contempt and a remedial sanction must show, by clear and convincing evidence, that the alleged contemnor failed or refused to comply with a court order and presently has the ability to comply with that order); MD. CODE ANN. R. SPEC. P. § 15-207 (permitting the court to make a finding of civil contempt if the petitioner proves the matter by clear and convincing evidence).

29. Rawlings v. Rawlings, 766 A.2d 98, 116 (Md. 2001) (holding that a contemnor may be incarcerated for civil contempt to coerce compliance but only if he has the present ability to purge).

30. *See, e.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911) (quoting *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902)).

31. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1667 (asserting that, as of 2002, all fifty states and Washington, D.C. had enacted statutes creating a separate statutory crime of violating a protection order); *see, e.g.*, ALA. CODE § 13A-6-142(a) (2015) (stating that violating a protection order can be a Class A misdemeanor); ARK. CODE ANN. § 9-15-207(b)(1) (2013) (stating that violating a protection order can be a Class A misdemeanor); DEL. CODE ANN. tit. 10, §§ 1046(h)–(i) (2013) (stating that violating a protection order can be a Class A misdemeanor); MINN. STAT. § 518B.01(14)(b) (2015) (stating that violating a protection order can be prosecuted as a misdemeanor).

32. MISS. CODE ANN. § 93-21-21(1) (2014).

33. This Article will not methodically analyze the locus of power and will to enforce the provisions of a protection order through a misdemeanor prosecution because only the government holds that power. The complications involving the deployment of that power are analogous to the government's prosecution for criminal contempt.

B. The Problem in Context: The Washington, D.C. Case of Watford-Cunningham v. Cunningham

The case of *Watford-Cunningham v. Cunningham*, which was litigated in the District of Columbia, brings to life the problem identified and interrogated in this Article. In her complaint for a protection order, Mrs. Cunningham alleged that her husband held her at gunpoint in their bedroom for almost ninety minutes, chambering a round into the barrel of the gun as he pressed it against her head.[34] She further alleged that, earlier that same year, he pinned her against a wall with his forearm.[35] She also reported that when she was at the hospital with her sick child, Mr. Cunningham threatened to kill her.[36]

Mrs. Cunningham sought a protection order in Washington, D.C. that directed Mr. Cunningham to not abuse her and to enroll in and complete a counseling program for domestic violence.[37] Because one of their children was ill and needed a sterile environment, Mrs. Cunningham could not take the children to a shelter despite feeling compelled to do so based on her fear of Mr. Cunningham. Therefore, she asked the court to place the children with their father until she had permanent, safe housing.[38]

The parties reached a settlement. Mr. Cunningham agreed not to assault his wife and to enroll in a counseling program.[39] He agreed to share joint legal and physical custody of the children with Mrs. Cunningham,[40] and the children would live with Mr. Cunningham for the

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34. Petition & Affidavit for Civil Protection Order at 1, Watford-Cunningham v. Cunningham (D.C. Sup. Ct. 2011) (No. 2011 CPO 0809) [hereinafter *Watford-Cunningham* Petition].

35. *Id.*

36. Supplemental Petition & Affidavit at 1, *Watford-Cunningham* (No. 2011 CPO 000809).

37. *Id.* at 2–3.

38. *Cf. id.* (requesting joint legal and physical custody).

39. Order of Protection at 1–3, *Watford-Cunningham* (No. 2011 CPO 000809).

40. Physical custody determines where a child will live, and legal custody determines who will make vital parenting decisions about that child. *E.g.*, D.C. CODE §§ 16-914(b)(i)–(ii) (2001) ("'legal custody' means legal responsibility for the child. . . . 'physical custody' means a child's living arrangements."); MASS. GEN. LAWS ch. 208, § 31 (2007) ("Sole legal custody" means "one parent shall have the right and responsibility to make major decisions regarding the child's welfare," and "Sole physical custody" means "a child shall reside with and be under the supervision of one parent"). This represents a somewhat unusual resolution of custody in a protection order case. In many jurisdictions, there is a presumption against joint custody when there is evidence of domestic violence. *See, e.g.*, ALA. CODE § 30-3-131 (2011) (stating that when a court makes a determination that there has been incidents of domestic violence, this raises a rebuttable presumption "that it is detrimental to the child and not in the best interest of the child to be placed in ." the custody of the perpetrator); IDAHO CODE ANN. § 32-717B(5) (2006) ("There shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence . . . . "); LA. REV. STAT. ANN. § 9:364(A) (2008) ("There is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children.").

first six months of the year-long order.[41] Under the order, Mr. Cunningham was required to produce the children for visitation with Mrs. Cunningham twice weekly for up to fourteen hours each week (for seven hours on Tuesdays and seven hours on Sundays).[42] The parties set a court hearing for six months later to reassess custody.[43]

The visits did not go as planned. Six months later, Mrs. Cunningham testified that her husband had failed to produce the children for visitation on any Sunday, resulting in twenty-six violations of the court order.[44] In response, the judge reminded Mr. Cunningham that the order was valid:

> it is my obligation to enforce an Order—a valid Order of this Court as written. And what is—what is written down in this Order is that she'll have visitation on Sunday[s] . . . . [T]he Order is what it is and—and he's responsible for making the . . . children available there at that time.[45]

After this warning, the judge asked if Mr. Cunningham would be able to produce the children the following Sunday.[46] Mr. Cunningham's counsel responded that Mr. Cunningham did not intend to produce the children for visitation.[47] In the face of this refusal, the judge responded: "All right, well, then I will entertain a motion for contempt."[48] That day, Mrs. Cunningham filed a motion for criminal contempt.[49]

Under D.C. law, a party may pursue criminal contempt of a protection order only through a public prosecutor or a private, court-appointed prosecutor.[50] After reviewing the motion, the prosecutor's office declined to prosecute; they also did not initiate a misdemeanor prosecution.[51] The judge did not, himself, initiate contempt proceed-

41. *See* Order of Protection, *supra* note 39, at 1–3.

42. *Id.* at 2.

43. *Id.*

44. Motion to Adjudicate Criminal Contempt, *Watford-Cunningham* (2011 CPO 000809); *see also* Transcript of Hearing at 3, *Watford-Cunningham* (2011 CPO 000809) [hereinafter September Transcript].

45. September Transcript, *supra* note 44, at 9.

46. *Id.*

47. *Id.* at 10.

48. *Id.*

49. Motion to Adjudicate Criminal Contempt, *supra* note 44. In the District of Columbia, petitioners are empowered to file their own motions for criminal contempt seeking a fine or jail time. However, petitioners may not proceed on their own but must rely on the government to prosecute the case. *See infra* notes 100–02 and accompanying text (discussing several cases which the court has held that a private right of action was permissible).

50. *In re* Robertson, 19 A.3d 751, 758 n.13, 759 & n.14 (D.C. 2011) (citing D.C. CODE § 23-101 (2001); SUPER. CT. DOM. V. R. 12(d)).

51. Transcript of Hearing at 3, Watford-Cunningham v. Cunningham (D.C. Sup. Ct. 2011) (2011 CPO 809) [hereinafter December Transcript].

ings, which fully foreclosed Mrs. Cunningham's use of the criminal system as an enforcement mechanism. Accordingly, Mrs. Cunningham filed for civil contempt.[52] At the hearing on the civil contempt motion, the judge asked Mrs. Cunningham if she had seen her children for visitation since they had last been in court.[53] She informed the court that she had approximately six Sunday visitations since she had filed the initial motion for criminal contempt.[54] In response, the judge denied her motion because Mr. Cunningham was currently in compliance.[55] Mrs. Cunningham was baffled and dismayed. She asked for increased visitation moving forward to compensate her for the more than 180 hours she had lost during the months Mr. Cunningham refused to deliver the children for visitation.[56] The judge asserted that the remedy she sought was inappropriate given that the purpose of civil contempt is to compel current compliance. The judge explained that because Mr. Cunningham was now in compliance, the judge was not "empowered to do anything in terms of the Civil Contempt Motion."[57] He refused to provide any compensatory visitation.[58]

According to allegations in the pleadings, Mr. Cunningham continued to violate the court order after that hearing. Mrs. Cunningham again filed for civil contempt, alleging that Mr. Cunningham violated the joint legal custody provisions of the protection order by deciding to enroll the children in schools without involving her in the decision and by failing to provide her with access or documentation related to the schools.[59] She also alleged that he had unilaterally sought and altered the children's medical care—even for their ill child.[60] Finally, she alleged that he had violated a provision of the order that required him to facilitate phone calls between Mrs. Cunningham and the children on more than a dozen occasions in a one-month period.[61] Again, this motion went nowhere. The court failed to ever hear arguments. Ultimately, with no resolution in the Washington, D.C. courts, violations of the order, and after many months of very limited access to her four young children, Mrs. Cunningham filed for custody in a different

52. *See* Motion to Adjudicate Civil Contempt, *Watford-Cunningham* (2011 CPO 809).
53. December Transcript, *supra* note 51, at 17.
54. *Id.*
55. *Id.* at 19.
56. *See id.* at 17.
57. *Id.* at 17–18.
58. *Id.* at 19.
59. Motion to Adjudicate Civil Contempt at 78, Watford-Cunningham v. Cunningham (D.C. Sup. Ct. 2011) (2011 CPO 809).
60. *Id.*
61. *Id.*

jurisdiction where the judge granted her sole legal and physical custody.

Mrs. Cunningham's story captures elements of court experiences shared by sizeable number of women seeking protection for themselves and their children. As in *Watford-Cunningham*, protection orders are subject to frequent violations,[62] and unlawfully withholding children from to domestic violence victims is a well-documented tactic of abuse and control exercised by abusive partners.[63] These survivors find very little solace in court action. The custody arrangements they obtain in court seem to exist on paper only—barely recognized by the courts.

What are the consequences of this type of breach and the subsequent lack of enforcement? When a party violates the custody or visitation provisions of a protection order, the court's authority is compromised, and the rights of the party to whom the remedy was granted have been denied. For the custody and parenting time provisions to have value and for them to create tenable custodial arrangements, their breaches must have consequences. If a petitioner files a valid motion to adjudicate criminal contempt that is later dismissed for want of prosecution, the parent who has violated the order not only escapes prosecution but may reasonably take away the message that the legal system fails to take seriously both the violation and the order.[64] In the end, pursuing this type of remedy may result in em-

62. *See supra* note 6 and accompanying text (discussing how protection orders are frequently violated).

63. *See* Mary Becker, *Access to Justice for Battered Women*, 12 WASH. U. J.L. & POL'Y 63, 64, 89–90 (2003) (explaining how batterers use custody and visitation rights to turn their children against the spouse who is the victim of domestic battery, making her look like the less competent parent); Nina W. Tarr, *The Cost to Children When Batterers Misuse Order for Protection Statutes in Child Custody Cases*, 13 S. CAL. REV. L. & WOMEN'S STUD. 35, 43–48 (2003) (citing a situation in which a batterer made the custody hearing so confusing that the judge denied both parties' requests for sole custody of their children); Lundy Bancroft, *Understanding the Batterer in Custody and Visitation Disputes*, LUNDY BANCROFT (1998), http://www.lundybancroft.com/articles/understanding-the-batterer-in-custody-and-visitation-disputes (stating that because batterers are manipulative, they can normally earn investigators' sympathies and coerce their children to testify on their behalves).

64. *See* PETER FINN & SARAH COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 2, 49 (1990), https://www.ncjrs.gov/pdffiles1/Digitization/123263NCJRS.pdf ("[T]he effectiveness of civil protective orders depends largely on their enforceability . . . . Offenders may routinely violate orders, if they believe there is no real risk of being arrested."); U.S. DEP'T OF JUSTICE, LEGAL SERIES BULLETIN #4: ENFORCEMENT OF PROTECTIVE ORDERS 1 (2002), https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin4/ncj189190.pdf ("[Protection] orders are effective only when the restrained party is convinced the order will be enforced. Unequivocal, standardized enforcement of court orders is imperative if protective orders are to be taken seriously by the offenders they attempt to restrain."); *see also* Brenner, *supra* note 16, at 309 (noting that for a civil protection order to be effective and protect the petitioner, law enforcement must be willing to reinforce the protec-

powering the parent in breach rather than deterring or punishing him,[65] leaving a victim open to continuing victimization.[66]

But, perhaps even more saliently, there is a long-term threat to the well-being of the children and the family itself. The custody and parenting time provisions in a protection order are intended to resolve critical issues for children whose parents can no longer safely and effectively communicate. When the provisions are rendered meaningless, children and families lose the chance to have concrete expectations for child care and child access. Given these affronts to the court, the protected party, and to the children at issue, the following Part considers who holds the power and who has the will to enforce the provisions as well as the limitations on that power and will.

III. Enforcement and Remedies

Given what appears to be the ample availability of enforcement remedies—in multiple formats—a litigant would reasonably expect that the relief with which she leaves court is reliable. Any law students would read the doctrine to provide seemingly dependable methods of enforcement. It is in practice that the criminal enforcement of protection orders becomes elusive due to the disconnect between the will and the power to enforce these provisions. At the same time, the relief promised in the civil context fails to effectively address the violation's harm.

A. When Do the Power and the Will To Enforce Through Criminal Contempt Coalesce?

Criminal contempt prosecution of a protection order violation may well be the most effective enforcement mechanism to deter future violations and to protect the integrity of a court order,[67] although this

tive order); Olivia M. Fritsche, Note, *The Role of Enticement in a Violation of a Protection Order*, 71 Wash. & Lee L. Rev. 1473, 1475 (2014) ("[A protective] order must be fully and rigorously enforced in order to protect a woman who is the victim of an abusive relationship.").

65. *See generally* Logan et al., *supra* note 6, at 156 (stating that, based on a broad study of Civil Protection Order enforcement, the effectiveness of the order depends on the respondent's fear of enforcement).

66. One commentator suggested that a judge's decision to appoint a private prosecutor should be determined based on whether the "government's decision not to file a justifiable criminal charge leaves the victim vulnerable to revictimization." Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 Calif. L. Rev. 727, 732 (1988).

67. *See* Livingston, *supra* note 23, at 373 ("Without criminal contempt, trial courts will find it difficult, if not impossible, to ensure respect of their orders and to provide redress 'to those who have sought the court's protection'" (quoting United States v. Dixon, 509 U.S. 688, 743 (1993) (Blackmun, J., concurring in judgment and dissenting in part))); David M. Zlotnick, *Empower-*

action is not without myriad potential complications for the contemnor-parent and the family.[68] Yet custody and parenting time provisions are rarely the subject of criminal contempt prosecution. The various entities and individuals potentially involved in a criminal contempt prosecution for the breach of a protection order have varying degrees of incentive and will to pursue criminal contempt in this context.

1. The Court's Enforcement Power and Will

Judges' power to criminally enforce protection orders is constrained, making them unlikely to move criminal enforcement actions forward without prosecutorial cooperation. U.S. Supreme Court precedent[69] as well as federal[70] and state law[71] all provide that courts hold an inherent authority to enforce their orders, which encompasses initiation of contempt proceedings. This power includes the authority to enforce orders in the face of violations that take place outside of the court's view. The power to initiate criminal contempt cases has been deemed critical to the administration of justice.[72] As the U.S. Supreme Court acknowledged, courts must hold this power because

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ing the Battered Woman: The Use of Criminal Contempt Sanctions To Enforce Civil Protection Orders, 56 OHIO ST. L.J. 1153, 1155, 1201–02 (1995) (arguing that "criminal contempt sanctions offer significant advantages and flexibility when incorporated into a comprehensive attack on domestic violence" because they provide faster, more efficient, and more effective methods of enforcing protection orders). *But see* Mili Patel, Note, *Guarding Their Sanctuary on the Offense: Criminal Contempt Actions by Domestic Violence Victims in Private Capacity*, 18 CARDOZO J.L. & GENDER 141, 167 (2011) (arguing that because enforcement of protection orders is not consistent, "civil contempt is not sufficient both to vindicate a court's authority and protect the legally recognized rights of the order's beneficiary in addition to the public interest in enforcement of particular orders").

68. See *infra* notes 149–217 and accompanying text, for a discussion of the collateral consequences of criminal enforcement for fathers and the family in general.

69. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987).

70. 18 U.S.C. § 401 (2012) ("[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders . . . . "); Bessette v. W.B. Conkey Co., 194 U.S. 324, 338 (1904); *In re* Debs, 158 U.S. 564, 596, 600 (1895).

71. Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. PITT. L. REV. 835, 854 (2007); *see, e.g.*, FLA. STAT. ANN. § 741.31(3) (2015) (stating that the court should initiate contempt proceedings if the state fails to act); ME. REV. STAT. tit. 14, § 252 (2015) (noting that the court can initiate contempt proceedings); R.I. GEN. LAWS ANN. § 8-6-1 (2012) (conferring on the court the right to punish contempts); State v. Murray, 623 A.2d 60, 62 (Conn. 1993) (agreeing that, separate and apart from statutory authority, courts have the inherent power to punish disobedience of a court order outside of the judge's presence); *In re* Price, 645 A.2d 488, 489 (R.I. 1994) ("[T]his court is of the opinion that these statutes confer . . . [on the court] broad powers to initiate contempt proceedings . . . . ").

72. *E.g.*, *Young*, 481 U.S. at 795 (citing Michaelson v. United States *ex rel.* Chi., St. Paul Minneapolis & Omaha Ry., 266 U.S. 42, 65–66 (1924)).

they "cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated."[73]

Despite this seemingly clear enforcement power, courts appear to deploy this power to initiate criminal contempt actions quite sparingly. By way of example, in the District of Columbia, where criminal enforcement power by the court is not codified, judges are clearly aware that they hold this power because they regularly exercise it in a narrow context. If a respondent fails to enroll in a court-ordered program, such as domestic violence intervention, the judge will issue a show-cause order[74] to force the respondent to answer to the violation and remedy it.[75] However, advocates cannot recall a single case in which the court has exercised that authority in response to any other alleged violations of protection order provisions.[76] In Kansas, as another example, courts are authorized by statute to issue a show-cause order and conduct a contempt hearing.[77] However, advocates in Kansas report that they have never seen Kansas courts deploy this power.[78]

The court's will to initiate contempt proceedings might well be dampened by the complications of deploying this power. First, the power to initiate contempt proceedings casts the judge in a potentially untenable position in that this power vests the court with the authority to charge and define the crime and, in some jurisdictions, then to adjudicate the alleged violation of its own order.[79] As Justice Scalia noted

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73. *Id.* at 796.

74. For an overview of the tool and procedure related to a show cause order, see Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 359 (1995); and Lina Guillen, *What Is a Show Cause Hearing in Family Court*, DIVORCENET, http://www.divorcenet.com/resources/divorce/divorce-basics/what-show-cause-hearing-family-court (last visited Jan. 23, 2016); MINN. CIV. PRAC. § 17.10 (2015).

75. *See, e.g.*, *In re* Jackson, 51 A.3d 529, 532–33 (D.C. 2012) (noting that the trial judge issued a show cause order to defendant to explain why he had not enrolled in a counseling program as required by a protection order).

76. *See, e.g.*, E-mail from Megan M. Challender, Teaching Fellow, Georgetown Univ. Law Ctr., to author (Aug. 11, 2015, 4:27 PM) (on file with author); E-mail from Deborah Epstein, Dir., Domestic Violence Clinic, Georgetown Univ. Law Ctr., to author (Aug. 11, 2015, 4:47 PM) (on file with author); E-mail from Jeanine Gomez, Legal Aid D.C., author (Aug. 11, 2015, 4:50 PM) (on file with author).

77. KAN. STAT. ANN. § 20-1204a (2007).

78. Brief & Appendix of Amicus Curiae Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) in Support of Neither Party at 13, *In re Jackson*, 51 A.3d 529 (No. 11-FM-1123) [hereinafter *Jackson* Brief & Appendix of Amicus Curiae].

79. *See* Walker v. Bentley, 600 So. 2d 313, 325 (Fla. Dist. Ct. App. 1995) (noting that, in a criminal contempt action, "[t]he judge also determines who should be prosecuted, and then tries, convicts, and punishes"); Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1066 (1993) ("[C]ontempt law exacerbates the conflict by committing to the conflicted adjudicator the authority not merely to find the facts but to define the offense, to initiate the enforcement proceed-

in his concurrence in *Young v. United States ex rel. Vuitton et Fils S.A.*:[80] "In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges' in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth . . . the prospect of 'the most tyrannical licentiousness.'"[81] As such, judges may shy away from using their power to pursue a criminal contempt case without prosecutorial involvement.

In some jurisdictions, the court can proceed with the prosecution even in the absence of a prosecutor.[82] However, most jurisdictions require that the government handle the prosecution and prohibit the judge from moving forward *sua sponte* in the absence of public prosecution.[83] Judges, therefore, might deploy their power to initiate contempt infrequently because their power to see the case through is constrained unless the prosecutor cooperates. Although judges may initiate contempt proceedings, they may not be able to assure that the cases will be prosecuted. After a court initiates a criminal contempt case by issuing an order to showcause, the case must be prosecuted.

If the prosecution declines to pursue the case, the judge can appoint a private prosecutor.[84] As the Court stated in *Young*: "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises."[85] However, that authority is constrained both legally and practically. As set forth in *Young*, the court must exercise that authority using the "least possible power adequate to the end proposed"[86] by appointing a prosecutor who is disinterested.[87] From a practical perspective, the court may have difficulty identifying a private prosecutor who is willing to

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ing, to determine the form and severity of the sanction, and, by the former choice, to fix what procedural protections the defendant will receive.").

80. 481 U.S. 787 (1987).

81. *Id.* at 822 (Scalia, J., concurring in judgment) (quoting Anderson v. Dunn, 19 U.S. 204, 228 (1821)).

82. In these states, the hearing proceeds in an inquisitorial fashion. For example, in Florida, in a criminal contempt proceeding, a judge may move forward even in the absence of a prosecutor or any other assistance. FLA. R. CRIM. P. 3.840(d).

83. *See, e.g.*, Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 833 (1994) ("Summary adjudication of indirect contempts is prohibited."); *In re Jackson*, 51 A.3d at 538 ("[T]rial judges may initiate and preside over, but may not prosecute, a CPO indirect criminal contempt proceeding in cases involving intrafamily offenses.").

84. *See generally* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution to Private Actors*, 43 U.C. DAVIS L. REV. 411, 413 (2009) (analyzing the various ways the government delegates prosecution to private prosecutors).

85. *Young*, 481 U.S. at 800–01.

86. *Id.* at 801 (quoting United States v. Wilson, 421 U.S. 309, 319 (1975)).

87. *Id.* at 804.

prosecute the case. A private prosecutor must be compensated with public funds or must be willing to handle the case without compensation. Some jurisdictions designate public funding for this purpose.[88] However, most jurisdictions do not have funds available to remunerate private prosecutors.[89]

Courts appear to deploy this appointment power infrequently. Looking to Washington, D.C. as an example, prosecutors review all motions for criminal contempt filed in D.C courts and, of the 412 motions for criminal contempt filed in 2014, 144 were dismissed because the government chose not to proceed, and the court declined to appoint a private prosecutor.[90] In the four years that this procedure for appointment has been in place, court personnel estimate that only a handful of private prosecutors have been appointed.[91] In Delaware, advocates are unaware of any case involving the appointment of a private prosecutor in this context.[92] Although, judges enjoy the inherent power to initiate criminal contempt cases, that power is constrained in legal and practical ways that render criminal enforcement of most protection order provisions unlikely to be judicially initiated.

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88. Fairfax, *supra* note 84, at 425–26. Fairfax also noting that 26% of the U.S. prosecutors are part-time prosecutors who maintain private practices as well, raising concerns with some scholars about conflicts of interest. *See id.* at 419 & n.24.

89. State courts have noted that this funding is not available at the state level. *See, e.g.*, State *ex rel.* O'Brien v. Moreland, 778 S.W.2d 400, 407 (Mo. Ct. App. 1989) ("No such funds are appropriated to State courts."); *see also* Musidor, B.V. v. Great Am. Screen, 658 F.2d 60, 65 (2d Cir. 1981).

90. E-mail from Anonymous Personnel, Office of Attorney General, to author (June 22, 2014, 10:38 AM) (on file with author). These statistics do not suggest that these 144 cases merited the appointment of a private prosecutor. However, it is reasonable to assume that a significant number of cases that actually had merit were declined. Based on their data, seventy-four cases were declined. Those cases were based on conflicts then reviewed by the U.S. Attorney for the District of Columbia. The U.S. Attorney's office undertook prosecution in nine of those cases. Several cases were withdrawn or settled, however, of those remaining, forty-one cases were eventually dismissed for lack of prosecution. Seperate statistics reveal that when the government perceives that a case has little prosecutorial merit, it declines those cases under a separate clarification.

91. E-mail from Anonymous Court Personnel, Superior Court of the District of Columbia Domestic Violence Unit, to author (June 16, 2015, 3:44 PM) (on file with author). Statistics from the Office of the Attorney General in the District of Columbia also show that there was a private prosecutor involved in only one case filed in 2014.

92. E-mail from Mariann Kenville-Moore, Interim Exec. Dir., Del. Coal. Against Domestic Violence, to Rachel Leach, Research Assistant, George Washington Univ. School of Law (June 23, 2015, 11:28 AM) (on file with author) (stating that their office is not aware of any case in which the court appointed a special prosecutor if the Attorney General's Office failing to prosecute). A deputy attorney general tasked with prosecuting criminal contempts of protection orders in Hawaii similarly indicated he had never heard of a private prosecutor being appointed for a criminal contempt case in which the government declined to prosecute. E-mail from Michael Kagami, Hawaii Deputy Attorney Gen., to Rachel Leach, Research Assistant, George Washington Univ. School of Law (Aug. 13, 2015, 8:56 PM) (on file with author).

2. The Prosecutor's Power and Will

Prosecutors hold the power to enforce all provisions of a protection order through criminal contempt. When a protection order is breached, the prosecutor's office can pursue a criminal contempt action against a party who has violated a protection order; however, there is no jurisdiction in which a prosecutor obligated to seek this type of remedy.[93]

Prosecutorial discretion has problematic results for domestic violence survivors and their children who depend on the government to give their protection orders meaning. Prosecution units throughout the country have limited resources and, therefore, must exercise their discretion. In doing so, prosecutors have historically been somewhat reluctant to take on violations of protection orders generally[94] and, particularly, have been likely to decline cases involving the breach of family law remedies.[95] With limited resources,[96] prosecutors ordina-

93. *See, e.g.*, State v. Hankins, 686 P.2d 740, 744 (Ariz. 1984) ("It is clearly within the sound discretion of the prosecutor to determine whether to file charges and which charges to file."); People v. Ramsey, 665 N.Y.S.2d. 501, 503 (Sup. Ct. 1997) (holding that a court may not overrule a prosecutor's decision regarding whether to pursue a criminal prosecution); State *ex rel.* Skinner v. Dostert, 278 S.E.2d 624, 631 (W. Va. 1981) ("The duty to prosecute is qualified, however, in that the prosecuting attorney is vested with discretion in the control of criminal causes . . . . [T]he prosecutor in [her] discretion may decide which of several possible charges [she] will bring against an accused." (citations omitted)).

94. *See* United States *ex rel.* Vuitton v. Karen Bags, Inc., 592 F. Supp. 734, 744 (S.D.N.Y. 1984) ("Realistically . . . aggrieved plaintiffs . . . cannot depend on the United States Attorney's Office to enforce the court's mandates . . . . "), *rev'd sub nom.* Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987); *Jackson* Brief & Appendix of Amicus Curiae, *supra* note 78, at 6 ("[The] enforcement of a *civil* order is simply not viewed by prosecutors—or anyone—as a 'crime' worthy of prosecution like other crimes. These violations are understandably viewed by law enforcement as minor 'law violations' rather than 'real crimes' requiring a criminal justice response."); Zlotnick, *supra* note 67, at 1209 ("Despite the wishes of . . . advocates, domestic violence does not behave like an 'ordinary' crime and prosecutors and police have legitimate grievances about being forced to treat it as such."); Wainstein, *supra* note 66, at 740 (noting that because prosecutors are under resourced and over worked, "they typically devote their scarce resources to more serious crimes and more readily ignore charges perceived as less serious"). In Washington, D.C., prosecutors review all motions for criminal contempt. Of those motions, the prosecution pursues slightly more than 50% of the cases. E-mail from Anonymous Personnel, *supra* note 90.

95. *See* Gordon v. State, 960 So. 2d 31, 39 (Fla. Dist. Ct. App. 2007) ("Although an indirect criminal contempt proceeding in a family law case is vitally important to the parties, such a case often has little interest to a professional prosecutor."); *Jackson* Brief & Appendix of Amicus Curiae, *supra* note 78, at 7 (referring to telephone conversations with an advocate and a judge, which confirmed that public prosecutors' offices are not primarily concerned with enforcement of civil orders—particularly those that do not involve violence); Celia Guzaldo Gamrath, *Visitation Abuse v Unlawful Visitation Interference; Is there Comfort for Noncustodial Parents?*, 91 ILL. B.J. 450, 453 (2003) ("Some police and prosecutors still believe enforcement of visitation belongs in family court and are reluctant to enforce the criminal statute.").

96. Wainstein, *supra* note 66, at 738 ("Public prosecutors, however, often fail to prosecute these contempt cases because of their already overwhelming caseloads."); *e.g.*, Green v. Green,

rily pursue violations involving violence, threats, or unwanted contact. These violations are often more discrete and most likely easier to prove. As one prosecutor in New Mexico stated: "Violation of an Order of Protection is a criminal statute and so [breaches] are prosecuted criminally. In my years spent prosecuting I never prosecuted an offender for violating custody/visitation provisions of an [Order of Protection]."[97]

3. The Protected Party's Power and Will

If judges and prosecutors decline to enforce the protection order, the aggrieved party is left to pursue enforcement on her own. However, although they possess the will to enforce breached protection order provisions, protected parties have the least access to enforcement power. The law governing whether beneficiaries of protection orders can themselves initiate and prosecute cases for criminal contempt against a defendant who has allegedly violated that order widely varies across the nation often rendering the power opaque and unreliable. In 2010, the U.S. Supreme Court—in an extensive dissent to a one sentence opinion dismissing a writ of certiorari as improvidently granted—considered this issue in *Robertson v. United States ex rel. Watson*.[98] The dissent analyzed the constitutionality of an Article III court permitting a private party to prosecute criminal contempt in a civil protection order case.[99] The case, which was litigated in the District of Columbia, involved beneficiaries of protection orders who had been permitted to privately prosecute criminal contempt.[100] Reasoning that "[o]ur entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another[,]" the dissent noted that the private right of action was impermissible.[101] The dissent

642 A.2d 1275, 1279 n.7 (D.C. App. 1994) (reporting at the time that the prosecuting authority in D.C. "prosecute[d] less than 10 percent of the criminal contempt motions brought for violations of protection orders" (quoting Brief for the Office of the Corporation Counsel as Amicus Curiae, *Green*, 642 A.2d 1275); Wilson v. Wilson, 984 S.W.2d 898, 903 (Tenn. 1998) (discussing the burden on prosecutors' offices to merely enforce criminal laws).

97. E-mail from Lisa Weisenfeld, Policy Coordinator, N.M. Coal. Against Domestic Violence, to Furqan Shukr (June 21, 2014, 9:04 PM) (on file with author).

98. Robertson v. United States *ex rel.* Watson, 560 U.S. 272, 272 (2010) (per curiam).

99. *Id.* at 276–78.

100. *Green*, 642 A.2d at 1280–81 (holding that it is constitutionally permissible for an interested private party to prosecute a criminal contempt action).

101. Robertson v. United States ex rel. Watson, 560 U.S. 272, 278 (2010) (per curiam) (Roberts, C.J., dissenting).

stated that any action for criminal contempt in a protection order case must be brought in the name of the sovereign.[102]

The repercussions of *Robertson* are yet unknown because the case fails to have precedential value given that it provided guidance only in the form of a dissent to an opinion dismissing a writ.[103] However, a look across the United States currently reveals a patchwork of state statutory and common law addressing enforcement power. Some jurisdictions explicitly permit a private beneficiary of a protection order to prosecute a defendant for criminal contempt of that order.[104] However, only one state has considered the issue since *Robertson* came down, leaving an open question about the sustainability of these private rights of action. In other states, courts have indicated that private, interested parties can prosecute crimes in general, in some circumstances, but courts have not addressed the prosecution of criminal contempt cases by beneficiaries of court orders.[105] In a significant number of other jurisdictions, courts either explicitly prohibit the pri-

102. *Id.* at 273 (Roberts, C.J., dissenting).

103. The D.C. Court of Appeals strictly incorporated the dissent's opinion into its own reconsideration of *Robertson*. *See In re* Robertson, 19 A.3d 751, 755–56 (D.C. 2011).

104. *See, e.g.*, N.Y. FAM. CT. ACT § 846 (McKinney 2016); ALASKA R. CIVIL P. 90(b) (permitting a private party to prosecute criminal contempt); Olmstead v. Olmstead, 284 S.W.3d 27, 28–29 (Ark. 2008) (upholding a private party's right to prosecute, distinguishing this case from *Young*); Gay v. Gay, 485 S.E.2d 187, 188 (Ga. 1997) (permitting a wife to prosecute her former husband in a criminal contempt case); Marcisz v. Marcisz, 357 N.E.2d 477, 480 (Ill. 1976) (holding that counsel may prosecute criminal contempt for the beneficiary's order); Wilson v. Wilson, 984 S.W.2d 898, 903–04 (Tenn. 1998) (noting that due process does not require the disqualification of a private party as prosecutor of a criminal contempt case); *Ex parte* Landry, 117 So. 3d 714, 717 (Ala. Civ. App. 2013) (per curiam) (holding that an order of protection requiring the defendant-father to notify the mother, her attorney, and the court if and when he obtained employment permitted her to independently pursue a motion for criminal contempt); Rollins v. State *ex rel.* Municipality of Anchorage, 748 P.2d 767, 769, 771 (Alaska Ct. App. 1988) (upholding a criminal contempt prosecution by an interested party); Eichhorn v. Kelley, 111 P.3d 544, 548 (Colo. App. 2004) (declining to adopt a rule that would prohibit a beneficiary of an order from prosecuting for contempt); Long v. Hutchins, 926 So. 2d 556, 567 (La. Ct. App. 2006) (en banc) (noting and approving of the procedure of private parties "traditionally and naturally" prosecuting for criminal contempt); Katz v. Commonwealth, 399 N.E.2d 1055, 1060 (Mass. 1979) (holding, in a landlord-tenant case, that a private party in civil litigation may press both the civil and criminal aspects of a case); DeGeorge v. Warheit, 741 N.W.2d 384, 392 (Mich. Ct. App. 2007) (permitting criminal contempt cases to be pursued by private parties); State *ex rel.* O'Brien v. Moreland, 778 S.W.2d 400, 406–07 (Mo. Ct. App. 1989) (upholding private prosecution for criminal contempt).

105. *See, e.g.*, Whitfield v. Gilchrist, 497 S.E.2d 412, 415–16 (N.C. 1998) (stating that North Carolina permits private prosecutors to pursue crimes); State v. Ray, 143 N.E.2d 484, 485 (Ohio Ct. App. 1967) (stating that private prosecutors representing interested parties can prosecute crimes); State v. Crouch, 445 S.E.2d 213, 218–19 (W. Va. 1994) (holding that private prosecution should be allowed to permit a victim's family to assure itself that a case is vigorously pursued).

vate prosecution of criminal contempt cases or generally preclude private parties from prosecuting criminal cases.[106]

Looking to the court, the prosecution, and protected parties illustrates that the power and the will to enforce custody and parenting time provisions of protection orders by criminal mechanisms rarely coalesce. Further, *Robertson* suggests that individuals whose protection orders are violated—those with the will—may have increasingly limited recourse through the criminal justice system. Because the court often lacks the will, and may lack the power, to enforce these provisions, in many jurisdictions, aggrieved parties who seek criminal enforcement of protection orders are completely dependent on the government's exercise of discretion.

B. Civil Contempt and Its Remedies

Given the limitations on the power to enforce criminal contempt, civil contempt is a frequent alternate course sought to fortify the relief in a protection order. The power and the will to enforce protection orders overlap much more seamlessly in the civil contempt context. However, the law surrounding civil contempt relief complicates the effectiveness of a civil action in this context. Those complications threaten to render the power to enforce an order through civil contempt meaningless for those who stand at the intersection of power and will. This Section briefly considers who has the power and will to enforce custody and visitation provisions of protection orders through

106. *See, e.g.*, VT. STAT. ANN. tit. 15, § 1108(e) (2015) (codifying that the state's attorney should prosecute criminal contempt cases); Robertson v. United States *ex rel.* Watson, 560 U.S. 272, 281 (2010) (per curiam) (Roberts, C.J., dissenting) (stating that private prosecution of criminal contempt cases should be prohibited); People v. Eubanks, 927 P.2d. 310, 315 (Cal. 1996) (citing CAL. GOV'T CODE § 100(d) (West 2013)) (holding that all criminal prosecutions must be prosecuted in the name of the people of California and by their authority); DiSabatino v. Salicete, 671 A.2d 1344, 1353 (Del. 1996) (following *Young* and holding that an attorney for the beneficiary of an order in a civil proceeding may not represent the party in a subsequent criminal contempt prosecution); Rogers v. State, 348 S.E.2d 888, 889 (Ga. Ct. App. 1986) (holding that private parties are prohibited from acting as private prosecutors in criminal cases); Dep't of Soc. Servs. *ex rel.* Montero v. Montero, 758 P.2d 690, 693 (Haw. Ct. App. 1988) (holding that, interested, private prosecutors may not prosecute criminal contempt actions); State *ex rel.* LaMere v. Young, 192 N.W.2d 186, 187 (Minn. 1971) (per curiam) (holding that a petitioner's attorney may not act as a special prosecutor in a contempt action); State v. Warford, 389 N.W.2d 575, 582 (Neb. 1986) (stating that private prosecutors are not permitted); Rogowicz v. O'Connell, 786 A.2d 841, 844 (N.H. 2001) (holding that interested parties may not prosecute criminal contempt cases); State v. Valentine, 864 A.2d 433, 435–36 (N.J. Super. Ct. App. Div. 2005) (setting certification requirements for private prosecutors that disqualify interested parties from prosecuting criminal contempt); *In re* Mowery, 169 P.2d 835, 842–43 (Wash. Ct. App. 2007) (holding that Washington State law requires disinterested prosecutors); Trecost v. Trecost, 502 S.E.2d 445, 449 (W. Va. 1988) (holding that it is unconstitutional for a private, interested party to prosecute a criminal contempt case).

civil contempt and then interrogates the underlying law applicable to the relief offered through this cause of action.[107]

1. Judicial and Prosecutorial Power and Will

Pursuant to its inherent authority to enforce orders[108] and to statutory authority in some jurisdictions,[109] the court can initiate and punish violations of court orders through civil contempt. The court also often possesses the will to initiate civil contempt. Civil contempt cases, without the due process procedures accorded to criminal contempt matters, are far less burdensome on the court's docket.[110] A coercive order to comply with the court's directive can be an easy fix to a noncompliance problem.[111] The prosecution, on the other hand, has no power to enforce the provisions of a court order through civil contempt. Civil contempt is a companion to an action in equity and, by nature, a civil case.[112] As such, the state has no right of action.

2. The Protected Party's Power, Will, and Limitations

Private parties hold the power to seek enforcement of the custody and parenting provisions of protection orders through civil contempt. With a relatively low burden of proof and no constitutional right to counsel for the defendant, civil contempt cases can be filed by private

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107. Most appellate case law dealing with the enforcement of custody and visitation orders address long-term orders entered in the domestic relations context. Largely due to the dearth of counsel and available remedies, appellate case law does not include civil contempt cases related to the enforcement of custody and visitation provisions within a protection order. As such, this Article analyzes the enforcement of domestic relations orders through civil contempt as a close analogy because the same rationale would apply to considering enforcement.

108. *See supra* notes 68–72 and accompanying text (discussing how the court's power to initiate criminal contempt cases has been critical to the administration of justice).

109. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-864 (2003) (permitting the court to imprison a defendant for his failure to obey a court order to compel compliance); 735 ILL. COMP. STAT. 5/15-1102 (2008) (codifying the court's "full power" to enforce any order by contempt).

110. Livingston, *supra* note 23, at 353–54 ("Unlike civil contempt, [criminal contempt] requires full-blown criminal procedures, including the privilege against self-incrimination, right to counsel, the presumption of innocence, proof of the violation beyond a reasonable doubt, and the right to a jury trial for serious sanctions." (footnotes omitted)).

111. *See In re* Keane, 110 B.R. 477, 482 (Bankr. S.D. Cal. 1989) (holding that civil contempt is more appropriate than criminal contempt because the court seeks an efficient resolution of the matter); Hopp v. Hopp, 156 N.W.2d 212, 216 (Minn. 1968) (noting the importance of efficiency in civil contempt cases); Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 651–52 ("Some jurisdictions, such as Marion County, Indiana, find civil enforcement more efficient than criminal enforcement.").

112. Livingston, *supra* note 23, at 353 (noting that a coercive contempt case is an adjunct to an action in equity).

attorneys or even pro se litigants without overwhelming procedural barriers.[113]

Legal barriers, however, can leave civil contempt of questionable assistance to a party who wishes to deter continuing violations and wishes to be compensated for breached parenting time or custody orders. Remedies at common law for civil contempt vary significantly across jurisdictions, revealing a patchwork of case law. With little statutory guidance, courts have taken a variety of approaches that limit the effectiveness of the relief available to litigants pursuing civil contempt in this context.

a. Limitations on Coercive Remedies

Federal and state courts in a wide array of jurisdictions have held that the purpose of civil contempt is to enforce both compliance with a court order and compensate for losses related to the noncompliance.[114] However, in some jurisdictions, if the contemnor has come into compliance by the time of the hearing, then the court will not impose further remedies to compensate the complainant.[115] For example, in *Bruzzi v. Bruzzi*,[116] a father was subject to civil contempt when he failed to return the children after visitation.[117] The court held that because the children had been returned by the time of the hearing, the court was not empowered to impose any civil contempt remedies, noting that the father "could not be coerced into returning the children; he had already done so."[118] Similarly, in *Watford-Cun-*

113. *Id.* at 353–54.

114. *See, e.g.*, Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 829 (1994); Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 635 (1988) (noting that sanctions can be purely remedial); *In re* Babbidge, 175 B.R. 708, 717 (Bankr. W.D. Mo. 1994); *see also, e.g.*, Wash. Metro. Area Transit Auth. v. Amalgamated Transit Union, 531 F.2d 617, 622 (D.C. Cir. 1976) ("Judicial sanctions in a civil contempt proceeding are proper either to coerce compliance with the court's order for the complainant's benefit, or to compensate the complainant for losses sustained."); Fuller v. Fuller, 987 A.2d 1040, 1045–46 (Conn. App. Ct. 2010); Loewinger v. Stokes, 977 A.2d 901, 915–16 (D.C. 2009) ("[C]ivil contempt is a sanction that is 'designed to . . . compensate the aggrieved party for any loss or damage sustained as a result of the contemnor's noncompliance.'" (quoting D.D. v. M.T., 550 A.2d 37, 43–44 (D.C. 1988))); *In re* T.S., 829 A.2d 937, 940 (D.C. 2003) ("[C]ivil contempt serves one of two purposes . . . . ").

115. *See*, *e.g.*, Reynolds v. Reynolds, 557 S.E.2d 126, 131 (N.C. Ct. App. 2001) ("A trial court . . . does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court."), *rev'd*, 569 S.E.2d 645 (N.C. 2002); *c.f.* Fields v. Fields, 240 S.E.2d 58, 60 (Ga. 1977) (stating that in visitation cases, civil contempt may be an inadequate means of enforcement and that criminal contempt might be the more appropriate action to achieve vindication of the court's authority).

116. 481 A.2d 648 (Pa. Super. Ct. 1984).

117. *Id.* at 650.

118. *Id.* at 652.

ningham discussed *supra*, for example, the court refused to compensate the mother for the father's failure to produce the children for visitation.[119] The mother sought compensatory visitation time for the months of missed visitation. Instead, the court ruled: "The purpose of Civil Contempt . . . is not to punish for past behavior. It's to compel current behavior."[120] The court refused to provide compensation of the many hours of visitation of which the mother had been deprived.

If an aggrieved party seeks compliance in the form of a one-time payment or the performance of a particular action, coercion into compliance itself may be sufficient to compensate a protected party for her losses.[121] In a child support case, for example, although the contemnor has violated a court order in the past, coercion into payment of arrears usually makes the other party whole. As such, the goals of civil contempt have been reified. But, in the context of an ongoing breach of a custody or visitation order, a nonmonetary obligation, coercion into compliance only forces the contemnor to come into contemporaneous compliance not to fulfill past obligations. This coercion cannot compensate past breaches that have hurt the protected party. Without assurance that the court will compensate the aggrieved party, civil contempt remedies can be of questionable utility to a party who has been repeatedly denied her court-ordered custody and visitation rights. Moreover, civil contempt remedies that are limited to coercion have minimal deterrence value. When a contemnor realizes that he must merely come into compliance upon service of a motion, he has little incentive to remain in compliance in the future.

b. Limitations on Compensatory Sanctions

Coercive sanctions are more frequently granted than remedial relief in civil contempt actions.[122] However, even when judges do award remedial sanctions in civil contempt cases, those sanctions are often monetary.[123] For example, the court might impose a monetary rem-

119. *See supra* notes 34–66 and accompanying text.

120. December Transcript, *supra* note 51, at 17–18.

121. *See* Mahoney, *supra* note 71, at 868 (discussing the shortcomings of traditional civil contempt remedies when dealing with a recurring violation that cannot be fully addressed by merely coercing one-time compliance).

122. *Id.* at 866.

123. *See, e.g.*, MacIntosh v. MacIntosh, 749 N.E.2d 626, 631 (Ind. Ct. App. 2001); Meade v. Levett, 671 N.E.2d 1172, 1181 (Ind. Ct. App. 1996); *see also* Mahoney, *supra* note 71, at 873; Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L. FORUM 971, 971. Several state statutes explicitly authorize the court to award compensatory monetary remedies in civil contempt cases related to custody enforcement. *See, e.g.*, MO. REV. STAT. § 452.400(6)(3) (2000); WASH. REV. CODE §§ 26.09.160(2)(b)(ii)–(iii) (2014).

edy to compensate a litigant for the litigation costs or out-of-pocket expenses.[124] Or the court might award monetary damages to compensate for inconvenience or frustration resulting from the breach in the long-term custody context.[125]

Monetary remedies[126] are insufficient on several levels to compensate an aggrieved party in cases of breached custody provisions of protection orders.[127] First, although they might have a deterrent effect for some contemnors, monetary damages are ineffective in cases in which the contemnor determines that the violation is worth the penalty.[128] For example, a father might determine that risking a fine to compensate the mother for her time and gas coming to his house to pick up the children when he refuses to surrender them after visitation is worth the benefit of keeping the children in contravention of the order. Monetary damages also have limited deterrent effect on a defendant who cannot pay the award. A defendant without resources to meet the monetary obligation cannot be coerced into paying with the

124. *See, e.g.*, Zillmer v. Lakins, 544 N.E.2d 550, 552–53 (Ind. Ct. App. 1989) (holding that it was a proper use of a civil contempt sanction to order reimbursement of costs for locating and obtaining physical custody of children that the contemnor was withholding from the other parent).

125. *See, e.g.*, *Meade*, 671 N.E.2d at 1181–82 (holding that there was sufficient evidence to grant monetary damages to compensate the complaining party for inconvenience and frustration).

126. Courts are split on the availability of monetary remedies. When an aggrieved party cannot quantify her losses, courts in some jurisdictions refuse to grant monetary relief, considering it an impermissible punitive fine. *See, e.g.*, *MacIntosh*, 749 N.E.2d at 631; Levis v. Markee, 771 S.W.2d 928, 932 (Mo. Ct. App. 1989) ("Generally, an outright fine, unrelated to actual damages, is not appropriate for civil contempt because it is not designed to cure but is intended to punish."); Nelson v. Nelson, 598 N.Y.S.2d 609, 612 (App. Div. 1993) (finding that a monetary fine for the respondent's failure to deliver the children to two scheduled visitation dates would be unduly harsh). In other jurisdictions, courts have affirmed monetary awards for nonmonetary losses in civil contempt cases in the custody context. *See, e.g.*, *Meade*, 671 N.E.2d at 1181 (stating that the court can consider compensating inconvenience and frustration with monetary relief); Luminella v. Marcocci, 814 A.2d 711, 719 (Pa. 2002) (affirming a $500 fine imposed on a mother for breaching the custody order). For example, a Florida court imposed a $100 per day fine on a mother to compensate the father for the mother's failure to return the child to his custody for sixty-one days. Laroche v. Briggs, 720 So. 2d 321, 322 (Fla. Dist. Ct. App. 1998). In another case, the Florida court noted that compensatory damages for unliquidated injuries are generally unavailable in noncommercial matters. Habie v. Habie, 654 So. 2d 1293, 1295 (Fla. Dist. Ct. App. 1995). But, the court held that it should have discretion to award compensatory monetary awards if the court has a "reasonable basis for concluding that a compensable injury may have been suffered as a result of a willful violation of an . . . order." *Id.* Because these cases are hard to find and are sprinkled across a few different jurisdictions, they cannot provide certainty for a party seeking to rely on a custody order.

127. Mahoney, *supra* note 71, at 872 (noting that remedies scholars have generally addressed the difficulty of awarding monetary relief for the breach of an equitable coercive court order).

128. The calculus is equally valid in the context of family law and other civil injunctions. See Wainstein, *supra* note 66, at 735, for an example in the context of trademark infringement.

threat of jail time.[129] As such, the relief will neither deter the contemnor from future noncompliance nor compensate the aggrieved party.

Second, although a monetary remedy, which is granted to compensate a party for the aggravation of having to bring a suit to realize one's rights, might provide some relief to a parent after the breach of a custody provision of a protection order,[130] it rarely addresses the actual loss. Money cannot compensate a parent for a long-term loss of access to her children. Further, it cannot compensate for a unilateral decision to change a child's school or religion. Consider Mrs. Cunningham: How would one quantify the monetary value of six months of visitation with her children? Even if the court did award her money to compensate for this loss, how could it address the actual loss she sustained?

In these cases, compensation in the form of make-up visitation, physical custody, a mandate to reverse the unilateral parenting decision, or to engage in mediation to reconsider the decision would far more effectively compensate the aggrieved party.[131] This remedial action would equitably redistribute the "good" to compensate for the breach.

In some jurisdictions, courts will award make-up parenting time in a civil contempt case to compensate a party whom has been denied access to her child. Those awards, however, usually rely on explicit statutory authorization[132] or on a court order that sets forth specific penalties for breach. For example, a Texas statute permits the imposi-

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129. State *ex rel.* Foster v. McKenzie, 683 S.W.2d 270, 270 (Mo. Ct. App. 1984) (stating that to justify imprisonment for contempt, the defendant must be able to purge himself of the contempt); Reeves v. Crownshield, 8 N.E.2d 283, 284 (N.Y. 1937) ("[The Court's] manifest intent is to exempt from imprisonment the honest debtor who is poor, and in good faith unable to pay his debts."); Hodges v. Hodges, 307 S.E.2d 575, 577 (N.C. Ct. App. 1983) (noting that states, like North Carolina, require that the defendant being held in contempt be able to comply with the order, and. if the defendant is unable to comply, then the court cannot imprison the defendant).

130. *See, e.g.*, *MacIntosh*, 749 N.E.2d at 628–29, 631 (awarding compensatory payment for the monetary loss related to one parent not producing the children for a scheduled trip with the other parent).

131. *See* LaLoggia-VonHegel v. VonHegel, 732 So. 2d 1131, 1133 (Fla. Dist. Ct. App. 1999) ("[A]n award of make-up or additional visitation may serve both to redress the wrong to the parent and to effectuate compliance with the court's authority.").

132. *See, e.g.*, FLA. STAT. § 61.13(4)(c)(1) (2014) (setting forth authority to award make-up visitation to a parent who was denied visitation); MICH. COMP. LAWS § 552.642(1) (2015) (directing that all circuits shall establish a make-up parenting time policy for cases when a parent has wrongfully been denied parenting time); *In re* Marriage of Herrera, 772 P.2d 676, 680 (Colo. App. 1989) (citing COLO. REV. STAT. § 14-10-129.5(2)(g) (2014)) (affirming a lower court judgment granting make-up visitation to a father who was denied his visitation time under a court order in a state with a statute that explicitly authorized make-up visitation as a remedy for parenting time interference).

tion of make-up time to compensate a parent for lost visitation.[133] The court of appeals then enforced that statutory provision and, in fact, held that awarding only seven days of make-up visitation time to compensate for ninety-seven days of denied visitation was unfair. The court directed the lower court to reconsider and award more time.[134] In a Florida case, the appeals court affirmed that a court may enforce a court order that specified that a party who has been denied visitation can be compensated with additional child access hours.[135] Limits on compensatory relief as to its availability and form often render civil contempt an unresponsive remedy for parents seeking to enforce the violation of parenting provisions in a protection order.

c. Purge Clauses Further Limit Effectiveness

Purge clauses may foreclose relief that is appropriate to redress past recurrent violations. Imposing a condition that the defendant may satisfy to purge the contempt, purge clauses are included in the typical civil contempt sentence.[136] In civil contempt, jail time can be imposed only if the contemnor has the ability to come into compliance and, even then, only until he has complied with the breached order.[137] Purge clauses are an excellent way to coerce one-time payments or a one-time surrender of medical records or school reports. However, a

133. TEX. FAM. CODE ANN. § 157.168(a) (West 2014).

134. Romero v. Zapien, No. 13-07-00758-CV, 2010 WL 2543897, at *17 (Tex. App. Ct. June 24, 2010) (mem.), *abrogated by* Iliff v. Iliff, 339 S.W.3d 74 (Tex. 2011).

135. Lombard v. Lombard, 997 So. 2d 1188, 1190–91 (Fla. Dist. Ct. App. 2008); *c.f.* Rush v. Rush, No. 74832, 1999 WL 1044482, at *1 (Ohio Ct. App. Nov. 18, 1999) (noting that in a prior case, the court had found the mother in contempt for interfering with the father's visitation rights, sentenced her to thirty days in jail but allowed her to purge by permitting the father to make-up for lost visitation).

136. *See, e.g.*, Hudson v. Hudson, 494 So. 2d 664, 667 (Ala. Civ. App. 1986) (affirming a civil contempt sentence against a mother that suspended her jail time and allowed the mother to purge the contempt by coming into compliance with the divorce decree); De Mauro v. State, 632 So. 2d 727, 729 (Fla. Dist. Ct. App. 1994) (noting that the order for civil contempt specified that the contemnor could purge her contempt by returning the children to the other parent); *MacIntosh*, 749 N.E.2d 626, 631 (Ind. Ct. App. 2001) (invalidating a fine imposed in a civil contempt sentence because it was imposed without any opportunity to purge); Bryant v. Howard Cty. Dep't of Soc. Servs. *ex rel.* Costley, 874 A.2d 457, 466 (Md. 2005) ("[I]f [a contempt penalty] is to be coercive rather than punitive, [it] must provide for purging; it must permit the [contemnor] to avoid the penalty by some specific conduct that is within the [contemnor's] ability to perform.")

137. *E.g.*, ME. REV. STAT. tit. 14, § 3136(5) (2014) (noting that individuals can be imprisoned and held in contempt if they are able to comply with the order, but first, they must be given the opportunity to purge themselves of the order; and, once they purge themselves, they are to be released); NEV. REV. STAT. ANN. § 22.110(1) (2013) (noting that for the court to award jail time, the court must first determine that the defendant can comply with the order; the defendant may only remain imprisoned until the defendant does comply); OHIO REV. CODE ANN. § 2705.06 (LexisNexis 2000) ("When the contempt consists of the omission to do an act which the accused yet can perform, he may be imprisoned until he performs it.").

purge remedy may not be responsive to an aggrieved parent's need for future compliance or past compensation, leading courts to query whether civil contempt can be a proper remedy for the violation of a custody or visitation order.[138]

In *Boggs v. Boggs*,[139] for example, the court distinguished between civil and criminal contempt by holding that, ordinarily, civil contempt findings must allow for the contemnor to purge the violation.[140] The court reasoned that without an opportunity to purge, the contemnor would be properly subject to criminal contempt remedies.[141] The court held the father in contempt for his failure to pay child and spousal support, and the court further provided that his jail sentence would be suspended on the condition of consistent payment.[142] The court also held the father in contempt for having exposed the children to his "paramour" in contravention of the custody order. For that violation, the trial court sentenced the father to serve the remaining ten days of his sentence in jail because that violation could not be discharged by performance.[143] On appeal, the court held that the jail sentence was impermissibly punitive for a civil contempt case because there was no opportunity to purge the violation.[144]

In the end, although will and power coalesce in the party protected by a court order, an aggrieved party may find that the civil system—the only system that she may be able to access—offers ineffective relief. The civil contempt remedy alone is likely to be less successful than criminal contempt in assuring future compliance. It fails to convey the importance of compliance with an order of the court.[145] Fur-

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138. *See* Wilson v. Freeman, 402 So. 2d 1004, 1007 (Ala. Civ. App. 1981) (citing 24 AM. JUR. 2D *Dismissal, Discontinuance, and Nonsuit to Divorce and Separation* § 811 (1936)) (suggesting that there is a serious question whether civil contempt is an appropriate response to noncompliance with a visitation order); *De Mauro*, 632 So. 2d at 730 (noting that an appropriate sanction for concealing the children for three months from the other parent would most likely have come from a criminal rather than a civil contempt action).

139. 2 N.E.2d 674 (Ohio Ct. App. 1997).

140. *Id.* at 678 (citing Brown v. Exec. 200, Inc., 416 N.E.2d 610, 613 (Ohio 1980)).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Jeffrey A. Parness & Daniel J. Sennott, *Expanded Recognition in Written Laws of Ancillary Federal Court Powers: Supplementing the Supplemental Jurisdiction Statute*, 64 U. PITT. L. REV. 303, 322 (2003) ("The chief purpose of coercive civil contempt is to resolve issues in an individual case, not to aid the court as an institution."). A Florida appellate court considered this issue when reasoning that a civil contempt remedy may send the message that a contemnor is exempt from punishment for on-going noncompliance with a court order. The court stated that "the trial court should have initiated a proceeding for indirect criminal contempt" to punish the contemnor for her "substantial infraction." De Mauro v. State, 632 So. 2d 727, 730 (Fla. Dist. Ct. App. 1994).

ther, the civil contempt system, with its complex web of legal barriers to compensatory relief, can offer a limited enforcement remedy for nonmonetary losses and for recurrent violations, leaving a protected party and a contemnor to reasonably conclude that the custody and visitation provisions of a protection order are of nominal value.

C. What Is Distinctive about the Enforceability of These Provisions?

Why should we be concerned with the barriers to enforcement of domestic relations provisions in protection orders? Aren't all civil orders challenged by the practice and law surrounding criminal and civil contempt? Indeed they are. Court orders granting relief in a wide range of civil cases, such as contract disputes,[146] patent infringement,[147] and bankruptcy,[148] are flouted by defendants, and the same principles of criminal and civil contempt equally apply to these orders. Enforcement of these orders should also be considered so that court orders maintain their integrity so that protected parties can rely on court-granted relief. Indeed, many of the initiatives discussed in Part IV can and should be broadly applied to the enforcement of all civil orders.

However, this Article focuses on this specific enforcement challenge because the power to enforce these provisions criminally resides with those who do not often deploy that power and because both civil and criminal enforcement mechanisms are distinctively unresponsive to the problems underlying the violation. The enforcement of custody and visitation provisions differs in relevant ways from the enforce-

146. *See, e.g.*, DeGeorge v. Warheit, 741 N.W.2d 384, 386–87 (Mich. Ct. App. 2007) (per curiam) (concerning a criminal contempt matter enforcing a court order that arose from a contract dispute); Cemetery Comm'r v. Burcham, No. 201437, 1998 WL 1988776, at *1, *3 (Mich. Ct. App. Nov. 17, 1998) (holding a defendant in criminal contempt for intentionally violating a permanent injunction from entering into contracts for the sale or assignment of burial rights, entombment rights, columbarium rights, cemetery merchandise, or cemetery services); Busch v. Berg, 384 N.Y.S.2d 301, 302–03 (App. Div. 1976) (mem.) (holding a vendor in contempt for failing to perform on a real estate contract).

147. *See, e.g.*, H. J. Heinz Co. v. Superior Court, 266 P.2d 5, 7, 10 (Cal. 1954) (affirming the trial court's decision to hold the defendant in civil contempt for violation of an injunction restraining defendant from building or using vinegar generators that infringed on a patent); Step Saver, Inc. v. Glacier Salt, Inc., No. A04-1805, 2005 WL 1389581, at *5 (Minn. Ct. App. June 14, 2005) (affirming the trial court's decision to hold appellants in civil contempt of court for failing to obey the district court's prior orders to cease salt delivery in violation of the patent).

148. *See, e.g.*, Am. Cyanamid Co. v. Rogers, 314 N.E.2d 679, 680, 682 (Ill. App. Ct. 1974) (affirming the trial court's decision to sentence a judgment-debtor to county jail for contempt of court for willfully refusing to pay a monthly installment on a money judgment, which was contrary to provisions of an order entered by the court in a previous proceeding despite a subsequent bankruptcy filing).

ment of other civil and family law injunctions, making this issue particularly worthy of consideration.

1. Criminal Penalties

In the context of two parents seeking to care for their children, criminal enforcement of a parenting provision may not be an appropriate remedy regardless of the state's interest in pursuing the case. Consider again the case of Mrs. Cunningham. The parties agreed to joint physical and legal custody of their children and together were responsible for providing for their children. Had the state agreed to prosecute Mr. Cunningham for his numerous violations of the protection order's visitation provisions, he would have faced a criminal conviction, which could have included either a fine or jail time. The collateral consequences of this type of conviction[149] may well have interfered dramatically with the best interests of the children. A conviction—part of his permanent record—could have hampered Mr. Cunningham's ability to seek employment, provide for the children, and maintain a positive relationship with his children.[150] Although Mrs. Cunningham sought make-up visitation, she was unable to care for the children overnight because she remained in a shelter. Where would the children have gone while Mr. Cunningham served his jail sentence? What effect would this turbulence have had on the children? And a fine—that would not be payable to Mrs. Cunningham but to the state—would merely have burdened the family's already tight finances. Although a criminal prosecution and a jail sentence might have effectively deterred Mr. Cunningham from future violations, the children's interests may well have been detrimentally impacted.

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149. *See* Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 272–76 (2004) (providing an overview of the myriad collateral consequences of incarceration).

150. Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 812–13 (2011) ("Where the parent was a source of income for the child, incarceration will result in a lower standard of living, and often leads to significant economic deprivation."); Laurie S. Kohn, *Money Can't Buy You Love: Valuing Contributions by Nonresidential Fathers*, 81 BROOK. L. REV. 53, 77, 104–05 (discussing the various negative effects of incarceration on fathers); *see* Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J.L. & SOC. POL'Y 24, 32, 34 (2013) ("Parental incarceration also increases the economic burden on these children and their remaining caretakers . . . . Further, the inability of a released inmate to find a place to live and gainful employment results in the inmate having little access to legitimate work . . . . "); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 492 (2010) ("[A]n individual with a criminal conviction will no longer be eligible for numerous categories of employment.").

In a contempt case involving the care of children and a defendant-parent who has parenting obligations, the best interests of the children, although not an explicit consideration in a criminal prosecution, should be addressed. This consideration, which is so integral to the violation in the first place, renders criminal contempt and prosecution of the misdemeanor violation of a protection order far more complex than a criminal contempt prosecution for the violation of another type of court order.

Further, incarcerating a father for seeking out additional parenting time may not be the message a court system, which already fails to encourage fathers to engage in the lives of their children, should send to parents.[151] Although breaches of court orders should be addressed promptly by courts, incarceration of fathers in this context risks perpetuating barriers to father engagement and other disadvantages that low-income children face.

When the defendant in a contempt action is the primary custodial parent, incarceration is similarly problematic. Because of the presumption against granting joint custody when there has been domestic violence,[152] and because of the relevance of that violence to the custody analysis,[153] a substantial majority of parents awarded primary custody in a protection order will be the protected parties. However, in some jurisdictions, courts have permitted contempt cases to proceed against the protected parties.[154] Punishing a parent with primary residential custody with jail time is likely to be particularly detrimental to the children involved—at least by upsetting their routine if not inducing more severe psychological stress.

Finally, a criminal contempt action may not achieve a goal that is consistent with the wishes of the aggrieved party. Although punishment may achieve future compliance, parents who have been denied parental rights or parenting time often wish to have that loss recog-

151. Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 521–31 (2013) (discussing the barriers to father engagement and the law's role in perpetuating those obstacles).

152. *See supra* note 40 and accompanying text.

153. *See, e.g.*, DEL. CODE ANN. tit 13, § 705A(a) (2009) (establishing a presumption against granting custody to a perpetrator of domestic violence); NEV. REV. STAT. ANN. § 125C.230(1) (2013) (establishing a presumption against granting sole custody to a parent who has committed domestic violence.).

154. *See, e.g.*, Reinhardt v. Strain, CIV. A. No. 07-3126, 2008 WL 4808897, at *4 (E.D. La. Oct. 31, 2008) (analyzing if officers were justified in arresting a party for violating an order issued to protect her); Francis X. Clines, *Judge's Domestic Violence Ruling Creates an Outcry in Kentucky*, N.Y. TIMES, Jan. 8, 2002, at A14 ("[These] are orders of the court . . . . People are ordered to follow them, and I don't care which side you're on." (quoting Judge Megan Lake Thornton)).

nized, redressed, remedied, and compensated. In this way, prosecution for criminal contempt or a misdemeanor may represent an overly criminalized[155] enforcement response in cases involving co-parenting but, at the same time, one that could be more appropriate and effective in the context of business injunction enforcement.

2. Civil Remedies Are More Responsive in Other Contexts

Civil contempt remedies are well calibrated to enforce civil orders dictating one-time performances, such as surrendering property, ceasing to infringe a patent or trademark, or paying off a debt or monetary obligation. As discussed *supra*, a contempt action can coerce performance by imposing a jail sentence but providing a purge clause to satisfy compliance.[156] If the performance is merely a solitary obligation that the defendant can fulfill, then this relief can be responsive and effective. The obligation has been extinguished and the aggrieved party has been made whole.

However, because of the limitations on relief discussed *supra*, without further statutory guidance, ordinary civil contempt remedies that are awarded are often insufficient either to coerce long-term compliance of a custody and visitation provision of a protection order or to compensate for recurrent breaches.[157] Therefore, custody and visitation provisions within protection orders present a particularly complex enforcement challenge from the perspective of relief.

3. Dearth of Statutory Guidance

The enforcement of civil protection orders is governed by thin statutory guidance around the country and by equitable principles of civil and criminal contempt doctrines. With protection orders statutes that, at most, merely note the availability of civil contempt as an enforcement action, judges are provided no specific direction about the range of relief.[158]

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155. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 714, 716 (2005) (discussing the phenomenon of overcriminalization and arguing that the "criminal sanction should be reserved for specific behaviors and mental states that are so wrongful and harmful to their direct victims or of the general public as to justify the official condemnation and denial of freedom that flow from a guilty verdict").

156. *Supra* notes 135–43 and accompanying text.

157. *See infra* note 155 and accompanying text.

158. *See, e.g.*, CONN. GEN. STAT. § 46b-15(i) (2015) (noting that civil contempt is only an enforcement mechanism in the protection order statute); UTAH CODE ANN. § 78B-7-106(5)(a) (LexisNexis 2012) (noting that civil contempt is only an enforcement mechanism in the protection order statute).

In contrast, enforcement of other civil orders is governed by specific statutes that elucidate the potential punitive, coercive, and compensatory relief available.[159] For example, in some jurisdictions, legislatures have enacted domestic relations statutes that specify various forms of relief available if a custody or visitation order is violated.[160] Similarly, the courts have developed rules providing for contempt remedies in bankruptcy and property actions.[161]

Although these statutes do not provide reliable remedies for all aggrieved parties, they do give plaintiffs and defendants notice of the range of enforcement remedies likely to be considered. They also give the judge specific statutory authority to provide compensatory relief in civil cases, which may well be the most useful remedy for recurrent violations. The absence of statutes regulating enforcement of custody and visitation provisions of protection orders further highlights the complexity of this enforcement action and the necessity of reform in this area.

4. Underrepresentation

The population of litigants seeking enforcement of protection orders is more likely to be unrepresented than those litigants seeking to enforce other civil injunctions. The vast majority of petitioners in protection order cases appear pro se.[162] Enforcement actions in trademark and contract cases, by contrast, are likely to be handled by experienced counsel who are in the position to negotiate with opposing counsel and advocate with the judge to secure an effective out-

159. *See infra* notes 204–14 and accompanying text (providing examples of statutes that provide broad remedies for violating a protection order).

160. In the jurisdictions that have enacted these statutes, relief may be available to enforce the custody and parenting time provisions of a protection order as well.

161. *See, e.g.*, Fed. R. Bankr. P. 8020 (noting that the power of the bankruptcy judge to issue sanctions for contempt is not limited to monetary punishment but includes the power to discipline counsel and the power to imprison the bankrupt individual for failure to comply with an order); FLA. R. CIV. P. 1.570 (2015) (providing recovery for property by holding the disobedient party in contempt and ordering a writ of sequestration).

162. *See* Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 567 (2006) (reporting that in one Illinois jurisdiction, "neither party was represented in 83.4% of" protection cases); LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 26 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (reporting that 98% of both petitioners and respondents in domestic violence matters in Washington, D.C. are pro se); STATE OF N.H. JUDICIAL BRANCH, CHALLENGE TO JUSTICE: A REPORT ON SELF- REPRESENTED LITIGANTS IN NEW HAMPSHIRE COURTS 2 (2004), http://www.nh.gov/judiciary/supreme/prosereport.pdf (reporting that in the New Hampshire domestic violence court, 97% of the cases involve one party appearing pro se).

come.[163] They can, for example, seek to settle the case in a way that makes the plaintiff whole. Or they can argue to the judge that she should appoint a private prosecutor or liberally construe her authority to grant a wide-range of relief in a civil contempt case. Pro se litigants in protection order enforcement actions are unlikely to be prepared to marshal these arguments or effectively negotiate a matter with the defendant or opposing counsel. They are unable to exert influence on the prosecutor's office to pursue a criminal enforcement action. This disparity in both access to legal representation and the capital that attends legal representation render enforcement in the protection order context an access to justice issue—one particularly in need of attention and reform.

5. Law Enforcement and Judicial Reluctance

Historically, law enforcement and the judiciary have been reluctant to interfere in family matters.[164] The doctrine of family privacy has often trumped state intervention.[165] This reluctance is particularly noticeable in the history of the state's response to domestic violence.[166] Whether out of respect for family privacy or based on distaste for becoming involved in the complexity and emotions of family dynam-

163. *See* Agran v. Shapiro, 273 P.2d 619, 626 (Cal. App. Dep't Super. Ct. 1954) (discussing the duty of a lawyer to possess a requisite level of knowledge in the practice of income tax); Russell M. Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 491 (1984) ("[A] more significant advantage of having a lawyer as mediator is his knowledge of the law and the legal consequences of the various decisions made by a divorcing couple.").

164. Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 976 (2004) (noting judicial reluctance to interfere in marital problems); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 557 (1999) (referring to state actors' historic responses as "years of indifference to intimate abuse").

165. Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 523 (1987) ("The justification for applying the family privacy doctrine . . . is the reluctance of government to intrude on the affairs of an ongoing family . . . . "); Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L. J. 269, 275 (2007) ("The problem is that law enforcement and the courts often withhold protection when it is most critically needed out of respect for family privacy.").

166. Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1781 (2012) ("Influenced by liberal theorists such as John Locke, state actors believed domestic violence was a matter that should be handled within the privacy of the home."); Elaine M. Chiu, *That Guy's a Batterer!: A Scarlet Letter Approach to Domestic Violence in the Information Age*, 44 FAM. L.Q. 255, 286 (2010) ("Family privacy, nonintervention and chauvinistic entitlement effectively isolated domestic abuse from law enforcement for centuries.").

ics,[167] police, prosecutors, and the judiciary have failed to respond to family violence in a consistent and reliable manner.[168]

In *Town of Castle Rock v. Gonzales*,[169] the U.S. Supreme Court held that there is no property interest in police enforcement of a restraining order, and this case provides a telling example of the state's response to family violence.[170] When a mother, who was the subject of a protection order directing the father to remain more than 100 feet from her home and not to molest their children, called the police when she believed that the father had taken the children from her front yard, the police took no action.[171] Approximately five hours later, while the children were still missing, the mother made a report. "The officer who took the report 'made no reasonable effort to enforce the Temporary Restraining Order (TRO) or locate the three children. Instead, he went to dinner."[172] This case ended tragically and illustrates the enduring ambivalence of law enforcement toward becoming involved in family matters.

Although mandatory intervention policies abound in law enforcement and prosecution nationwide,[173] that historic reluctance affects the treatment of family law matters and leaves the enforcement of family law provisions of protection orders a particularly overlooked problem. Because injunctions involving other civil matters fail to trigger historic resistance to intervention, their enforcement carries with it less baggage, making enforcement more likely and less complex.[174]

All injunctions suffer from underenforcement, and parties protected by injunctions should be able to rely on those orders. However, the particular context of the injunction issued in a protection order case governing custody and visitation involves legal, procedural, and systemic complications that make enforcement particularly critical to address.

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167. *See, e.g.*, Buel, *supra* note 164, at 966–67 (discussing examples in which judges have dismissed the importance and severity of family violence cases).

168. *See* Stoever, *supra* note 1, at 1035 (noting the exceptional treatment of domestic violence injunctions as compared to injunctions in other contexts (including trademark, copyright, and trade secret) as a result of the family privacy doctrine that has prevented abuse survivors from receiving adequate injunctive relief).

169. 545 U.S. 748 (2005).

170. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 768 (2005).

171. *Id.* at 751–53.

172. *Id.* at 754 (quoting Complaint & Jury Demand at 4, Gonzales v. City of Castle Rock, 2001 WL 35973820 (Jan. 23, 2001) (No. 00-D-1285), 2000 WL 35529077).

173. Bailey, *supra* note 166, at 1785 (discussing the prevalence of mandatory intervention policies for domestic violence); Mills, *supra* note 164, at 563–68 (analyzing the mandatory intervention policies of the police and prosecution nationwide).

174. *See* Stoever, *supra* note 1, at 1035–36.

IV. Realizing the Promise of Custody and Visitation Provisions

Custody provisions in a civil protection order are vital for the stability of children and the protected parties' peace of mind. Their inclusion as relief in protection order statutes across the country signals nationwide unanimity that the determination of custody and visitation matters, even in a temporary order, and is relevant to the successful resolution of domestic violence issues and the safety of all involved. But those protections are meaningless if they are unenforceable.

The enforcement mechanisms in their current form—misdemeanor prosecution and criminal and civil contempt—are unlikely to result in reliable custody and visitation provisions in protection orders. The myriad complications involved in the power to enforce, the will to enforce, the procedural and administrative shortcomings, and the limitations of the law surrounding relief all stand in the way of effective enforcement. To deliver on the promise of these provisions, a range of procedural, administrative, and legal mechanisms, as well as advocacy efforts, must be developed to instill in judges, prosecutors, and aggrieved parties the power and the will to enforce orders in appropriate cases. They must also be empowered and counseled to do so in a way that upholds the integrity of the order, instills faith in the system, and is responsive to the needs of the family.

A. The Court's Power Reconsidered

Formally, judges have the mechanisms available to them for effective enforcement in this context. However, a range of advocacy, regulatory, procedural, and administrative initiatives are necessary to move judges toward deploying these mechanisms and doing so contextually to appropriately enforce these provisions and vindicate the court's authority. The judiciary's swift and appropriate intervention may be the most effective response to remedy the breach of an order. It is often difficult to address a violation ex post facto due to the complexity of family dynamics and the limitations on relief that can compensate for long-term violations involving children.

1. Show Cause Orders

Courts should be explicitly directed through advocacy, statutes, or regulations to issue show cause orders for protection order violations consistent with the wishes of the protected party. Although judges in many jurisdictions utilize show cause orders in specific circumstances, that process is rarely codified in statutes or rules. As such, litigants do

not know to ask for such an action, and judges do not necessarily take the initiative to issue the orders in this context.

A show cause order is a useful tool because it allows the defendant to appear in an expedited fashion and informally defend against the alleged violation. The action also permits the judge to encourage compliance short of ordering it through a criminal or civil remedy.[175] In essence, a judge can use a show cause order as a warning—and an opportunity to convey the importance of the order—before the sanctity of the order has been even more seriously compromised and before an enduring violation that is more difficult to redress has occurred.

2. Private Prosecutors

Courts should be truly empowered to appoint private prosecutors under appropriate circumstances when the public prosecutor fails to prosecute. As discussed *supra*, the right of a judge to initiate a criminal contempt matter encompasses the right to appoint a private prosecutor in the face of a refusal by the public prosecutor to pursue the matter.[176] However, in *Young*, the U.S. Supreme Court held that there is a right to a disinterested prosecutor,[177] which greatly circumscribed the availability of private prosecutors to prosecute criminal contempt cases. Although the lawyer who represented the aggrieved party in the original case that resulted in the breached order might have a commitment to the injured party, a disinterested lawyer, by definition, does not share that commitment. Finding another lawyer who will prosecute the case without compensation is a tall order.[178]

For judges to realize their power to appoint private prosecutors, jurisdictions must either endeavor to create a database of pro bono prosecutors,[179] or they must commit public funds. Soliciting pro bono

175. *See supra* note 74 and accompanying text.

176. *See supra* notes 83–88 and accompanying text (discussing the judge's power to appoint a private prosecutor if the prosecution declines to pursue the case).

177. *See supra* notes 85–88 and accompanying text (noting that in *Young*, the court held that there is a right to a disinterested prosecutor).

178. *See supra* notes 88–89 and accompanying text (discussing that the possible difficulty in obtaining a private prosecutor who is willing to prosecute the case).

179. *C.f.* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL'Y 571, 603–04 (2011) (suggesting that lawyers should devote time to pro bono work, and individuals in need of pro bono services should have access to them); Martha Neil, *Following New York's Lead, California Bar Officials Plan To Require Pro Bono Work for Admission*, ABA J. (Mar. 13, 2015, 3:55 PM), http://www.abajournal.com/news/article/following_new_yorks_lead_california_bar_officials_plan_to_require_pro_bono ("Officials at legal aid organizations say more help representing low-income individuals who can't afford lawyers is greatly needed."); Media Release, Nearly Three-Fourths of America's Lawyers Do Pro Bono Work, According to ABA Study (Feb. 19, 2009) (on file with

prosecutors might be successful because prosecution could be attractive to law firm attorneys or law school clinics. One commentator proposed that the aggrieved party put money in a trust to be paid out to the private prosecutor on resolution of the contempt matter.[180] Although this approach might be feasible and effective in some contempt cases, it would limit the availability of prosecutors for indigent litigants who could not afford to fund the trust. An administrative initiative would provide substance to the court's ability to appoint private prosecutors and greatly enhance the chances that prosecution would proceed in these cases.

3. Contextual Sentencing

Judges should be provided with guidance on sentencing given the contextual considerations involved in these cases. This guidance could be statutory, regulatory, or merely informal.[181] In many cases, a suspended sentence that is executed only in the event of a further breach could be the most effective and appropriate sentence in the context of a family in which an incarcerated parent would greatly disrupt the custodial arrangement or the parent-child relationship.[182] In the alternative, probationary terms could be set that are consistent with the needs of the family and are in the best interests of the child. Probationary terms could include an order to attend parenting classes or comply with the parenting order. If incarceration were determined necessary to induce compliance, judges could be directed to impose an incarceration schedule consistent with the contemnor's parenting obligations and with his relationship with his children. In the end, al-

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author) ("Although lawyers donate more than 20 million hours each year, the poor still do not have access to the legal help they need 80 percent of the time." (quoting Mark I. Schickman, Chair, ABA Standing Committee on Pro Bono and Public Service)).

180. Wainstein, *supra* note 66, at 747.

181. States may seek to influence judicial sentencing through a variety of approaches, including advisory or mandatory sentencing guidelines. *See* DEP'T OF LEGISLATIVE SERVS., SENTENCING GUIDELINES—MARYLAND AND NATIONWIDE (2014), http://dls.state.md.us/data/polanasubare/polanasubare_coucrijusncivmat/Sentencing-Guidelines-Final-Unsigned.pdf (providing an overview of state sentencing structures). Recommendations for sentencing considerations could be made through one of the many sentencing commissions established by the state or through judiciary committees that retain the authority to create guidelines in other states. *See* John J. Cullerton et al., *Criminal and Sentencing Law Review Commissions: Detached, Contemplative Decision Making on Matters of Criminal Justice System Reform*, 41 J. MARSHALL L. REV. 777, 800 (2008) (noting that as of 2008, twenty-six states had created state sentencing commissions); Joanna Shepherd, Blakely*'s Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 541 (2007) (discussing that the state courts have retained authority to implement sentencing guidelines).

182. *See* Kohn, *supra* note 150, *passim* (providing an overview of research on the effect of father-absence).

though courts should take violations of custody and parenting provisions seriously, judges must remain attentive to supporting positive father-child relationships.

Finally, judicial education is necessary to enable judges to be attentive to the larger contextual issues related to the enforcement of these provisions. Advocates could seek out training opportunities with judges to note special issues related to relief in civil contempt cases, the importance of the enforcement of these orders despite their civil domestic relations nature, and the availability of private prosecution.

4. Enhanced Opportunity To Appeal

There is very little appellate guidance for judges with regard to the handling of contempt motions in this context. This dearth of case law relates to several factors, not the least relevant of which is the absence of counsel in domestic violence cases.[183] But, in addition to this factor, cases are not analyzed on appeal because judges often decline to rule on motions for contempt in this arena. Instead, they ask the parties to work it out, they set further hearing dates, and they urge the parties to address these issues in domestic relations cases. Eventually parties stop returning to court, or the plaintiffs dismiss the cases out of frustration. As such, there is no ruling to appeal. Administrative orders setting deadlines for judges to rule on motions for contempt in domestic violence cases could mandate that judges rule on motions in timely ways to permit effective enforcement or, in the alternative, to permit appeal.[184]

B. Prosecutor Power Reconsidered

Although prosecutors hold the power to enforce custody and parenting provisions of custody orders, they generally lack the will to deploy that power. Reforms that are achieved through advocacy, legislation, and judicial education to make prosecution both more prevalent and more effective should focus on incentivizing enforcement and assuring that enforcement and sentencing be undertaken in a contextual way that is responsive to the needs of the family at issue.

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183. *See supra* Part III (discussing how misdemeanor prosecution and criminal and civil contempt are unlikely to result in reliable custody and visitation provisions in protection orders).

184. Appeals themselves are complex in this context because protection orders, which are generally short term orders, often expire before the appeal is heard. *See* Stoever, *supra* note 1, at 1083–85 (discussing the varying lengths of protection orders). If the order has expired, appellate courts often deem the appellate issues in the appeal to be moot. *See* Watford-Cunningham v. Cunningham, 69 A.3d 404 (D.C. 2013) (affirming the dismissal of a civil contempt motion based on mootness because the order had expired).

1. Incentivizing Government Enforcement

Prosecutors, as discussed *supra*, ordinarily exercise their discretion not to pursue criminal enforcement of the parenting relief in a protection order. Advocacy centered on reinforcing the importance of parenting provisions of protection orders and the consequences nonenforcement could increase the likelihood that prosecutors pursue enforcement of these provisions. Further, more prevalent legislation criminalizing interference with custody would render prosecution more likely.

Encouraging prosecutors to perceive the infringement of the parenting provisions of a protection order in a broader context could induce more aggressive enforcement. Advocates could raise prosecutorial awareness about the potential consequences of the system, turning a blind eye to overt and recurrent violations of protection orders—even the parenting provisions. A respondent who realizes that he can violate the parenting provisions of a protection order may well, and rationally in fact, determine that he can violate the order without consequence. Sanctioning violations of some relief undermines all relief—even the relief that is intended to directly protect the safety of the victim, such as the stay away and no abuse provisions. Drawing an explicit connection between breaches of parenting provisions and general safety could incentivize prosecutors to respond more aggressively.

Further, advocates could convey to prosecutors the connection between custodial tension and violence. It is precisely this connection that first induced jurisdictions to include protection orders as available relief in family law.[185] When parties—who already have a history of violence and abuse—fight over children and are forced to negotiate

185. *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Role of the Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 24–25 (1999) (noting that "[a]lthough a civil protection order can resolve a survivor's family-law problems swiftly, it only provides temporary relief[,]" and it is important to reduce this temporary relief gap by "fil[ing] for permanent relief, [like divorce and custody,]" while adjudicating the civil protection order); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 890 (1993) (finding that it is important for a judge to consolidate a petitioner's family law case and domestic violence case because it "improves civil protection orders effectiveness"); Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 554–55 (2010) (noting that "[p]rotection order statutes have expanded the scope of relief available to victims from simple stay away orders to include family law[,]" and these statutes include other relief, such as family law relief, to address the conflict between, and meet the needs of the parties).

about parenting styles, the risk of violence increases.[186] Swift enforcement to reinforce the sanctity of the order is likely to reestablish a custodial system that quells tensions and reduces the opportunity for direct conflict.

Further, advocates could insist on framing a violation of the parenting provisions of a protection order as about not "merely" a family matter, but about criminal behavior. At its essence, violating any provision of a protection order—be it a no abuse provision or a parenting time provision—is a criminal act. State statutes criminalizing the violation of a protection order do not distinguish between different *types* of breaches. Similarly, the knowing and willful violation of a protection order amounts to criminal contempt of a court order[187] regardless of what type of relief is contained in that injunction. The breach of a parenting time provision is a crime.

In the 1970s and 1980s, when advocates were seeking to induce the criminal justice system to take seriously violence that occurs between intimates, they made similar arguments.[188] Regardless of the conduct's intimate context, the action itself amounted to criminal behavior and should be treated equivalently. Advocates recognized that the criminal justice system was resistant to entering into family disputes and pursued this initiative by illustrating the essential criminal nature of violence, even when it occurs in the home or between intimates.[189] And, ultimately, their arguments were persuasive.[190] All states and

186. *See* Elizabeth LaFlamme, *Missouri's Parenting Plan Requirement: Is It in the Best Interest of Domestic Violence Victims?*, 56 J. Mo. B. 30, 32 (2000) (noting that joint parental decision making increases contact between the abuser and the victim and enhances the risk of further violence); *c.f.* Klein & Orloff, *supra* note 185, at 866 (finding that when a parent seeks joint custody or unsupervised visitation and there is evidence of past family violence, there must be an investigation into the family violence, and state legislators and judges creating custody laws must understand the propensity for continued violence).

187. *See supra* notes 23–24 and accompanying text (noting that to prevail in a criminal contempt action, the prosecutor must prove that the contemnor willfully violated the court order).

188. *See* Zimring, *supra* note 165, at 536 (noting that in the 1970s and 1980s, advocates perceived that "anything other than criminalization demeans the seriousness of the offenses and the dignity of the victim-interests at stake in family violence"). *See generally* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. Rev. L. & Soc. Change 191, 211–24 (2008) (discussing the evolution of mandatory intervention policies and the criminalization of domestic violence).

189. *See Domestic Violence, Not Just a Family Matter: Hearing Before the Subcomm. on Crime & Criminal Justice of the House Judiciary Comm.*, 103d Cong. 2d Sess. 54–55 (1994) (statement of Joan Zorza, Senior Attorney, National Battered Women's Law Project, National Center on Women and Family Law); Cynthia Grant Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. Crim. L. & Criminology 201, 206 (1992).

190. *See* Bailey, *supra* note 166, at 1785 ("Feminist activists, therefore, were quite successful in changing the national conversation about domestic violence."); Mills, *supra* note 164, at 557 ("After years of indifference to intimate abuse, many state actors now respond uniformly to

the District of Columbia now treat domestic violence as an actionable criminal offense.[191] Similar arguments could now be successful in this context.

The domestic violence criminalization movement should, at the same time, serve as a cautionary tale.[192] Although advocates were successful in achieving criminalization, they did not adequately foresee the collateral consequences of prosecutors pursuing domestic violence as a crime like any other crime. Committed against an intimate partner, spouse, coparent, or relative, domestic violence involves complex interpersonal dynamics, and unlike most violence perpetrated against strangers, domestic violence implicates a broad range of people and considerations. After decades of more aggressive prosecution of domestic violence, advocates—who became more attentive to the complex interpersonal dynamics—began pushing prosecutors to consider issues such as the victims' preferences for or against prosecution,[193] the children involved in the relationship,[194] and the effect of

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crimes between domestic partners, an approach that eliminates both the state actor's discretion and the victim's desires from the state's decisionmaking [process.]").

191. *See supra* note 32 and accompanying text (providing an example of a state, Mississippi, that makes domestic violence an actionable criminal offense).

192. *See* Kohn, *supra* note 188, at 212–16 (arguing that the success of advocates' efforts to have the state consider domestic violence as a crime like any other crime ultimately compromised the agency of victims in the system); Victoria Law, *Against Carceral Feminism*, TRUTHOUT (Oct. 24, 2014, 11:27 AM), http://www.truth-out.org/news/item/27028-against-carceral-feminism (arguing that the feminist movement that lobbied for the criminalization against domestic violence did not sufficiently consider the consequences for low-income women and domestic violence victims generally).

193. *See* Kohn, *supra* note 188, at 240–44 (analyzing and critiquing the effect of mandatory interventions on victims); Renée Römkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions To Support Battered Women*, 13 YALE J.L. & FEMINISM 265, 266–67 (2001) ("From a criminal legal perspective, however, there is a growing acknowledgment among feminist legal scholars that mandatory arrest and prosecution policies invoke dilemmas and problems that deserve critical attention when developing policies to help protect victims."); *see also* Bailey, *supra* note 166, at 1785–86 (arguing that although feminists pushed for state intervention, they did not consider that many victims did not precisely engage the state to protect their privacy); Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 95 (2007) (concluding that civil protection orders can be ineffective when dealing with individuals who wish to stay together because many judges do not account for a victim's autonomy or the nature of the abuser's violence); Mills, *supra* note 164, at 595 (arguing that mandatory intervention policies can replicate a battering dynamic by denying the victim's agency).

194. *See, e.g.*, Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 18–19 (2001) (stating the possibility that incarcerating individuals who conduct abuse in front of a child might unnecessarily increase adult victim liability as well as increase the number of child witnesses to a traumatic degree).

potential incarceration on the family's wellbeing.[195]

Similarly, efforts to equate the violation of the parenting provisions of a protection order with any other law-breaching conduct must be accompanied by a discussion of the difference as well. Given the intertwined relationship between the parties, criminally enforcing the breach of a parenting time provision may not be appropriate in some cases. Sentencing might involve different considerations given the parenting responsibilities of the parties, the best interests of the children, and the preferences of the aggrieved party.

Finally, a legislative initiative might incentivize prosecutors to pursue criminal enforcement of parenting time provisions in protection orders. Some states criminalize interference with custody rights—the conduct involving a party breaching the parenting provision of a protection order.[196] Expanding the prevalence of criminal statutes such as this could increase criminal enforcement. At the same time, this type of enforcement elicits the same concerns about the effect of the criminal justice system being involved in specific cases and in sentencing as discussed *supra*.

Advocacy, consciousness-raising, and legislation could increase the likelihood of a prosecutorial response to violations of protection order parenting provisions. At the same time, any advocacy efforts should be tempered by an awareness of the criminal justice system's shortcomings as a response in this context.

2. Contextual Enforcement

Consequently, any effort to increase the likelihood that prosecutors will deploy their power to enforce parenting provisions must be accompanied by a concurrent campaign to encourage prosecutors to pursue enforcement in a contextual way with appropriate sentencing recommendations. As prosecutors' interests in deploying their en-

195. *See, e.g.*, Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced To Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 414 (2001) (explaining how each domestic violence situation is different, and prosecutors should, therefore, look to the socioeconomic needs of each victim, the seriousness of the victim's injuries, and the actual chance that the prosecution will be successful with a low risk of retaliation); Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 B.Y.U. L. REV. 515, 532–33 (arguing that no-drop prosecution policies in domestic violence cases can be problematic because they essentially end the romantic relationship between the two parties, and this may not serve the family's particular economic or familial needs).

196. *See, e.g.*, ALA. CODE § 13A-6-45 (2014) (stating that interference with custody is a felony); ARK. CODE ANN. § 5-26-501 (2007) (criminalizing interference with custody); IDAHO CODE § 18-4506 (2015); MONT. CODE ANN. § 45-5-631 (1997); TENN. CODE ANN. § 39-13-306 (2010); TEX. PENAL CODE ANN. § 25.03 (West 2011).

forcement power increases, so too must their attentiveness to the specific context of these breaches. By talking with the aggrieved parties and understanding their preferences, the finances of the family, the context and breadth of the breach, and the best interests of the child, the prosecutor can more contextually and effectively use her discretion to pursue criminal enforcement.

C. The Power of Aggrieved Parties and Relief Reconsidered

Aggrieved parties, who have both the most incentive and the access to relevant information, should have more meaningful power to enforce the parenting provisions of the protection orders than the courts grant them. For protected parties to garner more power in the criminal realm, their access to the criminal justice system should be expanded generally and their influence on charging and sentencing should also be fortified. Civilly, while aggrieved parties hold the power to pursue enforcement actions, limitations on relief should be minimized through statutory guidance to make that power more effective. These results could be achieved through a range of legislative, regulatory, and advocacy initiatives.

1. Reducing Barriers to the Criminal Justice System

To address the limitations on aggrieved parties who want to use the criminal justice system to enforce their parenting provisions within protection orders, barriers to accessing that system should be reduced. First, although the progeny of the U.S. Supreme Court's *Robertson* opinion eliminated the private right of action for criminal contempt the District of Columbia, that prohibition did not eradicate an aggrieved party's right of action nationwide. The issue is still very much in flux. As discussed *supra*, although some jurisdictions previously required that the state must prosecute criminal contempts,[197] a fair number of states have not addressed the issue either by common law or statute.[198] In these states, legislatures could codify a private right of action for aggrieved parties to prosecute criminal contempt.[199] Al-

197. *See supra* notes 105–06 and accompanying text.

198. *See supra* notes 103–04 and accompanying text.

199. Since *Robertson*, commentators have agreed to argue the importance and constitutional viability of the private right of action for criminal contempt. *See, e.g.*, Patel, *supra* note 67, at 164 (noting that "permitting private, interested prosecution is consistent with sound public policy of guaranteeing that victims are not deprived of court-ordered protections[,]" and "the interested party is in the best position to be aware of the contempt[,]" making private prosecution "proper [and] also favorable"); Note, *Permitting Private Initiation of Criminal Contempt Proceedings*, 124 HARV. L. REV. 1485, 1492 (2011) (finding multiple reasons why an individual should be able to initiate a private right of action because police enforcement and "public prosecutions of CPO

though the *Robertson* rationale suggests that some jurisdictions will refuse to provide this right, others may grant this power to aggrieved parties along with those jurisdictions that already do so.[200]

Short of a recognized private right of action, aggrieved parties should be granted access to the criminal justice system by the ability to initiate criminal contempt proceedings. In some states, aggrieved parties enjoy a clear right to initiate proceedings by filing a motion, a criminal complaint,[201] or another procedural document, such as an application for a show cause order.[202] With this filing, the party can at least seek the attention of the judge or the prosecutor. Other jurisdictions either fail to explicitly set forth a procedure for initiating a criminal contempt case[203] or restrict that right to the judge or prosecution.[204] Without this right, those holding court-ordered protection have little hope of criminal enforcement. The right to initiate a case is a critical entitlement to ensure that victims of domestic violence access to justice and the hope of reifying the promise of their protection orders.

Finally, to provide aggrieved parties with at least some influence on the criminal justice system, prosecutors should facilitate their involvement in the sentencing process. As discussed *supra*, prosecutors should be educated about the merits of considering the complaining witnesses' perspective on this complex dynamic and encouraged to consider that perspective. In addition, advocates could press prosecutors to seek out meaningful input from complaining witnesses in victim witness statements or in sentencing hearings.

2. Rendering Civil Relief More Effective

Although aggrieved parties hold the power to enforce a protection order through civil contempt, the effectiveness of that action is severely limited by legal constraints on the relief. Judges are either constrained by the law of civil contempt in awarding remedies or they choose to limit their own discretion in a way that often fails to provide

violations are often unreliable[,]" and this unreliability creates less incentive "to press charges for protective order violations").

200. *See supra* note 103 and accompanying text (noting that the repercussions of *Robertson* are unknown because the case fails to have precedential value).

201. *See supra* note 102 and accompanying text (noting that in *Robertson*, the district court permitted the aggrieved party to privately prosecute criminal contempt).

202. *See, e.g.*, KAN. STAT. ANN. § 20-1204a (2007).

203. *See supra* note 103 and accompanying text (noting that in some states, courts have permitted a interested, private party to prosecute crimes).

204. *See supra* notes 106 and accompanying text (discussing how a significant number of jurisdictions explicitly prohibit private prosecution of criminal contempt cases).

relief that is responsive to violations of parenting time provisions. Those limitations should be addressed through legislation so that aggrieved parties can more effectively enforce their court-granted relief. Providing a statutory right of enforcement short of contempt that enumerates remedies—an approach taken in the domestic relations context in some jurisdictions—should be effective in this context. Alternatively, domestic relations or domestic violence legislation could provide more guidance on relief in civil contempt cases.

a. Civil Enforcement

Some jurisdictions have sought to provide parties with specific statutory enforcement actions short of contempt for the violation of custody and visitation orders. These statutory provisions, which are often included in the states' general custody statutes, provide explicit enforcement mechanisms for aggrieved parties so that they can move on their own to effectively address breaches of custody and visitation provisions without turning to contempt remedies.[205] These statutes provide aggrieved parties with a specific right of action that they can pursue without government action and that is not hampered by the ordinary civil contempt doctrines that might limit relief.

For example, a Delaware statute provides that if a court, after a hearing, has determined that a party has "violated, interfered with, impaired or impeded the rights of a parent or a child with respect to the exercise of" visitation, custody, or other contact with the child, then it may impose specific sanctions or grant enumerated remedies.[206] The sanctions include a fine assessed against the interfering parent that is calculated based on the interested parent's child support obligation.[207] Under the statute, the aggrieved parent is also entitled to a combination of extra visitation to make up for lost visits, or a temporary transfer of custody for up to thirty days, and other relief granted at the judge's discretion.[208] A Colorado statute provides an even more extensive array of relief, including an order that requires

205. *See, e.g.*, COLO. REV. STAT. § 14-10-129.5 (2014); DEL. CODE ANN. tit. 13, §§ 727–28 (2009); MINN. STAT. § 518.175(6) (2014); N.J. STAT. ANN § 2A:34-23.3 (West 2010); WYO. STAT. ANN. § 20-2-204 (2014); *see also* Mahoney, *supra* note 71, at 855–56 (discussing the recent advent of remedies embedded in custody statutes addressing relief for violations of custody and visitation orders).

206. DEL. CODE ANN. tit. 13, § 728(b).

207. *Id.* § 728(b)(3).

208. *Id.* §§ 728(b)(1)–(2).

parent education program attendance, family counseling, custody modification, and the imposition of a civil fine.[209]

These specific provisions for enforcement actions and the enumeration of broad available remedies should be included in protection order statutes. With this statutory authorization, aggrieved parties could enforce breached custody and visitation provisions without the complications inherent in civil contempt law and in pursuit of remedies that seek to further the child's best interest and future compliance with judicial orders.

b. Civil Contempt

Alternatively, some jurisdictions have enacted specific statutes that set forth specific enumerated relief in civil contempt cases for the violation of general custody and visitation orders.[210] In Louisiana, for example, the statute sets forth replacement visitation days, parent education attendance, counseling, and attorneys' fees as alternatives or additions to jail time when the court holds a contemnor in civil contempt for breaching a custody or visitation order.[211] Michigan supplements those forms of relief by suspending occupational or driver's licenses and placing the parent under supervision until he completes substance abuse counseling programs, mandating that the parent engages in job seeking efforts, and facilitating make-up parenting time.[212]

The rationale behind the statutes is sound because the statutes give the judge specific authorization to grant appropriate relief that will correct past and coerce future compliance and compensate the aggrieved parent. Judges have implicit authority to grant this relief but are often reluctant to do so without explicit statutory authorization.[213]

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209. COLO. REV. STAT. § 14-10-129.5. It is important to note that failure to comply with a protection order's provisions regarding custody and visitation may be relevant to a subsequent case for permanent custody. Under the considerations set forth for courts to determine custody, this conduct might well be admissible and extremely probative.

210. Mahoney, *supra* note 71, at 854–55 (discussing statutes that set forth remedies for civil contempt for violating a custody or visitation order); *see, e.g.*, IND. CODE § 31-17-4-8 (2008); IOWA CODE § 598.23 (2016); LA. STAT. ANN. § 13:4611 (2012); ME. STAT. tit. 19, § 1653 (2015); MICH. COMP. LAWS § 552.644 (2015); MO. REV. STAT. § 452.400 (2014); NEV. REV. STAT. § 125C.030 (2014); OHIO REV. CODE ANN. § 2705.031 (2016); VT. STAT. ANN. tit. 15, § 603 (2015); WASH. REV. CODE § 26.09.160 (2015).

211. LA. STAT. ANN. §§ 13:4611(d)–(e).

212. MICH. COMP. LAWS § 552.644(2).

213. D.C. Act of July 12, 1982, D.C. L. No. 4-144, §§ 4–6 (codified as amended at D.C. CODE § 16-1003 to -1005 (2009)) (stating that under the prior version of the statute, judges were reluctant to award relief that was not specifically enumerated despite their authority to do so under a broad catch-all clause).

Analogous statutory guidance in protection order statutes, if offered nationwide, could provide holders of protection orders with the potential for more effective enforcement mechanisms and a more secure reliance on orders' dictates. Statutory enumeration of relief would also clarify the purpose of civil contempt so that there is no ambiguity that the action is intended to coerce *and* compensate.[214]

3. Individual Advocacy

Advocates could enhance protected parties' access to compensation for breaches by drafting self-activating remedies in protection orders. For example, a protection order could include a clause mandating that if the respondent fails to return the child from visitation within a certain amount of time after the agreed upon time, or if he fails to produce a child according to the order, then the aggrieved party may unilaterally take additional visitation hours with the child or may refuse to produce the child for the next visitation. This type of clause would obviate the need for future court enforcement. However, it would be effective, of course, only if the protected party had enough access to the child to take advantage of those remedies.

Further, advocates could encourage protected parties to seek long-term domestic relations orders to supplement the relief in their protection orders. Although long-term custody orders granted by domestic relations courts also suffer from underenforcement, statutory guidance to judges about appropriate remedies for violations is far more prevalent, rendering it more likely that judges will grant effective relief.[215]

4. Relief Consistent With The Best Interests of the Child

Ultimately, any relief granted to compensate an aggrieved party for violations of a parenting time order should be consistent with the best interests of the child because the relief involves the well-being of children. Imposing a statutory best interest consideration would be consistent with other legal doctrines because the law consistently provides judges with the opportunity to consider standards that give their determinations integrity and effectiveness.[216]

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214. *See supra* Section III.B.2 (discussing how some jurisdictions fail to recognize the dual purpose of civil contempt, which is to enforce compliance with a court order and compensate for losses related to the noncompliance).

215. *See supra* Section III.C.3 (discussing that judges are not provided any specific direction about the range of relief to enforce custody and visitation provisions of protection orders).

216. David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CALIF. L. REV. 937, 992 (1990) ("Without the guidance of formal legal standards, and with only broad notions of policy and the judge's own conscience to guide the judge's decision, the likelihood of inconsis-

This context is no exception. Even when granting enumerated statutory remedies in civil contempt cases, the judge should be mandated to consider the best interests of the child. Would it be in that child's best interest to change physical custody? What effect would granting the father two consecutive weeks of parenting time to compensate for fourteen days withheld by the mother over a six-month period have on the child? Protection order statutes should include a direct mandate to consider the child's well-being when considering appropriate relief in a civil contempt case.

This range of reforms could make real and useful the power that various system actors and litigants have to enforce the custody and parenting time provisions of protection orders. Any effort to sharpen enforcement of domestic relations provisions of protection orders, however, must also be attentive to collateral consequences for the beneficiaries of those orders. Sometimes a parent will withhold parenting time from the other parent not to harass that parent or challenge the order's effectiveness, but to protect a child or the party herself. Enforcement mechanisms must take into account defenses for parents who exercise good-faith efforts to protect their children.[217]

In addition, fortifying enforcement mechanisms also runs the risk of providing abusive parents with an additional avenue by which to harass the other parent.[218] As one commentator noted: "Threatened or

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tency and unfairness is immeasurably increased."); *see* Nancy Lee Firak & Kimberly A. Schmaltz, *Air Rage: Choice of Law for Intentional Torts Occurring in Flight over International Waters*, 63 ALB. L. REV. 1, 66 (1999) (discussing that courts have found that current legal standards in admiralty jurisdictions, like the locality test, should remain the legal standard because incorporating a "factors-based test" would be "hard to apply, jettisoning relative predictability" (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995))); Raymond A. Catanzano, *Enforcement of Support Awards in Matrimonial Actions: The Need for Uniformity*, AM. BAR ASS'N GPSOLO EREPORT (May 2014), http://www.americanbar.org/publications/gpsolo_ereport/2014/may_2014/enforcement_support_awards_matrimonial_actions_need_uniformity.html. Courts impose different sanctions on the noncustodial parents when they failed to pay their child support, creating inconsistency in family court: "Cooperative uniformity in the enforcement of [child] support orders [through uniform law] between the states is essential." *Id.*

217. *E.g.*, IDAHO CODE ANN. § 18-4506(2)(a) (2015) (codifying that it is an affirmative defense to a prosecution for interference with custody if the defendant is acting to protect a child); TENN. CODE ANN. § 39-13-306(c)(1) (2010); *see also* Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. KAN. L. REV. 433, 451 (1998) (explaining that in some instances of extreme violence, mothers may violate a custody order and flee the state out of fear of physical abuse or even murder); Tarr, *supra* note 63, at 43–48 (stating that because batterers can misuse the protection order system and because challenging these decisions in court can be prohibitively emotionally and financially challenging, some victims may flee the state and avoid the process entirely).

218. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 24 (2004) (stating that batterers engage in a "race to the courthouse" to obtain a civil protection order against their spouse by asserting that all of the abuse has actually happened to the batterer);

actual litigation regarding custody or visitation can become a critical avenue for the batterer to maintain control after separation."[219] Further, experts who study abusive fathers note the prevalence of custody litigation in the context of domestic violence.[220] They also note the frequent success[221] of abusive fathers in strategically manipulating the system to use custody litigation to their advantage.[222] Any initiative creating private rights of action to enforce custody and visitation provisions in protection orders should include safeguards to protect parties from harassing litigation.

V. CONCLUSION

All court orders should make good on their promise of enforceability. Parties should be able to rely on injunctions that are validly issued to protect their legal rights and safety. If a protected party can prove that the opposing party violated the court order, she should be entitled to her day in court and to meaningful relief to compensate for the violation. This is not the case. Civil injunctions are often unenforced, and the problem is particularly acute in the enforcement of domestic relations provisions in protection orders. Immediate attention should

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George Lardner, Jr., Opinion, *Beating the System*, WASH. POST, Aug. 1, 1993, http://www.washingtonpost.com/archive/opinions/1993/08/01/beating-the-system/8a3fba5b-9c62-41b8-8716-5b11db56b92e/ (explaining that batterers use intimidation tactics to intimidate individuals within the legal system, such as lawyers and jurors, in order to further marginalize victims and gain the upper hand in custody disputes); Mary Przekop, Student Scholarship, *One More Battleground: Domestic Violence, Child Custody, and the Batterer's Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053, 1058–93 (2011) (explaining how batterers can continually file motions and claims against their victim to maintain control and create a culture of emotional instability over the victim for years); Lundy Bancroft, *Understanding the Batterer in Custody and Visitation Disputes*, LUNDY BANCROFT (1998), http://www.lundybancroft.com/articles/understanding-the-batterer-in-custody-and-visitation-disputes (stating that when batterers feel as if they are losing, they can use threats of violence or retaliation to intimidate women to drop legal disputes or even make the victims's attorneys fear for their own personal safety); Amy Barasch, *Justice for Victims of Domestic Violence*, SLATE (Feb. 19, 2015, 9:30 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/domestic_violence_protection_victims_need_civil_courts_and_lawyers.html (arguing that because batterers are both manipulative and abusive, they use abusive litigation methods to establish more control over their partners).

219. Tarr, *supra* note 63, at 61 (citing LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 98 (2002)).

220. *See, e.g.*, BANCROFT & SILVERMAN, *supra* note 219, at 98.

221. *See id.* at 98 (noting that abusive fathers are more likely than non-battering fathers to seek custody and that they have an advantage over battered women in winning in a contested custody case); *supra* note 63 and accompanying text (explaining that it is a well-documented tactic of the abuser to unlawfully withhold children from women).

222. *See* BANCROFT & SILVERMAN, *supra* note 219, at 22–128 (discussing an abuser's manipulative tactics and attitudes towards victims of domestic violence); *supra* note 63 and accompanying text (noting that abusers may unlawfully withhold children from women to exert control over them).

be focused on the enforcement of the parenting time provisions within protection orders because of the particular confluence of historical, economic, and legal influences that result in prodigious under enforcement and ineffective enforcement of this relief. The lack of effective enforcement of these orders not only undermines the faith of litigants in the justice system, but also puts them and their families at risk of violence and dangerous instability. Reforms in this area of particularly extreme underenforcement should have an influence on enforcement of all civil injunctions so that they can deliver on their assurances of just and reliable resolution, shoring up the legal system and its role in resolving conflicts.