

# Analyzing the Impact of Coercion on Domestic Violence Victims: *How Much is Too Much?*

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## INTRODUCTION

Feminist scholars and activists have long called for the justice system to recognize coercion, rather than physical assault alone, as a critical method batterers use to control victims' behaviors and decision-making.<sup>1</sup> Such coercion often undermines the legal remedies established to combat domestic violence.<sup>2</sup> Without attention to the batterer's use of coercion—pressure, influence, or threat of force to the degree that these tactics interfere with a victim's volition<sup>3</sup>—courts hear only parts of victims' stories.<sup>4</sup>

Physical violence may not be the most significant factor about battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children, and friends; and work. Sporadic, even severe violence makes this strategy of control effective. But the unique profile of “the battered woman” arises as

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1. See, e.g., Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 973-974 (1995) (arguing for an alternative framework emphasizing the “batterer’s pattern of coercion and control rather than his violent acts or their effects on victim psychology”).
2. *Id.* See also Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 744 (2005) (arguing that coercive control in intimate partner violence “needs to be more fully understood in the legal context”).
3. Bruce Winnick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1145 (1997) (explaining coercion in its most basic meaning, before discussing it in the context of coerced mental health treatment: “Coercion may occur when individuals experience a loss of control over decisions that they would like to make for themselves through threats, pressure, persuasion, manipulation, or deception on the part of another”).
4. Dutton & Goodman, *supra* note 2, at 744.

much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma.<sup>5</sup>

By taking coercion into account, legal actors may more effectively prosecute, sentence, and treat batterers as well as effectively plan for victims' safety.<sup>6</sup> When a victim seeks legal intervention, consideration of coercion furthers her goals by strengthening both criminal and civil cases against batterers. But when a victim does not support the state's prosecution of a batterer, or wishes to dismiss a civil case against him, consideration of coercion may undermine her goal. If legal advocates, lawyers and judges believe that a victim's decision to "drop" her case is coerced by a batterer, they may be reluctant to give credence to her decision.

In the criminal system, mandatory arrest<sup>7</sup> and "no drop" prosecution<sup>8</sup> policies are aimed at preventing the batterer from pressuring the victim to "drop the charges."<sup>9</sup> Similarly, in the civil system, when victims move to dissolve their civil protection orders,<sup>10</sup> judicial guidelines encourage judges to deny victims' requests unless they are convinced that the victims are acting of their own volition, without pressure from batterers.<sup>11</sup>

For example, when a victim moves the court to dissolve her civil protection

5. Stark, *supra* note 1, at 986.

6. See, e.g., Stark, *supra* note 1, at 984; Dutton & Goodman, *supra* note 2, at 744.

7. "Mandatory arrest" refers to the requirement, codified in most states' criminal laws, of police to make an arrest, regardless of the victim's wishes, when they have probable cause to believe that a suspect violated a valid civil protection order or when a misdemeanor incident of domestic violence has occurred. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859-1860 (1996); Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239, 264-271 (2005); ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 184-188 (2000).

8. "No drop" prosecution refers to the policy of many states district attorneys to prosecute batterers even if the victim does not wish to pursue or support the case. See Hanna, *supra* note 7, at 1862-1863 (though the author explains that "no drop" is a misnomer; rather "hard drop" and "soft drop" more aptly describe pro-prosecution policies); Miccio, *supra* note 7, at 264-271; SCHNEIDER, *supra* note 7, at 184-188.

9. See generally Hanna, *supra* note 7; SCHNEIDER, *supra* note 7, at 185. Other goals of mandatory interventions in the criminal justice system include sending a strong message regarding the public wrong of domestic violence; sending the batterer the message that violent conduct and abuse are criminal; and treating domestic violence with the same seriousness that violence between strangers is treated. *Id.* at 185-186.

10. Civil protection orders (or restraining orders) provide domestic violence victims seeking protection from abuse with an alternative or additional remedy to criminal prosecution. See PETER FINN & SARAH COLSON, NAT'L INST. OF JUSTICE, *CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT* (1990). They may prohibit a batterer from further abusing or contacting a victim, and may also evict him from the parties' residence, provide for custody and visitation of the parties' minor child, require a party to pay child or spousal support, and provide other avenues of relief. *Id.* at 33-47.

11. These policies are most commonly promulgated in the form of benchguides for judges who hear CPO cases, though one state statute (Idaho) encourages judges to consider coercion and one jurisdiction's rules of procedure (the District of Columbia) do the same. See *infra* note 63 and accompanying text, Section II.

order (“CPO”), a judge may be unwilling to find that her request is made free of coercion if the batterer threatened to kill her unless she got the order “dropped.” Fearing that she is not acting of her own will, but rather that of the batterer’s, the judge may keep the order in place despite the victim’s stated wishes to the contrary.<sup>12</sup> The judge’s fear makes sense, given that batterers do, in fact, threaten victims into dropping their CPOs<sup>13</sup> and re-assault them in retaliation for taking legal action.<sup>14</sup>

Less clear is what a judge should do when a victim has been pressured by more subtle means. Take another example. As a result of the issuance of a CPO, a batterer may no longer live with a victim or contribute to household expenses. He may tell her that if she drops the order, he will pay child support. If the victim cannot afford to survive on her own,<sup>15</sup> she may choose to drop the order rather than face homelessness<sup>16</sup> and the accompanying risk of danger to her and her children.<sup>17</sup> When the victim returns to court to ask that the protection order be dissolved, should the judge deny her motion, finding that she has not acted voluntarily?

We all make decisions based on financial pressures. Many of us would say that financial factors inform, rather than invalidate, our decision making. But financial pressure is one of the most prevalent means used by batterers to control victims, and has been found to be a primary reason victims do not separate from

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12. See FINN & COLSON, *supra* note 10, at 28 (noting that judges in many jurisdictions maintain CPOs in force against the express wishes of the victim; others make a regular effort to determine whether petitioners have been intimidated). Some feminist scholars have advocated that if a court so much as doubts the voluntariness of a victim’s request to dismiss her CPO, it should continue rather than dissolve the order. See, e.g., 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, 1068, n. 1652 (1993).
  13. See, e.g., Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 214, 219 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996) (reporting the results of an empirical study in which 40% of women who obtained CPOs did not return to court to request that the order be made final. Of these women, 35% reported that the reason she did not return was that the batterer talked her out of it; 6% reported that the batterer threatened her; and 4% stated the batterer forced his way back into the home).
  14. JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 84 (1999).
  15. Barbara J. Hart & Erika A. Sussman, *Civil Tort Suits and Economic Justice for Battered Women*, 4 VICTIM ADVOCATE 3, 3 (Spring 2004) (explaining that access to economic viability is critical to the long-term safety of victims, but that civil protection orders and the majority of legal mechanisms available to battered women do not account for this reality); Richard Gelles, *Abused Wives, Why Do They Stay?*, 38 J. MARRIAGE & FAM. 659, 661-663 (1976) (arguing that the fewer resources and less power wives had, the more likely they were to stay with violent husbands).
  16. Naomi Stern & Terri Keeley, *The Impact of the Violence Against Women Act 2005 (VAWA) on the Housing Rights and Options of Survivors of Domestic and Sexual Violence* 1, THE LAPTOP UPDATE, LEGAL ASSISTANCE PROVIDERS’ TECHNICAL OUTREACH PROJECT, Office on Violence Against Women, Spring 2006.
  17. Stern & Keeley, *supra* note 16, at 1 (explaining that 92% of homeless women have experienced severe physical or sexual violence).

batterers.<sup>18</sup> If financial pressure is as effective as a threat of violence at persuading a victim to drop her CPO, perhaps a judge should find that it too renders a victim's decision to drop involuntary. But if that is true, where should the dividing line be drawn between coerced and voluntary decisions?

Further complicating the judicial inquiry is the subjective nature of coercion.<sup>19</sup> The victim whose batterer threatened to kill her may not actually feel coerced. On the other hand, the victim who cannot afford to live without the financial support of the batterer may feel enormously coerced. Should not the victim's actual experience be considered?

The purpose of this essay is to expose these and other complexities inherent in analyzing coercion in the context of a domestic violence victim's decision making process. The matrix of influences on victim decision making and the subjective nature of coercion are but two examples. Further obscuring the analysis is that coercion is contextually dependent<sup>20</sup> and exists on a continuum.<sup>21</sup> A dichotomous legal standard—whether a victim's decision is coerced, or is voluntary—masks these complexities.

This dichotomy is problematic not just on a practical level, in terms of measuring the impact of coercion on a victim's decision, but on a conceptual level as well. It fails to account for any degree of victim volition, even in the face of a batterer's pressure. A common conception of coercion—that the use of pressure “forces” a person to act in a given way—may be inadequate for legal purposes. Social scientists have developed a more nuanced definition of coercion that acknowledges the role of victim choice, albeit constrained choice.<sup>22</sup> Such paradigms distinguish between force and coercion: when a batterer forces a victim to comply with his demand, she has no discretion regarding how to respond; when he coerces her, she has a choice to comply, to resist, or to do some combination of the two.<sup>23</sup>

If a narrower conceptualization of coercion could be translated into a legal paradigm—one that recognizes the existence of choice, even if not entirely free choice—it would shift the court's focus from the outcome of a victim's decision to drop her CPO to the process by which she arrived at her decision. Both “objective” factors, such as the level of violence in the past and the type and

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18. Hart & Sussman, *supra* note 15, at 3; see also Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1020-1025 (2000) (arguing that “inadequate material resources render women more vulnerable to battering and increase batterers' access,” “increase batterers' access to women who separate,” and “are a primary reason why women do not attempt to separate”).
  19. Winnick, *supra* note 3, at 1146 (explaining that coercion may have a significant subjective component that must not be overlooked).
  20. Dutton & Goodman, *supra* note 2, at 747, also discussed in Section III, *infra*.
  21. *Id.* at 746-747; Winnick, *supra* note 3, at 1146.
  22. See, e.g., B.H. Raven, *The Bases of Power: Origins and Recent Developments*, 49 JOURNAL OF SOC. PSYCHOLOGY 227, 227-244 (1993), cited and explained in Dutton & Goodman, *supra* note 2, at 745.
  23. Dutton & Goodman, *supra* note 2, at 745.

severity of the batterer's current pressure to drop, as well as "subjective"<sup>24</sup> factors, such as the victim's assessment of both the likelihood that the batterer will follow up on his threat, and the costs and benefits of compliance versus resistance, could be evaluated. This shift in focus would place courts in a better position to truly analyze the voluntariness of a victim's decision, rather than presuming involuntariness.<sup>25</sup>

This presumption of involuntariness, when coupled with the practical challenges of measuring the impact of coercion, poses an enormous risk to victim autonomy. If a court substitutes its judgment for that of the victim's because it believes her to be coerced, and presumes that when she is coerced she cannot make an autonomous decision, it usurps control over a decision the victim would like to make for herself,<sup>26</sup> thereby replicating the very dynamic it seeks to prevent.<sup>27</sup> Instead of the batterer compelling the victim to do something she does not want, the court does. This is particularly problematic in cases involving domestic violence, in which an important element of responding to the problem is to restore a victim's fundamental rights of freedom, choice, and autonomy.<sup>28</sup>

The essay utilizes a particular scenario—when a victim moves a court to dissolve her CPO—to illustrate the challenges involved in analyzing coercion for legal purposes. I chose this type of case, in this procedural posture, for two reasons. First, many states have promulgated guidelines that explicitly encourage judges to consider the role of coercion at this juncture. Second, in a prosecutor's

24. I have inserted quotation marks around the words "objective" and "subjective" for the purpose of acknowledging two assumptions I make in this essay. First, I assume that certain factors, such as the severity of a batterer's pressure, may be "objectively" measured apart from the victim's "subjective" experience of that pressure. Second, I assume that a victim's subjective experience of the batterer's pressure, *i.e.*, what she "really" thinks or feels about the batterer's pressure, can ever be known or accessible to an outsider looking in, or disentangled from the effect of the pressure itself. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST VIEW OF THE STATE 115-117 (1989) (MacKinnon discussed the concept of "false consciousness" – the idea that women think what they think because they have been programmed to do so and not necessarily because it's what they "really" think. She pointed out a flaw in the "false consciousness approach"; it assumes that women have considerable latitude to make or choose the meanings of their situations, or that what they authentically believe can be separated from the "false" belief that has been produced by patriarchy).
25. While the creation of a new judicial colloquy is beyond the scope of this article, it suggests and discusses alternative perspectives from which a judge might view a victim's desire to dissolve her CPO. It's primary purpose is to expose the complexities of analyzing coercion in the context of domestic violence cases, with the hope that scholars and policymakers will begin to discuss and debate current legal approaches that presume a victim's decision to drop is coerced, and that such coercion renders her decision involuntary.
26. I am applying Winnick's definition of coercion: "when individuals experience a loss of control over decisions that they would like to make for themselves." *See Winnick, supra* note 3, at 1145.
27. Linda Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 587-597 (1999) (arguing that mandatory state interventions such as no drop prosecution replicate the coercion of the batterer).
28. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 317-319 (1982).

case in chief against a batterer, or in a victim's case in chief for issuance of a CPO, judges should consider and weigh a batterer's pressure on a victim, in all its forms, to paint a more vivid and complete picture of the context of the physical violence. But when a victim chooses to stop using legal remedies designed to assist her, evidence of coercion may become a sword used against her, rather than a shield to protect her.<sup>29</sup>

In CPO cases, litigant autonomy ought to be more critical to judicial decision-making than in criminal cases, where the victim is a witness in the state's case rather than a party in a private right of action.<sup>30</sup> Thus in determining vacatur of CPOs, the challenges of assessing the role of coercion on victim decision making are acute. This legal context, where victim autonomy is at a premium, has implications for the development of discrete but consistent doctrinal approaches for analyzing coercion in broader contexts.

Part I of the essay reviews the work of activists and scholars who make the case that coercion is central to domestic violence, but notes that these scholars' conceptions of coercion are diverse. Part II describes the justice system's current responses to the impact of coercion on a victim's decision to drop a criminal<sup>31</sup> or civil case. Part III exposes a number of challenges inherent in measuring the impact of a batterer's influence on a domestic violence victim's decision. Part IV describes the conceptual limitations of current judicial guidelines, and argues for a more nuanced conceptualization of coercion that accounts for victim volition.

The essay concludes that scholars and policy makers should continue to advocate for courts to consider the role of coercion to more fully understand and effectively respond to domestic violence victims. However, we must recognize the practical and conceptual challenges embodied in current legal approaches that may hinder victims' autonomy when victims attempt to exit the system.

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29. Miccio, *supra* note 7, at 242 (Miccio analyzes the ideological division among feminist scholars with regard to the sacrifice of victim autonomy that has resulted from mandatory criminal interventions in domestic violence cases, calling the usurpation of women's decision making power by the state a sword used against victims, rather than a shield to protect them.)

30. I do not mean to say that victim autonomy should not be an important consideration in criminal cases. Rather, I argue that the concerns raised about victim autonomy by critics of mandatory interventions in the criminal justice system, *see infra*, Section IV, should apply tenfold in the civil justice system, given the distinct goals of these systems - for example, restoration of a party in a civil case versus deterrence and punishment of a perpetrator in a criminal case, *see* Hanna, *supra* note 7, at 1870, and the adjudication of a claim between private parties versus the state's use of power against a defendant, *see* Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 820 (2000). In addition, drafters of CPO legislation explicitly intended that CPOs promote victim autonomy. *See, e.g.*, Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 5, 23 (1992) ("[T]he drafters of civil protection orders produced vehicles to provide comprehensive relief to facilitate batterer desistance and victim autonomy. Protection order codes have proven to be tools that can significantly facilitate the achievement of the goals of safety and autonomy for abused women and children . . .").

31. While victims do not have the power to "drop" criminal cases, I use this expression as a shorthand way of describing a victim's general reluctance to support the criminal prosecution of a batterer.

Examination of a victim's decision to drop a CPO, where there is no statutory or case law on point, provides a context-specific opportunity to engage in a discussion of how to implement a narrower conceptualization of coercion and a broader understanding of victim decision making. It provides a starting point for the development of more discriminating legal approaches that would reject the reflexive practices of many judges who do not take into account the complexities of analyzing coercion.

### I. COERCION IS CENTRAL TO UNDERSTANDING DOMESTIC VIOLENCE

One woman filing for a protection order wrote: "He called me at my place of employment and threatened me. He told me that if he couldn't have me, no one will and also that he wanted to 'cut my heart out.'"<sup>32</sup> Another stated: "I have tried to end the relationship, but [I am] fearful, intimidated . . . [Once he] came to my office, cried and threatened suicide if I left him. Finally I ended it . . . and since [then he makes] . . . threats to use any means . . . He has a gun permit."<sup>33</sup>

For years, battered women's advocates have recognized that battering is comprised of far more than just physical violence. Elizabeth Schneider described early activist work: "First, 'battered women' were set forth as a definable group or category, with battering regarded within the larger context of 'power and control;' physical abuse was a particular 'moment' in a larger continuum of 'doing power,' which might include emotional abuse, sexual abuse and rape, and other maneuvers to control, isolate, threaten, intimidate, or stalk."<sup>34</sup>

As activists articulated a more comprehensive definition of battering, they identified coercion as an integral component. One of the first and hallmark accomplishments of the battered women's movement in the 1970s was to create refuges, or shelters, with the distinct purpose of keeping women physically safe while providing them time and space to think, free from coercion.<sup>35</sup> In 1979, Dr. Lenore Walker, a clinical psychologist and pioneer in the field, described battered women as "repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."<sup>36</sup> In the early 1980s, Susan Schechter coined the term "coercive control": battering is "a pattern of coercive control that one person exercises over another. Abusers use physical and sexual violence, threats, emotional insults and economic deprivation as a way to

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32. PTACEK, *supra* note 14, at 81.

33. *Id.*

34. SCHNEIDER, *supra* note 7, at 21-22.

35. SCHECHTER, *supra* note 28, at 39. Schechter also noted that shelter workers respected victims' decisions to stay with or separate from batterers, and avoided substituting their own judgments of what was best for victims. *Id.* at 63-64.

36. Lenore Walker, *THE BATTERED WOMAN*, xv (1979) (though Dr. Walker's later work did not include a definition of domestic violence that included coercion, and has been criticized by feminist legal scholars for, among other problems, focusing exclusively on incidents of physical violence rather than coercion).

dominate their partners and get their way.”<sup>37</sup>

Marginalized groups have explicitly recognized coercion as a defining element of battering. Barbara Hart articulated a definition of lesbian battering as “that pattern of violent and coercive behaviors whereby a lesbian seeks to control the thoughts, beliefs or conduct of her intimate partner or to punish the intimate for resisting the perpetrator’s control over her.”<sup>38</sup> The “power and control wheel”<sup>39</sup>—a cornerstone feminist theory of domestic violence portraying ways in which batterers coerce victims—has been adapted to portray abuse within marginalized communities, such as immigrant communities, lesbians, and gay men.<sup>40</sup>

Even batterers’ own accounts of and justifications for battering have been cited as evidence that much battering is done with the strategic purpose of coercing victims to behave the way the batterers wanted them to behave.<sup>41</sup> As noted by Susan Schechter: “One man, recounting why he physically restrained his wife from leaving a family gathering, said, ‘I felt that she didn’t have the right to make the decision to leave. Her decision to leave was not as important as mine to have her stay . . . [W]hen all else fails, violence is the way to keep control, to maintain your identity.’”<sup>42</sup> Feminist intervention models therefore recognize that success is not complete when the batterer stops physically assaulting a woman; he must also be able to “relate in noncoercive ways.”<sup>43</sup>

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37. SUSAN SCHECHTER, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES 4 (1987). *See also* Schechter, *supra* note 28, at 216 (analyzing battering within the historical context of male domination, with coercion at the heart of the analysis: “the power a dominating group exercises carries with it the threat or the use of force to coerce compliance”).
  38. Barbara J. Hart, *Lesbian Battering: An Examination*, in NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 133 (Kerry Lobel ed., 1986).
  39. The power and control wheel is a widely recognized and utilized feminist theory of domestic violence developed by the Domestic Abuse Intervention Project in Duluth, MN, in a series of educational sessions held with abused women by the Duluth battered women’s shelter in 1984. *See* Ellen Pence & Michael Paymar, EDUCATIONAL GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 2 (1993).
  40. *See, e.g.*, Power and Control Tactics Used Against Immigrant Women, <http://www.endabuse.org/programs/display.php3?DocID=111> (last visited Mar. 15, 2007); Power and Control Wheel for Lesbian, Gay, Bisexual and Transgender People, <http://www.mcbw.org/pdf/lgbtwheel.pdf> (last visited Mar. 15, 2007); Abuse in Later Life Wheel, [http://www.ncall.us/docs/Later\\_Life\\_PCWheel.pdf](http://www.ncall.us/docs/Later_Life_PCWheel.pdf) (last visited Mar. 15, 2007).
  41. *See* James Ptacek, *Why do Men Batter Their Wives?*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, 148 (Kersti Yllo & Michael Bograd eds., 1988); Isabel Marcus, *Reframing “Domestic Violence”: Terrorism in the Home*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 23 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1988).
  42. SCHECHTER, *supra* note 28, at 219.
  43. Anne L. Ganley, INTEGRATING FEMINIST AND SOCIAL LEARNING ANALYSES OF AGGRESSION: CREATING MULTIPLE MODELS FOR INTERVENTION WITH MEN WHO BATTER; TREATING MEN WHO BATTER: THEORY, PRACTICE AND PROGRAMS 223-224 (P.L. Caesar & L.K. Hamberger, eds. 1989). EMERGE, a collective of men formed in 1977 for the purpose of ending violence against women, holds as a basic premise that battering is a pattern of coercive acts in which physical violence is accompanied and reinforced by other forms of abuse, including psychological abuse, economic abuse, demands of domestic services, and social isolation. Ellen Pence, *Batterer Programs: Shifting from Community Collusion to*



More recently, Evan Stark expanded upon Schechter's "coercive control" model of domestic violence.<sup>44</sup> He explained that a victim is subjected to an ongoing strategy of intimidation, isolation and control that extends to all areas of her life, including access to food, money, help, protection, friendships, family and children; work; transportation; control over her own sexuality; and the minutiae of every day life.<sup>45</sup> Stark argued that to fully understand the dynamics of domestic violence, one must focus on the pattern of coercion and control rather than the discrete acts of physical violence; then and only then can one see the effects of domestic violence on the fundamental human rights of autonomy and self-determination.<sup>46</sup>

While Stark and other feminist scholars make the case that a batterer's use of psychological, emotional, financial and other pressure—not just physical assault—is a defining principle of domestic violence, they have yet to come to a common understanding of what defines "coercion," both qualitatively and quantitatively.<sup>47</sup> The above examples are illustrative. Schechter included threats, emotional insults and economic deprivation in her definition.<sup>48</sup> Stark suggested that a strategy of intimidation, isolation and control comprised "coercive control."<sup>49</sup>

Others have proposed a narrower definition. For example, psychologists

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*Community Confrontation*, in TREATING MEN WHO BATTER: THEORY, PRACTICE, AND PROGRAMS 36 (P. Lynn Caesar & L. Kevin Hamberger, eds. 1989). Another renowned batterer treatment program, the Domestic Abuse Intervention Project in Duluth, Minnesota, developed the "power and control wheel" as a core part of its curriculum. The wheel identifies "coercion and threats" as one of nine fundamental tactics utilized by batterers to establish and maintain power and control over women. David Adams, *Feminist-Based Interventions for Battering Men*, in TREATING MEN WHO BATTER: THEORY, PRACTICE, AND PROGRAMS 4-5 (P. Lynn Caesar & L. Kevin Hamberger, eds. 1989).

44. Stark, *supra* note 1, at 975-76, and note 13.

45. Stark, *supra* note 1, at 986, 1005. See also Karla Fisher, Neil Vidmar and Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2119-20 (1993) (describing a "culture of battering" in which an abuser uses a range of behaviors to impose his will, including exerting extreme control over the every day activities of the family, the enforcement of rules by punishment, and the cementing of the connection between the rules and punishment through fear, emotional abuse and social isolation); David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 176, 191 (Kersti Yllo & Michael Bograd, eds. 1988) (defining "wife-beating" as any act that causes the victim to do something she does not want to do, prevents her from doing something she wants to do, or causes her to be afraid); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1563 (1998) (describing domestic violence as strategic, stating it is used in varying degrees and with different motivations to gain some advantage or control over a mate).

46. Stark, *supra* note 1, at 976.

47. Psychologists Mary Ann Dutton and Lisa Goodman recently observed that for years "battered women's advocates have placed the notion of coercive control squarely at the center of their analysis of intimate partner violence," yet "surprisingly little work has been done to conceptualize and measure the key construct of coercive control." See Dutton & Goodman, *supra* note 2, at 743.

48. SCHECHTER, *supra* note 28, and accompanying discussion.

49. Stark, *supra* note 1, and accompanying discussion.

Mary Ann Dutton and Lisa Goodman recently defined coercion as a dynamic process in which a batterer makes a demand and threatens a negative consequence for non-compliance with the demand.<sup>50</sup> This definition weeds out the use of isolation and intimidation by the batterer, and distinguishes between a batterer's use of physical force, in which a victim has no choice but to comply with his demand, versus coercion, in which a victim has the opportunity to choose whether to comply.<sup>51</sup>

How are the types of coercion identified by scholars distinct from each other, and from the use of physical force exerted by a batterer? To what extent do these behaviors infringe on victim volition? The answers to these questions are critical to the development of more discriminating legal approaches to analyzing coercion in domestic violence cases.<sup>52</sup>

## II. LEGAL REFORM TO ACCOUNT FOR THE ROLE OF COERCION

Though activists have yet to define the precise parameters of coercion, they have nonetheless won major reforms in the law to address its presence in domestic violence cases in both the criminal and civil justice systems. Within the criminal justice system, a sea change in law and policy has been to impose "no-drop" or "hard drop" prosecution policies.<sup>53</sup>

Historically, prosecutors in domestic violence cases rarely pressed charges, and when they did, they rarely followed through with the case.<sup>54</sup> District attorneys across the country routinely dropped charges at the victim's request based on the rationale that convictions could not be obtained without the victim's cooperation and testimony.<sup>55</sup> "This 'automatic drop' policy ceded to perpetrators an enormous degree of control over the criminal justice process. All a batterer had to do was coerce his victim – through violence or threat of violence - into asking the prosecutor to drop the charges; once she did so, the risk of incarceration instantly vanished."<sup>56</sup> Accordingly, in many jurisdictions, prosecutors now file and go forward with domestic violence charges against

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50. These psychologists defined this construct as "a dynamic process linking a demand with a credible threatened negative consequence for non-compliance." The abuser makes the demand and the threat; the victim chooses whether to comply. See Dutton & Goodman, *supra* note 2, at 749.

51. *Id.* at 745.

52. *Id.* at 744 (observing that a tighter conceptualization and operationalization of coercion in intimate partner violence research would lead to a more thorough understanding of the role of coercive control in the legal context, where "domestic violence is usually understood as a one-size-fits-all category").

53. Hanna, *supra* note 7 (discussing generally the history of the move toward mandatory arrest and prosecution policies).

54. LINDA MILLS, *INSULT TO INJURY, RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 34 (2003).

55. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 13 (1999).

56. *Id.* at 15.

alleged batterers even when victims do not support the prosecutions.<sup>57</sup> One rationale underlying these policies is the need to prevent the batterer from coercing the victim to “drop” the charges. By taking the decision to prosecute out of the victim’s hands, the state theoretically obviates the incentive for the batterer to coerce the victim to drop.<sup>58</sup>

Major legal reform has also occurred within the civil justice system’s response to domestic violence. All states have enacted statutes authorizing civil orders of protection for domestic abuse.<sup>59</sup> CPOs, or restraining orders, enjoin batterers from contacting, abusing, harassing, and threatening victims, and may provide a wide array of other relief such as eviction from a victim’s residence, child custody and support, and in some jurisdictions, monetary relief.<sup>60</sup> CPOs may be obtained in addition or as an alternative to pre-existing criminal cases.<sup>61</sup>

Concerned that batterers coerce victims to drop CPOs, just as they coerce victims to recant in criminal prosecutions, many state judicial departments have promulgated guidelines<sup>62</sup> cautioning that a judge should not grant a victim’s request to dissolve her order unless assured that she is acting without pressure from the batterer to do so.<sup>63</sup> For example, in New Jersey, a *Domestic Violence*

57. Hanna, *supra* note 7, at 1861-62.

58. *Id.* These policies have produced extensive debate in the scholarly literature. See SCHNEIDER, *supra* note 7, at 184-188, for a summary of the arguments for and against mandatory interventions in the criminal justice system.

59. For a comprehensive list of each state’s statutes, see <http://www.WomensLaw.org>.

60. See FINN & COLSON, *supra* note 10, at 33-47.

61. *Id.* at 1. For example, the District of Columbia Intrafamily Offenses Act states that the “institution of criminal charges . . . shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this chapter.” D.C. CODE ANN. § 16-1002(c) (2007). The legislative history provides further clarification. The Intrafamily Offenses Act “was intended to provide family members with access to special court remedies without interposing criminal sanction in the family circle,” and further states that “criminal sanctions should not be the only avenue for correcting such abuses, because . . . threats to the long-term stability of the family or home may arise in the seeking of criminal sanctions.” *Legislative History of 1982 Amendments to the D.C. Intrafamily Offenses Act* 4, May 12, 1982.

62. Of the fifty states, only one state’s statute (as opposed to a benchbook or other judicial guideline) directs a judge to consider whether a victim’s motion to modify her CPO is made without duress. See IDAHO CODE ANN. § 39-6311(4) (2007) (“If the petitioner voluntarily and without duress consents to the waiver of any portion of the protection order vis-à-vis the respondent . . . the order may be modified by the court.”) In the absence of statutory provisions, judicial guidelines and court rules address the issue of coercion. See note 63, *infra*.

63. See, e.g. Alabama’s Domestic Violence Benchbook, available at [http://www.acadv.org/2005\\_benchbook.pdf](http://www.acadv.org/2005_benchbook.pdf) (courts should evaluate whether or not the request is made without coercion. Rather than dismiss the order completely, a prudent practice is to modify it to leave in effect, at a minimum, the “no abuse” provision); Arizona’s Domestic Violence Benchbook, available at <http://www.supreme.state.az.us/cidvc/PDF/DVBB.pdf> (caution should be taken to ensure the victim is not making the request under duress or coercion); Florida’s Domestic Violence Benchbook, available at [http://www.flcourts.org/gen\\_public/family/bin/dvbenchbook.pdf](http://www.flcourts.org/gen_public/family/bin/dvbenchbook.pdf) (“Courts should not dismiss injunction cases at the petitioner’s request without first conducting a hearing at which the court determines whether the petitioner initiated the request freely and voluntarily, is aware of community resources, and understands the requirements for filing a case in the future . . . .”); Indiana’s Protection Order

*Procedure Manual*<sup>64</sup> sets forth a specific procedure for state court judges to follow when they are presented with a victim's motion to dissolve her order: "The judge, after reviewing the file . . . should reiterate to the victim the information given . . . by the domestic violence staff person. If the judge thereafter is convinced that the request for withdrawal is an informed one and is not made under duress, the withdrawal should be granted . . . ."<sup>65</sup>

Imposing a process that allows for inquiry into the victim's motivation for dropping her CPO makes sense at this juncture in a victim's life, when she may be particularly vulnerable to re-abuse.<sup>66</sup> The problem with these policies, like feminist theories of coercive control discussed above, is their imprecision. They do not define coercion, nor do they explain how much coercion is too much. Oregon's *Benchguide for the Family Abuse Prevention Act*<sup>67</sup> is illustrative. It first notes the absence of explicit statutory guidance: "FAPA provides no specific standards or guidance for dismissal . . . and practices vary considerably . . . The variation of judicial practices is the result of attempts to balance safety concerns with respect for victim-litigant autonomy."<sup>68</sup> The *Benchguide* fills in the gap left by statute by recommending judicial "exploration of intimidation or coercion,"<sup>69</sup> but nowhere does it define or discuss either of these concepts.

As a result, as noted in the *Oregon Benchguide*, judicial practices vary

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Deskbook, available at <http://www.in.gov/judiciary/center/pubs/benchbooks/protection-order-deskbook.pdf> ("When a request is made to terminate . . . the Court may choose to set a hearing to . . . ensure that the victim is not being coerced in any way . . ."); Michigan's Domestic Violence Benchbook, available at [http://www.courts.michigan.gov/mji/resources/dvbook/DV3\\_chap7.pdf](http://www.courts.michigan.gov/mji/resources/dvbook/DV3_chap7.pdf) ("The Advisory Committee for this chapter of the benchbook suggests that the court remain alert for the following factors that indicate possible coercion: one attorney appearing in court to act on behalf of both parties . . . the respondent's past violent history . . . a criminal case pending . . . a short time elapsed between the filing of the petition and the request for dismissal . . . the respondent's appearance with or without the petitioner to file a request for dismissal . . . a lack of credible reasons for the requested dismissal . . ."); New Mexico's Domestic Violence Benchbook, available at [http://jec.unm.edu/resources/benchbooks/dv/ch\\_2.htm#289](http://jec.unm.edu/resources/benchbooks/dv/ch_2.htm#289) ("Due to the possibility of coercion or intimidation, dismissals should be carefully considered."); The Ohio Domestic Violence Benchbook, available at <http://www.ocjs.ohio.gov/Publications/OCJS%20benchbook.pdf> ("Judicial officers should be alert for agreements obtained by physical coercion, threats of custody litigation, witness intimidation, and similar or unethical or illegal litigation tactics."); Tennessee's Domestic Violence Benchbook, available at <http://www.tcadsv.org/Files/TN%20Abuse%20Benchbook/Benchbook%202006/Benchbook%202006.pdf> ("Court may wish to . . . ascertain whether the respondent is coercing the petitioner into this request . . .").

64. I.J. v. I.S., 744 A.2d.1246, 1250 (N.J. Super. Ct. Ch. Div. 1999).

65. *Id.*

66. CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 531 (2001).

67. HON. MAUREEN MCKNIGHT & HON. MERRI SOUTHER WYATT, OREGON JUDICIAL DEP'T, A BENCHGUIDE FOR THE FAMILY ABUSE PREVENTION ACT (2006).

68. *Id.* at 15.

69. *Id.* However, they do suggest that in its exploration of coercion, the judge consider referring the victim to a victim advocate.

widely.<sup>70</sup> Some judges dismiss CPOs without inquiry. Some make an effort to determine whether the victim is acting voluntarily. In many jurisdictions judges maintain CPOs against the express wishes of the victim, as a matter of policy.<sup>71</sup>

### III. CHALLENGES IN ANALYZING COERCION

In the absence of more explicit guidance, courts charged with determining if a batterer's actions are "coercive" or a victim's choices are "coerced" face considerable obstacles. There are varying types and degrees of coercion that are difficult to ascertain, and these range "from friendly persuasion to interpersonal pressure, to control of resources to use of force."<sup>72</sup> In addition, coercion is contextually dependent, and has a significant subjective component,<sup>73</sup> making the application of a universal standard of measurement difficult. Victims' decisions to drop their cases may be influenced by numerous external sources in addition to the batterer, and these influences must be distinguished. Exacerbating all of these complexities, judges and other legal actors doubt victims, are frustrated with them, and have too few resources and too little time. Each of these factors, explored below, complicates assessment of a victim's volition.

#### A. Coercion Varies in Type and Degree

Bruce Winnick noted that although determining the existence of coercion is not a dichotomous question, courts often view it as such.<sup>74</sup> He argued that coercion is best understood as existing on a continuum.<sup>75</sup> A guideline that calls for a judge to decide whether a batterer has coerced a victim to do something—such as to vacate her CPO—is only the starting point of the inquiry. At the heart of determining whether a decision is coerced or voluntary is determining how much pressure the batterer has exerted—whether it is more like the normal pressure we all face, or whether it is extraordinary.

Psychologists Dutton and Goodman distinguished between severe coercion and less serious coercion in the specific context of domestic violence.<sup>76</sup> They

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70. Tamara L. Kuennen, "No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims, UCLA WOMEN'S L.J. (forthcoming 2007).

71. FINN & COLSON, *supra* note 10, at 28, 53. A judge may have such a policy for varying reasons. She may feel that maintaining the CPO is the only way to effectively send the message that the state takes domestic violence seriously; she may doubt that the victim is capable of making a rational decision regarding what is in her best interest; or she may feel that CPOs are effective mechanisms for preventing future violence and hence prefer to be "safe rather than sorry" by maintaining rather than dissolving the CPO. See Kuennen, *supra* note 70 (manuscript at 63, on file with author).

72. Ronald J. Diamond, *Coercion and Tenacious Treatment in the Community: Applications to the Real World*, in A NEW FRONTIER IN MENTAL HEALTH LAW 55 (Deborah L. Dennis & John Monahan eds., 1996).

73. ALAN WETHEIMER, COERCION 206 (1987).

74. Winnick, *supra* note 3, at 1147.

75. *Id.*

76. Dutton & Goodman, *supra* note 2, at 747.

suggested that severe coercion might include the threat of physical assault for failure to fulfill the batterer's sexual demands; the threat of taking the children if the victim does not allow the batterer to return to the family home; and the threat to withdraw an immigration application for a victim if she calls the police.<sup>77</sup> Less serious coercion—in terms of physical harm—might consist of a threat to embarrass a woman in front of her family or friends, or a threat to seek sex outside the relationship unless the victim complies with the batterer's sexual demands.<sup>78</sup>

On this continuum of severity, a batterer's threat to kill a victim unless she drops her CPO would surely qualify as the kind of extraordinary pressure that judges should protect against. Accordingly, courts should deny these victims' motions to vacate. Threats of serious physical assault should be included in this category as well. Perhaps then the dividing line between coerced decisions and voluntary ones should be drawn where physical violence is threatened.

But what if the threat of physical assault is vague (e.g., "I'm going to get you if you leave me")? What if the threat is one of physical violence, but the violence is not "serious"? What if the batterer threatened to assault the victim, but the batterer lives 500 miles away and has had no other contact with her? What if the violence is aimed at the victim's child rather than the victim herself? Even an apparently bright line physical/non-physical test is riddled with problems of quantification.

More problematic is that a physical/non-physical test fails to capture the subtle but prevalent ways in which batterers pressure victims. A victim may be dependent on her partner for money, health care, child care, transportation, or housing.<sup>79</sup> A threat involving the loss of any of these may be just as effective as a threat of physical violence. And it may be precisely the type of pressure that drafters of CPO legislation intended CPOs to prevent.

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

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77. *Id.*

78. *Id.*

79. Deborah Epstein, et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 477 (2003).

power of the battering husband or partner to coerce reconciliation. One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders were this new remedy.<sup>80</sup>

A dividing line that excludes non-physical threats quite clearly fails to capture the host of pressures that a batterer might exert. But then, where on the continuum of coercion should the dividing line be drawn? Should a victim's decision to drop, if based solely on financial pressure, be considered involuntary?

Dutton and Goodman noted that "virtually all relationships involve persuasion and influence."<sup>81</sup> Similarly, Winnick observed that "virtually no choice is free of at least some degree of psychological coercion."<sup>82</sup> Thus not every pressure can be considered coercive for legal purposes. Instead, a judge must determine whether an additional, related, unfair, or improper pressure has been brought to bear.<sup>83</sup>

Given the insidious use of pressure by a batterer to control a victim, and the goal of drafters of CPOs to prevent abuse in all its forms, defining which pressures are extraordinary is a daunting task. Perhaps the complexity of the task justifies a presumption, if not a *per se* rule, that when a batterer pressures a victim to drop and she does so, her request should be deemed involuntary.

But analogous contexts exist in which individuals, like domestic violence victims, are particularly at risk of coercion, and the law draws a dividing line between coerced decisions and voluntary ones. For example, the law has recognized the right of prisoners to give voluntary consent to be the subjects of research despite arguments that prisons, by their very purpose and character, make sufficiently free consent to research impossible.<sup>84</sup> Courts have recognized the right of institutionalized mental health patients—even those who have been involuntarily committed—to refuse treatment.<sup>85</sup>

Winnick argued that "where the law chooses to place the dividing line between coercion and voluntariness is essentially a normative judgment."<sup>86</sup> In cases involving domestic violence, where a batterer's use of pressure is so deep seated, that line is particularly difficult to draw. Yet if a dividing line is not drawn, and all pressures exerted by a batterer were considered *per se* impermissibly coercive, the result would be sweeping.

While some victims may feel as though they had no choice but to comply with a batterer's demand, this fact should not mean that all victims should be considered incapable of making a voluntary decision. Take an example

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80. See Hart, *supra* note 30, at 23.

81. Dutton & Goodman, *supra* note 2, at 747 ("Virtually all relationships involve persuasion and influence according to theories of social power").

82. Winnick, *supra* note 3, at 1154.

83. *Id.* at 1155.

84. *Id.* at 1150.

85. *Id.* at 1148-1149.

86. *Id.* at 1147.

mentioned in the introduction. A victim may decide to drop her CPO based on the batterer's promise to pay child support. The victim may feel as if she had no real choice but to drop. Another victim, one who happens to have more resources, might not feel any pressure whatsoever in this circumstance. If a promise to pay child support was *per se* improper, the result would be absurd. Not only would such a rule mischaracterize many victims' decisions as coerced when in fact they are not, it would cast doubt on the ability of a victim to make a rational decision under any circumstance.

This type of "one size fits all" legal approach has been widely criticized in the context of the criminal justice system's response to domestic violence.<sup>87</sup> For example, while "no drop" policies help some victims who are truly coerced, they also harm others who may effectively use their willingness to drop as a powerful negotiation tool.<sup>88</sup> Some victims may be able to strike a bargain with the batterer. One study showed that when women agreed to drop the charges, the batterers frequently agreed to stay away, pay child support, or relinquish custody of the children.<sup>89</sup>

"No drop" policies have been broadly criticized for failing to honor a victim's individual preferences, an issue that is particularly problematic for many victim sub-groups, such as racial minorities, immigrant women, and women of lower socio-economic status.<sup>90</sup> Given the sweeping effect of a *per se* rule and criticisms of such rules in the criminal justice system, where a given pressure falls along the continuum of coercion in a civil case must be determined on a case by case basis, rather than presumed.

### B. The Importance of Context

Another factor affects the placement of such pressure on this continuum of coercion: the context within which the pressure was exerted. In trying to understand the dynamics of coercive control, context is everything. "Economic, political, cultural, familial, social, and individual factors—as well as their interactions—give meaning to an abuser's coercive behavior."<sup>91</sup> Dutton and Goodman provide this example: a man who threatens to leave a relationship with a victim who is a new immigrant and who is completely financially dependent on him may constitute a severe form of coercive control, whereas a man who threatens to leave a partner who is a wealthy citizen with abundant familial and social resources may not be at all coercive.<sup>92</sup>

Individuals enter abusive relationships with different levels and types of

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87. See SCHNEIDER, *supra* note 7, at 186-188.

88. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1869 (2002).

89. *Id.*, citing David A. Ford, *Wife Battery and Criminal Justice: A Study of Victim Decision-Making*, 32 FAM. REL. 463, 469 (1983).

90. Epstein, *supra* note 88, at 1867-1868.

91. Dutton & Goodman, *supra* note 2, at 747.

92. *Id.*



vulnerabilities. The vulnerability may not necessarily be a weakness, but merely something the batterer may exploit or take away.<sup>93</sup> Victims of color, gay, lesbian, bisexual or transgender (GLBT) victims, and victims who are disabled are coerced by tactics specifically targeted to take advantage of their marginalized status. For example, a lesbian batterer may threaten to “out” her victim if she does not drop the order.<sup>94</sup> A batterer who is a caretaker for a physically disabled victim may threaten to leave the relationship. Though this victim may feel utterly coerced, it is hard to imagine that a batterer’s threat to leave would qualify as the kind of pressure that a judge should seek to prevent in determining whether to vacate her CPO. After all, an underlying purpose of CPO statutes is to end the violence. If a batterer threatens to leave a victim, the act of leaving may likely accomplish this purpose.

Countless individual factors such as these caused Dutton and Goodman to conclude that “not only is context required to understand the nature of coercive behaviors and responses to them, but it is required even to determine whether a particular behavior should be considered coercion at all.”<sup>95</sup>

### C. The Experience of Coercion is Subjective

Examining coercion in the context of mental health treatment and the law, Winnick described research regarding civil commitment of patients showing that patients’ perceptions of whether or not they have been coerced are largely inconsistent both with their legal status and with others’ perceptions of whether they have been coerced.<sup>96</sup> Specifically, many patients who were involuntarily committed did not report feeling coerced.<sup>97</sup> Others who voluntarily (without court order) committed themselves reported feeling coerced.<sup>98</sup> The same can be true in domestic violence cases. The victim whose batterer promised to pay child support if she dropped her CPO may feel enormously coerced. Another victim in the same situation might not feel coerced. A victim’s subjective experience<sup>99</sup> should be a factor in determining whether she has been coerced.

Dutton’s and Goodman’s definition of coercion treats as critical the victim’s perception of the batterer’s threat. The threat cannot be hollow; it must be credible for coercion to occur. “Coercive power is based in the [victim’s]

93. *Id.* at 750.

94. Charlene Allen and Beth Levanthal, *History, Culture, and Identity. What Makes GLBT Battering Different* 73, 75 in *SAME-SEX DOMESTIC VIOLENCE* (Sandra E. Lundy & Beth Levanthal 1999).

95. Dutton & Goodman, *supra* note 2, at 747.

96. Winnick, *supra* note 3, at 1146.

97. *Id.*

98. *Id.*

99. I am assuming that a victim’s subjective experience of the batterer’s pressure, *i.e.*, what she “really” thinks or feels about the batterer’s pressure, can never be known or accessible to an outsider looking in, or separated analytically from the general oppression she has felt at the hands of the batterer and/or the effect of the particular form of pressure in question. See MACKINNON, *supra* note 24.

belief that she can and will be punished for noncompliance.”<sup>100</sup> Accordingly, it may be that if the victim does not believe the threat, by definition she has not been coerced.<sup>101</sup>

But how can a judge distinguish between a victim who says that she does not feel pressured, and one “who has a literal or figurative gun to her head?”<sup>102</sup> As a practical matter, it may be impossible to determine—based on a victim’s self report—whether she is communicating her true feelings about not being pressured to drop the CPO. For example, one prosecutor who spent every day for six months interviewing victims who sought to drop charges found that he was “unable to distinguish between those who were responding to a direct threat and those who were not.”<sup>103</sup> When the prosecutor went forward with charges regardless of the victims’ requests that he drop them, many of those same victims called him later “to explain that they had been threatened into the request against their will” and to thank him for pursuing the prosecutions.<sup>104</sup>

Of course, many of the victims did not call to thank him, and there has been a tremendous amount of documentation in the scholarly literature of the re-victimization of women by both the state and the batterer as a result of “no drop” policies.<sup>105</sup> But the point is well taken. It is difficult to discern how much weight to give a victim’s statement of her feelings if she is truly being coerced. A legal standard intended to measure coercion must address both the objective and the subjective components of coercion.

Perhaps the weight given each should vary depending upon the circumstances. In the example regarding the batterer who offered to pay child support if the victim dropped, maybe the subjective sense of coercion should have greater weight because, objectively, the threat is not so severe in terms of physical violence. On the flip side, if more severe violence were threatened, perhaps the subjective experience of the victim would be less critical to determining coercion. If a batterer threatened to kill a victim unless she got her order dropped, but the victim tells the judge she does not feel coerced into dropping, the judge might employ an objective measure, finding, for example, that a reasonable person in her shoes would feel threatened.<sup>106</sup> It should be noted,

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100. Dutton & Goodman, *supra* note 2, at 747.

101. *Id.* at 751 (explaining that coercive control relies in part on the victim’s perception of the threat. Without the perception of a credible threat, coercion cannot occur).

102. Epstein, *supra* note 55, at 15.

103. *Id.* at note 62 (reporting the statements of an interview conducted on Sept. 3, 1997 with Robert Spagnoletti, then Chief of the U.S. Attorney’s Domestic Violence Unit in Washington, D.C.).

104. *Id.*

105. See SCHNEIDER, *supra* note 7, at 186.

106. See, e.g., *Stevenson v. Stevenson*, 714 A.2d 986, 994 (N.J. Super. Ct. Ch. Div. 1998). The critical inquiry in this case was not whether the victim had been coerced to drop her CPO, but rather whether she had proven the statutory requirement of good cause to dissolve the order. (See Kuennen, *supra* note 70, manuscript at 33-41 for a detailed discussion of the holding of the case.) Though the victim did not report feeling concern that the batterer would assault her again, the court doubted her testimony and applied an objective standard to

however, that imposition of a reasonable person standard has produced numerous problems for domestic violence victims in court.<sup>107</sup>

#### D. External Influences on Victim Decision Making

Parsing out the pressure exerted by the batterer versus that exerted by external sources presents yet another difficulty for judges. A combination of factors—only one of which may be that the batterer has put pressure on the victim to drop—may influence a victim's decision. This section provides illustrations of a handful of external (as opposed to batterer-exerted) influences. It observes how such influences affect different groups of women, depending upon their race, socio-economic status, immigrant status, and sexual orientation, to name but a few. The illustrations of external influences and their effects could not possibly be exhaustive, given both the subjective and contextual nature of coercion, as discussed above. Nonetheless it sheds light on the number of factors that go into a victim's decision, in addition to pressure by the batterer.

Various forces may be at work in the initial phase of CPO litigation, influencing the reasons victims obtain protection orders at the outset. To begin, the state itself places pressure on victims. For example, child protective services may require a battered mother to obtain a protection order or risk losing her children.<sup>108</sup> Welfare may be more easily available to applicants who are victims of domestic violence if—and only if—they have protection orders.<sup>109</sup> Immigrant victims of domestic violence self-petitioning for lawful residency in the United States have stronger immigration cases if they have protection orders.<sup>110</sup> While these policies are helpful to victims who choose to obtain CPOs independent of the requirements of these laws, they may in effect create an additional hoop to jump through for victims who otherwise might not obtain CPOs.

In addition to the state, private actors may pressure victims to get orders. Because the batterer constantly causes disruption at her apartment, a victim's landlord may require her to obtain a protection order or face eviction.<sup>111</sup> When

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measure her fear. It reasoned that because a victim may live with continual fear in the relationship, "the defendant's perceived control over the victim may attenuate the victim's ability to act" in her own best interests; hence not just subjective fear, but objective fear (fear which a reasonable victim similarly situated would have experienced under the circumstances) should be assessed.

107. See generally, G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89 (1999).
108. See Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 173 (2003) (explaining that mothers who are battered must obtain CPOs or risk losing their children in child neglect proceedings).
109. Under the Family Violence Option, 42 U.S.C. § 602 (1996), some states require proof of domestic violence in the form of CPOs.
110. Battered immigrant women who self-petition for lawful immigrant status pursuant to 8 U.S.C.A. § 1154 (2006) must prove abuse, and a civil protection order signed by a judge presents credible evidence of abuse.
111. Recently the Violence Against Women Act amended the Public Housing Program, the Section 8 Housing Choice Voucher Program, and Project Based Section 8 to ensure that

batterers harass women at work, employers may pressure women to obtain protection orders or face adverse employment action.<sup>112</sup> Employers themselves may obtain protection orders against batterers, with or without the support of the victim.<sup>113</sup> Friends and family, concerned about the safety of the victim, may pressure her to obtain an order.

These pressures may all be in play when victims decide to vacate their orders. The state may be prosecuting the batterer against the wishes of the victim for the same abuse that gave rise to the CPO, pursuant to a “no drop” or “hard drop” prosecution policy. This loss of control to the state in the criminal case may cause the victim to want to reclaim control in the civil arena.<sup>114</sup> A victim’s case with child protective services may have come to an end, or the victim may no longer need welfare. If she would not have obtained an order but for these purposes, she may want it vacated when it is no longer needed.

Just as victims may be pressured by people—whether friends, family or some other community—to obtain orders, they may also be pressured to drop those orders. African American victims may face tremendous pressure to resolve problems within their community and outside of the judicial system.<sup>115</sup> The disproportionate prosecution of African American men in the criminal justice system has been well-documented.<sup>116</sup> This may increase the pressure on victims to not contribute any further to the already high rates of prosecution of African-American men.

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victims of domestic violence are not wrongfully evicted or denied housing based on the violence committed against them. See 42 U.S.C. § 1437d and § 1437f (2006).

112. See Maria Amelia Calax, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167, 171-172 (2003); see also Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 FAM. L. Q. 157, 176 (2005).
113. See, e.g., CAL CODE CIV PROC § 527.8 (2007).
114. At least one jurisdiction explicitly recognizes as much in its legislative history regarding CPOs. In the District of Columbia, the Intrafamily Offenses Act “was intended to provide family members with access to special court remedies without interposing criminal sanction in the family circle,” acknowledging that “criminal sanctions should not be the only avenue for correcting such abuses, because . . . threats to the long-term stability of the family or home may arise in the seeking of criminal sanctions.” *Legislative History of 1982 Amendments to the D.C. Intrafamily Offenses Act*, at 4.
115. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1256 (1991) (describing the political or cultural interests of the community being interpreted in a way that precludes full public recognition of the problem of domestic violence and how race adds another dimension to why the problem of domestic violence is suppressed within nonwhite communities: “People of color often must weigh their interests in avoiding issues that might reinforce distorted public perceptions against the need to acknowledge and address intracommunity problems”); See also, 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, 36-37 (discussing a generalized ethic among communities of color against public intervention in domestic violence cases).
116. See, e.g., Paul Butler, *Starr is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 708-714 (1999); Angela Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1674-84 (1996) (book review).

Latina victims may face the same pressure.<sup>117</sup> “Latinas face the precarious, often untenable situation of the ‘double bind’—empowerment through the disempowerment of a male member of the community.”<sup>118</sup> Cultural beliefs about family and gender roles among Latinas<sup>119</sup> and other communities, such as subgroups of Asian Americans, may cause victims to keep the violence hidden.<sup>120</sup> Immigrant women face these challenges, plus the risk of deportation of themselves or their batterers because of issuance of the CPOs.<sup>121</sup>

Lesbians and gay men may face pressure from within their communities.<sup>122</sup> Charlene Allen and Beth Levanthal, discussing the similarities and differences in heterosexual and GLBT battering, pointed out that internalized condemnation and oppression directed against GLBT individuals by both the state and society generally causes GLBT victims to feel pressure not to “[air] dirty laundry in public.”<sup>123</sup> Others in the victim’s community may pressure him or her to “drop” for this reason.<sup>124</sup> Or they may discourage a victim from utilizing patriarchal institutions, such as the courts.<sup>125</sup> Victims may be unwilling to make public the violence they experience out of fear that it will only reinforce beliefs that their relationships are immoral or unnatural—beliefs that GLBT individuals and communities have worked hard to eradicate.<sup>126</sup>

As mentioned earlier, financial pressures are among the most difficult obstacles faced by victims trying to escape domestic violence.<sup>127</sup> For a disabled

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117. Coker, *supra* note 18, at 1019.

118. Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 248 (1994).

119. *Id.* at 241 (describing Latinas’ identities as being defined on the basis of their roles as mothers and wives, and the expectation within the community that they be traditional, and exist solely within the Latino family structure).

120. See generally Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women’s Movement and the Asian American Community*, 3 ASIAN L.J., 167-71 (1996); see also SUJATA WARRIER, (UN)HEARD VOICES: DOMESTIC VIOLENCE IN THE ASIAN-AMERICAN COMMUNITY, 10 (2002).

121. See Goodmark, *supra* note 115, at 37 (discussing the risk of deportation to both the victim and the batterer that results from a victim obtaining a CPO); see also Crenshaw, *supra* note 115, at 1244-62.

122. Allen & Levanthal, *supra* note 94, at 76.

123. *Id.*

124. See, e.g., Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 583 (1990) (“Several women put a lot of pressure on me to drop the charges. They said things like: ‘Oh, come on. Haven’t you ever hit a lover? It wasn’t all that bad.’ ‘You’re dragging your lover’s name through the mud. It was in the newspapers.’ ‘Do you realize that the state could take away her children because of what you have done?’”)

125. Sandy Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 286-87 (1993).

126. Kathleen Finly Duthu, *Why Doesn’t Anyone Talk About Gay and Lesbian Domestic Violence*, 18 T. JEFFERSON L. REV. 23, 31-33 (1996).

127. See Hart, *supra* note 30. See also Martha F. Davis, *The Economics of Abuse: How Violence Perpetuates Women’s Poverty*, in THE TIES THAT BIND 17-18 (Ruth A. Brandwein ed., 1999) (explaining the relationship between domestic violence and poverty); Shelby A. D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women From Leaving Abusive Relationships*, 12 TEX. J.

victim, this pressure—a commonality that exists across many disability groups<sup>128</sup>—combined with the general inaccessibility of services for victims<sup>129</sup> may cause her to feel pressure to vacate her order. Awareness of the influence of economic considerations may be doubly important for a judge presented with a disabled victim's motion to vacate, given prevalent stereotypes of disabled individuals as being particularly susceptible to coercion and unable to make decisions of their own accord.

Coercion can also result from a woman's status as a mother. Society puts great pressure on mothers to maintain the sanctity of the family. A mother's love for her child is expected to overcome all "physical, financial, emotional and moral obstacles."<sup>130</sup> As Nina Tarr explained:

[A] mother may stay in an abusive relationship because she does not see alternatives which provide for a "family." Her constructed image of what a life is "supposed to be" may include a male in the home, regardless of his behavior. Accordingly, she may tolerate the intolerable to perpetuate the illusion for herself, her children, and for the outside world that everything is "okay."<sup>131</sup>

Internalized social constructs of what a family should look like and internalized sexism may both be coercive forces at work in a victim's decision to vacate her order.

Mothers who are victims of domestic violence must also cope with more practical, day-to-day pressures. In addition to losing financial security, without a partner the mother may also lose child care, transportation for children, and help with both nurturing and disciplining children.<sup>132</sup> For example, one victim explained that she wished her case had never gone to court. As a result, her partner was jailed and was no longer able to care for their daughter at night, causing the victim to lose her job.<sup>133</sup>

The discrimination that battered women face because of their status as

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WOMEN & L. 451 (2003).

128. See generally Karen Nutter, Note, *Domestic Violence in the Lives of Women With Disabilities: No (Accessible) Shelter from the Storm*, 13 S. CAL. REV. L. & WOMEN'S STUD. 329 (2004) (explaining that although the term "disabilities" encompasses a wide range of impairments, including physical, sensory, mental, a combination of these or other impairments, research has shown that certain commonalities exist across disability groups, including economic dependence).
129. Mary Ann Curry and Laurie E. Powers, *Abuse of Women with Disabilities: An Issue Brief*, 1, available at <http://cavnet2.org/details.cfm?DocID=2870>; M.A. Nosek, et al., *Wellness Among Women With Physical Disabilities* 17, in WOMEN WITH PHYSICAL DISABILITIES: ACHIEVING AND MAINTAINING HEALTH AND WELL-BEING (P.H. Brooks, ed. 1996).
130. Jeane A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure to Protect Laws*, 76 N.Y.U. L. REV. 272, 290-291 (2001).
131. Tarr, *supra* note 108, at 170.
132. *Id.*
133. Goodmark, *supra* note 115, at note 140, citing EMILY STONE, DOMESTIC ABUSE, WHEN TO BACK OFF, 1 (2003).

victims of domestic violence can also be coercive. Employers and landlords discriminate against them based on their status as victims.<sup>134</sup> Insurance companies discriminate and make it more difficult for them to obtain health insurance, life insurance, and home owners' insurance.<sup>135</sup> Because a CPO is a public record documenting abuse, a victim may want or need it to be dissolved for the sole purpose of assuaging such discrimination.

Separating the pressures that battered women experience in general versus that which they experience at the hands of the batterer is no easy task. The victim herself may be unable to allocate the weight she gives one factor over another, let alone one external influence versus the influence of the batterer. Relevant to the judge's inquiry with regard to coercion is the knowledge that battered women are coerced in myriad ways by myriad sources. This understanding may serve to complicate the analysis, in some cases, while in others it may provide a clear alternative, other than pressure by the batterer, for a victim's decision to vacate.

### E. Lawyers and Judges May Be Coercive

Prof. Leigh Goodmark recently described the first cases in which she represented victims of domestic violence.

How hopelessly naïve I was. Conveniently, I forgot that my clients who had children with their abusers would be pulled into the courts by batterers using the legal system as a new forum for their abuse. I ignored the reality that batterers continue to stalk their victims—and in many cases, increase their violence—after separation. And I refused to hear the doubts my clients expressed about ending their relationships, turning a deaf ear to their intuitions that perhaps these relationships had not ended after all. I did not understand that finality within the legal system was not finality in the real world.<sup>136</sup>

Goodmark's candid and insightful comments illustrate the ways in which well-meaning attorneys and advocates for victims may also be coercive actors. Political and ideological beliefs about what avenues battered women should take, about the efficacy of the legal system in protecting victims, and about our roles in that system, create a bias. Upon further reflection, Goodmark noted

We must consider both the legal and nonlegal dimensions of a client's problem. We must ask these questions without thinking about our own role—or lack thereof—in the strategy that the battered woman ultimately chooses.

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134. See Tarr, *supra* note 108, at 181; see generally Julie Goldscheid, *Advancing Equality in Domestic Violence Law Reform*, 11 AM. U. J. GENDER SOC. POL'Y & L. 417 (2003) (discussing employment discrimination). For a discussion of housing discrimination, see generally Stern & Keeley, *supra* note 16; see also Lenora A. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 377 (2003).

135. Tarr, *supra* note 108, at 177.

136. Goodmark, *supra* note 115, at 7-8.

We must honor the choices that battered women make—even if those choices leave us without our preferred tools in working towards her protection.<sup>137</sup>

Judges hearing CPO cases day in and day out also develop biases. Seeing hundreds of abused women each year in protection order hearings and reading the daily news, judges may fear the potential consequences of making a mistake. “No judge wants to be the one who didn’t grant a restraining order to the woman found face down in the morning.”<sup>138</sup> Likewise, when dealing with a request to vacate a CPO, no judge wants to be the one who vacated a woman’s order, only to be greeted the next day with news of the same fatal result.<sup>139</sup> If the issue before the judge is whether the victim has been coerced to drop, judges may very well choose to be safe rather than sorry, assuming that battered women’s advocates are correct—that coercion is central to, and ever present in, domestic violence relationships.

### F. Credibility Issues

Another challenge for a judge making a coercion inquiry is that women as a group have serious credibility issues in court. State task forces on gender bias and a wide range of scholarly literature confirm that women’s voices are not given much weight, and that women’s evidence is often still suspect in the law.<sup>140</sup> Battered women in particular face formidable credibility obstacles.<sup>141</sup>

Even battered women’s lawyers have suggested that victims’ testimony be questioned: a woman’s testimony “should be accorded great deference when [the victim] wants the law to take action against the batterer, but should be given less weight when [the victim] says she wants to protect him.”<sup>142</sup> Because a battered woman “is far more likely to minimize her husband’s brutality than exaggerate it . . . she has more credibility when she is making charges against him than when she is refusing to complain.”<sup>143</sup>

If attorneys for victims accept such stereotypes as truths, believing that victims are incapable of making rational, autonomous decisions, why would judges find differently?

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137. *Id.* at 47.

138. PTACEK, *supra* note 14, at 6.

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

140. Kim Lane Scheppelle, *Just the Facts, Ma’am*, 37 N.Y.L. SCH. L. REV. 123, 128-33 (1992).

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

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

143. *Id.*



#### IV. CONCEPTUAL LIMITATIONS OF CURRENT JUDICIAL GUIDELINES

The challenges of accurately measuring the pressures faced by victims in domestic violence cases, and their effects on victim decision making, are numerous. These include the severity of the batterer's threat, the context within which it was made, and how it actually made the victim feel, to name but a few. Exacerbating these challenges are any pressures a victim may feel from external sources, in addition to the batterer, and the serious credibility hurdles victims face in court.

In addition to the practical problems of assessing coercion, there exists a conceptual one as well. In a court's determination to dissolve a CPO, judicial guidelines tell a judge to consider whether a victim is being coerced, but they do not define coercion.<sup>144</sup> A common understanding of coercion—"forcing" someone to act in a certain way<sup>145</sup>—may lead to a dichotomous framing of the inquiry. The judge may view his task as determining whether a victim is coerced into dropping, or she is acting voluntarily. This dichotomy—that a victim's decision is either coerced or is voluntary—fails to account for any degree of victim volition.

This common conception of coercion that equates coercion with force may be inadequate, for legal purposes. Social scientists utilize a more nuanced conceptualization that acknowledges the role of victim choice, albeit constrained choice.<sup>146</sup> Such paradigms distinguish between force and coercion. When a batterer forces a victim to comply with his demand, she has no discretion regarding how to respond; when he pressures her, she has a choice to comply, to resist, or to do some combination of the two.<sup>147</sup>

Resistance to a batterer's demands may take many forms, all of which may be difficult to recognize.<sup>148</sup> By way of illustration, a victim whose batterer has threatened to kill her unless she drops, and who then drops, may appear to be complying with a batterer's demand. She may also be resisting. She may know, for example, that if she drops her CPO, she will no longer be bound to the provisions of the order that give the batterer visitation rights with the parties'

144. See note 63, *supra* and accompanying text.

145. The Merriam-Webster online dictionary (<http://www.m-w.com/>) defines "coerce" as "to restrain or dominate by force." See also Winnick, *supra* note 3, at 1145 (explaining that, in its most basic meaning, the term coercion connotes force or duress, or at least the threat of force).

146. Raven, *supra* note 22, at 227-244 (1993), cited in Dutton & Goodman, *supra* note 2, at 745.

147. See Dutton & Goodman, *supra* note 2, at 745.

148. See SCHNEIDER, *supra* note 7, at 83-86 (discussing several scholars' theories of the concepts of resistance and agency of domestic violence victims, and stating, "Women who are battered may be unable to bring a battering relationship to an end, but they may be constantly planning and asserting themselves—strategizing, in ways that are carefully hidden from the batterer, to contribute to their own safety and to that of their children. They may be negotiating and carefully hiding small but important acts of independence so as to mitigate "separation assault." They may be gathering information, seeking money and support to assist them when they leave, and succeeding in breaking away only after multiple attempts.").

child. Without those provisions in place, she may be able to avoid the conflict that inevitably ensues whenever the batterer picks up the child for a court ordered visit. Her decision to drop her CPO, while on the surface appearing to be complete capitulation with the batterer's demand, may upon closer examination be a combination of compliance and subversive resistance. It may be part of a longer term strategy of resistance, a strategy intended to endure the contact the parties will necessarily have over the years until their minor child reaches adulthood.

Just as resistance may take many forms, so too may compliance. Take the same example, but change the outcome. Another victim may face the same threat by a batterer—that he will kill her unless she drops her order—but she may decide to maintain the order nonetheless. Maintenance of a CPO may certainly be a form of resistance. But should it be presumed to be such? It may be resistance if, for example, the victim feels that the order is effective at protecting her, and thus that the batterer will be punished if he attempts to violate it. But is maintenance an act of resistance when she feels that the CPO is ineffective? For example, she may feel that, because the batterer has continued to threaten her, even with a court order prohibiting him from doing so, the order is ineffectual and hence it does not matter whether she drops. She may believe that, because the order does not restrict her conduct, she does not need to drop, even if she plans to have contact with the batterer. She may feel conflicted about whether to drop. Or she simply may not be able to find transportation, to arrange child care, or to take a day off of work to go to court for the purpose of obtaining the court's permission to drop.

In all likelihood, a judge will never know why a victim who decided to maintain her order chose this course of action. Only the victim who chooses to drop, to formally stop utilizing the legal remedy available to her, will need the court's permission to do so. Yet in both scenarios, regardless of the outcome of the victim's decision, the batterer exerted the same pressure: to kill the victim if she did not drop. The batterer's pressure can only render the victim's decision coerced, as a legal conclusion, for the victim who decided to drop.

This essay does not argue that victims are not coerced into dropping. Rather, it argues that a victim's decision to comply with a batterer's pressure is not necessarily an involuntary decision, to the extent that "involuntary" is equated with the inability to make a deliberate, strategic, or rational choice. A victim's decision to comply may be well-reasoned. As one example, it may be that when the batterer has violated the CPO in the past, the police did not respond, or the prosecutor did not press charges. Or it may be that they did, and the batterer blamed the victim for his incarceration, and retaliated by re-assaulting her.<sup>149</sup> For this victim, the costs (continued pressure by the batterer, or

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149. See Epstein, *supra* note 79, at 467-468 (arguing that for many victims, prosecution of batterers actually creates a greater long-term risk of harm. Because of short sentences, the risk that a batterer will sustain a connection to the victim during imprisonment and attempt to resume the relationship on release, and the fact that many batterers blame the victim for their

worse, following through on his threat) may outweigh the benefit (the state's protection on paper but not in practice).

Because a judge may not fully understand the myriad factors that play a role in a victim's decision to drop her order, he or she may reflexively react to evidence of coercion by assuming that no victim could reasonably seek to drop unless she was coerced. Deciding to drop a CPO, refusing to cooperate with the state's prosecution, or more broadly, staying with rather than separating from a batterer, are victim decisions that appear unreasonable in the eyes of the justice system.<sup>150</sup>

Because resistance takes many forms that are not readily apparent, and because compliance may be the most rational way for a victim to minimize the risk of violence against her, the importance placed on a victim's choice to separate has been criticized as a "crabbed notion of resistance and will."<sup>151</sup> It marginalizes the myriad ways victims actively and thoughtfully resist terror in their homes,<sup>152</sup> such as by "constantly mediating, planning, and strategizing how to survive from day to day [or by] . . . secret[ing] children to protect them from harm and engage[ing] in countless nonconfrontational acts that challeng[e] the assailant's power."<sup>153</sup> By placing too much emphasis on the outcome of a victim's decision rather than the process of making a decision for oneself,<sup>154</sup> it is assumed that women are "either weak, wholly compromised . . . or inadequately assertive individuals" who should be "treated paternalistically . . . [and] compelled" to leave the relationship and prosecute the batterer.<sup>155</sup> The process of deciding, rather than the action taken, is relevant to autonomy determinations, even when this process occurs under conditions of oppression.<sup>156</sup>

A narrower conceptualization of coercion—one that acknowledges a victim's choice to comply, resist, or both, even in the face of pressure—would assist a judge in unraveling the complex dynamics involved in coercion generally. While a judge must still inquire about the objective, subjective and

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incarceration and seek retribution by committing further violence); see also Ruth Jones, *The Control of the Abuser*, 4 GEO. L. J. 605, 629 (2000) (arguing that arrest and prosecution do not ensure victim safety, and that criminal prosecution vindicates societal interests with victim's interests a secondary by-product of the proceedings).

150. See, e.g., Goodmark, *supra* note 115, at 20 (arguing that the legal system penalizes victims who choose to "stay"); SCHNEIDER, *supra* note 7, at 84 (describing widely held criticism of "the way legal images of battered women frequently depict them as passive in the face of abuse if they have not left the relationship"); Hanna, *supra* note 7, at 1883 (equating staying in an abusive relationship as proof that a victim is acting out of learned helplessness rather than of her own volition); Waits, *supra* note 142, at 307 (victim's decision should be accorded great deference when [the victim] wants the law to take action against the batterer, but should be given less weight when [the victim] says she wants to protect him).

151. Miccio, *supra* note 7, at 318.

152. *Id.*

153. *Id.* at 320.

154. *Id.*

155. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 842 (1999), cited by Miccio, *supra* note 7, at 321.

156. Miccio, *supra* note 7, at 320.

contextual factors mentioned earlier,<sup>157</sup> the recognition of the existence of choice, albeit not entirely free choice, allows for the possibility that the victim thought carefully about her options. This guards against the risk of invoking coercion to invalidate a decision that, without further probing, appears unreasonable.

This “recognition of the existence of both choice and constraint . . . can move us beyond the dichotomy of victimization and agency that has impeded justice for battered women.”<sup>158</sup> It should therefore be applied in broader legal contexts. For example, lawyers representing domestic violence victims in civil cases, or defending them in criminal cases, often put on evidence of the batterer’s coercion in order to paint a fuller picture of the day-to-day experiences of the victim, one that is not reflected by evidence of discrete acts of physical assault alone. When doing so, a lawyer could elicit testimony not just of the pressures exerted by the batterer, but could describe in detail her assessment of the credibility of the batterer’s threats, her responses to these threats, and her numerous and varied responses—that included both compliance and resistance—to the batterer’s coercive control generally. In a CPO case, such a litigation strategy in the case in chief would not only have the benefit of more accurately depicting the victim’s actual experience, but would have implications later, if the victim appears before the same judge requesting that her order be vacated.<sup>159</sup>

Lawyers must “examine, unearth, and describe aspects of battered women’s lives that constitute dimensions of self-direction, which an emphasis on exit has rendered invisible,” and “emphasize broader problems of contradiction and complexity, and shifting combinations of choice and restriction within which these actions take place.”<sup>160</sup> If these complexities are not highlighted, the risk to victim autonomy is grave.

Linda Mills argued that mandatory interventions such as “no-drop” policies perpetuate the kinds of power dynamics that exist in the battering relationship itself.<sup>161</sup> Prosecutors take complete control over the case, functioning as the sole decision-makers and ignoring victims’ voices<sup>162</sup> or worse, punishing them for failing to cooperate with states’ cases against batterers.<sup>163</sup> Similarly, when a CPO court substitutes its judgment for that of the victim’s because it believes her to be

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157. See text of Section III, *supra*.

158. See SCHNEIDER, *supra* note 7, at 86 (“Recognition of the existence of both choice and constraint in women’s lives, and description of this complexity in both lawmaking and culture, can move us beyond the dichotomy of victimization and agency that has impeded justice for battered women”).

159. If the complexities of coercion, and particularly the notion of victim choice, were presented to a judge hearing a victim’s case in chief for a CPO, it would be less difficult for a judge to later find that she is acting of her own volition when asking for the CPO to be vacated.

160. Schneider, *supra* note 7, at 85.

161. See Mills, *supra* note 27, at 566.

162. *Id.*

163. Hanna, *supra* note 7, at 1863 (discussing some jurisdictions’ policies of arresting and prosecuting victims who fail to cooperate, such as by failing to appear in court to testify pursuant to a subpoena).

coerced, and presumes that when she is coerced she cannot make an autonomous decision, it usurps control over a decision the victim would like to make for herself, thereby replicating the very coercion it seeks to prevent. This result is particularly problematic in cases involving domestic violence, in which an important element of responding to the problem is to restore a victim's fundamental rights of freedom, choice, and autonomy.<sup>164</sup>

### CONCLUSION

Given the centrality of coercion in domestic violence, it is only logical that scholars and activists have called for courts to consider not just discrete physical assaults but also the ways in which coercion affects the self-determination and basic human rights of victims. As policy makers continue to advocate that courts consider the role of coercion, they must recognize the practical and conceptual challenges embodied in current legal approaches. These challenges are especially critical when victims try to stop using legal remedies designed to assist them. This essay sought to expose those challenges by examining them in context. Given that there is virtually no statutory or case law governing victims' motions to vacate their CPOs, there exists a real opportunity for scholars and policymakers to engage in a discussion about how to implement a narrower conceptualization of coercion and a broader understanding of victim decision making. This context provides a starting point for the development of more discriminating legal approaches, to be applied in broader contexts that would reject the reflexive practices of many judges who do not take into account the complexities of analyzing coercion.

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164. See SCHECHTER, *supra* note 28, at 317-319.