

EX PARTE DOMESTIC VIOLENCE ORDERS OF
PROTECTION:

HOW EASING ACCESS TO JUDICIAL PROCESS HAS EASED
THE POSSIBILITY FOR ABUSE OF THE PROCESS

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I. INTRODUCTION

Domestic violence is a pervasive problem in today's society.¹ The number of incidents of abuse is staggering.² Nevertheless, prior to the enactment of domestic violence statutes beginning in the 1970's, judicial process was largely unavailable to victims as a practical remedy due to power and economic differences, as well as the slow speed with which the wheels of

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1. COUNCIL ON DOMESTIC VIOLENCE & SEXUAL ASSAULT, AN ANNUAL REPORT TO GOVERNOR WALTER J. HICKEL & THE ALASKA STATE LEGISLATURE. 2 (1992) ("A woman is beaten every 18 seconds and 4,000 battered women are killed every year in the United States. Nationwide, more than one million abused women each year seek medical assistance for injuries caused by battering. In Alaska, 26% of adult women have been physically abused by a spouse sometime during their lives and most of the battered women were abused at least once a month. It is estimated that a minimum of 13,200 women living in Alaska have required medical treatment by a doctor or hospital for injuries sustained by abuse at some time in their life. In 1990, fifty percent of female murder victims in Alaska were killed by their husbands or boyfriends. More than half of all homeless women are on the street because they are fleeing domestic violence. There are nearly three times as many animal shelters in the United States as there are battered women shelters.").

2. U.S. DEP'T OF HEALTH & HUMAN SERVS., CENTS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, INCIDENCE, PREVALENCE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 19 (2003), http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf ("Nearly 5.3 million intimate partner victimizations occur among U.S. women ages 18 and older each year. This violence results in nearly 2.0 million injuries and nearly 1,300 deaths.")

justice turn.³ In recognition, all fifty states and the District of Columbia have enacted some form of statutory relief for victims of domestic violence.⁴ These statutes largely employ a common, two-stage scheme.⁵ First, a victim of domestic violence may obtain an *emergency* ex parte order of limited duration. These temporary orders grant various forms of relief, such as a prohibition of contact with the victim, exclusion from a shared residence, a prohibition of removing possessions from the residence, and physical care and custody of the parties' children.⁶ After notice to the alleged abuser, a full hearing is held within a relatively short period of time at which the alleged abuser may appear and defend the action.⁷ An order of longer duration may then be entered;

3. Traditional legal responses to domestic violence include the civil remedies of tort and criminal actions, both of which are time-consuming and require, as a practical matter, professional legal assistance. Inter-spousal immunity historically presented a bar to victims' pursuit of even these remedies. See FREDERICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE (West Group 2007) (providing a synopsis of intentional tort, negligence, and criminal actions available to victims of domestic violence); Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 160-63 (2003) (describing civil remedies of injunction and divorce and the ways in which these remedies are inadequate to provide prompt relief to a victim); see also *Magness v. Magness*, 558 A.2d 807, 808-09 (Md. 1989) (examining the "evolution of injunctions in divorce, alimony, and annulment cases in Maryland" as the Maryland court's equity power to grant injunctions in domestic cases expanded through case law and statute from 1846 through 1977, and noting that "[t]he use of ex parte injunctions in domestic cases became well accepted and frequently used [after 1942].").

4. 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, 810 (1993) ("Currently all fifty states plus the District of Columbia and Puerto Rico make civil protection orders available to victims of domestic violence."); see also ARK. CODE ANN. § 9-15-101 (West 2004) ("The General Assembly . . . finds that this [statute] shall meet a compelling societal need and is necessary to correct the acute and pervasive problem of violence and abuse within households in this state."); 750 ILL. COMP. STAT. ANN. 60/102(3) (West 1999) (stating that one of the underlying purposes of the Domestic Violence Act is to "[r]ecognize that the legal system has ineffectively dealt with family violence in the past . . .").

5. See generally Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L 163, 165-66 (1993) (noting that reform statutes "typically create a two-step process for obtaining an order of protection.").

6. Klein & Orloff, *supra* note 4, at 1031-44. For clarity, this article will use the term "ex parte order of protection" for general references to the ex parte order; however, footnotes and other references to specific sources will use the term contained in the source.

7. See, e.g., 750 ILL. COMP. STAT. ANN. 60/222(c) (West Supp. 2008) ("Unless respondent was present in court when the order was issued, the sheriff, other law enforcement official or special process server shall promptly serve that order upon respondent and file proof of such service, in the manner provided for service of process in civil proceedings."); 750 ILL. COMP. STAT. ANN. 60/221(b)(4) (West Supp. 2008) ("An order of protection shall further state . . . [t]he date, time and place for any scheduled hearing for extension of that order of protection or for another order of greater duration or scope."); 750 ILL. COMP. STAT. ANN. 60/221(b)(6) (West Supp. 2008) ("For emergency and interim orders of protection, that respondent may petition the court . . . to re-open that order if he or she did not receive actual prior notice of the hearing . . . and alleges that he or she had a meritorious defense to the order or that the order or any of its remedies was not authorized by this Act."). See also Kinports & Fischer, *supra* note 5.

commonly one to two years is entered.⁸

Emergency ex parte relief is an effective weapon in the arsenal available to combat domestic violence.⁹ By affording a victim the opportunity to obtain judicial relief without notice, that person can seek to extricate herself from the circumstance of violence, free from fear that further violence would be precipitated by notice to the abuser. When an actual victim of domestic violence seeks ex parte relief, the propriety of this remedy is unassailable.¹⁰ Therefore, statutory schemes have sought to ease the ability of a person to afford herself of such relief.¹¹ Nevertheless, as the doors of the courthouse

8. *E.g.*, ALA. CODE § 30-5-7(e)(1) (West 1998) (“Any final protection order or approved consent agreement shall be for a period of one year unless a shorter or longer period of time is expressly ordered by the court.”); ME. REV. STAT. ANN. tit. 19A, § 4007(2) (West Supp. 2007-08) (“A protective order or approved consent agreement is for a fixed period not to exceed [two] years.”); TEX. FAM. CODE ANN. § 85.025(a) (Vernon 2002) (“[A]n order under this subtitle is effective (1) for the period stated in the order, not to exceed two years; or (2) if a period is not stated in the order, until the second anniversary of the date the order was issued.”).

9. Studies have measured the effectiveness of ex parte orders of protection using various criteria. While there seems to be no authoritative measurement of the effectiveness of the ex parte order of protection, the evidence available indicates that ex parte orders of protection have been effective for most victims in that the order of protection has succeeded in reducing the obstacles to judicial protection. See, *e.g.*, SUSAN KEILITZ & PAULA L. HANNAFORD, BENEFITS AND LIMITATIONS OF CIVIL PROTECTION ORDERS FOR VICTIMS OF DOMESTIC VIOLENCE IN WILMINGTON, DELAWARE, DENVER, COLORADO, AND THE DISTRICT OF COLUMBIA, NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA (1995), <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/02557.xml> (finding that, in most cases, civil protection orders increase the victim’s sense of well-being and deter repeated physical or psychological abuse); Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women’s Experience with Male Violence and Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 227, 245 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (finding that temporary restraining orders are generally effective in empowering women to end abusive relationships); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL’Y & L. 499, 509 (2003) (citing a 1999-2000 study conducted in Baltimore that indicated a “substantial number” of study respondents found “‘filing for a protective order’ a helpful strategy” in increasing their safety and well-being). *Cf.* Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of “Efficacy,”* 11 S. CAL. INTERDISC. L.J. 361, 368-78 (2002) (arguing that many existing studies regarding the effectiveness of civil restraining orders are methodologically flawed.).

10. Throughout the article I have used the pronoun “she” in reference to victims of domestic violence. There are, of course, male victims as well. Nevertheless, because abuse of females by males is most prevalent, I have used the female pronouns.

11. Ease may be considered in two contexts: one, easing relief in the sense of increasing the number of remedies available and, two, in the sense of the ease with which the remedies may be obtained. See Klein & Orloff, *supra* note 4 (explaining that legal reforms have created a “broad array” of remedies for battered women); see, *e.g.*, IDAHO CODE ANN. § 39-6302 (West 2006) (“It is the intent of the legislature to expand the ability of the courts to assist victims by providing a legal means for victims of domestic violence to seek protection orders to prevent such further incidents of abuse.”); LA. REV. STAT. ANN. § 46:2131 (1999) (“It is the intent of the legislature to provide a civil remedy for domestic violence which will afford the victim immediate and easily accessible protection.”); W. VA. CODE ANN. § 48-27-101(b)(2) (West 2002) (explaining that one of the purposes of the statute is “[t]o create a speedy remedy to discourage violence”); State v. Bingaman, 991 P.2d 227, 230 (Alaska Ct. App. 1999) (“The procedure is

have been opened to actual victims of domestic violence, they also have inadvertently been opened to persons who are not victims of domestic violence. In fact, they have been opened to the actual abuser who seeks relief for improper motives, such as trying to gain a tactical advantage in an anticipated domestic violence proceeding or divorce action.¹² The ease with which ex parte orders can be obtained creates the opportunity for this misuse, allowing an ex parte order of protection to be granted on the basis of flimsy or false allegations.¹³ Though a temporary restraining order in any other context is an extraordinary remedy,¹⁴ ex parte orders of protection are granted routinely at an extraordinarily high rate; in some jurisdictions, nearly one hundred percent.¹⁵ The danger is presented by the ease and frequency with

designed to protect victims of domestic violence expeditiously, before there has been time to obtain a criminal conviction.”); *Paschal v. Hazlinsky*, 803 So. 2d 413, 417 (La. Ct. App. 2001) (“First, we note that La. R.S. 46:2131 expressly states that one of the purposes of the domestic abuse assistance statutes is ‘to provide a civil remedy for domestic violence which will afford the victim immediate and easily accessible protection.’”).

12. *See, e.g., Chieco v. Chieco*, 170 A.D. 2d 569, 569, 571 (N.Y. App. Div. 1991) (holding that a police officer obtained a temporary ex parte order of protection against his wife not because of “any real or perceived need for protection, but rather . . . to intimidate his wife, who had previously commenced an action for divorce” missibly invoking the court’s process as “a sword rather than as a shield.”).

13. *See, e.g., In re Marriage of Los*, 593 N.E.2d 126, 128, 131 (Ill. App. Ct. 1992) (explaining that where a mother whose ultimate purpose was to modify a dissolution judgment regarding child custody sought an order of protection by falsely claiming that the father “abducted” their children when he took the children for his court-appointed summer visitation, the court noted, “[W]e do not appreciate the way in which the judicial system was manipulated in this situation. [The mother] should have petitioned for modification of the judgment Instead, she created an inconvenient and frustrating situation for [the father] by seeking an emergency order of protection”); *In re Marriage of Gordon*, 599 N.E.2d 1151, 1172 (Ill. App. Ct. 1992) (“Robert has not advanced any reason, nor can we find one, to justify his proceeding under the Domestic Violence Act rather than the Marriage Act. Whatever the relief he sought — extended visitation, injunction or custody — he could have received under section 610 of the Marriage Act. To approve the procedure followed in this case would be an open invitation to parties disappointed in a custody dispute to file a separate action under the Domestic Violence Act and call it something other than a claim for custody In this case, however, the Domestic Violence Act was misused and was a subterfuge to circumvent the requirements of the Marriage Act.”).

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 978, 979 (D.D.C. 1952) (“An application for a temporary restraining order involves invocation of a drastic remedy which a court of equity ordinarily does not grant, unless a very strong showing is made of a necessity and desirability of such action.”); *see, e.g., Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836, 846 (E.D.N.Y. 1971) (“Injunctive relief is an extraordinary remedy and is not to be routinely granted.”); *U.S. v. W.F. Morgan & Sons*, 155 F. Supp. 40, 43 (E.D. Va. 1957) (“An injunction is a harsh remedy . . . and to be used only when fully justified.”); *Abdulhafedh v. Sec’y of State*, 514 N.E.2d 563, 565 (Ill. App. Ct. 1987) (“A TRO is a drastic, emergency remedy which may issue only in exceptional circumstances and for a brief duration.”).

15. *See MARTHA ROSS ET AL, DEP’T OF THE ATT’Y GEN. STATE OF HAWAII, RESTRAINING ORDERS SOUGHT IN THE CITY & COUNTY OF HONOLULU 1, 36 (1999), available at www.cpja.ag.state.hi.us; see also Regina DuFresne & Jonathan S. Greene, Increasing Remedies for Domestic Violence: A Study of Maryland’s 1992 Domestic Violence Act in the Courtroom*, 6 MD. J. CONTEMP. LEGAL ISSUES 155, 170 (1995) (“Petitioners succeeded in obtaining ex parte orders in 85% of the cases observed (57 of 67), with no county granting ex parte orders in less

which the ex parte orders are entered. The abuser can use an order of protection as another means of abuse.¹⁶ By obtaining an unwarranted ex parte order of protection, the abuser can exclude the true victim from their shared residence and cut her off from her children, her possessions, and, in some situations, her means of support.¹⁷ In other words, the judicial remedy that was intended to overcome disparity in power and income can be used as another tool for exploiting such disparities. The courts, instead of providing a mechanism for relief from an abusive relationship, then become yet another tool for effectuating abuse.

We are left, therefore, with the very difficult problem of separating justifiable grants of relief in situations where it is deserved from situations where a party seeks ex parte relief for an improper purpose.¹⁸ Further exacerbating the problem is that no judge, especially one who must face election by popular vote, wants to deny ex parte relief and have later abuse occur.¹⁹ The resulting consequence is that well-intentioned legislative schemes and judicial rulings have become potential vehicles for further abuse.²⁰

In this article, we will discuss how common state statutory schemes have contributed to the abuse of orders of protection. A context for the discussion will be established by means of two composite situations from our law school legal clinic in which women who were the actual victims of domestic violence had orders of protection entered against them. The article will then discuss how various factors, such as over-worked judges and societal pressures, have contributed to the abuse of the order of protection process. We will discuss due process challenges to orders of protection and review the statutes of all

than 75% of the possible cases.”).

16. See *People v. Stiles*, 779 N.E.2d 397, 402 (Ill. App. Ct. 2002) (explaining that a defendant obtained an order of protection against his ex-girlfriend — who had already obtained such an order against the defendant — that applied to a pub where defendant ostensibly intended to apply for employment and later, upon entering the pub and seeing the ex-girlfriend there, proceeded to verbally harass the woman and called the police in an attempt to have her arrested).

17. See generally Cherry Henault, *The Reissuance of Domestic Violence Orders Under Kentucky Law: A Due Process Analysis*, 40 BRANDEIS L.J. 575, 577-78 (2001) (referencing the author’s interviews with Kentucky Circuit Court Judges John T. Daughaday and Royce W. Buck who describe first-hand experience with the “Poor Man’s Divorce,” where a Domestic Violence Order is obtained to “get a spouse out of the house to gain sole possession of any children,” thus attaining the desired objective faster than commencing divorce proceedings).

18. See Klein & Orloff, *supra* note 4.

19. See Henault, *supra* note 18 (“Even when Judge Buck is convinced that a petitioner is abusing the system, he estimates that he grants a [Domestic Violence Order] at least 95% of the time “[I]f I am going to err in my ruling, I am going to err on the side of caution.”). *But see* Woolridge v. Hickey, 700 N.E.2d 296, 298 (Mass. App. Ct. 1998) (“The judge must focus on whether serious physical harm is imminent and should not issue a [domestic violence protection] order on the theory that it still does no harm, i.e., ‘seems to be a good idea or because it will not cause the defendant any real inconvenience’”); *contra* Davis v. Barbano, No. B163121, 2004 Cal. App. LEXIS 2033, at *13 n.2 (Cal. Ct. App. March 4, 2004) (explaining how the court “categorically reject[s] that notion as an affront to the judicial system”).

fifty states to assess what procedures may be constitutionally suspect. The article will then take a closer look at the potential problems posed by form pleadings designed to ease access to the courthouse. In conclusion, we will call upon the judiciary to treat orders of protection as any other request for emergency injunctive relief — that is, as an extraordinary remedy that should be granted only after finding that a risk or irreparable injury is present and the requested relief is warranted.

II. THE PROBLEM CREATED WHEN EX PARTE RELIEF IS OBTAINED TOO EASILY

Domestic violence statutes generally seek to provide a quick and simple mechanism by which victims of domestic violence can obtain a judicial remedy. When the petitioner seeking relief is an actual victim of domestic violence, that goal is without reproach. Nevertheless, when the remedy becomes too easy to obtain, a person who has not been abused can improperly use the statutes as both a further mechanism of abuse, as well as a means to gain strategic advantage in a related matter, such as a divorce.²¹ Two anecdotal composite situations from our law school clinic illustrate the problem.²²

In the first, our client was a woman in her mid-thirties' who had been married for several years and had children with her husband. She was approximately five foot, 'two inches' and of slight build. Her husband was a large man, over six feet tall and sturdily built. He was a jailor employed by the sheriff's department of a neighboring county. Our client had been experiencing marital difficulty. She and her husband had an argument that included talk of divorce. The next day the husband obtained an ex parte order of protection, alleging that he was physically afraid of his diminutive wife because of things said during the argument. The ex parte order excluded her from the marital home and gave him custody of the children. She immediately came to our clinic for assistance. We were able to have the ex parte order dissolved pursuant to 750 ILCS 60/224(d)(2), which provided for a re-hearing upon two days notice in order to establish a meritorious defense. Our client was restored to her home and children.

In the second situation, our client was a young woman in her early twenties. She was married to and had a child with a man considerably older than her. He had children from a previous marriage living in the home. They had an argument that ended in her leaving the house. He obtained an ex parte order of protection based upon the allegation that she pushed him while he held their child in his arms.²³ The emergency order excluded her from the marital

21. See *infra* app. A.; *Stiles*, 779 N.E.2d at 402.

22. Zeke Giorgi Legal Clinic, <http://niu.edu/law/clinic.index.shtml> (explaining that third year law students licensed to practice pursuant to Illinois Supreme Court Rule 711 provide representation to victims of domestic violence in the Domestic Abuse Clinic).

23. See generally *Wilson v. Jackson*, 728 N.E.2d 832, 840 (Ill. App. Ct. 2000) ("When petitioner did not leave, respondent 'grabbed Anslay' and 'jerked' him from petitioner's hands.

residence and gave her husband custody of their child. She came to our clinic several days after being served with the order. At about the same time, the husband obtained counsel and filed for divorce. He had obtained the order of protection *pro se*. Our client wanted to contest little in the divorce, and even though she was counseled that she had defenses to the order of protection action, she simply gave up. The abuser successfully had exploited the statutory scheme, using it as another form of abuse.

In each situation, a mother was excluded from her home and children based upon a flimsy, if not non-existent, allegation of domestic abuse, and the orders of protection should not have been granted on an emergency basis. Neither petitioner was in fear or danger of immediate and irreparable injury. The orders appear to have been obtained for the purpose of gaining some strategic advantage in a contemplated divorce action.

III. FACTORS CONTRIBUTE TO THE ABILITY TO MISUSE ORDERS OF PROTECTION

Several factors contribute to the ability of orders of protections to be misused. To obtain relief from domestic abuse, the statutory schemes generally require the petitioner to have been subject to “abuse,” as statutorily defined. Definitions of what constitutes abuse can be very broad, ranging from threats or abusive language to physical violence resulting in serious bodily harm.²⁴ Conduct that is not harmful in actuality, or actions of the victim that

There is no indication that respondent’s actions created an immediate risk of physical harm to the child. While she may have acted abruptly, taking the child from petitioner did not constitute physical abuse.”).

24. *E.g.*, MD. CODE ANN., FAM. LAW § 4-501(b)(1) (West 2006) (“‘Abuse’ means any of the following acts: (i) an act that causes serious bodily harm; (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm; (iii) assault in any degree; (iv) rape or sexual offense under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree; (v) false imprisonment; or (vi) stalking under § 3-802 of the Criminal Law Article.”); W. VA. CODE ANN. § 48-27-202 (West 2002) (“‘Domestic violence’ or ‘abuse’ means the occurrence of one or more of the following acts between family or household members, as that term is defined in section 27-204: (1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons; (2) Placing another in reasonable apprehension of physical harm; (3) Creating fear of physical harm by harassment, psychological abuse or threatening acts; (4) Committing either sexual assault or sexual abuse as those terms are defined in articles eight-b and eight-d, chapter sixty-one of this code; and (5) Holding, confining, detaining or abducting another person against that person’s will.”); N.M. STAT. ANN. § 40-13-2(C)(2) (West Supp. 2008) (“As used in the Family Violence Protection Act . . . ‘domestic abuse’ . . . means any incident by a household member against another household member . . . resulting in: (a) physical harm; (b) severe emotional distress; (c) bodily injury or assault; (d) a threat causing imminent fear of bodily injury by any household member; (e) criminal trespass; (f) criminal damage to property; (g) repeatedly driving by a residence or work place; (h) telephone harassment; (i) harassment; or (j) harm or threatened harm to children as set forth in this paragraph”); KY. REV. STAT. ANN. § 403.720(1) (West 2006) (“‘Domestic violence and abuse’ means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical

are justified under the circumstances, could be portrayed by the actual abuser to fall within broad statutory definitions of abuse.²⁵ A person might cause physical contact while protecting him- or herself or make statements in an argument that could be construed as threatening.²⁶ Though not the type of conduct sought to be prohibited by statutory schemes, it is conduct that meets definitions of abuse intended to afford relief to the greatest number of persons.²⁷ In the event of a race to the courthouse door in such situation, the truly abused person could find herself the respondent in an *ex parte* proceeding that excludes her from her home and takes custody of her children.²⁸ Thus, the intention of the statute is turned on end, and the system intended to equalize the power difference between the parties now becomes part of the power differential itself.

Also contributing to the problem is the adoption by many courts of form pleadings to aid the victim in petitioning for relief. While form pleadings lower the barrier to the courts, especially for pro se litigants, they also can eliminate statements of fact that could help separate fraudulent claims of abuse from legitimate ones. For example, form pleadings approved for use in Illinois by the Conference of Chief Circuit Judges contain the following conclusionary statement, pleaded by the check of a box:

injury, sexual abuse, or assault between family members or members of an unmarried couple”).

25. See, e.g., *Wilson*, 728 N.E.2d at 840; *State v. McMurry*, 143 P.3d 400, 401-02 (Idaho Ct. App. 2006) (“Officers . . . discovered that McMurry had a black eye, lumps and bruises on her face, red marks around her neck and a stab wound in her thigh. . . . Ultimately, McMurry was charged with felony aggravated battery for stabbing Sorter. At trial, Sorter testified that he and McMurry argued all the time and that McMurry stabbed him. Sorter testified that McMurry went to the kitchen and picked up a knife. Sorter said he told her to put the knife down before somebody got hurt, and then he ‘got stabbed.’ . . . Sorter also admitted he may have hit McMurry on that evening. A detective testified that Sorter’s knuckles were skinned and that, in his opinion, Sorter should be charged with domestic battery.”); *Thompson v. Olson*, 711 N.W.2d 226, 232 (N.D. 2006) (“Thompson argues the trial court erred in failing to find that Olson committed domestic violence against him by perforating his eardrum in August 1998, in which case the domestic violence presumption might cease to exist. However, the trial court found Olson, then pregnant, slapped Thompson in the ear in an act of self defense to force him off of her while Thompson sat on Olson’s stomach and tried to choke her.”) (citation omitted).

26. See Shana Wallace, *Beyond Imminence: Evolving International Law and Battered Women’s Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1761-62 (2004) (“If jury instructions and statutes articulated specific factors that we actually accept in practice as defining ‘necessary’ self-defense, they would allow self-defensive actions that look more anticipatory”); Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor’s Culpability in Self-Defense*, 39 TULSA L. REV. 875, 886 (2004) (“Therefore, in a situation of self-defense, the victim’s course of action is not limited to means that will definitely protect [her] . . . ; [she] may employ means that will provide reasonable protection, including forms of defense that may constitute a counter-attack.”).

27. See, e.g., 750 ILL. COMP. STAT. ANN. 60/103(14)(i) (West Supp. 2008) (defining abuse as “knowing or reckless use of physical force”).

28. See, e.g., *Hartman v. Hartman*, 621 N.E.2d 917, 918-19 (Ill. App. Ct. 1993) (“In announcing its determination of who would be awarded custody of Lyndsey, the trial court set out extensive findings of fact. It found that both parties had misused the Domestic Violence Act and had raced to the courthouse to obtain *ex parte* orders of protection against each other.”).

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 91

I did not give the Respondent notice that I am seeking protection because I fear that giving notice would result in further abuse *or* because the abuse is likely to recur before I return to court. Good cause exists for granting the remedy of remedies requested without prior service of process or notice.²⁹

Without the requirement of any supporting facts, a conclusion stated in the alternative provides the basis for dispensing with notice, a fundamental aspect of due process.³⁰ A conscientious judge not pressured by an overloaded docket may inquire as to whether it is proper to proceed without notice, but the opportunity exists for the over-burdened, distracted, or simply lazy judge to accept the checked alternative conclusion that supports proceedings without notice, one of the most fundamental elements of due process.

Of course, a petitioner seeking relief could also simply lie and make false allegations of abuse. As a protection, all states require sworn or verified petitions, and, in addition, most statutes contain sanctions for making untruthful statements in the petitions.³¹ Nevertheless, the proceedings necessary to prove the untruthfulness are held days after the respondent may have been deprived of her home or even her children. Additionally, an unrepresented person may not be aware such a remedy exists, let alone know how to procedurally avail him- or herself of such relief. In such case, the actual abuser has exploited the power imbalance and gained a strategic advantage at the same time. If a divorce action follows and the abuser has been able to exclude the real victim from the marital home and obtain temporary custody of the children, a court later called on to determine permanent custody could view preservation of the status quo as a significant factor.³² The victim turned respondent could also lose faith in the court's ability to effectuate true justice, having had an order of protection entered against her when such is not warranted. As a result, she gives up or accepts a resolution that is less favorable than she could obtain from a judicial system in which she had faith.³³ This is the situation presented by the second composite

29. Circuit Court of Illinois, Verified Petition for Order of Protection, *available at* www.19thcircuitcourt.state.il.us/forms/family/dv/OP_Petition_Lake_051107.pdf (emphasis added).

30. *See* *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (“The fundamental requisite of due process of law is the opportunity to be heard.”) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965) (explaining that a hearing must be “granted at a meaningful time and in a meaningful manner”).

31. *See infra* app. A.

32. *See, e.g.,* *Thomas v. Thomas*, 608 So. 2d 755, 757 (Ala. Civ. App. 1992) (“The court is strongly impressed by the family cohesiveness of the husband’s immediate family and the fact that if the husband is the primary care taker [sic], the status quo of the family child care will be maintained.”).

33. *See* *People v. Allen*, 788 N.Y.S.2d 820, 827 (N.Y. Sup. Ct. 2004) (“If the Court were to dismiss the defendant’s criminal case it would be ignoring the interests of the complainant and the community. Both undoubtedly would lose faith in the criminal justice system. Such a decision also would cause the public to view the system as unconcerned about safety among family members especially where as here, the crime underscores the issue of domestic violence, the seriousness of which [cannot] be outweighed by the defendant’s interest in avoiding

client.

One could dismiss this concern under the belief that it is the role of judges to weed out the real cases from the fraudulent ones, and that relief would be entered only when truly appropriate.³⁴ However, the pressures on judges pull them in several directions at the same time.

No judge wants to deny an order of protection to a person who is later injured or killed by the person against whom they unsuccessfully sought relief.³⁵ Therefore, the bench may feel it is better to err in favor of the petitioner, even though that person, by all appearances, is the person who would be expected to hold the power in the relationship. An example from the Tennessee Domestic Abuse Benchbook shows the pressure to grant relief to the petitioner without giving the allegations much scrutiny:

In making the determination whether or not to issue an Ex Parte Order, the judge or other official must liberally construe the allegations of the Petition in favor of the petitioner, particularly if it is filed without the assistance of an attorney. Thus if, taking the allegations of the petition as true, it appears that the petitioner is at risk of continued harm, the Ex Parte Order should be issued.”³⁶

At the same time, judges should also view the matter through the additional lens of deprivation to the respondent.³⁷ In contrast to Tennessee,

prosecution.”) (citing N.Y. CRIM. PROC. LAW § 170.40(1)(a), (h), (g) (McKinney 2008).

34. See *Creaser v. Creaser*, 794 N.E. 2d 990, 991 (Ill. App. Ct. 2003) (describing how the appellate court vacated an emergency order of protection because it found an abuse of discretion when the trial court failed to hear evidence on the risk of further abuse and accepted instead the “standard allegation” provided on the pre-printed petition); NATIONAL INSTITUTE OF JUSTICE & AMERICAN BAR ASSOCIATION, LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 45 (U.S. Dep’t of Justice 1998) (“Even when judges are not statutorily required to hold a hearing prior to issuing a protective order, they may find it of value to inform themselves about the victim’s circumstances Judges could . . . assess the petitioner’s credibility and thus safeguard the rights of the defendant.”).

35. See HENAULT, *supra* text accompanying note 20; MIKE BRIGNER, THE OHIO DOMESTIC VIOLENCE BENCHBOOK 10-11 (Family Violence Prevention Ctr. at the Ohio Office of Criminal Justice Servs. 2003) (“The mishandling of a single domestic violence case due to a failure to thoroughly understand this area of the law can have disastrous results for judges as well as victims.”).

36. TENNESSEE DOMESTIC ABUSE BENCHBOOK § 3-4.01 (Kathy Skaggs ed., The Administrative Office of the Courts and the Tennessee Coalition against Domestic and Sexual Violence 2003), available at <http://www.nowfoundation.org/issues/family/benchbooks.html> (“The Court should consider the following when determining whether there is an immediate and present danger of domestic abuse: A history of violence; Petitioner’s injuries; Respondent’s access to weapons; Threats to attack petitioner; Threats to attack or abduct the children; Threats or attacks on family or household members; Respondent’s drug and alcohol abuse; Respondent’s history of a mental disorder; Respondent’s threats of suicide; and Petitioner’s fear of retaliation for attempts to leave the relationship”); see also NEW MEXICO DOMESTIC VIOLENCE BENCHBOOK, § 2.6.2 (Univ. of N.M. 2005), available at http://jec.unm.edu/resources/benchbooks/dv/ch_2.htm (showing that New Mexico uses all but a couple of the same factors as Tennessee to determine “immediate danger”).

37. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS 1:02 B (The Massachusetts Court System Administrative Office of the Trial Court 2004), available at

the Massachusetts benchbook urges a process oriented on preventing wrongful deprivation to the yet to be noticed and absent party:

Since the plaintiff is unopposed at the ex parte hearing, it is essential that the court be satisfied that the evidence submitted is credible, and sufficient as a matter of law, to justify the issuance of an order. The court should question the plaintiff if necessary, to make this determination. In certain circumstances, inquiry beyond the face of the written affidavit or the plaintiff's oral statement is not only appropriate, but essential to the proper exercise of the court's authority to decide these significant issues in the absence of an opposing party.³⁸

Nevertheless, while Massachusetts gently reminds judges that "an accusation is just that, an accusation,"³⁹ its guidelines are inherently conflicted. The benchbook cautions against "unnecessary informality" and stresses the need for decorum where the rights of an accused are determined in his or her absence.⁴⁰ At the same time, it states that the court need not take long nor make formal findings on the record when making its determination.⁴¹

Additionally, the ease of the process has made caseloads grow. For example, in Illinois in 2006, there were 706,836 civil cases filed, 49,338 of which were petitions for orders of protection.⁴² Combining increasing case numbers with a summary proceeding makes it less likely the individual petitions receive the scrutiny appropriate to *weed out* the justified from unjustified. It is startling that in some jurisdictions, one hundred percent of the orders of protection sought are granted.⁴³ Therefore, societal pressures might make it an unrealistic expectation that judges are able to sort out the justified from the unjustified, and caution can tip the balance in favor of granting the ex parte order.

IV. DUE PROCESS AND EX PARTE ORDERS OF PROTECTION

As discussed, the common statutory scheme for orders of protection provides for a preliminary emergency order to enter without notice or opportunity to be heard. Due process concerns obviously are implicated. Therefore, an examination of the propriety of the frequent use of orders of

<http://www.mass.gov/courts/formsandguidelines/domestic/dvc1.html#1.02> ("When possible . . . the court should limit the duration of an ex parte order . . . in order to minimize the deprivation of the defendant's rights prior to notice and an opportunity to be heard.")

38. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS 3:06 (The Massachusetts Court System Administrative Office of the Trial Court 2004), *available at* <http://www.mass.gov/courts/formsandguidelines/domestic/dvc3.html#3.06>.

39. *Id.* at 3:07, *available at* <http://www.mass.gov/courts/formsandguidelines/domestic/dvc3.html#3.07>.

40. *Id.*

41. *Id.*

42. Illinois Circuit Court Statistics, <http://www.state.il.us/court/CircuitCourt/CCStats.asp> (last visited Aug. 27, 2008).

43. *See supra* note 16.

protection begins with basic due process. In addition to restraining acts of violence, an ex parte order of protection can implicate several constitutionally protected interests in property and liberty.⁴⁴ It can operate to deprive a person of access to his or her home and personal belongings,⁴⁵ as well as deny he or she custody or visitation with his or her children.⁴⁶ As the typical statutory scheme has simplified the process of obtaining an ex parte order to improve access to judicial relief, the possibility exists for bypassing fundamental rights of the opposing party. Though some provisions may appear facially suspect in some regards, there has not been a successful constitutional challenge to a statutory scheme.⁴⁷ The most thorough constitutional analysis of a domestic violence statute is found in *Blazel v. Bradley*,⁴⁸ a decision from the United States District Court for the Western District of Wisconsin, the only federal court that has addressed the constitutionality of a typical state statute providing for the issuance of ex parte temporary restraining orders in domestic abuse actions.⁴⁹ The analysis begins with the general principle that ex parte temporary restraining orders are rarely available because they “run[] counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.”⁵⁰ This is a strong reminder that ex parte injunctive relief is an extraordinary remedy, though, as has been discussed, ex parte emergency orders are granted in large numbers and are regular, if not ordinary occurrences.⁵¹

The court determined that temporary restraining orders in domestic abuse actions implicate due process concerns because of deprivations of interests protected by the Fifth and Fourteenth Amendments of the Constitution.⁵² A possible deprivation of property interest can occur by requiring that the alleged

44. See *Blazel v. Bradley*, 698 F. Supp. 756, 762 (W.D. Wis. 1988) (“[T]he order can cause two distinct deprivations. First, by requiring that the alleged abuser avoid the petitioner’s residence, in which the respondent may well have a cognizable property interest, the statute threatens a deprivation of property which triggers due process protections. Second, the order may implicate cognizable liberty interests if it deprives an alleged abuser of his relationship with his children.”) (citations omitted).

45. See *id.*; *M.B. v. H.B.*, No. 02-34530, 2003 Del. Fam. Ct. LEXIS 15, at *11 (Del. Fam. Ct. May 2, 2003).

46. See *Blazel*, 698 F. Supp. at 762.

47. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, HASTINGS L.J. 1325, 1406 (1991) (“As with other civil penalty regimes, parties have complained that CPO practice deprives them of procedural due process. Parties have challenged ex parte relief, the preponderance standard of proof, and the absence of appointed counsel. Courts repeatedly have rebuffed these complaints.”) (footnotes omitted). Some courts have even gone so far as to declare a presumption of constitutionality with regard to ex parte orders of protection. See, e.g., *Baker v. Baker*, 494 N.W.2d 282, 288 (Minn. 1992); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 232 (Mo. 1982); *H.E.S. v. J.C.S.*, 815 A.2d 405, 413-14 (N.J. 2003).

48. 698 F. Supp. at 756.

49. *Id.*

50. *Id.* at 761 (quoting *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974)).

51. See *supra* notes 14-16 and accompanying text.

52. *Blazel*, 698 F. Supp. at 762.

abuser avoid the petitioner's residence, in which the respondent may have a cognizable property interest, and a deprivation of a liberty interest may occur by interfering with the relation between an alleged abuser and his children.⁵³ The temporary nature of the orders does not obviate basic requirements of due process, though the nature of the process that must be provided is affected.⁵⁴ For due process purposes, the "circumstances justifying the postponing of notice and hearing 'must be truly unusual . . . ' and must be shown to have met three criteria: First, . . . the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force. . . ."⁵⁵ As to the latter, the majority found that circumstances of domestic abuse restraining orders do not completely fulfill these criteria and "are not comparable to . . . cases in which seizure or suspension without notice or hearing [has been permitted] based on extraordinary circumstances."⁵⁶ The court reasoned that, in domestic violence cases, "the threat of harm is less to the general public than to a private individual," that in some instances "there is not necessarily a need for prompt action," and that "the deprivation is not initiated by the government but by a private petitioner."⁵⁷

Nevertheless, the majority proceeded to apply the factors adopted in *Mathews v. Eldridge*.⁵⁸ The court weighed the private interest affected, "the risk of an erroneous deprivation under existing procedures and the probable value of additional procedures," and "the government's interests, including the burdens imposed by additional procedural requirements," and it reached two conclusions.⁵⁹ First, the court found "that substantial procedural protections are mandated by the strength of the respondent's interest in his home and family and the evident risk of erroneous deprivation when mere allegations in a verified petition may be the basis for an *ex parte* temporary restraining order."⁶⁰ Second, the court found that "the strength of the petitioner's countervailing interest in her home and family, the government's interest in preventing abuse, and the possibility that prior notice may incite domestic violence, suggest that [procedural] protections" in domestic violence cases should not require prior notice in appropriate situations.⁶¹ Faced with these competing interests, the majority held that the *Mathews* factors do not "provide substantial guidance" as to the required specific due process procedural protections and decided to analogize instead to cases dealing with "statutes allowing repossession of property or garnishment without prior notice and

53. *Id.*

54. *Id.*

55. *Id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67, 90-92).

56. *Id.*

57. *Id.*

58. *Id.* at 763 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

59. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

60. *Id.*

61. *Id.*

hearing.”⁶² Following the analysis employed in this line of cases, the court concluded that in domestic violence disputes “the due process clause requires either a pre-deprivation hearing or at least four minimum procedural safeguards: 1) participation by a judicial officer; 2) a prompt post-deprivation hearing; 3) verified petitions or affidavits containing detailed allegations based on personal knowledge; and 4) risk of immediate and irreparable harm.”⁶³

The *Blazel* court next examined the Wisconsin statute and decided that, while it lacked any provision for a pre-deprivation hearing, the statute satisfied the first three of these requirements explicitly, both on its face and as applied to the plaintiff.⁶⁴ The court noted that the statute allowed “only a judge or a family court commissioner to issue an ex parte temporary restraining order,” that it “provide[d] for a [mandatory] post-deprivation hearing within seven days” after issuance of the order, and that “it require[d] a verified petition based on personal knowledge . . . containing specific allegations” made under oath, as well as allegations of facts “sufficient to show ‘that the respondent engaged in, . . . [or was likely to engage in,] . . . domestic abuse of the petitioner.’”⁶⁵ As to the fourth criteria, the court decided that, although the statute did not explicitly contain such requirement, the legislative history of the statute showed that the legislature was aware of constitutional demand that ex parte orders be issued only when there is risk of immediate and irreparable harm and that the legislature intended the statute to compel such showing.⁶⁶

The *Blazel* reasoning, applying the *Mathews* factors, has been followed by subsequent courts in their analysis of constitutionality of protective orders. For example, the U.S. District Court for the District of Massachusetts specifically adopted the reasoning in *Blazel* with regard to procedural safeguards necessary for an ex parte order of protection, also finding that the Massachusetts statute met due process requirements.⁶⁷ Similarly, the U.S. District Court for the Northern District of Texas applied the relevant portions of the *Blazel* analysis when determining whether due process notice requirements were satisfied by a pre-deprivation hearing.⁶⁸ In *Willmon v. Daniel*, the plaintiff Willmon was a law enforcement officer who was arrested after a domestic disturbance, and he challenged his arrest and the terms of the protective order on several grounds.⁶⁹ The *Willmon* court granted summary judgment to the defendant city and police officers on most claims, while finding triable issues of fact in Willmon’s claims of unconstitutional deprivation of employment and eviction

62. *Id.* at 763-64.

63. *Id.*

64. *Id.* at 764.

65. *Id.* (quoting WISC. STAT. § 813.12(3)(b) (1988)).

66. *Id.* at 765-66.

67. *Nollet v. Justices of the Trial Court of Massachusetts*, 83 F. Supp. 2d 204, 212-13 (D. Mass. 2000).

68. *Willmon v. Daniel*, No. 3:05-CV-1391-M, 2006 U.S. Dist. LEXIS 40658, at *21-23 (N.D. Tex. June 19, 2006).

69. *See id.*

from his residence.⁷⁰ At trial, the court found no property interest in Willmon's at-will employment as a police officer, but it did recognize Willmon's liberty interest in access to his residence and in his relationship with his wife.⁷¹ The court, applying *Mathews* and citing *Blazel*, found that his pre-deprivation hearing while in custody satisfied due process.⁷²

State courts also have rejected due process challenges to ex parte relief granted in protection orders.⁷³ "This reflects the overriding judicial acceptance" that the "need for immediate protection of abuse victims and their families" outweighs the respondent's interest in "prior notice and hearing."⁷⁴ Courts have routinely decided that, as balanced against the risk of further abuse, ex parte temporary protection orders will survive procedural due process challenges when the respondent's deprivations of property or visitation are temporary and subject to prompt hearing.⁷⁵ Likewise, many courts have

70. *Id.* at *27-29.

71. *Id.* at *3-6.

72. *Id.* at *10.

73. State courts that have considered and upheld the constitutionality of ex parte orders of protection or temporary restraining orders are MA, CT, MO, WA, IL, NJ, MI, PA, OK, TN, OH, NY (and the Virgin Islands). See also *Commonwealth v. Chretien*, 417 N.E.2d 1203, 1209 (Mass. 1981) (explaining that the legislative purpose in Massachusetts' Domestic Violence Act — which defines abuse to include involuntary sexual relations engaged in by spouses — constitutes a clear statement of public policy that can be used as basis for upholding a rape statute in the case of a husband who raped and assaulted his wife who had separated from him pending divorce proceedings); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 236 (Mo. 1982) (holding that Missouri's Adult Abuse Act is constitutional); *People v. Revell*, 402 N.Y.S.2d 522, 524 (N.Y. Dist. Ct. 1978) (explaining "strong presumption of constitutionality" of statute that criminalizes offenses against minors, between spouses, between parent and child, or between family or household members); *People v. Forman*, 546 N.Y.S.2d 755, 764-66 (N.Y. Crim. Ct. 1989) (holding that temporary protection order may be issued without evidentiary hearing so long as one is held promptly after issuing the order); *Marquette v. Marquette*, 686 P.2d 990, 995-96 (Okla. Civ. App. 1984) (holding that Oklahoma's Protection from Domestic Abuse Act does not violate due process); *Boyle v. Boyle*, 12 Pa. D. & C.3d 767, 779 (Pa. Comm. Pl. 1979) (holding that Pennsylvania's Protection From Abuse Act does not violate due process).

74. Klein & Orloff, *supra* note 4, at 1039.

75. See *MacDonald v. State*, 997 P.2d 1187, 1190 (Alaska Ct. App. 2000); *Pendleton v. Minichino*, No. 506673, 1992 Conn. Super. Ct. LEXIS 915, at *38 (Conn. Super. Ct. Apr. 2, 1992) (holding ex parte order that suspended visitation for fourteen days until hearing did not violate due process); *Fuller v. Fuller*, 621 S.E.2d 419, 421 (Ga. 2005) ("Orders prepared ex parte do not violate due process and should not be vacated unless 'a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair.'") (quoting *In re Colony Square Co.*, 819 F.2d 272, 276 (11th Cir. 1987); *Sanders v. Shephard*, 541 N.E.2d 1150, 1155 (Ill. App. Ct. 1989) ("There is no procedural due process defect [when an ex parte order] is supported by affidavits that demonstrate exigent circumstances"); *Knight v. Knight*, 525 N.W.2d 841, 844 (Iowa 1994); *Commonwealth v. Henderson*, 747 N.E.2d 659, 664-66 (Mass. 2001); *State ex rel. Williams*, 626 S.W.2d at 232 (holding ex parte order excluding respondent from home and prohibiting contact with children for fifteen days prior to hearing did not violate due process); *Marquette*, 686 P.2d at 995-96 (holding that ex parte order that restrained respondent from communicating with his wife and effectively denied visitation with his children for ten days prior to the hearing did not violate procedural due process); *State v. Karas*, 32 P.3d 1016, 1020-21 (Wash. Ct. App. 2001); *Schramek v. Bohren*, 429 N.W.2d 501, 507 (Wis. Ct. App. 1988) (holding of reasonable basis for the legislature's creation of special procedures in situations of

also concluded that the procedural safeguards provided by the statutes, including sworn affidavits and mandatory judicial involvement, are protection against erroneous deprivation of property or rights sufficient to insulate ex parte temporary protection orders from due process attacks.⁷⁶

For example, after considering due process objections to Oklahoma's Protection from Domestic Abuse Act, the court in *Marquette v. Marquette* noted that the order was in effect for only a brief period and found that the state's interest in providing protection to victims of domestic violence was apparent from the considerable magnitude of the problem.⁷⁷ In ruling that the procedures provided by the statute were adequate to satisfy due process, the court also discussed the statute's additional safeguards and the court's ability to judge the credibility of the petitioner and to observe any evidence of violence firsthand.⁷⁸ In *Baker v. Baker*, the Minnesota Supreme Court applied the *Mathews* factors and concluded that the Minnesota Domestic Abuse Act provision allowing ex parte protection orders did not violate due process clause by virtue of the following: "the state's strong interest in preventing violence in a domestic setting;" the "special need for prompt action;" the "very narrowly drawn" statute; and the provision in the statute that issuance of the order "must be determined by a district court judge or other judicial officer before ex parte relief is available."⁷⁹

In *H.E.S. v. J.C.S.*, the court stated that "[a]t a minimum, due process requires that a party in a judicial hearing receive 'notice defining the issues and an adequate opportunity to prepare and respond.'"⁸⁰ Further, the court reasoned that "[t]here can be no adequate preparation where the notice does not reasonably apprise the party of the charges, or where the issues litigated at the hearing differ substantially from those outlined in the notice."⁸¹ Hence, the court concluded that to the extent that compliance with the . . . provision [requiring a final hearing within ten days] precludes meaningful notice and an opportunity to defend, the provision must yield to due process requirements.⁸² In *Boyle v. Boyle*, a Pennsylvania common pleas court, similarly faced with a due process challenge to the Pennsylvania's Protection from Abuse Act, rejected the defendant's claim that he should receive notice a few days before

abuse by family or household members); Klein & Orloff, *supra* note 4, at 931. *But cf.* Dittes v. Dittes, No. C0-95-1945, 1996 Minn. App. LEXIS 238, at *5 (Minn. Ct. App. 1996).

76. See *Pendleton*, 1992 LEXIS 915, at *34 (explaining that procedures requiring an affidavit under oath and judicial involvement in issuing an ex parte order protected against erroneous deprivation of rights); *Sanders*, 541 N.E.2d at 1155 (holding that an ex parte emergency order supported by affidavits that demonstrate exigent circumstances — in this case, fear of concealment of a child — does not violate procedural due process).

77. *Marquette*, 686 P.2d at 996.

78. *Id.*

79. *Baker v. Baker*, 494 N.W.2d 282, 288 (Minn. 1992).

80. *H.E.S. v. J.C.S.*, 815 A.2d 405, 412 (N.J. 2003) (quoting *McKeown-Brand v. Trump Castle Hotel & Casino*, 626 A.2d 425 (N.J. 1993)).

81. *Id.* at 412 (quoting *Nicoletta v. North Jersey Dist. Water Supply Comm'n*, 390 A.2d 90 (N.J. 1978)).

82. *Id.* at 413.

the presentation of the petition.⁸³ The court concluded that providing such notice would defeat the Act's purpose of providing the plaintiff with immediate protection.⁸⁴ Although the court noted that a notice requirement would be more consistent with the focus of the Fourteenth Amendment, it explained that such a requirement would increase the risk of violence.⁸⁵

Likewise, in *State ex rel. Williams v. Marsh* the Supreme Court of Missouri upheld the constitutionality of the state's Adult Abuse Act, stating that despite the significance of the defendant's interest in remaining in the home, the statute met the standards developed by the United States Supreme Court in *Mathews v. Eldridge*.⁸⁶ As the court explained, the requirement that the plaintiff show "an immediate and present danger of abuse" provided adequate procedural safeguards to meet the Supreme Court's requirements of notice and an opportunity to be heard prior to the deprivation of a protected interest.⁸⁷

The court in *Kampf v. Kampf*, decided that obtaining, without notice, an emergency protective order under the Michigan statute did not violate a husband's procedural due process rights.⁸⁸ The court concluded that there was "no procedural due process defect . . . when the petition for the emergency protection order [was] supported by affidavits [demonstrating] exigent circumstances . . . and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued."⁸⁹ In order to issue an ex parte order of protection, the Michigan law required a "verified complaint, written motion, or affidavit" clearly setting forth a showing of "immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice . . ." ⁹⁰ Under the Michigan law the respondent had the "right to bring a motion to rescind the protection order within fourteen days of being served," while the court was required to "schedule a hearing on the motion within five to fourteen days."⁹¹ Further, the respondent could avoid

83. *Boyle v. Boyle*, 12 Pa. D. & C.3d 767 (C.P. Alleg. 1979).

84. *Id.* at 773-774.

85. *Id.* The court noted the imminent danger of recurrent abuse to the plaintiff if it failed to issue the order. Furthermore, the court recognized that almost one-half of the petitioners seeking a protection order voluntarily remove themselves from the residence and that many defendants also voluntarily remove themselves from the residence. Thus, the court concluded, a defendant should not be excluded from the residence unless no viable alternative exists. *Id.* at 774-75.

86. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 230, 231, 232 (Mo. 1982).

87. *Id.* at 231; *see also Fuentes v. Shevin*, 407 U.S. 67 (1972). In *Fuentes*, the Court held that in a replevin suit between private individuals, the initial determination of who should retain control of the goods require something more than an *ex parte* proceeding before a court clerk. *Id.* at 96-97. But *Fuentes* involved only the loss of property and the risk of physical danger was not a factor. *Id.* at 92-93. Therefore, unlike the countervailing interest posed by the threat of violence in actions involving *ex parte* protection orders, *Fuentes* involved no compelling competing interest. *See id.* at 91-92 (replevin statutes serve no important governmental or compelling public interest).

88. *Kampf v. Kampf*, 603 N.W.2d 295 (Mich. Ct. App. 1999).

89. *Id.* at 299.

90. *Id.*

91. *Id.*

arrest for a first violation of the order if he lacked notice.⁹² For the foregoing reasons, the procedural safeguards employed under the statute were sufficient to defeat respondent's due process challenge.⁹³

Similarly, the court in *Sanders v. Shephard* held that no procedural due process defect arises by virtue of the issuance of an emergency order of protection without notice to respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice.⁹⁴ The court concluded that the harm the statute intended to prevent would be likely to occur if the respondent were given any prior notice.⁹⁵ The court found the Illinois Domestic Violence Act, which provided the trial court "shall issue an emergency order of protection 'regardless of prior service of process or of notice upon the respondent,'" was constitutional.⁹⁶

In *State v. Karas*, the court applying the Mathews factors decided that the ex parte protection order issued under the Washington domestic abuse statute was proper because it "does not protect merely the 'private right' of the person named as petitioner in the order," but the public interest in preventing domestic violence; because the "curtailment of [defendant's] liberty imposed by the protection order" was minor; and because of the "significant public and governmental interest in reducing the potential for irreparable injury, the Act's provision of notice and a hearing before a neutral magistrate satisfies the inherently flexible demands of procedural due process."⁹⁷

Finally, in the case of *Pendleton v. Minichino* the court considered "challenges to the constitutionality of a Connecticut statute, C.G.S. § 46b-15, which permits an ex parte restraining order for relief from physical abuse by a family member to issue without prior notice or hearing."⁹⁸ The court found that the statute was "directly necessary to effect the valid government interest in protecting the victims of physical abuse and preventing family violence in general."⁹⁹ "Given the compelling interest of the applicant in being free from physical abuse[,] the important interest of the government in preventing such abuse and the limited degree of risk of erroneous deprivation in this particular case," the statute did not violate due process.¹⁰⁰

Despite this widespread acceptance of statutory order of protection schemes, two aspects remain suspect on a case by case basis. First, when is a risk of immediate and irreparable harm present so as to justify proceeding

92. *Id.*

93. *Id.*

94. *Sanders v. Shephard*, 541 N.E.2d 1150 (Ill. App. Ct. 1989).

95. *Id.*

96. *Id.* at 1155.

97. *State v. Karas*, 32 P.3d 1016, 1020-21 (Wash. Ct. App. 2001) (quoting *State v. Dejarlais* 969 P.2d 90 (Wash. 1998)).

98. *Pendleton v. Minichino*, No. 506673, 1992 WL 75920, at *1 (Conn. Super. Ct. Apr. 3, 1992).

99. *Id.* at *11.

100. *Id.*

without notice to the opposing party? Does any action meeting the low threshold of abuse, as defined in some statutes constitute irreparable harm? For example, does an isolated threat or shove during an argument warrant proceeding without notice or must there be some showing of a likelihood of repetition? Second, if notice may be dispensed with in order to grant an emergency, ex parte order to prevent future further abuse, may all other remedies be similarly granted, such as possession of a shared residence, custody of children, or deprivation of visitation? Instead, should the abuse preventative order be granted, and further relief await notice and opportunity to be heard?

It is interesting to compare the *Blazel v. Bradley* analysis and its progeny to the requirements for granting temporary restraining orders without notice contained in Federal Rule of Civil Procedure 65(b).¹⁰¹ The *Blazel* court rejected plaintiff's argument that Rule 65(b) codified constitutional requirements for ex parte temporary restraining orders.¹⁰² Nevertheless, safeguards reflected in Rule 65(b) reflect how to protect the interests of the absent party and ensure justice is done. In most respects, the *Blazel* reasoning is in accord with Rule 65(b). The participation of a sworn judicial officer is obviously required. The rule also requires an affidavit or verified complaint for a temporary restraining order to issue without notice.¹⁰³ Likewise, Rule 65(b) restricts ex parte temporary restraining orders to those instances in which immediate and irreparable harm would occur.¹⁰⁴ Finally, the rule requires that the hearing on a preliminary injunction be held at the earliest possible time and take precedence over all other matters.¹⁰⁵

Rule 65(b) goes further and requires additional protections. The moving party's attorney must certify any efforts to give notice and reasons in favor of dispensing therewith, and requires specific sworn facts supporting a finding of immediate and irreparable injury.¹⁰⁶ It is in this regard that orders of protection can fall short, especially when form pleadings are used with conclusionary statements that notice must be dispensed with because of the risk of injury.¹⁰⁷ If notice would place the petitioner at peril, it obviously should not be given. But, if affording a respondent notice can be accomplished without risk of harm, notice should be given in order to safeguard against the types of abuse of the protective order mechanism experienced by the

101. See FED. R. CIV. P. 65(b) (Temporary Restraining Order. (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.).

102. *Blazel v. Bradley*, 698 F.Supp. 756, 761 (D. Wis. 1988).

103. FED. R. CIV. P. 65(b)(1).

104. *Id.*

105. FED. R. CIV. P. 65(b)(3).

106. FED. R. CIV. P. 65(b)(1).

107. See *infra* Part VI.

composite clients.

States may be well-served to incorporate the two preceding requirements. Specifically, a requirement that the court define the injury and state why it is irreparable so that notice may be dispensed with would go far in reducing the number of improperly granted ex parte protective orders. Such a statutory scheme would place the burden upon the court to state its findings and elucidate its reasoning, while preserving the simplicity and expedience that form pleadings afford the victims of domestic abuse. Indeed, the unintended consequences of “checking boxes” seem more acceptable when weighed against the need to provide simple, easy-to-understand form pleadings to the victims of domestic abuse. Where the court is concerned, pre-printed forms are a matter of convenience, and it is fair to ask judges to pick up the pen and record their reasoning.

Similarly, affording the adverse party an opportunity to contest the ex parte order prior to the plenary hearing further reduces the adverse consequences of the nationwide effort to make domestic violence protective orders more accessible. As noted, the Illinois’ domestic violence statute contains just such a provision, and our law school clinic experiences demonstrate that it can be used to quickly correct the most egregious and flagrant abuses.

V. SURVEYING THE STATUTORY SCHEMES

Blazel and its progeny established criteria by which the constitutionality of state statute schemes may be measured. Rule 65(b), as noted, contains somewhat greater procedural protections, which, though more desirable, are not mandated by due process concerns. A survey of the statutes reveals varying degrees of compliance with these principles.

A. *Participation by judicial officer*

The majority of state statutes complies with the first of the *Blazel* requirements and provides for some form of judicial participation in the process of entering ex parte orders of protection. Forty-six jurisdictions demand that ex parte orders of protection are issued by the court, including district, circuit or superior court.¹⁰⁸

Nevertheless, the laws of three jurisdictions specifically authorize persons other than a judge to issue orders of protections.¹⁰⁹ Although these issuing officers are called “specifically-authorized masters,” the particular provisions defining this term refer to nothing more than a licensed attorney appointed to hear petitions for protection.¹¹⁰ Hence, these schemes may be suspect.

108. See *infra* app. A.

109. See *infra* app. A.

110. For example, in Massachusetts the law provides that orders necessary to protect the plaintiff may be issued by telephone when the court is closed or the plaintiff is unable to appear on account of physical hardship. MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 2007). The

B. A Prompt Post-deprivation Hearing

As recognized in *Blazel* and as reflected in Rule 65(b), due process generally requires that the respondent receive notice of any action resulting in the deprivation of a constitutionally protected interest.¹¹¹ Accordingly, the majority of state ex parte relief is granted for a short period.¹¹²

Blazel required a hearing within seven days of issuance.¹¹³ Under Rule 65(b) if ten days elapse before the preliminary hearing injunction, the ex parte order automatically expires.¹¹⁴ Using these benchmarks the state statutes can be regarded as suspect¹¹⁵ or non-suspect,¹¹⁶ in this regard. Notably, some

statute allows any issuing officers, in the interest of justice, to grant relief via telephone communication to an officer or employee of an appropriate law enforcement agency. *Id.* The officer records the order on a form promulgated by the chief administrative justice and a copy of the order is delivered to the clerk-magistrate of the court having venue and jurisdiction over the matter on the next court day. *Id.* Due to the preeminent role of non-judicial officers in the issuance of these orders, the statutes described are arguably suspect under *Blazel v. Bradley*. 698 F.Supp. 756, 761 (W.D. Wis. 1988).

111. See FED. R. CIV. P. 65(b)(1); *Blazel*, 698 F. Supp. at 762.

112. See *infra* app. A. However, not every state provides for a full mandatory hearing after issuance of an *ex parte* protective order and the time period between entering of the *ex parte* order and conducting the hearing varies greatly.

113. *Blazel*, 698 F. Supp. at 764.

114. FED. R. CIV. P. 65(b)(2).

115. See *infra* app. A. These laws allow mandatory post-deprivation within ten days or only upon request of the respondent. Twenty-one states and the Lerman Model Code provide for a mandatory post-deprivation hearing within eight to fourteen days from filing a petition or from issuance of *ex parte* order of protection. See ALA. CODE § 30-5-6 (1998); COLO. REV. STAT. ANN. § 13-14-102 (West Supp. 2008); CONN. GEN. STAT. ANN. § 46b-15(b) (West 2004); DEL. CODE ANN. tit. 10, § 1043(d) (2006); D.C. CODE ANN. § 16-1004(d) (Supp. 2008); GA. CODE ANN. § 19-13-3(c) (West 2003.); IDAHO CODE ANN. § 39-6308(5) (2006); 750 ILL. COMP. STAT. ANN. 60/220(a)(1) West 1999); KY. REV. STAT. ANN. § 403.740(4) (West 2006); MASS. GEN. LAWS ANN. ch. 209A, § 4 (West 2007); MISS. CODE ANN. § 93-21-11(1) (West 2007); N.M. STAT. ANN. § 40-13-4(D) (West 2003); N.C. GEN. STAT. ANN. § 50B-2(c) (West Supp. 2007); N.D. CENT. CODE § 14-07.1-03(4) (2008); OHIO REV. CODE ANN. § 3113.31(D)(2)(a) (West Supp. 2008); 23 PA. CONS. STAT. ANN. § 6107(a), (b) (West Supp. 2008); VT. STAT. ANN. tit. 15, § 1104(b) (2007); WASH. REV. CODE ANN. § 26.50.070(4) (West 2005); W. VA. CODE ANN. § 48-27-403(d) (West Supp. 2008); and WIS. STAT. ANN. § 813.12(3)(c) (West Supp. 2008). Notably, Idaho is the only state that allows respondent to an *ex parte* order the opportunity to petition the court for an earlier hearing. See IDAHO CODE ANN. § 39-6308(5) (2006).

Eleven jurisdictions provide for a mandatory hearing on *ex parte* orders of protection within fifteen to twenty-nine days. See FLA. STAT. ANN. § 741.30(5)(c) (West Supp. 2008); HAW. REV. STAT. § 586-5(b) (West 2008); IOWA CODE ANN. § 236.4(1) (2008); KAN. STAT. ANN. § 60-3106(a) (2005); LA. REV. STAT. ANN. § 46:2135(B) (Supp. 2008); ME. REV. STAT. ANN. tit. 19-A, § 4006(1) (Supp., 2007-08); MO. ANN. STAT. § 455.040(1) (West 2003); MONT. CODE ANN. § 40-15-202(1) (2005); OKLA. STAT. ANN. tit. 22, § 60.4(B)(1) (West Supp. 2009); TENN. CODE ANN. § 36-3-605(b) (West Supp. 2008); and UTAH CODE ANN. § 30-6-4.3(1)(a) (West 2004). In order to determine whether the period of deprivation runs afoul of due process, it is necessary to consider the date such deprivation begins. States differ in this regard, with the period in Iowa, Kansas, Maine, Missouri, and Oklahoma running from the date of the petition for protection as opposed to the date of issuance of the *ex parte* order. IOWA CODE § 236.4(1) (2008); KAN. STAT. ANN. § 60-3106(a) (2005); ME. REV. STAT. ANN. tit. 19-A, § 4006(1) (Supp. 2007-08); and MO. ANN. STAT. § 455.040(1) (West 2005). Since the date of application for protection may be eight

states do not require an automatic post-deprivation hearing.¹¹⁷ Others tie the

to twenty-two days earlier than the date of entering of the *ex parte* order, in certain circumstances the statutes will fulfill the due process norm of a seven day time limit for post-deprivation hearing accepted in *Blazel*. See *supra* note 102. Likewise, in Iowa there is a requirement for a minimum period of five days before a hearing on the *ex parte* order is held by the court. IOWA CODE § 236.4(1) (2008). This duration requirement seems to be unique and there is no provision for hearings prior to five days post-issuance. Presumably, if a hearing is held between days five and seven, the statute will not violate the due process requirements of *Blazel*. See *supra* note 102.

The statutes of three jurisdictions permit courts to grant *ex parte* protection orders and provide for mandatory post-deprivation hearings after twenty-nine days, either from the filing of the petitions for or from the issuance of such orders. See ARK. CODE ANN. § 9-15-206(d) (West 2004); IND. CODE ANN. § 34-26-5-10(b) (West Supp. 2008); and S.D. CODIFIED LAWS § 25-10-4 (2004). It may be that these laws are constitutionally suspect with regard to the due process rights of the respondents. Like the Ohio statute, in Indiana, the right to a hearing is conditioned upon the type of relief granted by the *ex parte* protection order. See IND. CODE ANN. § 34-26-5-10(a),(b) (West Supp. 2008). Where relief does not trigger a mandatory hearing, the court schedules one only upon a request by either party. *Id.*

Only one jurisdiction, Rhode Island, does not set a specific time for the mandatory post-deprivation hearing. R.I. GEN. LAWS § 15-15-4(a)(2) (2006). Instead, like Rule 65(b), the statute calls for a mandatory hearing on the *ex parte* order within a reasonable time, taking precedence over all other matters. *Id.*

116. Only three states provide for post-deprivation hearings within seventy-two hours after the issuance of the *ex parte* order of protection. See N.M. STAT. ANN. § 40-13-3.2(E) (West Supp. 2008); OKLA. STAT. ANN. tit. 22, § 60.4(B)(1), (2) (West Supp. 2009); and WYO. STAT. ANN. § 35-21-104(a)(iii) (2007). Two states' statutes provide for *ex parte* orders of protection lasting seven days before a mandatory hearing is required. See MINN. STAT. ANN. § 518B.01(5)(c) (West Supp. 2008); and OHIO REV. CODE ANN. § 3113.31(D)(2) (West Supp. 2008). Interestingly, the nature of the relief granted determines the time period within which a full hearing must be held. In Minnesota, a mandatory hearing must be held within seven days only if the petitioner is seeking relief beyond restraining the abusing party from committing acts of domestic abuse; excluding such party from the shared dwelling; excluding from or limiting access of the abusing party to the place of employment of the petitioner; or continuing all insurance coverage without change in coverage or beneficiary designation. MINN. STAT. ANN. § 518B.01(5)(b)-(d) (West Supp. 2008). In Ohio, if the court, after an *ex parte* hearing, enters an order which grants possession of the residence or household to the petitioner to the exclusion of the respondent, a full hearing on the *ex parte* order must be held within seven court days. OHIO REV. CODE ANN. § 3113.31(D)(2)(a), (E)(1) (West Supp. 2008). If any other type of *ex parte* protection order is issued, the hearing is to be held within ten court days after the issuance of the order. *Id.* The laws described above provide for a mandatory hearing only in cases where the relief granted falls within certain categories defined by the statutes. Because these categories are not necessarily based upon due the process considerations and due to their limitations on hearing within 7 days, these statutes are ostensibly suspect.

117. See *infra* app. A. Fifteen states do not provide for a post-deprivation hearing, but allow the court to grant an *ex parte* order of protection that expires after a statutorily prescribed time period. ALASKA STAT. § 18.66.110(b) (2007); CAL. FAM. CODE § 6256(a), (b) (West 2004); COLO. REV. STAT. ANN. § 13-14-103(f) (West 2005); IOWA CODE § 236.6(2) (2008); KAN. STAT. ANN. § 60-3105(b) (2005); MD. CODE ANN., FAM. LAW § 4-505(c) (West 2006); N.H. REV. STAT. ANN. § 173-B:4 (2002); N.M. STAT. ANN. § 40-13-3.2(E) (West Supp. 2008); N.C. GEN. STAT. § 50B-2(c) (2006); N.D. CENT. CODE § 14-07.1-08 (2008); OKLA. STAT. tit. 22, § 60.4(B)(1) (West Supp. 2009); 23 PA. CONS. STAT. ANN. § 6110(a), (b) (West Supp. 2008); R.I. GEN. LAWS § 15-15-4(b)(1), (4) (2006); VA. CODE ANN. § 16.1-253.4(C) (2007); and WYO. STAT. ANN. § 35-21-104(a)(iii) (2007). In almost all of these states such *ex parte* orders are issued only in exigent circumstances, such as imminent danger to the victim or the unavailability of a court or judge. *Id.* The absence of a hearing is offset by the fact that the orders expire

requirement of a post-deprivation hearing to the relief granted, where that relief implicates the constitutionally recognized liberty interests in home or family. For instance, in Indiana no post-deprivation hearing is required unless the relief granted excludes respondent from use of the home or automobile, or where visitation rights have been determined in an *ex parte* proceeding.¹¹⁸

Similarly, both Arizona and Ohio require that the mandatory plenary hearing be expedited where the relief granted excludes respondent from the residence.¹¹⁹

C. Verified petitions or affidavits

Rule 65(b) requires the filing of an affidavit or verified complaint setting forth specific facts, but does not explicitly mandate personal knowledge on the part of the petitioner (although this deficiency may be off-set, somewhat, by the bond requirement).¹²⁰ Likewise, the *Blazel* court required verified petitions in order to comport with due process. *Blazel's* test contains three sub requirements: verified petitions by the persons seeking protection, detailed allegations of abuse, and allegations based on personal knowledge.¹²¹

The laws of eighteen jurisdictions require specific allegations of instances of domestic abuse or violence and do not violate respondent's due process rights.¹²² The rest of the statutes do not contain any provisions regarding the

automatically within twenty-four to seventy-two hours. *Id.*

In eleven states, the statutes do not provide for mandatory post-deprivation hearing dates, but allow a court to hold hearings upon request by the respondent, petitioner or any party affected by the *ex parte* protection order. ALASKA STAT. § 18.66.110 (2007); ARIZ. REV. STAT. ANN. § 13-3602(I) (Supp. 2008); IND. CODE ANN. § 34-26-5-10(a) (West Supp. 2008); MICH. COMP. LAWS ANN. § 600.2950(13) (West Supp. 2008); MINN. STAT. ANN. § 518B.01(5)(d) (West Supp. 2008); NEB. REV. STAT. ANN. § 42-925 (2004); NEV. REV. STAT. ANN. § 33.080(5) (West 2000); N.J. STAT. ANN. § 2C:25-28(i) (West 2005); N.H. REV. STAT. ANN. § 173-B:4(I) (2002); OR. REV. STAT. ANN. § 107.718(8)(a) (West Supp. 2008); and TEX. FAM. CODE ANN. § 83.002(a) (Vernon 2002). Notably, in three of the jurisdictions, Minnesota, Michigan, and Oregon, hearings must be demanded within a statutorily established period after the alleged abuser has received notice. MINN. STAT. ANN. § 518B.01(5) (West Supp. 2008); MICH. COMP. LAWS ANN. § 600.2950(13) (West Supp. 2008); and OR. REV. STAT. ANN. § 107.718(8)(a) (West Supp. 2008). This requirement seems to be unique, but can probably be explained by the need to protect the rights of respondents by expediting hearings on *ex parte* orders of protection. Once a party requests a hearing, most statutes generally define a time within which the hearing must be held. *See* ARIZ. REV. STAT. § 13-3602(I) (Supp. 2008); IND. CODE ANN. § 34-26-5-10(a) (West Supp. 2008); MICH. COMP. LAWS ANN. § 600.2950 (West Supp. 2008); NEB. REV. STAT. ANN. § 42-925 (2004); NEV. REV. STAT. ANN. § 33.080(5) (West 2000); N.H. REV. STAT. ANN. § 173-B:4(I) (2002); and TEX. FAM. CODE ANN. § 83.002(a) (Vernon 2002). In Arizona, however, the time period for the hearing again depends on the relief granted by the *ex parte* order of protection — five days if the order awards exclusive use of the home and ten days in all other cases. ARIZ. REV. STAT. § 13-3602(I) (Supp. 2008).

118. IND. CODE ANN. §§ 34-26-5-9(b)-(c), -10(b) (West Supp. 2008).

119. ARIZ. REV. STAT. § 13-3602(I) (Supp. 2008) (requires a hearing within five days if the respondent is excluded from the residence but within ten days for all cases).

120. FED. R. CIV. P. 65(b).

121. *Blazel*, 698 F. Supp. 756, 764 (W.D. Wis. 1988).

122. ARIZ. REV. STAT. ANN. § 13-3602(C)(3) (Supp. 2008) (“The petition shall . . . [offer a]

[s]pecific statement, including dates, of the domestic violence alleged.”); FLA. STAT. ANN. § 741.30(3)(b)(h) (West Supp. 2008) (“Petitioner is either a victim of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence because respondent has (mark all sections that apply and describe in the spaces below the incidents of violence or threats of violence, specifying when and where they occurred, including, but not limited to, locations such as a home, school, place of employment, or visitation exchange)”); GA. CODE ANN. § 19-13-3(b) (West 2003) (“Upon the filing of a verified petition in which the petitioner alleges with specific facts that probable cause exists to establish that family violence has occurred in the past and may occur in the future, the court may order such temporary relief ex parte as it deems necessary to protect the petitioner or a minor of the household from violence.”); HAW. REV. STAT. ANN. § 586-3(c) (West 2008) (“A petition for relief shall be in writing upon forms provided by the court and shall allege, under penalty of perjury, that: a past act or acts of abuse may have occurred; threats of abuse make it probable that acts of abuse may be imminent; or extreme psychological abuse or malicious property damage is imminent; and be accompanied by an affidavit made under oath or a statement made under penalty of perjury stating the specific facts and circumstances from which relief is sought.”); IOWA CODE § 236.3(5) (2008) (“The petition shall state the . . . (n)ature of the alleged domestic abuse.”); KY. REV. STAT. ANN. § 403.730(1)(c) (West 2006) (“A petition filed pursuant to KRS 403.725 shall be verified and shall contain . . . (t)he facts and circumstances which constituted the alleged domestic violence and abuse”); LA. REV. STAT. ANN. § 46:2134(A)(2) (Supp. 2008) (“A petition filed under the provisions of this Part shall contain the . . . facts and circumstances concerning the alleged abuse.”); MD. CODE ANN., FAM. LAW § 4-504(b)(1)(ii) (West 2006) (“The petition shall . . . include any information known to the petitioner of . . . (1) the nature and extent of the abuse for which the relief is being sought, including information known to the petitioner concerning previous injury resulting from abuse by the respondent”); MINN. STAT. ANN. § 518B.01(4)(b) (West Supp. 2008) (“A petition for relief shall allege the existence of domestic abuse, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.”); N.M. STAT. ANN. § 40-13-3(B) (West Supp. 2008) (“The petition shall be made under oath or shall be accompanied by a sworn affidavit setting out specific facts showing the alleged domestic abuse.”); OHIO REV. CODE ANN. § 3113.31(C) (West Supp. 2008) (“A person may seek relief under this section on the person’s own behalf, or any parent or adult household member may seek relief under this section on behalf of any other family or household member, by filing a petition with the court. The petition shall contain or state: (1) An allegation that the respondent engaged in domestic violence against a family or household member of the respondent, including a description of the nature and extent of the domestic violence”); OR. REV. STAT. ANN. § 107.710(1) (West Supp. 2008) (“The person may seek relief by filing a petition with the circuit court alleging that the person is in imminent danger of abuse from the respondent, that the person has been the victim of abuse committed by the respondent within the 180 days preceding the filing of the petition and particularly describing the nature of the abuse and the dates thereof.”); R.I. GEN. LAWS § 15-15-4 (a)(2) (2006) (“If it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before notice can be served and a hearing held on the matter, the court may enter any temporary order without notice that it deems necessary to protect the plaintiff.”); R.I. GEN. LAWS § 15-15-6(a)(5) (2006) (“A form in substantially the following language shall suffice for the purpose of filing a complaint[.] . . . On or about _____, I suffered abuse when the defendant:

_____ Threatened or harmed me with a weapon: (type of weapon used: _____)

_____ Attempted to cause me physical harm

_____ Caused me physical harm

_____ Placed me in fear of imminent physical harm

_____ Caused me to engage involuntarily in sexual relations by force, threat of force, or duress.

Specifically, the defendant _____ [.]”); S.C. CODE ANN. § 20-4-40(b) (Supp. 2007) (“A petition for relief must allege the existence of abuse to a household member. It must state the specific time, place, details of the abuse, and other facts and circumstances upon which relief is sought

allegations contained in the petitions or it simply states that a person seeking protection allege abuse or an immediate and present danger of such abuse by the defendant.¹²³ Since these laws lack a specificity requirement, they arguably violate due process.

D. Showing Irreparable Harm

As suggested above, it is in the arena of irreparable harm that Rule 65(b) is superior to minimum due process protection.¹²⁴ Rule 65(b) not only requires the temporary restraining order to define the injury and state why it is irreparable, it issues only if it clearly appears from the specific facts shown “that immediate and irreparable injury, loss or damage will result to the

and must be verified.”); S.D. CODIFIED LAWS § 25-10-3(2) (2004) (“A petition shall allege the existence of domestic abuse and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances of the domestic abuse.”); WASH. REV. CODE ANN. § 26.50.030(1) (West Supp. 2008) (“A petition for relief shall allege the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.”); W. VA. CODE ANN. § 48-27-403(a) (West Supp. 2008) (“Clear and convincing evidence of immediate and present danger of abuse to the petitioner or minor children shall constitute good cause for the issuance of an emergency protective order pursuant to this section.”); WYO. STAT. ANN. § 35-21-103(b) (2007) (“The petition shall be made under oath or be accompanied by a sworn affidavit setting out specific facts showing the alleged domestic abuse.”); WYO. STAT. ANN. § 35-21-104(a) (Westlaw through 2008 Budget Sess.) (i) (“Upon the filing of a petition for order of protection, the court shall . . . (i) immediately grant an *ex parte* temporary order of protection if it appears from the specific facts shown by the affidavit or by the petition that there exists a danger of further domestic abuse . . .”).

123. ALA. CODE § 30-5-5(a) (Supp. 2008); CAL. FAM. CODE § 6300 (West 2004); DEL. CODE ANN. tit. 10 § 1043(a) (2006); 750 ILL. COMP. STAT. ANN. 60/203(a) (West Supp. 2008); MONT. CODE ANN. § 40-15-201(1) (2005); N.H. REV. STAT. ANN. § 173-B:3(I) (Supp. 2008); N.J. STAT. ANN. § 2C:25-28(a) (2005); N.Y. JUD. CT. ACTS § 821(1)(a) (McKinney Supp. 2008); N.C. GEN. STAT. ANN. § 50B-2(a) (West 2006); OKLA. STAT. ANN. tit. 22, § 60.2(A) (West 2003); OKLA. STAT. ANN. tit. 22 § 60.3(A) (West 2003); 23 PA. CONS. STAT. ANN. § 6106(a) (West Supp. 2008); TENN. CODE ANN. § 36-3-602(a) (West Supp. 2008); TENN. CODE ANN. § 36-3-605(a) (West Supp. 2008); TEX. FAM. CODE ANN. § 83.001(a) (Vernon 2002); TEX. FAM. CODE ANN. § 82.002 (a)-(c) (Vernon 2002); UTAH CODE ANN. § 78B-7-103 (West Supp. 2008); UTAH CODE ANN. § 78B-7-106(1) (West Supp. 2008); VT. STAT. ANN. tit. 15, § 1103(a) (2007); VT. STAT. ANN. tit. 15, § 1104 (a) (2007); VA. CODE ANN. § 16.1-253(A)-(B) (2007); VA. CODE ANN. § 16.1-253.1(A) (2007); VA. CODE ANN. § 16.1-253.4(B) (2007); W. VA. CODE ANN. § 48-27-305 (West Supp. 2008); W. VA. CODE ANN. § 48-27-403(a) (West Supp. 2008); WIS. STAT. ANN. § 813.12(5)(a) (West Supp. 2008).

124. Black’s Dictionary defines irreparable injury as “[a]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction.” BLACK’S LAW DICTIONARY 801 (8th ed. 2004). American Jurisprudence states, “The judicial power to grant injunctive relief should be exercised only when intervention is essential to protect property or other rights from irreparable injury. . . . Irrespective of the magnitude of the injury, it must be sufficiently probable that the defendant’s future conduct will violate and irreparably injure a right of the plaintiff. . . . Irreparable harm is measured in terms of the harm arising during the interim between the request of injunction and final disposition of the case on the merits.” 42 AM JUR. 2D *Injunctions* § 33 (2000). “Irreparable injury has been shown by: damage to human dignity and peace of mind; frustration of a judgment[;] . . . [p]ossible loss or destruction of property.” 42 AM JUR. 2D *Injunctions* § 34 (2000).

[applicant] . . . ”¹²⁵

Minnesota’s statute, for example, stands in stark contrast to Rule 65(b) stating, “[a] finding by the court that there is a basis for issuing an ex parte order for protection constitutes a finding that sufficient reasons exist not to require notice under applicable court rules governing applications for ex parte relief.”¹²⁶ This approach begs the question and turns due process on its head. Rather than requiring a specific finding as Rule 65(b) does, that notice is not required as a precondition to granting ex parte relief, this statute does the opposite: Issuance of the order, without notice, is deemed to justify dispensing with notice. This makes the judge’s job easier but burdens the respondent who is deprived of notice in the absence of any finding specific finding of imminent harm to petitioner.

The United States Supreme Court has not addressed the issue of irreparable harm in the area of domestic violence, however, the Court’s ruling in other areas of injunctive relief are instructive. In *Trainor v. Hernandez*, the majority held that irreparable injury, as a precondition for equitable relief, must be “both great and immediate.”¹²⁷ This high threshold is reflected in numerous circuit court decisions.¹²⁸ The few state courts that have addressed the issue of imminent irreparable injury favor an individualized objective standard.

125. FED. R. CIV. P. 65(b).

126. MINN. STAT. ANN. § 518B.01(7)(b) (West Supp. 2008).

127. *Trainor v. Hernandez*, 431 U.S. 434, 442 (1977).

128. Generally, opinions on the subject agree. First, that a showing of irreparable injury is necessary for issuance of injunctions. Accordingly, in *Bell & Howell: Mamiya Co. v. Masel Supply Co.* the court held that irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. 719 F.2d 42, 45 (2d Cir. 1983) (quoting 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, § 2948 (1973)). The majority in *Reuters Ltd. v. United Press Int’l, Inc.* insisted that, as a general rule, “the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.” 903 F.2d 904, 907 (2d Cir. 1990).

Second, judges agree that the irreparable harm determination is a difficult and close question. Two appellate courts have opined that “[t]he concept of irreparable harm ‘does not readily lend itself to definition.’” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quoting *Wis. Gas Co. v. Fed. Energy Regulatory Comm’n* 758 F.2d 669, 674 (D.C. Cir. 1985)). The very nature of the term “makes it difficult to define every situation the term encompasses” *Sullivan v Pittsburgh*, 811 F.2d 171, 179 (3d Cir. 1987). In any event, it is not an “easy burden to fulfill.” *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (citing *Adams v. Freedom Forge Corp.* 204 F.3d 475, 485 (3d Cir. 2000)). See also *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250.

Third, the courts have reached consensus on the contours of irreparable harm. Case law indicates that the injury “‘must be both certain and great,’ (citation omitted) and that it must not be ‘merely serious or substantial.’” *Id.* (quoting *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976)). Accordingly, the majority in *Shapiro v. Cadman Towers, Inc.* held that, in an action for injunction, “the movant must demonstrate ‘an injury that is neither remote nor speculative’” 51 F.3d 328, 332 (2d Cir. 1995) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)). The petitioner must show her injury to be actual, imminent and one that cannot be remedied by a monetary award. *Id.*; see also *Reuters Ltd.*, 903 F.2d at 907; *Loveridge v. Pendleton Woolen Mills, Inc.*, 788 F.2d 914, 917-18 (2d Cir. 1986); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

“One that looks at the situation in the light of the circumstances as would be perceived by a reasonable person in the petitioner’s position”¹²⁹

In domestic violence cases appellate courts have decided that the standard is met where there is an immediate danger to a child’s safety, for example, in the case of an inebriated father who beats his children and has not fed them.¹³⁰ The threat to a child’s safety is justification enough to take immediate action and hold a hearing later, and, so long as such a hearing is provided, there is no denial of due process in refusing to grant a full adversary hearing before taking away property or liberty.¹³¹ In *Blazel v Bradley*, the most thorough constitutional analysis of a domestic violence statute to date, the court read a statutory requirement for showing physical violence to mean a showing of imminent danger.¹³² The court concluded that any allegation of bodily harm makes the showing of irreparable harm.¹³³

Most statutes do not define immediate and irreparable injury in the context of domestic violence. Generally, the laws in different states seem to equate “abuse” with “injury” and in many states, a finding of “imminent danger of abuse” is a satisfactory basis for granting an ex parte order of protection. The majority of statutes also contain a laundry list of acts that constitutes abuse or domestic violence. The broader of these definitions raise the question of whether certain types of abuse are immediate and irreparable injuries, thereby justifying ex parte orders of protection.

The courts, however, have generally upheld these broad statutory provisions. Because each case and its facts are unique to each complainant, it is inevitable that different standards are applied in determining whether there exists an immediate and present danger of abuse.¹³⁴ As the majority in *Boyle* explained, “a case by case determination of abuse petitions based upon the

129. *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249, 1259 (Md. 2001). Generally, a showing of actual or threatened physical violence/harm is required to meet the requirement of irreparable harm. *Sandy v. Sandy*, 316 N.W.2d 164, 168 (Wis. Ct. App. 1982).

Following this line of reasoning the court in *D.T. v. H.S.*, for example, held that “[i]mmediate and irreparable harm means: (1) there is an immediate threat to the health and safety of a child, due to the fact that serious physical abuse to the child or another member of the child’s household has previously occurred or been threatened and there is a likelihood of it occurring or reoccurring to the child or to a member of the child’s household; (2) there is a threat of immediate harm to the health of the child, due to the present deprivation of food, shelter, or medical attention; or (3) a child has been removed from the State of Delaware in violation of a statute or court order.” No. CK04-03972, 2004 Del. Fam Ct. LEXIS 146, at *5 n.5 (Del. Fam. Ct. Aug. 18, 2004) (quoting DEL. FAM. CT. CIV. P. R. 65.2). Another court found that removing children from the state, subjecting children to verbal or emotional abuse is irreparable injury. *Kanth v. Kanth*, No. 20010718-CA, 2002 WL 31770985, at *4 (Utah Ct. App. Dec. 12, 2002). In *Marquette v. Marquette*, the majority explained that a petition alleging “harassment, assault, throwing children, verbal threats, and fear of harm” was sufficient where the statute required a showing of imminent serious physical harm. 686 P.2d 990, 994 (Okla. Civ. App. 1984).

130. *Lossman v. Pekarske*, 707 F.2d 288, 289, 291 (7th Cir. 1983).

131. *Id.* at 291; *see also* *Duchesne v. Sugarman*, 566 F.2d 817, 825-26 (2d Cir. 1977).

132. *Blazel v. Bradley*, 698 F.Supp. 756, 765-766 (W.D. Wis. 1988).

133. *Id.* at 768.

134. *Boyle v. Boyle*, 12 Pa. D. & C.3d 767, 776 (C.P. Alleg. 1979).

circumstances of each case is the only practical means of implementing [domestic violence acts].”¹³⁵

Only a few jurisdictions define the term “irreparable injury” in their domestic violence statutes.¹³⁶ For example, under Idaho’s provisions irreparable injury “includes but is not limited to situations in which the respondent has recently threatened the petitioner with bodily injury or has engaged in acts of domestic violence against the petitioner.”¹³⁷

Twenty-two jurisdictions allow issuance of ex parte orders of protection on finding of immediate and present danger of abuse.¹³⁸ Eight states permit relief if there is allegation of incidents of past abuse.¹³⁹ Notably, some statutes

135. *Id.* at 776-77. Following this line of reasoning and after the California legislature expanded the definition of domestic violence and abuse to “embrace nonviolent but harassing conduct,” the court in *Ritchie v. Konrad*, decided that it could “impose a protective order not only because of prior or threatened bodily injury, but also where the restrained party has only been ‘stalking, . . . harassing, telephoning, including, but not limited to, annoying telephone calls[,] . . . destroying personal property, contacting, either directly or indirectly by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, . . .’” 10 Cal. Rptr. 3d 387, 403 (Cal. Ct. App. 2004). The court stated that although this sort of nonviolent behavior in some circumstances is not enough to place the other person in “reasonable apprehension of imminent serious bodily injury,” such a finding in order to issue a protective order is no longer necessary in light of the statutorily provided nonviolent acts.” *Id.* at 404.

136. IDAHO CODE ANN. § 39-6308(3) (West 2006) (“Irreparable injury under this section includes but is not limited to situations in which the respondent has recently threatened the petitioner with bodily injury or has engaged in acts of domestic violence against the petitioner.”); R.I. GEN. LAWS § 15-15-4(a)(2) (2006) (“If it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before notice can be served and a hearing held on the matter, the court may enter any temporary order without notice that it deems necessary to protect the plaintiff.”); WASH. REV. CODE ANN. § 26.50.070(1) (West 2005) (“[I]rreparable injury could result from domestic violence if an order is not issued immediately”); WASH. REV. CODE ANN. § 26.50.070(2) (West 2005) (“Irreparable injury under this section includes but is not limited to situations in which the respondent has recently threatened petitioner with bodily injury or has engaged in acts of domestic violence against the petitioner.”).

137. IDAHO CODE ANN. § 39-6308(3) (West 2006).

138. *See infra* app. A.

139. When statutes define abuse, it usually includes violent acts or crimes against the person of family members or children, such as: assault or attempted assault; child abuse; criminal coercion; harassment; kidnapping; sexual abuse or assault; rape or sexual offense; engaging in sexual acts with minor; unlawful/false imprisonment; physical harm; bodily injury; the infliction of fear of imminent physical harm; intentionally placing, by physical threat, another in fear of imminent bodily injury; communicating to a person a threat to commit, or to cause to be committed, a crime of violence dangerous to human life; terroristic threats; extreme psychological abuse; harassment; severe emotional distress and harm or threatened harm to children. *See, e.g.*, ALA. CODE § 30-5-2(a)(1) (1998); ARK. CODE ANN. § 9-15-103(3) (West Supp. 2008); CAL. FAM. CODE § 6203 (West 2004); DEL. CODE ANN. tit. 10, §1041(1) (2006); HAW. REV. STAT. ANN. § 586-1 (2008); 750 ILL. COMP. STAT. ANN. 60/103(1) (West Supp. 2008); IOWA CODE § 236.2(2) (2008); KAN. STAT. ANN. § 60-3102(a) (2005); KY. REV. STAT. ANN. § 403.720 (West 2006); LA. REV. STAT. ANN. § 46:2132(3) (Supp. 2008); ME. REV. STAT. ANN. tit. 19-A, § 4002(1) (Supp. 2007-08); MD. CODE ANN., FAM. LAW § 4-501(b)(1) (West 2006); MASS. ANN. LAWS ch. 209A, § 1 (West 2007); MINN. STAT. § 518B.01(2)(a) (West Supp. 2008); MISS. CODE ANN. § 93-21-3(a) (West Supp. 2008); N.H. REV. STAT. ANN. § 173-B:1(I) (2002); N.M. STAT.

include, in the definition of abuse, acts or crimes against property or other acts not directed against the person.¹⁴⁰

In contrast to the term abuse, the phrase “domestic violence” is rarely defined by the statutes. When it is, its definition is not very different than the one used for abuse,¹⁴¹ and generally includes violent acts such as: homicide; assault; aggravated assault; battery; aggravated battery; sexual assault or abuse; sexual battery; stalking; aggravated stalking; kidnapping; false imprisonment;

ANN. § 40-13-2(C) (West Supp. 2008); OKLA. STAT. tit. 22, § 60.1(1) (West Supp. 2009); 23 PA. CONS. STAT. ANN. § 6102 (West Supp. 2008); R.I. GEN. LAWS § 15-15-1(2) (2006); S.C. CODE ANN. § 20-4-20(a) (Supp. 2007); S.D. CODIFIED LAWS §25-10-1(1) (2004); UTAH CODE ANN. § 78B-7-102(1) (West Supp. 2008); VT. STAT. ANN. tit. 15, § 1101(1) (2007); VA. CODE ANN. § 16.1-228 (2007). *See also infra* app. A.

140. For example, in four jurisdictions family abuse includes trespass to property. *E.g.*, ALA. CODE § 30-5-2(a)(1)(m) (1998) (Trespass is defined as “[e]ntering or remaining in the dwelling or on the premises of another after having been warned not to do so either orally or in writing by the owner of the premises or other authorized persons.”); DEL. CODE ANN. tit. 10, § 1041(1)(e) (Supp. 2008) (Abuse includes “[t]respassing on or in property of another person, or on or in property from which the trespasser has been excluded by court order”); N.J. STAT. ANN. § 2C:25-19(a)(12) (West 2005) (including criminal trespass as a type of domestic violence); N.M. STAT. ANN. § 40-13-2(C)(2)(e) (West Supp. 2008) (including criminal trespass as a type of domestic abuse). Six states include acts resulting in destruction of property, or simple theft and burglary. *E.g.*, ALA. CODE § 30-5-2(a)(1)(l) (1998) (Theft is defined as “[k]nowingly obtaining or exerting unauthorized control or obtaining control by deception over property owned by or jointly owned by the plaintiff and another.”); DEL. CODE ANN. tit. 10, § 1041(1)(c) (Supp. 2008) (“Intentionally or recklessly damaging, destroying or taking the tangible property of another person . . .” is a type of abuse.); HAW. REV. STAT. ANN. § 586-1 (West 2008) (“Domestic abuse” includes “[m]alicious property damage”); N.H. REV. STAT. ANN. § 173-B:1(I)(e) (2002) (“Abuse” includes “[d]estruction of property”); N.J. STAT. ANN. § 2C:25-19(a)(11) (West 2005) (“Domestic violence means the occurrence of . . . [b]urglary”); N.M. STAT. ANN. § 40-13-2(C)(2)(f) (West Supp. 2008) (“[D]omestic abuse” includes “criminal damage to property”). Five statutes are so broad that they include acts, repeated and without cause, such as: following the plaintiff; being at or in the vicinity of the plaintiff’s home, school, business or place of employment; interference with an emergency call; unauthorized entry; lewdness; criminal mischief; acts resulting in severe emotional distress; repeatedly driving by a residence or work place; and telephone harassment. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 4002(1)(F) (Supp. 2007-08) (“Following the plaintiff; or [b]eing at or in the vicinity of the plaintiff’s home, school, business or place of employment” is abuse.); MINN. STAT. § 518B.01(2)(a)(3) (West Supp. 2008) (Domestic abuse includes “interference with an emergency call.”); N.H. REV. STAT. ANN. § 173-B:1(I)(f) (2002) (Abuse includes “[u]nauthorized entry.”); N.J. STAT. ANN. § 2C:25-19(a)(9), (10) (West 2005) (Domestic violence includes “[l]ewdness” and “[c]riminal mischief.”); N.M. STAT. ANN. § 40-13-2(C)(2)(b), (g), (f) (West Supp. 2008) (Domestic abuse includes “severe emotional distress; . . . repeatedly driving by a workplace; [and] telephone harassment”). Finally, in two jurisdictions legislative provisions define domestic abuse as any other conduct directed toward a member of the protected class that could be punished as a criminal act under the laws of the state or any other conduct which a reasonable person under the circumstances would find threatening or harmful. ALA. CODE § 30-5-2(a)(1)(h) (1998); DEL. CODE ANN. tit. 10, § 1041(1)(h) (Supp. 2008).

141. Though, again, in four states the statutes are so broad that they include in the definition such conduct as trespass, arson, larceny, burglary or destruction of property. *See* GA. CODE ANN. § 19-13-1(2) (West 2003); N.J. STAT. ANN. § 2C:25-19(a)(11), (12) (West 2005); NEV. REV. STAT. ANN. § 33.018(1)(e) (West Supp. 2008); UTAH CODE ANN. § 77-36-1(4), (4)(l) (West Supp. 2008).

or any criminal offense resulting in physical injury or death; any felony; physical injury; terroristic threats; physical harm; bodily injury; the infliction of fear of imminent physical harm; bodily injury; and possession of a deadly weapon with intent to assault.¹⁴²

VI. FORM PLEADINGS AS A CONTRIBUTING FACTOR

While the issuance of emergency, *ex parte* orders of protection unfortunately is not an unusual event in present society,¹⁴³ they are extraordinary events in terms of civil litigation.¹⁴⁴ The party against whom they are entered may be deprived of property or liberty without notice and/or opportunity to be heard. It is only to protect against an irreparable injury that the fundamental dictates of due process, notice and opportunity to be heard, are deferred until a later hearing.¹⁴⁵

It is doubtful that anyone would argue that an abused person should be entitled to immediate relief without unnecessary procedural obstacles. Legislatures have appropriately determined that protection from domestic

142. *See, e.g.*, FLA. STAT. ANN. § 741-28(2) (West 2005); GA. CODE ANN. § 19-13-1 (West 2003); IDAHO CODE ANN. § 39-6303(1) (2006); 750 ILL. COMP. STAT. ANN. 60/103(1), (3) (West Supp. 2008); KY. REV. STAT. ANN. § 403.720(1) (West 2006); N.H. REV. STAT. ANN. § 173-B:1(I), (IX) (2002); N.J. STAT. ANN. § 2C:25-19(a) (West 2005); NEV. REV. STAT. ANN. § 33.018(1) (West Supp. 2008); N.D. CENT. CODE § 14-07.1-01(2) (2008); TEX. FAM. CODE ANN. § 71.004 (Vernon 2002); UTAH CODE ANN. § 77-36-1(4) (West Supp. 2008).

143. For example, a survey published in 2005 sampled twenty-five (25) North Carolina counties during a specified two-week period. Douglas L. Yearwood, *Judicial Dispositions of Ex-Parte and Domestic Violence Protection Order Hearings: A Comparative Analysis of Victim Requests and Court Authorized Relief*, 20 J. FAMILY VIOLENCE 160 (June 2005). In the twenty-two (22) counties where the courts completed the survey the follow *ex parte* relief was granted: (1) Possession of the Residence – 90% (85 of 95 requests); (2) No Contact with Plaintiff – 89% (186 or 209 requests); (3) Possession and Use of the Vehicle – 86% (57 of 66 requests); and (4) Eviction of Defendant – 86% (68 or 73 requests). *Id.* at 165.

144. *State v. Beeler*, 530 So.2d 932, 933 (Fla. 1988) (“A temporary injunction without notice is an extraordinary remedy and should be granted sparingly.”). *But see* *MacDonald v. State*, 997 P.2d, 1187, 1189-90 (Alaska Ct. App. 2000) (“The issuance of *ex parte* orders is not an unusual procedure. Courts issue *ex parte* orders in a variety of situations . . .”).

145. *See, e.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972) (“Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, ‘except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.’” (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). Examples of ‘extraordinary situations’ include seizure of contaminated foods or drugs to protect the consumer and the collection of government revenues and seizure of enemy property in wartime. *See, e.g.*, *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 273 (1987) (Stevens, J., dissenting in part); *State v. Karas*, 32 P.3d 1016, 1019 n.2 (Wash. Ct. App. 2001) (“[T]he petitioner must allege that irreparable injury could result if an order is not issued immediately.”). In addition, Federal Rule of Civil Procedure 65(b) provides a sense of the narrow circumstances in which such action may be taken. For example, 65(b) allows a judge to grant a temporary restraining order (TRO) only if it clearly appears that “immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” *See* FED. R. CIV. P. 65(b)(2)-(3). The TRO expires after ten days or less, and an adversarial hearing must be scheduled “at the earliest possible time, taking precedence over all other matters . . .” *Id.*

violence should be readily and easily available.¹⁴⁶ Nevertheless, applied analysis of constitutional questions remain, as well as questions of whether the statutory schemes are being appropriately followed.¹⁴⁷ This is especially true when the ease of obtaining *ex parte* relief affords the abuser an opportunity to abuse the order of protection scheme and unjustifiably obtain an order of protection against the abused person in the relationship.¹⁴⁸ If *ex parte* relief is made too easy to obtain, the flimsiest allegations can support the entry of an *ex parte* order excluding the abused from her home, depriving her of her children, and putting her at a strategic disadvantage in later proceedings.¹⁴⁹ Perhaps the greater harm is caused when the abused person, against whom an improper *ex parte* order is entered, loses faith in the judicial system as a mechanism to protect her from abuse.¹⁵⁰ Several factors contribute to the circumstance where the abused can have an *ex parte* order entered against her.

In order to make courts more easily accessible to victims of domestic violence seeking an order of protection, especially those proceeding *pro se*, many jurisdictions and court systems have adopted form pleadings.¹⁵¹ The forms simply require the checking of appropriate boxes and filling in blanks with required information. These form pleadings can be a great assistance for a person proceeding in good faith, but a tool for possible abuse for a person seeking an order of protection in improper circumstances.¹⁵² The forms often

146. See *supra* note 4.

147. See *Hedrick-Koroll v. Bagley*, 816 N.E.2d 849 (Ill. App. Ct. 2004). In *Bagley*, the trial judge issued an *ex parte* order of protection. Subsequently, a plenary order was entered “based on the findings of this court . . . which were made orally for transcription.” *Id.* at 852. However, no transcript was created and no official record was created. *Id.* Under the statute, as an alternative to making findings, the judge could have examined the petitioner under oath or affirmation. *Id.* Because neither action was taken, the case was remanded on appeal. *Id.* at 853. See also *M.B. v. H.B.*, No. CS02-04668, 2003 De. Fam. Ct. LEXIS 15 (Del. Fam. Ct. May 2, 2003) (holding the husband’s statements that he would “flip out” and “go out with a bang” if he saw his estranged wife with someone else were insufficient grounds to grant an *ex parte* order of protection where the statute required the petitioner to show that she has been subjected to “abuse” by respondent); *Los v. Los*, 593 N.E. 2d 126 (Ill. App. Ct. 1992) (holding the trial court’s grant of an *ex parte* emergency order of protection was improper due to non-compliance with the statute’s notice requirement, the petitioner’s failure to attach an affidavit to the original petition, and no alleged exigent circumstances).

148. See *supra* note 10.

149. See *supra* note 11.

150. See, e.g., *supra* notes 28-30.

151. See, e.g., FLA. STAT. ANN. § 741.30(2)(c)(2) (West Supp. 2008) (“All clerk’s offices shall provide simplified petition forms for the injunction, any modifications, and the enforcement thereof, including instructions for completion.”). See also OKLA. STAT. tit. 22, §60.3(A) (West 2003); OR. REV. STAT. § 107.710(5) (West Supp. 2008).

152. For example, in *Radke ex rel. Radke v. Radke*, 812 N.E.2d 9 (Ill. App. Ct. 2004), the Court found that the trial court abused its discretion when it granted an *ex parte* order of protection where Petitioner sought to enjoin her ex-husband from “harassing” their teenage daughter by unplugging the daughter’s phone from the wall and using physical force to return her to the house and to her room. Respondent’s step-son testified to the effect that the daughter had punched her father and kicked him in the groin, but that the father had refrained from striking her while restraining her. *Id.* at 11. Without making a finding that abuse had occurred, the trial court proceeded to issue a two-year plenary order of protection. *Id.* at 12. The Court noted that “an

contain broad conclusory language that establishes the constitutionally required criteria for entering an ex parte order without notice or opportunity to be heard. The forms frequently used in Illinois and approved by the Conference of Chief Circuit Judges are illustrative.

Boilerplate language on the “Verified Petition for Order of Protection” provides the justification for proceeding without notice:

I did not give the Respondent notice that I am seeking protection because I fear that giving notice would result in further abuse or because the abuse is likely to recur before I return to court. Good cause exists for granting the remedy or remedies requested without prior service of process or notice.¹⁵³

The form does not require any specific facts to support the circumstance that allows for dispensing with notice to the opposing party. The language is phrased in the alternative. The situation is either that notice would result in abuse or abuse may recur before a hearing after notice. Those are different circumstances, but a simple check of the box is all that is required to dispense with notice. The Illinois *Verified Petition* also contains a “Remedies Section” where the pleader seeks specific remedies and states the justification for it.¹⁵⁴ In regard to jointly owned property, the forms allows for the awarding of property by checking a box that states in part, “the balance of hardships favors temporary possession by Petitioner,”¹⁵⁵ and “the balance of hardships favors granting this remedy.”¹⁵⁶

Due process would seem to require more, if not in the pleading, at least an inquiry and specific findings by the judge that the circumstances justify proceeding without notice.¹⁵⁷ Nevertheless, the form “Emergency Order of Protection” contains similar check boxes by which the judge entering the ex parte order justifies the lack of notice to the respondent.¹⁵⁸ The judge may

order of protection is not the proper procedure for resolving child custody or visitation issues.” *Id.* at 13.

153. Circuit Court of Illinois, Verified Petition for Order of Protection, available at www.19thcircuitcourt.state.il.us/forms/family/dv/OP_Petition_Lake_051107.pdf.

154. *Id.* at 5.

155. *Id.*

156. See *Creaser v. Creaser*, 794 N.E. 2d 990, (Ill. App. 2003). Illinois’ Domestic Violence statute requires, prior to the issuance of any order of protection, that the court consider two factors: 1) the danger of further abuse and 2) hardship to the respondent. Where the court fails to actually hear evidence regarding both factors, it is an abuse of discretion. In *Creaser* the court accepted without inquiry the standard form pleading language concerning the first factor: “Both parties have the right to occupancy; and, considering the risk of further abuse by Respondent interfering with Petitioner’s safe and peaceful occupancy, the balance of the hardships favors the Petitioner because of the following relevant factors: Availability, accessibility, cost, safety, adequacy, location, and other characteristics of alternative housing for each party and any minors or dependents.” The court stated flatly, “This is a conclusion for the court and not for the petitioner.” See also *Verified Petition*, *supra* note 153, at 5. But see 750 ILL. COMP. STAT. ANN. 60/217(a)(3)(ii) (West 1999).

157. See *Creaser*, 794 N.E.2d 990.

158. Circuit Court of Illinois, Emergency Order of Protection, available at http://www.19thcircuitcourt.state.il.us/forms/family/dv/OP_EmergencyOrder_Lake_051107.pdf.

select from three different boilerplate paragraphs that are keyed to the remedy sought. For the relief of possession of personal property, the court checks a box that provides: “. . . improper disposition of the personal property would likely occur if the Respondent were given any prior notice, . . . or Petitioner has an immediate and pressing need for the possession of that property.”¹⁵⁹ For the relief of granting exclusive possession of a shared residence, the appropriate box to be checked states, “. . . the danger of further abuse . . . [if] Respondent was given any prior notice . . . outweighs the hardships to Respondent.”¹⁶⁰ A separate check box justifies a variety of forms of relief, including a prohibition against further abuse, “possession” of minor children, requiring appearance in court, prohibition against disposing of personal property, with the language, “[t]he harm [prevented] would be likely to occur if the Respondent were given prior notice”¹⁶¹

The parsing of boilerplate in an attempt to support proceeding without notice is curious, especially in light of the lack of any provision of specific factual findings supporting proceeding without notice. What is lacking is a finding that ensures proceeding without notice is constitutionally permissible. This omission provides the opportunity for a person seeking an ex parte order of protection for improper purposes to simply check a box and proceed without having to provide factual justification for the relief sought.¹⁶²

Of course, it could be hoped or expected that judges would make appropriate inquiry to determine whether proceeding ex parte is warranted. Reliance on the expectation has several flaws.¹⁶³ The Respondent who has had relief entered against him or her in a situation where it is not warranted has no way of knowing the basis for the court’s decision. With only a box checked, there is no opportunity to ascertain whether the basis for the court proceeding is based on real or fabricated facts. Therefore, the party cannot determine whether there is a basis to seek immediate relief as provided for in many statutes.¹⁶⁴ Additionally, no judge wants to be in the position of denying an

159. *Id.* at 3.

160. *Id.*

161. *Id.*

162. *See* H.E.S. v. J.C.S., 815 A.2d 405 (N.J. 2003) (holding the trial court’s granting of a protection order was improper for lack of due process when the Plaintiff filled out a form pleading incorrectly and testified to past domestic violence not alleged to on the form).

163. *See, e.g.*, Blazel v. Bradley, 698 F. Supp. 756 (W.D. Wis. 1988). In this case, the court states that the domestic violence “statute requires more than a conclusory claim that petitioner is entitled to a restraining order.” *Id.* at 764. The court then suggests that “[t]o ensure that petitioners are aware that they must allege a risk of imminent harm, the state might consider revising the simplified form it provides for petitions for *ex parte* restraining orders to make it explicit that such an allegation is necessary.” *Id.* at 768 n.9. The suggested language underscores the problem: on the one hand, conclusory statements by the petitioner are undesirable but, on the other hand, providing a checklist of required allegations necessarily facilitates the filing of petitions containing such conclusions, rather than the specific facts and circumstances from which a judge could make the requisite findings.

164. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 60/224(d) (West Supp. 2008) (allowing a rehearing of an emergency order of protection upon two days notice).

emergency order of protection to a person who is thereafter further abused. If in doubt, the balance for the judge favors granting the requested temporary relief. What is overlooked in that attitude is that harm can be done to the person against whom an improper order has been granted. In the scenarios discussed from our law school clinic, our clients came to the office greatly discouraged. After having been abused at home, now they felt abused by the courts and had a tendency to want to give up. One client did proceed with challenging the improper order and gaining back access to her home and children. The other did not.

VII. THE ULTIMATE ASSURANCE OF DUE PROCESS: CONSCIENTIOUS JUDGES

While domestic violence statutes generally comply with due process, it is, of course, in the application that the important rights can be violated. It is incumbent upon judges to look beyond conclusionary allegations of irreparable injury. If there is no actual risk of imminent harm, the adjudication of relief should await notice and hearing. Similarly, the judge must scrutinize the factual circumstances to make sure the alleged victim has in fact suffered abuse justifying relief. If *ex parte* relief is warranted, the judge should scrutinize the relief sought to see if all remedies should be adjudicated at the *ex parte* stage. For example, an *ex parte* order, in appropriate circumstances, could order the abuser to stay away from the victim, but await resolution of other issues for a hearing after notice. The key is for the judge to parse the *ex parte* relief that is necessary to protect the victim from further abuse, but at the same time afford the alleged abuser an opportunity for a hearing before resolving non-critical issues that do not impact matters of immediate safety. It is the lack of this scrutiny, or the knee jerk granting of one hundred percent of the petitions that set the stage for easy abuse of the process that is intended to prevent abuse.

In the composite situations, judicial scrutiny would have easily revealed that the allegations of abuse rested on the most flimsy of grounds: a large man scared of his diminutive wife and a minor push of a man by a woman during an argument. Even if arguably construed to meet the statutory definition of abuse, there certainly is no risk of immediate, irreparable injury that would warrant granting relief without notice. Giving each of these women a day in court before excluding them from their children and homes would have prevented a gross abuse of the very statutes enacted to protect them.

VII. CONCLUSION

Domestic violence statutes were enacted with the laudable purpose of providing an easily assessable means of judicial relief to a vulnerable segment of society. To remain effective, the ease of access must not be exploited by persons who use the system to obtain unwarranted relief. While the statutory schemes facially survive constitutional scrutiny, it is in application that their

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 117

procedural protections may fall short. It is incumbent upon courts to treat orders of protection as they would any other request for ex parte relief and ensure that relief be granted only when necessary to prevent the risk of immediate and irreparable injury. When that risk of injury is not present, notice and hearing should precede issuance of an order.

APPENDIX

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 119

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 121

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 123

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 125

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 127

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 129

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 131

2008] *TAYLOR: EX PARTE DOMESTIC VIOLENCE ORDERS* 133