GUARDING THEIR SANCTUARY ON THE OFFENSE: CRIMINAL CONTEMPT ACTIONS BY DOMESTIC VIOLENCE VICTIMS IN PRIVATE CAPACITY

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INTRODUCTION

> 'I loved him and I thought my love would change him. But I was wrong.' Patty Parra-Perez is still haunted by the memory of December 10, 2004. She and her children, 13-year-old Lauren and 12-year-old Sean, left their house to go to the bookstore. Then they heard a familiar voice. It was Bob O'Marra, her ex-husband and the children's father. 'I turned around and I faced him. And he shot me in the head, with a .38.' She said the children tried to run. 'My son panicked and ran to the front door. He chased him and he shot him too. My daughter screamed and ran away. He chased her and shot her.' O'Marra then killed himself. Parra-Perez, somehow survived.[1]

Essentially a public safety issue, domestic violence is not confined to the victim and offender but impacts the community as a whole.[2] Notably, one in every four women will suffer domestic violence in her lifetime, and approximately 1.3 million women are victims of physical assault by an intimate partner each year.[3] Yet most cases of domestic violence are never reported to the police.[4] Eighty-five percent of domestic violence victims are women; men only comprise approximately fifteen percent.[5] Historically, females have been most often victimized by people they know.[6] Out of 3.5 million violent crimes committed

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[1] Tanya Arja, *A Story Of Domestic Violence Survival,* MY FOX TAMPA BAY (Oct. 15 2010), http://www.myfoxtampabay.com/dpp/news/local/hillsborough/a-story-of-domestic-violence-survival-10152010.

[2] *See* Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 174 (1997).

[3] *See Domestic Violence Facts*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, (July 2007), *available at* http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf.

[4] *See id.*

[5] Callie Marie Rennison, *Intimate Partner Violence, 1993-2001*, BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF (Feb. 2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf.

[6] Shannan M. Catalano, *Criminal Victimization*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Sept. 2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv05.pdf.

against family members, forty-nine percent were crimes against spouses.[7] While women constituted eighty-four percent of spouse abuse victims and eighty-six percent of dating partner abuse victims,[8] males comprised eighty-six percent of spouse murderers and seventy-five percent of dating partner murderers.[9] The gravity of the crime is reflected by the statistic that "(f)ifty percent of offenders in State prisons for spousal abuse had killed their victims."[10] Unsurprisingly, "wives were more likely than husbands to be killed by their spouses: wives were about half of all spouses in the population in 2002, but eighty-one percent of all persons killed by their spouse."[11]

Part I reflects on the English common law roots of the legal treatment of women, traversing through the decades up to the present and exploring the perception of, and behavior toward, women in society. This Part also reveals the origins of domestic violence legislation surrounding the Battered Women's Movement and the various responses to such legislation. Lastly, this Part briefly delves into the inadequacy of the current, prominent domestic violence remedies in our justice system. Part II explores the recent case of *Robertson v. United States ex rel. Watson* for its close relation to one of the essential remedies for domestic violence in our justice system: civil protection orders. This Part investigates several arguments put forth by Wykenna Watson, a domestic violence victim in the above case, in support of the contention that enforcement of civil protection orders—through private criminal contempt actions—is permissible.

Finally, Part III of this Note alludes to *Robertson v. United States ex rel. Watson* to argue for an essential improvement that more effectively supports domestic violence victims against their abusers in our justice system. This Note contends that domestic violence victims, in their private capacities, should be allowed to bring criminal contempt actions against perpetrators who violate civil protection orders. In support, several of the government's arguments for public enforcement of civil protection, to the exclusion of private enforcement by victims, are rejected. This Note advocates for private enforcement of civil protection orders by elucidating the inadequacies present in public enforcement and identifying the need for more enhanced and effective remedies for the numerous victims of domestic violence.

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[7] *Statistics on Domestic Violence in the United States, Domestic Violence*, (2009), *available at* http://www.soundvision.com/Info/domesticviolence/statistics.asp.

[8] Matthew R. Durose et al., *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, at 10 (June 2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs02.pdf.

[9] *Id.* at 14.

[10] *Id.* at 3.

[11] *Statistics on Domestic Violence, supra* note 7.

I. DOMESTIC VIOLENCE: THEN AND NOW

A. Historical Treatment of Women

Attitudes toward domestic violence at the time of this country's founding originated from English common law, where a man was permitted to beat his wife as long as he employed a "rod not thicker than his thumb."[12] Until the nineteenth century, husbands who beat their wives could use the defense of "chastisement,"[13]—justified by the husband as a correction of an errant wife—as a result of which such abuse escaped the reach of the state.[14] Since husbands could be held accountable for their wives' actions, upon marriage, they became the rulers of their wives[15] and were allowed to control their wives by force, so long as they did not inflict permanent injury, which was the only instance in which the "law [would] . . . go behind the curtain."[16] In the late nineteenth century, a shift in public policy changed explicit legal approval of wife-beating into simple toleration by judicial and law enforcement personnel of such ill treatment.[17] Because domestic violence was viewed strictly as a private matter between the husband and the wife, police officers were ordered not to make arrests in domestic incidents. Instead, they were ordered merely to separate the spouses at the scene of the incident and, if required, to instruct the husband to calm down by "taking a walk around the block."[18]

Until the 1970s, the justice system responded to domestic violence by trivializing, ridiculing and ignoring the women's complaints and invalidating the terror that they were subjected to by their batterers.[19] By the late nineteenth century, some states began to move away from actually condoning a husband's use of physical force to discipline his wife, but many courts continued to refuse to hear complaints. For example, the Supreme Court of North Carolina in *State v. Oliver* declared that "[i]f no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out

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[12] Pat Campbell, Comment, *Adult Abuse in Missouri: The Beating Continues*, 58 UMKC L. REV. 257, 258 (1990) (quoting U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB, BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982)).

[13] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative*, 105 YALE L.J. 2117, 2118 (1996).

[14] *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661 (2004).

[15] *The Abuse of Women—A Worldwide Issue—American Traditions*, *available at* http://www.libraryindex.com/pages/2031/Abuse-Women-Worldwide-Issue-AMERICAN-TRADITIONS.html.

[16] State v. Jesse Black, 60 N.C. 262 (1864).

[17] *See* Siegel, *supra* note 13, at 2150-54.

[18] Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996).

[19] *See* Vi T. Vu, Note, *Town Of Castle Rock v. Gonzales: A Hindrance In Domestic Violence Policy Reform And Victory For The Institution Of Male Dominance*, 9 SCHOLAR 87, 93 (2006).

the public gaze, and leave the parties to forget and forgive."[20] Those courts, which affirmed that a husband could no longer legally beat his wife, did little to help battered wives as the law was rarely enforced, and there was no real legal recourse against a batterer since there were no criminal penalties yet attached to physical abuse.[21]

At the turn of the twentieth century, domestic violence was still viewed as a private matter that should be kept out of the public view.[22] Explicitly directed not to arrest the perpetrators of domestic violence, law enforcement officers embraced the view that domestic violence was considered noncriminal, thus assigning low priority to domestic violence calls and showing general disinterest, delay or ignorance in responding to such calls.[23] As a result, domestic violence batterers were almost never arrested even if they had inflicted severe injuries on their victims.[24] Such a system enabled abusers to believe that their conduct was acceptable and led to continued or increased violence to the abused.[25]

Violence against women also continued because the batterer, even if arrested, had little to no likelihood of being prosecuted.[26] It was conventional for prosecutors to drop charges against the perpetrator in fifty to eighty percent of cases where the "victim request[ed] it, refuse[d] to testify, recant[ed], or fail[ed] to appear in court."[27] Although there was no requirement that victims testify, prosecutors frequently dismissed domestic violence cases when victims showed any reluctance to cooperate,[28] despite the fact that the reluctance might owe its

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[20] Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 10 (1999) (quoting State v. Oliver, 70 N.C. 60, 61-62 (1874)).

[21] *The Abuse of Women*, *supra* note 15.

[22] Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) ("Throughout the 1970s and early 1980s, officers believed and were taught that domestic violence was a private matter, ill suited to public intervention.").

[23] Epstein, *supra* note 20, 13-14.

[24] *Id.* at 14 (finding by a District of Columbia study carried out in 1990, before the passage of its mandatory arrest law in 1991, that police arrested batterers in only 5% of all domestic violence cases, failed to arrest in more than 85% of cases in which the victim had serious injuries visible when the police arrived, and were more likely to arrest when the perpetrator had insulted an officer or damaged a vehicle).

[25] *See* Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is it Enough?*, 1996 U. ILL. L. REV. 533, 553 (1996).

[26] Zorza, *supra* note 22, at 65.

[27] Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 857 (1994).

[28] *See id. See also Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System, reprinted in* 8 GA. ST. U. L. REV. 539, 566 (1992) (The Minnesota Supreme Court Task Force for Gender Fairness in the Courts conducted a study that found that of 224 cases reviewed, none went to trial. Prosecutors disposed of every case either by guilty plea or dismissal before trial, with no defendant who pled "not guilty" ever proceeding to trial.); Deborah Nelson & Rebecca Carr, *Some Frustrated Victims Talk of Taking up Arms*, CHI. SUN-TIMES, July 24, 1994, at 18 (finding that of 10,700 cases filed in Chicago's domestic violence court last year, 7,400 have been dropped so far.); Maureen McLeod, *Victim Noncooperation in the Prosecution of Domestic Assault*, 21 CRIMINOLOGY 395, 408 (1983) (finding that only 2.6% of cases brought to the attention of law enforcement in Detroit resulted in adjudication.); Mary O'Doherty, *New Jefferson Wife-*

origins to fear and anxiety of being in close physical proximity with the perpetrator. Even the few cases that led to prosecution were grossly trivialized as misdemeanors rather than felonies, notwithstanding the gravity of the inflicted injuries on the battered women.[29]

Even civil remedies were lacking for the protection of domestic violence victims. Absent narrow injunctive relief in the case of divorce or legal separation in limited jurisdictions, the abused women were generally without any aid from our civil system.[30] No criminal penalty existed for the violation of an injunction; a woman was required to bring her own contempt action where the police and prosecutors played no meaningful role.[31] It was not until the Battered Women's Movement achieved momentum in the 1960s that abused victims, who had suffered gross injustices at the hands of a system that perpetuated conventional norms and underplayed the serious crime of domestic violence, saw some hope at the end of a dark tunnel.

II. THE LEGAL RESPONSE TO DOMESTIC VIOLENCE

A. Beginnings of the Battered Women's Movement

The women's liberation movement, which advocated that incidents occurring in the privacy of a woman's home may have deep political effects,[32] set the stage for the Battered Women's Movement—the "first modern organized resistance to violence against women"—during the late 1960s and 1970s.[33] The victim's safety and the need to avoid injury were finally given foremost priority, and the movement began with the opening of safe houses and battered women's shelters.[34] These shelters not only provided a sanctuary for the fearful and desperate victims, but they also sought to provide moral and emotional support by helping them regain their strength and self-esteem and by aiding their rehabilitation into society through job training and other resources.[35]

In addition to a focus on the victims, the activists of the Battered Women's Movement also promoted widespread education of the invasive and persistent

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Abuse Unit to Make Cases Tough to Drop, COURIER-JOURNAL, April 26, 1991, at 1A (a 70% dismissal rate is common to jurisdictions that make no special effort to prosecute domestic violence).

[29] *See* Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1145 n.107 (1994) (citing an estimate by a victim advocate in Chicago that, in 1987, about 90% of domestic violence cases in Cook County, Illinois were charged as misdemeanors, no matter how severe the injuries).

[30] *See* Zorza, *supra* note 22, at 52-53.

[31] *See id.* at 53.

[32] *See Her Story of Domestic Violence: A Timeline of the Battered Women's Movement*, MINNESOTA CENTER AGAINST VIOLENCE AND ABUSE, *available at* http://www.mincava.umn.edu/documents/herstory/herstory.html.

[33] *The Battered Women's Movement: A Brief Overview*, 73, *available at* http://new.vawnet.org/Assoc_Files_VAWnet/Overview-BatteredWomeMov.pdf.

[34] *See* Wanless, *supra* note 25, at 536.

[35] *Id.*

crime of domestic violence across a society that had existed on conventional gender-biased norms for decades.[36] Deficient of state involvement, the battered women's movement started as a "grassroots effort" to provide a safe haven and services for domestic violence victims.[37] In addition, given the former lack of any assistance for the abused women by our legal system, the women did not anticipate any aid from a system that they perceived—and justifiably so—to be a male-dominated, patriarchal system, demonstrated by its toleration and forgiveness of male violence against women.[38]

The criminal justice system was much less prone to change; as explained above, even though spousal abuse was against the law, it was rare that response to victim calls resulted in police officers doing anything more than mediation and crisis intervention.[39] Until the mid-1980s, police officers followed the requirement of arresting abusers for the misdemeanor offense of domestic violence only when the violence was inflicted in the presence of the police officer.[40] Some activists in the movement, however, strongly believed that domestic violence would be effectively deterred only when society treated it as a crime rather than family bickering or a lovers' quarrel.[41] For that reason, those activists focused on attacking the laws and policies that overlooked domestic violence against women as a crime to be countered through the justice system.[42] The activists also pushed to infiltrate state resources for aid, such as funding for battered women's shelters and victim advocacy groups.[43] In addition, they sought improved access to civil protection orders against the perpetrators of domestic violence and greater enforcement by the criminal justice system, such as law enforcement participation and increased prosecution of the perpetrators.[44]

B. Origins of Domestic Violence Laws in the United States

Although few legal strides have been made in domestic violence legislation since the mid-1980s, arguably the leading legislation that pushed for the prevention of and protection against domestic violence came in the 1990s.[45] In 1994, the

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[36] Bernadette D. Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 996-97 (1989).

[37] Sack, *supra* note 14, at 1666.

[38] *See id.*

[39] *See* Wanless, *supra* note 25, at 536-37 (citing to *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1535-36 (1993)).

[40] *See id.* (citing *Developments*, at 1536-37).

[41] *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 304-05 (1985).

[42] *See* Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 340 (1995).

[43] *See* Sack, *supra* note 14, at 1666.

[44] Barry, *supra* note 42.

[45] *See Herstory of Domestic Violence: A Timeline of the Battered Women's Movement*, MINNESOTA CENTER AGAINST VIOLENCE AND ABUSE, (September 1999), *available at* http://www.mincava.umn.edu/documents/herstory/herstory.html#lemon.

Violence Against Women Act ("VAWA") was founded, which defined a domestic violence misdemeanor as a crime committed by an intimate partner, guardian, or parent of the victim using or attempting to use physical force or the threat of a deadly weapon.[46] The Act also had a substantial impact on state laws regulating domestic violence. For the states to receive federal funding, VAWA proposed that states must implement specific responses to domestic violence, such as mandatory arrest or pro-arrest programs for domestic abuse and violations of protection orders in law enforcement departments.[47] Thus, the Violence Against Women Act—which funded protective services for domestic violence victims, allowed women to seek civil rights resolutions for gender-related crimes, trained previously inconsiderate police and court officials to be more sensitive to the plight of domestic violence victims, and provided that jurisdictions give full faith and credit to other jurisdiction's protection orders—was one of the first and foremost substantial leaps toward legal reform in the field of domestic violence.[48] Unsurprisingly, VAWA came about in 1994 when the stark realities of domestic abuse were unveiled and put forth to the public on a national scale. Partner abuse captured media and public attention when the much-publicized O.J. Simpson case drew widespread attention to domestic violence.[49]

Over the past decades, our nation has progressed from a period in which domestic abuse went unnoticed and effectively overlooked to a period of extensive public awareness of the crime. Such public awareness has given rise to a conscious perception that domestic abuse is objectionable and intolerable, such that a substantial legislative resolve has been initiated to respond to the problem. Each state has adopted a civil protection order statute,[50] thirty-three states have embraced criminal contempt legislation to enforce protection orders, and forty-five jurisdictions have made a protection order violation a statutory crime.[51] In

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[46] *Id.* The Violence Against Women Act advanced programs to preclude violence against women; added protections for abuse victims, such as confidentiality of location and ability to contact a national domestic violence hotline; established the recognition of full faith and credit to all orders of protection, so abusers could not escape by following the victim into another jurisdiction; and permitted victims of domestic abuse to sue in civil court for damages, which was later overturned in *Brzonkala v. Morrison*, which held Congress lacked power to implement such law. *See* Federal Domestic Violence Legislation: The Violence Against Women Act, *available at* http://family.findlaw.com/domestic-violence/federal-domestic-violence-legislation.html.

[47] *Herstory*, *supra* note 46.

[48] *Id.* (citing NANCY LEMON, DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES (Austin and Winfield,1996)).

[49] *See* People of the State of California v. Orenthal James Simpson, http://law.jrank.org/pages/19057/Simpson-O-J-Trials.html#ixzz1G9lxSRi0 (O.J. Simpson pleaded not guilty to the savage murders of his ex-wife, Nicole Simpson, and her friend Ronald Goldman, both of whom were found stabbed to death on June 12, 1994. Although the physical and circumstantial evidence obtained against Simpson was compelling, police and prosecution errors combined with widespread distrust of the Los Angeles Police Department set the stage for Simpson's acquittal).

[50] *See* 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).

[51] *See* Epstein, *supra* note 20, at 12.

addition, the implementation of mandatory arrest laws has reduced police inaction,[52] and the enforcement of no-drop prosecution policies has allowed prosecutors to proceed with criminal charges even if the victim becomes uncooperative or unavailable.[53] Yet, these recent reforms of mandatory arrest, no-drop policies and protection orders—albeit functioning as agents of deterrence and victim safety—are insufficient to fully combat the malicious crime of domestic violence; far-reaching improvements are still needed.

III. INSUFFICIENCY OF CURRENT REMEDIES

A. Mandatory Arrest and No-Drop Policies

Cultivated from and mandated by the Violence Against Women Act, mandatory arrest legislation was passed in a majority of the states.[54] The mandatory arrest law required an arrest every time an abuse was reported, no longer leaving it up to police discretion.[55] In addition, no-drop prosecution policies, which may be considered complementary to mandatory arrests, were adopted by many states. These policies authorize the prosecutor to make the decision as to whether to prosecute a domestic violence perpetrator regardless of the victim's consent or support.[56]

While mandatory arrests may serve the immediate protection and safety interests of the victim by bringing about at least a short separation from the batterer, during which the victim would have the ability to rationally evaluate her options,[57] it does not suffice in protecting women in the long-term. Instead, the law has had the unintended effect of increasing the number of murders committed by intimate partners in the states that have adopted mandatory arrest laws.[58] Many

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[52] *See* Zorza, *supra* note 22, at 53-65.

[53] *See* Hanna, *supra* note 18, at 1852-53, 1861-62.

[54] *See* Charles E. Corry, *Mandatory Arrest for Domestic Violence Doesn't Work – Even Harvard Says So 8/10/07*, ALLIANCE FOR NON-CUSTODIAL PARENTS RIGHTS (August 11, 2007), http://ancpr.com/2007/08/11/mandatory-arrest-for-domestic-violence-doesnt-work-even-harvard-says-so-81007/.

[55] *See id.*

[56] *See* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 561 (1999). "These policies range from strict or 'hard' no-drop policies to highly deferential policies. A 'hard' no-drop policy is one in which the state will push forward a prosecution using all means available. In addition to submitting into evidence the testimonies of police officers and neighbors and excited utterances made by the victim at the time of the alleged attack, prosecutors in these jurisdictions might subpoena a victim to testify against her will. Prosecutors may go so far as to arrest or even imprison victims who fail to comply with their subpoenas. On the other end of the spectrum, deferential drop jurisdictions defer completely to the wishes of the victims, routinely dropping charges according to victim desires." Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 181 (2003).

[57] *See* Jennifer Hagan, Note, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 975 (2001).

[58] *See* Radha Iyengar, *The Protection Battered Spouses Don't Need*, N.Y. TIMES, Aug. 7, 2007,

victims, who are tied to their abusers psychologically, financially and emotionally, realized that every report came with the certainty of arrest and, thus reported incidents of abuse less frequently because despite wanting protection, some victims did not wish to see their abusers behind bars.[59] Others reported fewer incidents of abuse with the fear that after being arrested, their abusers would be quickly released and would retaliate more severely against them.[60]

In the case of domestic violence, victims are most in need of police and prosecution "responsiveness and sensitivity."[61] Although crime control is a significant focus of the police and prosecution, they still need to consider that domestic violence is a crime that is likely to occur continually and is extremely likely to increase in severity subsequent to a batterer's arrest.[62]

Similarly, no-drop prosecution policies only aim to secure arrests as per the law and hold the perpetrators responsible for their actions[63] rather than focusing on individual victims. These policies are effectively void of the objective of victim empowerment. Proponents of these policies argue that they serve the state's interest in ending violent relationships; however, battered women pay an enormous price as the policies effectively forego individual victim interests.[64] These policies are also based on the assumption that victims are incapable of making their own decisions since they are under the domination of the abuser.[65] This "overly optimistic" view that the prosecution is the "best or safest solution"[66] for the victim ignores the reality that "prosecution . . . is no guarantee that the violence will stop."[67] The view overlooks the fact that batterers would have access to the victims pending trial and that batterers have a tendency to plead guilty to get probation or minimal jail time.[68] A victim's plight regarding her conflict with the United States legal system may be encapsulated as follows:

> A woman who opposes prosecution is taking a calculated risk, as is the woman who actively pursues prosecution. Neither she, nor the judge or the prosecutor, can know with certainty which action will result in less violence. The problem is not that the batterer's coercion is not real, but

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http://www.nytimes.com/2007/08/07/opinion/07iyengar.html.

[59] *Id.*

[60] *Id.*

[61] *See* Han, *supra* note 57, at 190.

[62] *See id.*

[63] *See id.*

[64] *See* Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 633-34 (2000).

[65] *See* Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 218-19 (1999).

[66] *See* Han, *supra* note 56, at 183 (citing LINDA G. MILLS, THE HEART OF INTIMATE ABUSE 56 (1998)).

[67] Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV 801, 826 (2001).

[68] *See* Han, *supra* note 56, at 183 (citing to LINDA G. MILLS, THE HEART OF INTIMATE ABUSE 56 (1998)).

> rather that it is not always clear that the criminal justice system offers a better alternative.[69]

The optimal result would be for law enforcement officials to be assiduous on a case-by-case basis when arrest may greater endanger the victim[70] and for prosecutors to be responsive to the fact that prosecutions resulting from forced victim cooperation may increasingly imperil the victim.[71] Thus, mandatory arrest and no-drop policies, which are flagged as a one-size-fits-all approach to a problem whose causes vary by situation, are inadequate to meet the profound needs of domestic violence victims.[72]

B. Protection Orders

Both civil and criminal courts have been given the authority to constrain improper conduct to dissuade violent and abusive acts against victims in general.[73] Also termed "restraining orders," "injunctions," or "protective orders," protection orders prohibit one's intolerable conduct to protect another individual.[74] They generally include provisions "restricting contact; prohibiting abuse, intimidation, or harassment; determining child custody and visitation issues; mandating offender counseling; and prohibiting firearm possession and provisions for other relief the court deems appropriate."[75] Although all states have adopted laws sanctioning the issuance of civil or criminal protection orders, different enforcement mechanisms are present from state to state.[76] Definite, unambiguous penalties for violations of protection orders are required to encourage conformity with the order's provisions.[77] The most common method utilized to enforce protection orders is criminal sanction for violations.[78]

Even though obtaining a civil protection order may be worthwhile in and of itself, such orders are futile unless the restrained party is convinced that the order will be enforced.[79] Without effective enforcement, meaningful compliance with protection orders is unworkable, and civil protection orders remain a mere piece of paper that a batterer can—and often does—fail to acknowledge without fear of

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[69] Coker, *supra* note 67, at 826.

[70] *See* Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 75-76 (2000).

[71] Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L.J. 953, 958-59 (2000).

[72] Han, *supra* note 56, at 191.

[73] *See Enforcement of Protective Orders*, LEGAL SERIES BULLETIN #4 (Jan. 2002), *available at* http://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin4/1.html.

[74] *Id.*

[75] *Id.*

[76] *See id., available at* https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin4/2.html.

[77] *See Enforcement of Protective Orders, supra* note 73.

[78] *See id.*

[79] *See id.*

punishment.[80] "[E]nforcement is the Achilles' heel of the . . . process, because an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security."[81] Around the nation, legislatures have enacted laws that facilitate law enforcement officials in responding swiftly to violations and allow courts to impose punishments or penalties.[82] Yet presently, enforcement of protection orders is not consistent; even where legislation has been enacted to require stringent enforcement, it is too often disregarded.[83] In effect, poor enforcement may be significantly accountable for the outcome of studies showing high rates of non-compliance with protection orders.[84]

Thus, the remedy of the protection order is inadequate. No legal responses, taken independently, can be sufficient to resolve the complex and entrenched crime of domestic violence.[85] Yet, the effect of protection orders has been very promising in furthering the interests of battered women:

> The relative ease and speed [to acquire], the fact that civil actions are initiated and controlled by the victim, and the possibility of obtaining individualized and broad-ranging relief, . . . the demonstrably high level of satisfaction among women who have obtained orders, all indicate that . . . [they] are a uniquely valuable asset . . . to combat domestic violence.[86]

Studies reveal that effectively enforced protection orders decrease violence against victims, granting them the protection necessary to enable them to "regain their emotional well-being, a sense of security, and overall control over their lives."[87] Thus, an examination of how the effects of protection orders could be enhanced to result in a greater positive influence on battered women is needed. For a comprehensive exploration, we initially embark on the case of *Robertson v. United States ex rel. Watson*, where the proposed action invites substantial legal strides for battered women in terms of enforcement of protection orders.

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[80] *See* Epstein, *supra* note 20, at 12.

[81] *Id.* (quoting PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT 49 (U.S. Dep't of Justice 1990)).

[82] *See Enforcement of Protective Orders, supra* note 73.

[83] *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders For Domestic Violence: Can Law Help End The Abuse Without Ending The Relationship?*, 29 CARDOZO L. REV. 1487, 1516 (2008) (citing JANICE GRAU ET AL., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 25-27 (Claudine SchWeber & Clarice Feinman eds., 1985)).

[84] *Id.*

[85] *See* Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits, Conference on Criminal Justice Research and Evaluation, January 1996*, 24, 39-40.

[86] Goldfarb, *supra* note 83, at 1518.

[87] Vu, *supra* note 19, at 95 (citing Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 95 (2005)).

IV. PLEA FOR EMPOWERMENT: ROBERTSON V. UNITED STATES EX REL. WATSON

A. Background

On March 29, 1999, Ms. Watson obtained a civil protection order from the Family Division of the Superior Court against Robertson, who allegedly on March 27, 1999

> repeatedly pursued and hit her on various parts of her body, including her head and face, with his closed fist; kicked her several times in the head with his heavy work shoes; and threatened to kill her while holding a pocket knife. She suffered a black eye and head injuries.[88]

The civil protection order—effective for twelve months—directed that Robertson not "assault, threaten, harass, or physically abuse Ms. Watson in any manner; stay away from Ms. Watson's person, home, and workplace; and avoid contacting Ms. Watson in any manner."[89]

Robertson was charged with one count of aggravated assault based on the March 27, 1999 occurrence and later indicted on July 8, 1999 for "one count of aggravated assault and two counts of assault with a dangerous weapon."[90] In violation of Ms. Watson's civil protection order, Robertson allegedly came to her home on June 26, 1999 and harassed and physically attacked her.[91] On July 20, 1999, Robertson entered into a plea bargain with the United States Attorney's Office, in which the United States agreed to "not pursue any charges concerning an incident on June 26, [19]99"—a subsequent offense, violating the civil protection order—in exchange for his guilty plea for one count of felony attempted aggravated assault in relation to the March 27, 1999 incident. [92]

On January 28, 2000, Ms. Watson, who was represented by Corporation Counsel, filed a motion to hold Robertson in criminal contempt for violating the civil protection order, with respect to the incidents between Robertson and Ms. Watson on June 26 and 27, 1999.[93] The court granted the motion to adjudicate and Robertson was held in contempt for willfully violating the civil protection order.[94] The trial judge ordered Robertson to pay $10,009.23 in restitution for Ms. Watson's medical expenses and sentenced him to three consecutive 180-day jail terms.[95]

When Robertson moved for dismissal of his criminal contempt convictions, the trial court asserted that it was permissible for Ms. Watson to initiate a criminal contempt action against Robertson in her private capacity, as opposed to the action

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88 In re Robertson, 940 A.2d 1050, 1052 (D.C. 2008).

89 *Id.* at 1053.

90 *Id.*

91 *Id.*

92 *Id.*

93 *See id.*

94 *See* In re Robertson, 940 A.2d 1050, 1053-54 (D.C. 2008).

95 *Id.* at 1054.

being necessarily brought by the government.[96] Therefore, the trial court held that no breach of the plea agreement by the United States had occurred since the proceeding was being brought by Ms. Watson, rather than by the government. In response, Robertson filed an appeal, alleging a violation of his due process rights and ineffective assistance of counsel due to the trial court's failure to vacate his contempt convictions in view of his July 28, 2000 plea agreement with the United States.[97]

The District of Columbia Court of Appeals ruled that Robertson's prosecution for criminal contempt was constitutionally "conducted as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity."[98] Robertson alleged that such holding violated the United States Constitution in that criminal contempt prosecutions in congressionally created courts are constitutionally mandated to be pursued on behalf of the government.[99] In support for vacating his criminal contempt conviction, Robertson argued that if the Supreme Court "deems Ms. Watson to represent the United States, it must conclude that the prosecution of Robertson should have been barred by his plea agreement."[100] Alternatively, if the Court deemed that Ms. Watson, in private capacity, invoked the court's power to bring the criminal contempt action, Robertson argued that "criminal actions must be prosecuted in the name of the sovereign and pursuant to its power, and that criminal contempt, like any crime, is a 'public wrong.'"[101]

In a per curiam order on May 24, the United States Supreme Court dismissed *Robertson v. United States ex rel. Watson* as improvidently granted, thereby declining to decide "[w]hether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States."[102] Alluding to the case, the subsequent sections refute Robertson's allegations against private criminal contempt actions and argue that private criminal contempt actions are not only permissible, but also crucial for providing effective redress and protection to domestic violence victims against violators.

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96 Reply Brief for Petitioner-Appellant at 2, Robertson v. U.S. ex rel. Watson, 130 S. Ct. 2184 (2010) (No. 08-6261), 2008 U.S. Briefs 6261.

97 *In re Robertson*, 940 A.2d at 1054.

98 Reply Brief for Petitioner-Appellant, *supra* note 96, at 7.

99 *See id.* at 7-8.

100 *Id.* at 6.

101 *Id.* at 7.

102 Robertson v. U.S. ex rel. Watson, 130 S. Ct. 2184, 2185 (2010).

B. Criticism of Robertson's Allegations That the Constitution Declares Crimes, Including Criminal Contempt, to be Public Wrongs

Initially, Robertson retaliated against Ms. Watson's criminal contempt charges brought in her private capacity by asserting that only the sovereign with whom the public has entrusted this power may constitutionally bring a criminal proceeding.[103] He first alleged that the Framers of the Constitution assumed that criminal actions must be brought in the name of the sovereign because the Constitution declares a crime to be a "public wrong."[104] At common law, he contended, the Crown was the proper prosecutor for every public offense; likewise, post-Revolution, the United States became the proper prosecutor for every public offense against it.[105] To provide further support against the contempt charges brought by Ms. Watson in her private capacity, Robertson claimed that the only historical action in the English common law through which a private party could prosecute crime and obtain punishment in one's own name was the antiquated private "appeal of felony."[106] Apart from that sole cause of action, Robertson alleged, incorrectly, that common law mandated—and that the Constitution still mandates—all crimes, including contempt, to be prosecuted in the name of the sovereign.[107]

1. Contempt Proceedings Not Viewed as "Crimes" by the Framers

Robertson's argument—that the common law and the Constitution require criminal contempt proceedings to be brought in the name of the sovereign—rests on an "erroneous assertion that there are no relevant differences between criminal contempt and other criminal proceedings."[108] In fact, there are significant differences between contempt proceedings and other criminal proceedings.[109] Contempt cases have in no way been considered "crimes within the meaning and intention of the second section of the third article of the constitution of the United States; nor have attachments for contempt ever been considered as criminal prosecutions within the [S]ixth [A]mendment."[110]

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[103] *See* Brief for Petitioner at 11, Robertson v. U.S. ex rel. Watson, 130 S. Ct. 2184 (2010) (No. 08-6261), 2008 U.S. Briefs 6261 [hereinafter Br. for Pet'r].

[104] *Id.* at 21.

[105] *See id.*

[106] *Id.*

[107] *See* Brief for Respondent at 12, Robertson v. U.S. ex rel. Watson, 130 S. Ct. 2184 (2010) (No. 08-6261), 2008 U.S. Briefs 6261 [hereinafter Br. for Resp't].

[108] *Id.* at 23. Robertson incorrectly relies on this Court's statement that "[c]riminal contempt is a crime in the ordinary sense" and contends that there is no relevant distinction between criminal contempt and other crimes. *Id.* at 13. *See, e.g.*, Br. for Pet'r, *supra* note 104, at 36 (quoting Bloom v. Illinois, 391 U.S. 194, 201 (1968)).

[109] *See* Br. for Resp't, *supra* note 107, at 13.

[110] Ex parte Burr, 4 F. Cas. 791, 797 2 D.C. (2 Cranch); *see also* Green v. United States, 356 U.S. 165, 185 (1958). Accordingly, many courts have discussed the relationship between criminal contempt and jury trial and have concluded or assumed that criminal contempt is not subject to jury trial under

Robertson also argued that in *Bloom v. Illinois*, criminal contempt was observed to be a "crime in the ordinary sense."[111] However, Robertson made no reference to the later explanation by the Court in *Young v. United States ex rel. Vuitton et Fils S.A.* that this "insistence on the criminal character of contempt prosecutions . . . [was simply] intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings,"[112] rather than to attest that criminal contempt proceedings bear no difference to other crimes. In short, the Court's statement that contempt is a "crime in the ordinary sense" did not suggest that there are no differences between criminal contempt and other crimes.[113]

Moreover, the Framers arguably would not have regarded petty criminal contempt as a "crime" at all.[114] The rationale for this argument is two-fold. First, many of the Framers were members of the First Congress, which enacted the Judiciary Act of 1789, authorizing the courts of the United States to "punish by fine and imprisonment, at the discretion of the said courts, all contempt of authority in any cause or hearing."[115] However, if the Framers had regarded the term "crimes" in the Constitution to be applicable to contempts, then they would not have violated the "constitutional command that 'Trial of all Crimes . . . shall be by Jury'[116] by authorizing summary punishment of contempt."[117] Secondly, the Framers also would not have considered contempt in this case as a "crime" because, as opposed to contempt being a petty criminal offense subject to a maximum sentence of six months' imprisonment,[118] "the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less

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Art. III, § 2, or the Sixth Amendment. *See* Eilenbecker v. District Court of Plymouth County, 134 U.S. 31, 36-39 (1890).

111 Br. for Resp't, *supra* note 107, at 25-26.

112 Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 800 (1987) (noting that a federal court can appoint a private attorney to prosecute a criminal contempt action if the executive refuses to prosecute).

113 Br. for Resp't, *supra* note 107, at 26-27. To the contrary,

"[t]his Court's decisions have recognized that contempt proceedings, including criminal contempt proceedings, differ from ordinary criminal proceedings in important ways: Contempts committed in open court may be punished summarily, without 'a hearing, counsel, and the opportunity to call witnesses.' Pounders v. Watson, 521 U.S. 982, 988 (1977); In re Oliver, 333 U.S. 257, 275 (1948); Cooke v. U.S., 267 U.S. 517, 534-35 (1925). Criminal contempt proceedings may be initiated by the court on its own motion. *See* Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 800-01 (1987). There is no right to a grand jury indictment in contempt cases. *See* Green v. U.S., 356 U.S. 165, 184 (1958). Although '[f]ederal crimes are defined by Congress, not the courts,' U.S. v. Lanier, 520 U.S. 259, 267 n.6 (1997), contempt is defined by the content of the court's order, not by a statute. *See* 18 U.S.C. § 401. For contempts, unlike other crimes, there may be no 'statutory limitation of the amount of a fine or the length of a prison sentence which may be imposed for their commission.' Green, 356 U.S. at 187."

114 Ex parte Burr, 4 F. Cas. at 797.

115 *Id.*

116 U.S. CONST. art. III, § 2, cl. 3.

117 Br. for Resp't, *supra* note 107, at 24.

118 *Id.* (quoting Pet. Br. App. 14).

consequence are comprised under the gentler name of 'misdemeanors' only."[119] Since the Sixth Amendment guaranteed only a right to trial in criminal cases, "in light of the popular understanding of the meaning of the word 'crimes,' as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses."[120]

C. Criticism of Robertson's Allegation that the Constitution and the Common Law Mandate that Criminal Contempt Proceedings be Brought on Behalf of the Government

Robertson conceded that the Constitution does not explicitly assert that criminal contempts must be prosecuted in the name of and pursuant to the power of the sovereign.[121] But, Robertson argued that "[t]he many references in the Constitution to crimes, offenses, criminal cases, and criminal prosecutions reflect settled common-law principles and definitions entirely familiar to the framing generation,"[122] which required all crimes, including criminal contempt, to be prosecuted in the name of the sovereign.[123] He further claimed that "these common law principles were incorporated into the Constitution through the use of terms such as 'crimes.'"[124] These allegations are incorrect.

1. The Constitution did not Require Criminal Contempt Actions to be Brought in the Name of the Sovereign

Despite Robertson's allegations, "there is no settled common law understanding, let alone constitutional requirement, that criminal contempt proceedings must be brought in the name of the sovereign."[125] Even if such a

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[119] Schick v. United States, 195 U.S. 65, 69-70 (1904) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769) (defining the word "crime")).

"Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it." *Id.* at 69.

[120] Br. for Resp't, *supra* note 107, at 24 (quoting Schick, *supra* note 119, at 70).

> In the light of this definition we can appreciate the action of the convention which framed the Constitution. In the draft of that instrument, as reported by the committee of five, the language was "the trial of all criminal offenses . . . shall be by jury," but by unanimous vote it was amended so as to read "the trial of all crimes." The significance of this change cannot be misunderstood. If the language had remained "criminal offenses," it might have been contended that it meant all offenses of a criminal nature, petty as well as serious; but when the change was made from "criminal offenses" to "crimes," and made in the light of the popular understanding of the meaning of the word "crimes," as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.

Schick, *supra* note 119, at 70.

[121] *See* Br. for Resp't, *supra* note 107, at 17-18.

[122] *Id.* (quoting Pet'r Br. at 14-15).

[123] *See id.* at 17-18

[124] *See id.*

[125] Br. for Resp't, *supra* note 107, at 23. "Robertson's argument to the contrary rests on an

requirement existed, it would not be "incorporated into the Constitution by the word 'crimes.'"[126] Granted that the "'language of the Constitution . . . could not be understood without reference to the common law' . . . 'the principles and history of which were familiarly known to the framers of the Constitution.'"[127] It does not follow from this observation, however, that the use of general terms such as 'crimes' incorporates into the Constitution the entire common law of crimes.

Conversely, "the Court has held that even when the Framers expressly included specific common law rights in the Constitution, they did not incorporate all the common law features of those rights."[128] The Court's rationale in *Williams v. Florida*, holding that "the 12-man [jury] requirement cannot be regarded as an indispensable component of the Sixth Amendment,"[129] applies with even greater force to this case.[130] In contrast to *Williams*, which considered a particular common law right expressly included in the Constitution, Robertson's argument was established on merely the "Framers' use of general terms such as 'crimes.'"[131] When Congress wanted to include in the Bill of Rights a particular feature of the common law of "crime," it used express language.[132] Similarly, in *Williams*, the Court also elucidated that its "holding does no more than leave these considerations to Congress and the States."[133] The same principle applies in the present case.[134] In addition, "many courts have expressly held that there is no requirement that

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erroneous assertion that there are no relevant differences between criminal contempt and other criminal proceedings." *Id.* As explained above, this is a fallacious argument.

[126] Br. for Resp't, *supra* note 107, at 18. "[Where] the Court considered whether the Sixth Amendment right to a jury trial 'necessarily requires trial by exactly 12 persons.'" *Id.* at 18 (citing Williams v. Florida, 399 U.S. 78, 86 (1970). "The Court acknowledged that 'at common law the jury did indeed consist of 12,' and also recognized that in earlier decisions the Court had suggested in *dicta* that this aspect of the common law was incorporated into the Sixth Amendment." *Id.* (citing Williams 399 U.S. at 86). "The Court nevertheless held that the Sixth Amendment right to a jury trial does not incorporate the common law right to a 12-person jury." *Id.*

[127] Schick, *supra* note 119, at 69 (quoting Moore v. United States, 91 U.S. 270 (1875); Minor v. Happersett, 88 U.S. 162 (1874)).

[128] Br. for Resp't, *supra* note 107, at 18-19. (alluding to Williams v. Florida, 399 U.S. 78, at 186).

[129] Williams v. Florida, 399 U.S. 78, 100 (1970). "The fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" *Id.* at 102 (quoting Duncan v. Louisiana, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)).

[130] *See* Br. for Resp't, *supra* note 107, at 20.

[131] *Id.*

[132] *Id. See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967) (noting the Framer's familiarity with the long common law history of the right to a speedy trial); WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 302-06 (1769) (describing the role of the grand jury in English common-law indictments); *Id.* at 335 (recognizing the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence). "Had the Constitution's use of the term 'crime' incorporated the entirety of the common law understanding of 'crime,' there would have been no reason to include these protections separately." Br. for Resp't, *supra* note 107, at 20-21.

[133] Williams v. Florida, 399 U.S. 78, at 103.

[134] *See* Br. for Resp't, *supra* note 107, at 22. "More than a decade of experience demonstrated that exclusive reliance on public prosecutors was 'inadequate in aiding victims in preventing further abuse.'" Green v. Green, 642 A.2d 1275, 1279 n.7 (D.C. 1994) (quoting D.C. Judiciary Comm. Report at 2)." Br. for Resp't, *supra* note 10788, at 22.

criminal contempt proceedings be brought in the name of the sovereign."[135] In sum, there is no constitutional requirement—and certainly not one identified by a general incorporation of the word "crimes" into the Constitution—that criminal contempt proceedings must be brought in the name of the sovereign.[136]

2. Private Prosecutions Were Well Established at the Time of the Founding

Furthermore, contrary to Robertson's arguments, "private prosecutions were well established at the time of the Founding"[137] and thus common law did not require all proceedings, including criminal contempt proceedings, to be brought by the sovereign. Historically, in England, private citizens carried out most criminal prosecutions—especially victims, who were intimately involved in criminal proceedings.[138] As Robertson conceded in the lower court, even outside the contempt framework, there is a "long tradition in our legal system of private person[s] serving as prosecutors to criminal actions."[139]

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[135] Br. for Resp't, *supra* note 107, at 28.

For example, the Illinois Supreme Court has held that '[c]riminal contempt proceedings do not have to be brought in the name of the People.' In re Marriage of Rodriguez, 545 N.E.2d 731, 734 (Ill. 1989). Similarly, the Indiana Supreme Court has determined that, so long as '[i]t was clear to all, including the Respondent, that this was a criminal contempt proceeding . . . it [was] unnecessary that the State actually be named.' In re Crumpacker, 431 N.E.2d 91, 95 (Ind. 1982). Likewise, the California Supreme Court has concluded that criminal contempt cases 'are not . . . required to be brought in the name of the people of the state, nor prosecuted by their authority.' Bridges v. Sup. Ct. of Los Angeles County, 94 P.2d 983, 989 (Cal. 1939), *rev'd on other grounds sub nom,* Bridges v. California, 314 U.S. 252 (1941). The Pennsylvania Supreme Court has explained that 'in most cases of a violation of a court order, the criminal contempt is really initiated or prosecuted by the aggrieved party; the contempt is not prosecuted in the name of the People and the State's Attorney is not even notified or aware of the proceedings.' Commonwealth v. Allen, 486 A.2d 363, 369 (Pa. 1984), *overruled on other grounds,* Commonwealth v. Yerby, 679 A.2d 217, 221 (Pa. 1996); *see also* McDougall v. Sheridan, 128 P. 954, 963 (Idaho 1913) ('[I]n a proceeding for contempt, it is not necessary to name the state as plaintiff.'); In re Contempt of Potter, 301 N.W.2d 560, 561 (Neb. 1981) (affirming contempt conviction over objection that '[t]he prosecution for contempt should have been brought in the name of the State and prosecuted by the county attorney'); Freeman v. Huron, 66 N.W. 928, 928 (S.D. 1896).

Id. at 28-29.

[136] *See* Brief For The United States As Amicus Curiae Supporting Respondent at 8, Robertson v. United States ex rel. Watson, 130 S. Ct. 2184 (2010) (No. 08-6261).

[137] Br. for Resp't, *supra* note 107, at 38. At the time of the Founding, in England and America, "prosecutions by victims of crime and their families were the rule, not the exception." *Id.* at 38-39.

[138] *See id.* at 40 (citing Douglas Hay, *Controlling the English Prosecutor*, 21 OSGOODE L.J. 165, 168-70 (1983)).

[139] Br. for Resp't, *supra* note 107, at 39 (quoting C.A. Post-Argument Br. at 4).

"('[T]hroughout much of the common law's history, private person served as the prosecutors to virtually all criminal actions'; '[T]he public prosecutor system . . . is a fairly new phenomenon in the common law legal tradition.'; '[T]he common law did not frown on the practice of having aggrieved persons serve as private prosecutors.'; 'Quite the contrary, having the putative victim of a crime (or his or her representative) serve as the prosecuting attorney was the norm.')"; "Private prosecutions were also common in America at the time of the Founding." *See* Br. for Resp't, *supra* note 108, at 39-41 (quoting Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 9 (2007).

Even after the Founding, a number of states "still have vibrant practices of private prosecutions of less serious statutory and general common law criminal offenses."[140] In New York, for instance, it has been common practice for the complainant to carry out the prosecution in certain cases, usually involving violations.[141] Similarly, other states permit private criminal prosecutions under certain circumstances.[142] Thus, this long-standing history depicts that the criminal contempt prosecution in *Robertson v. Watson* "does not inhabit 'an alternative universe' of 'prosecutions of a type never contemplated by the Framers [as alleged by Robertson].'"[143] In contrast, Watson's role in the legal action would have been entirely recognizable and accepted by the Framers.[144]

D. Criticism of Robertson's Allegation that a Private Criminal Contempt Action Creates an Impermissible Threat to Liberty

Robertson's contention that private criminal contempt actions pose severe attacks on the liberty of the violators of civil protection orders is unsubstantiated.

1. Private Criminal Contempt Proceedings do not Infringe Rights of Those Who Violate Protection Orders

Robertson further challenged private criminal contempt proceedings by arguing that prosecution by a private citizen violates due process.[145] In support, he

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[140] Br. for Resp't, *supra* note 107, at 41 (quoting Pet. C.A. Post-Argument Br. at 10 n.6).

[141] *See id.* at 41 (quoting People ex rel. Allen v. Citadel Mgmt. Co., 355 N.Y.S.2d 976, 978 (N.Y.C. Crim. Ct. 1974)).

[142] *Id.*

See, e.g., State v. Martineau, 808 A.2d 51, 53 (N.H. 2002) ('[P]rivate prosecutions continue to exist as a matter of New Hampshire common law' for petty offenses not involving jail time.); Olsen v. Koppy, 593 N.W.2d 762, 767 (N.D. 1999) (where the state attorney is neglectful, the trial court has discretion 'to appoint a private attorney in criminal proceedings'); State v. Storm, 661 A.2d 790 (N.J. 1995) (allowing private prosecutions by disinterested parties); Katz v. Commonwealth, 399 N.E.2d 1055, 1060 (Mass. 1979) (noting in landlord-tenant contempt case that '[p]rivate parties to civil litigation have the right to press both the civil and criminal aspects of the case'). Even where purely private prosecutions are not available, many states allow a substantial role for private prosecutors in criminal proceedings. *See, e.g.*, Vetcto v. State, 8 S.W.3d 805, 817 (Tex. Ct. App. 2000) (district court did not abuse discretion in permitting counsel retained by the victim's family, to present the prosecution's opening statement and examine half of the witnesses), overruled on other grounds, State v. Cook, 248 S.W.3d 172 (Tex. Crim. App. 2008); State v. Crouch, 445 S.E.2d 213, 219 (W. Va. 1994) (where public prosecutor did not attend a hearing, a private prosecutor retained by the victim's family could conduct the hearing 'in order to ensure that the case would be prosecuted vigorously'); State v. Addis, 186 S.E.2d 415, 417 (S.C. 1972) ('If [a private prosecutor] participates in the trial of a case and does only what a solicitor should do, the defendant has no right to complain.').

Br. for Resp't, *supra* note 107, at n.15.

[143] Br. for Resp't, *supra* note 107, at 42 (quoting Pet'r. Br. at 15).

[144] *See id.*

[145] *See* Brief For Domestic Violence Legal Empowerment & Appeals Project, et al. as Amici Curiae in Support of Respondent at 30 (quoting Pet'r. Br. at 47-60), Robertson v. United States ex rel. Watson, 130 S. Ct. 2184 (2010) (No. 08-6261).

made a hyperbolic claim that civil protection orders and their enforcement create an abusive "private 'criminal code' of virtually 'unbounded' scope."[146] As best articulated in an amicus brief in support of Ms. Watson, this argument lacks merit since enforcement of civil protection orders through private contempt proceedings are fully equipped with all pertinent procedural safeguards to guarantee fundamental fairness.[147] Notably, many state courts have considered, and rejected, challenges to the private criminal contempt enforcement of protection orders.[148]

a. Faulty Assumption that Private Contempt Proceedings will be Vengeful or Abusive

Robertson asserted that whereas private prosecutors can be expected to seek only vengeance, only public prosecutors will weigh the public interest and disinterestedly carry out justice.[149] However, empirical evidence and the extensive experience of domestic violence organizations and professionals state otherwise.[150] Many domestic violence victims' goals often include a preference for civil avenues over criminal trials. Civil remedies, while certainly desirable to defendants, are not accessible to prosecutors, who are limited to seeking criminal penalties.[151] It is unreasonable to believe that private lawyers will abuse the judicial process when representing victims in contempt proceedings.[152]

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[146] *Id.* at 30 (quoting Pet'r. Br. at 52).

[147] *See id.* at 34. This Court and the District of Columbia have appropriately assured accused criminal contemnors of all the key procedural protections normally afforded criminal defendants, including the right to defense counsel, Cooke v. U.S., 267 U.S. 517, 537 (1925); the proof beyond a reasonable doubt standard, Gompers, 221 U.S. 418, 441 (1911); trial by jury for serious contempt actions, Bloom v. Illinois, 391 U.S. 194, 198 (1968); and protection against double jeopardy, Dixon, 509 U.S. 688, 696 (1993); *see also* In re Wiggins, 359 A.2d 579, 581 (D.C. 1976) (recognizing foregoing due process protections and the right to confront the witnesses against him); D.C. Super. Ct. Dom. Viol. R. 9(b) (strict evidentiary requirements, right to present and rebut evidence); *id.* at R. 12(d), (notice); *id.* at R. 12(c) (right to counsel and appointment of counsel for defendant; right against compulsion to testify or give evidence); and 13(a) (right to appeal). But, especially given all these procedural protections to ensure fairness, the identity of the moving party raises no valid due process concerns. *See* Resp. Br. at 58-63; *see also* 13 C.J.S. Contempt § 82 (1917) ('[I]t is a matter of no importance who institutes the proceedings for contempt, since the alleged contemnor is not prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court').

[148] *Id.* at 30-31 ("*See, e.g.,* Olmstead v. Olmstead, 284 S.W.3d 27, 28 (Ark. 2008); Eichhorn, 111 P.3d at 548 (Colorado); Gordon, 960 So.2d at 39 (Florida); In re Marriage of Betts, 558 N.E.2d at 425 (Illinois); DeGeorge, 741 N.W.2d at 392-393 (Michigan); Moreland, 778 S.W.2d at 405-407 (Missouri)").

[149] *See* Br for Domestic Violence Legal Empowerment & Appeals Project, et al. as Amici Curiae in Support of Resp't, *supra* note 145, at 35.

[150] *Id.*

[151] *See id.* at 36 (citing Joan Meier, *The Right to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests,* 70 WASH. U. L. Q. 85, 110 (1992) ("The assumption . . . that private prosecutors are overzealous, singleminded, and inflexible--is distorted at best . . . Injured parties have a wide array of needs and desires. . . [P]rivate parties are in fact *more* likely to seek flexible resolutions of their disputes than are public prosecutors").

[152] *See id.* at 35. (citing Wilson v. Wilson, 984 S.W.2d 898, 904 (Tenn. 1998)) (a private lawyer does not "detract from the integrity of the judicial process" since a litigant's private attorney is "no less likely to seek justice and no more likely to be influenced by improper motives than a public prosecutor or a disinterested private attorney").

Also, even where contempt proceedings are privately initiated, courts—rather than the parties—control whether the proceeding continues, which claims to adjudicate, and any applicable sanctions."[153] Even if an attorney or an aggrieved victim files a frivolous criminal contempt application, sanctions are available, as they are in any legal proceeding.[154] The preceding rationales also combat the argument that allowing victims to bring private actions may lead to flooding of the courts. The likelihood of private criminal contempt actions overwhelming the court system is low. Moreover, courts should disregard any potentially minor increase in the number of contempt cases in light of the dire circumstances presented by many domestic violence victims. Hence, private contempt proceedings do not propose to be an outlet for vengeance or abuse, and the argument that they will lead to flooding of the courts appears exaggerated at best, given victims' inclination to avoid criminal trials and the courts' ability to control the initiation and direction of any proceeding.

b. No Cognizable Benefit to the Accused by State Prosecution of Criminal Contempt Proceedings

Robertson also insisted that the State alone should be allowed to enforce the civil protection order violations.[155] This is inconsistent, however, with "traditional fairness concerns underlying due process protections for defendants."[156] Although due process protections typically seek to level the playing field by limiting state power and augmenting defendants' procedural rights vis-à-vis the State, Robertson's "right" in this case would require that the "full machinery of the State," as opposed to the minimal powers of a private litigant, be brought against him.[157] Also, since accused contemnors are already given all procedural protections that guarantee fairness in process, the "only conceivable benefit to a defendant of prosecution by the State rather than a private litigant would be the possibility that the State will be less likely to bring an enforcement action at all (as in this case)."[158] But this interest in the non-enforcement of civil protection orders is not a valid interest, and it certainly does not reach the apex of a due process right.[159] Thus, state prosecutions of criminal contempt proceedings do not offer any cognizable advantage to the accused contemnor.

As explicated above, Robertson's allegations that "the history and text of the constitution demonstrate that crimes including criminal contempts are 'public

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153 *Id.* at 36.

154 *See* Br. for Domestic Violence Legal Empowerment & Appeals Project, et al. as Amici Curiae in Support of Resp't, *supra* note 145, at 37.

155 *See id.* at 39.

156 *Id.*

157 *Id.* at 37.

158 *Id.* at 39.

159 *See* Meier, *supra* note 151, at 112.

wrongs' and are required by the Constitution and common law to be brought in the name of the sovereign"[160] are false. Moreover, Robertson's other allegation that private criminal contempt actions create an impermissible threat to liberty is false as well.[161] Therefore, despite Robertson's allegations, bringing contempt charges in one's private capacity does not create a constitutional dilemma. Absent a constitutional bar, as explained below, it is not only feasible but necessary that domestic violence victims be permitted to bring criminal contempt actions in private capacity against perpetrators who have violated civil protection orders.

E. Strong Recognition of Criminal Contempt Charges Brought In Private Capacity

Despite the proposition that criminal contempt proceedings are between the public and the defendant,[162] a criminal contempt action is not a "criminal action" in the sense that it must be brought by the sovereign. Contempt proceedings "are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience,"[163] which must be within the court's authority to properly carry out their functions.

1. Contempt is a Special Situation, a "Sui Generis" Proceeding

Contempt is "an offense *sui generis*,"[164] and "contempts are neither wholly civil nor altogether criminal."[165] A criminal contempt proceeding should not be regarded as a "crime in the ordinary sense," but rather a "*sui generis* proceeding, meant to protect and enforce private orders between individual parties."[166] Even criminal contempt proceedings are "not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court."[167] As explained earlier, contempt proceedings, including criminal contempt actions, differ from ordinary criminal proceedings in significant ways.[168]

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[160] Br. for Pet'r, Robertson v. Watson, *supra* note 103, at 14.

[161] *See* Br. for Domestic Violence Legal Empowerment & Appeals Project, et al. as Amici Curiae in Support of Resp't, *supra* note 145, at 39.

[162] *See* Br. of Amicus Curiae Nat'l Ass'n of Criminal Def. Lawyers in Support of Robertson at 11, Robertson v. United States ex rel. Watson, 130 S. Ct. 2184 (2010) (No. 08-6261).

[163] Myers v. United States, 264 U.S. 95, 103 (1924); *see also* Frank v. United States, 395 U.S. 147, 152 (1969); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911).

[164] *E.g.*, *Frank*, 395 U.S. 147, 151 (1969) (quoting Cheff v. Schnackenberg, 384 U.S. 373, 379-80 (1966)).

[165] *Gompers*, 221 U.S. at 441.

[166] Br. of Amicus Curiae The Nat'l Crime Victim Law Institute in Support of Respondent at 14, Robertson v. United States ex rel. Watson, 130 S. Ct. 2184 (2010) (No. 08-6261).

[167] Young v. United States ex rel. Vuitton et Fils S.A. et al., 481 U.S. 787, 800 (1987).

[168] *See* Br. for Resp't, *supra* note 107, at 40-42; Br. of Amicus Curiae The Nat'l Crime Victim Law Institute in Support of Respondent, *supra* note 166, at 14 n.2 ("Despite th[e] linguistic classification [in Bloom v. Illinois regarding criminal contempts as 'crimes in the ordinary sense,' the current state of criminal contempt law still fails to extend all protections of criminal proceedings to criminal

A comparison of the treatment of criminal contempt to the treatment of civil contempt reveals that criminal contempt—like civil contempt—should be treated as "distinct from 'ordinary' crimes."[169] If courts treat criminal contempts as *sui generis*, and more akin to civil contempts than to "ordinary" crimes, they would be "properly styled in the name of the person bringing forward the action."[170] Since the "generic crime of contempt of court has different elements than . . . substantive criminal charges . . . they are separate offenses."[171] Moreover, "[t]he purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order."[172] Even historically, case law has distinguished between prosecutions of contempts, which have often been brought in the name of the private litigant, and criminal prosecutions.[173]

Whereas "a criminal proceeding is brought on behalf of the entire community to enforce fundamental community *mores,* a contempt proceeding is brought to enforce an order obtained through private litigation for the benefit of an individual private party."[174] Thus, at its fundamental core, the purpose of contempt proceedings—civil or criminal—is primarily private.[175] The distinction between

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contempts."). *See, e.g.*, Green v. United States, 356 U.S. 165, 185 (1958) (finding criminal contemnor has no right to grand jury indictment); *Myers*, 264 U.S. 95 at 104-105 (finding venue provisions of the Sixth Amendment to be inapplicable to criminal contempt proceedings).

169 Br. of Amicus Curiae The National Crime Victim Law Institute, *supra* note 166, at 14.

170 Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444-45 (1911).

171 United States v. Dixon, 509 U.S. 688, 714 (1993) (Rehnquist, J., concurring in part and dissenting in part) (noting that double jeopardy should not apply to contempt charges because it is a separate and distinguishable offense, and the elements of contempt are entirely different from the elements of the substantive crimes from which the contempt charges arose).

172 *Id.* at 742 (Blackmun, J., concurring in part and dissenting in part) (noting that contempt "is one of the very few mechanisms available to a trial court" in order to enforce its orders, and it should be considered as separate and distinct because it is serving the court's interest as opposed to that of the government).

173 *See* Br. of Amicus Curiae The National Crime Victim Law Institute, *supra* note 166, at 18-20. *See, e.g.*, Richmond Black Police Officers Ass'n v. City of Richmond, 548 F.2d 123, 129 (4th Cir. 1977) (overturning criminal contempt conviction on due process grounds, but finding no impropriety in practice of holding contempt proceeding on basis of complaining party's motion, with case styled in name of private party); Rogers v. Webster, 776 F.2d 607, 609-10, 612 (6th Cir. 1985) (per curiam) (vacating and remanding contempt order on Fifth Amendment grounds, but finding no impropriety in having private counsel for civil litigant to underlying suit bring forward criminal and civil contempt motions, with case styled in name of private party); Hubbard v. Fleet Mortgage Co., 810 F.2d 778, 781 (8th Cir. 1987) (per curiam) (finding no impropriety in having private counsel to underlying suit litigate 'dual' civil/criminal contempt motions, with case styled in name of private party); In re Marriage of Rodriguez, 545 N.E.2d 731, 734 (Ill. 1989) ('Criminal contempt proceedings do not have to be brought in the name of the People. A private party has standing to prosecute these actions'); McDougall v. Sheridan, 128 P. 954, 963 (Idaho 1913) ('[I]n a proceeding for contempt, it is not necessary to name the state as plaintiff.'); *see generally* Webber v. Webber, 706 P.2d 329, 329 (Alaska Ct. App. 1985) (finding no fault in interested private party initiating criminal contempt action, with case styled in name of private party); Eichorn v. Kelley, 111 P.3d 544, 548 (Colo. Ct. App. 2005) (allowing private interested contempt prosecution, with case styled in name of private party); Gordon v. State, 960 So. 2d 31, 40 (Fla. Dist. Ct. App. 2007) (allowing private, interested contempt prosecution).

174 Meier, *supra* note 151, at 127.

175 *See* Br. of Amicus Curiae The National Crime Victim Law Institute, *supra* note 166, at 16. Case law also reflects this notion that criminal contempt proceedings, unlike criminal proceedings generally, are, at their core, private. *See, e.g.*, Gordon v. State, 960 So. 2d

civil and criminal contempt proceedings has been a source of confusion for the courts, and treating criminal contempt actions as ordinary criminal proceedings would simply add to courts' confusion.[176] Indeed, "taking the criminal contempt proceeding outside the classification of a 'crime in the ordinary sense,' and rooting it back in its historical place as a *sui generis* proceeding, would further serve to ameliorate this confusion, and would avoid secondary harm to the victim."[177]

2. Modern Public Policy Rationales for Private Prosecution by Victims

Furthermore, permitting private, interested prosecutions is consistent with sound public policy of guaranteeing that victims are not deprived of court-ordered protections.[178] Since the interested party is in the best position to be aware of the contempt and bring it to the attention of the court, private, interested prosecution of criminal contempts is not only proper but also favorable.[179] On the other hand, failure to permit private interested parties to prosecute contempt orders would likely lead to the orders remaining unenforced, rendering them meaningless.[180] For a victim to endure the emotional and usually dangerous process of securing a

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31, 39 (Fla. Dist. Ct. App. 2007) . . . (allowing criminal contempt to proceed through private interested individual, and noting that '[a]lthough the public has an interest in an order entered in a family law or domestic violence case, this interest is far outweighed by the interest of the party seeking the enforcement or protection of the order'); Long v. Hutchins, 926 So. 2d 556, 561 (La. Ct. App. 2005) (Brown, C.J., dissenting) (*rev'd*, 926 So. 2d 556 (La. Ct. App. 2006)) ('[C]ontempts are fundamentally matters of private interest in a way that criminal prosecutions by the state are not. . . .'). *See generally* Young v. United States ex rel. Vuitton et Fils S.A. et al., 481 U.S. 787, 800 (1987) (noting that a criminal contempt is . . . 'conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings').

Id.

[176] *See* Br. of Amicus Curiae The National Crime Victim Law Institute, *supra* note 166, at 17 n.3.

See, e.g., Hicks v. Feiock, 485 U.S. at 631 (noting that in contempt cases, 'the 'civil' and 'criminal' labels of the law have become increasingly blurred'); Hubbard v. Fleet Mortgage Co., 810 F.2d 778, 781 (8th Cir. 1987) (per curiam) ('There is considerable confusion in the courts over the distinction between civil and criminal contempt. . . .'); Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 681-84 (1981) (noting difficulties in classifying civil versus criminal contempts).

Id.

[177] *Id.* at 17-18.

[178] *See, e.g.*, Wilson v. Wilson, 984 S.W.2d 898, 903 (Tenn. 1998) (noting that if private parties were not able to prosecute, it would cause many citizens to be "deprived of the benefits to which they already have been adjudged entitled by state courts and many state court orders would remain unenforced"). *See generally* Meier, *supra* note 151, at 90 (asserting that "without enforcement of civil orders by the 'interested private parties,' such orders will be virtually unenforceable and will become largely ineffective").

[179] Eichorn v. Kelley, 111 P.3d 544, 548 (Colo. Ct. App. 2005) (allowing private interested contempt prosecution, with case styled in name of private party). *See generally* DeGeorge v. Warheit, 741 N.W.2d 384, 392 (Mich. Ct. App. 2007) (stating that it is "manifest" that Michigan statutes "contemplate that a private party . . . may initiate and prosecute a motion to hold an opposing party in criminal contempt" since the private party is in the best position to observe the contempt).

[180] *See, e.g.*, Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 496-97 (1999) (stating that secondary victimization can occur when victims feel they are not given a meaningful role in the justice process).

protection order against the accused,[181] only to be told upon violation of that order that it is unenforceable, would likely cause the victim to feel that the process had been not only futile but also victimizing in itself.

This secondary victimization by the criminal justice system—even noted in debates by Congress during the enactment of the Crime Victims' Rights Act[182]—has been attested to by social scientists to be very real, as studies have found that victims' experiences in the criminal justice system can influence their recovery and psychological well being.[183] Hence, permitting victims of domestic violence to enforce the protection orders in criminal contempt proceedings can help avoid or diminish the adverse effects of re-victimization.

3. Resulting Current Trend of Victims' Private Rights in the Contempt Action

A strong history of private participation in the criminal justice system, including contempt proceedings, is consistent with the "current trend of the law resulting from the victims' rights movement, which emphasizes the importance of the victim's voice and ability to vindicate private interests."[184] The victims' rights movement was a grass-roots movement to protect and enforce victims' rights and has been successful in progressing victims' rights through legislation, constitutional amendments and case law.[185] The movement has effectively reinforced the desirability of victim participation in the criminal justice system, through legislation that "reflects a desire not to wed victims to the state, often including rights that are independent of the prosecutor."[186] Overall, both an originalist

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[181] *See, e.g.*, Molly J. Walker Wilson, *An Evolutionary Perspective on Male Domestic Violence: Practical and Policy Implications*, 32 AM. J. CRIM. L. 291, 308, 318 (2005) ("The evidence that women are at a particularly high risk of violence of homicide when they are posed to leave or recently have left a relationship is overwhelming.").

[182] *See* 18 U.S.C. § 3771, 150 Cong. Rec. S10910, S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("Too often victims of crime experience a secondary victimization at the hands of the criminal justice system.").

[183] Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, The Crime Victims' Rights Act, and the Victim's Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 82-83 (2010) (citing Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 314 (2002)) (noting that "secondary victimization" by the criminal justice system can adversely affect victims' "self-esteem, faith in the future, trust in the legal system, and belief in a just world").

[184] Br. of Amicus Curiae The National Crime Victim Law Institute, *supra* note 166, at 29.

> For instance, in *Morris v. Slappy*, the Court, in finding that a continuance to obtain defendant's counsel of choice was properly denied, stated that 'in the administration of justice, courts may not ignore the concerns of victims.' 461 U.S. 1, 14 (1983) . . . *See also* Calderon v. Thompson, 523 U.S. 538, 556 (1998) (Kennedy, J.) (recognizing that not only the state, but victims, too, have an interest in finality of judgments for, '[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out').

Id. at 29-30.

[185] *See* Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years after the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 32-33 (1999).

[186] Br. of Amicus Curiae The National Crime Victim Law Institute, *supra* note 166, at 30. Victims may also independently assert their right to restitution, absent state involvement. *See* Melissa J. v.

understanding and growing due process considerations favor victim participation, since both recommend against further denigration of victim participation.[187] As a result, a private party who has been adversely affected by the contempt should be allowed to continue bringing criminal contempt proceedings.[188] Thus, a historical understanding of victims' private rights in the contempt action, present-day jurisprudence and strong modern public policy lead to a solid recognition of private prosecution by victims in criminal contempt proceedings.

F. Privatizing Criminal Contempt Is Crucial to Domestic Violence Enforcement

1. Law Enforcement Lacks the Resources to Meet the Increasing Demands of Protection

Public enforcement of protection orders is not an effective alternative to private criminal contempt proceedings. In *Green v. Green*, the D.C. Attorney General's Office reported that it "prosecute[d] less than 10 percent of the criminal contempt motions brought for violations of civil protection orders, and ha[d] only one counsel available for that duty."[189] The Office maintained that it would be "hard pressed to prosecute all of the contempt motions filed in D.C. Superior Court given the current limited state of [its] resources."[190]

The Office further explained that it was "unable to draw on the resources of the section that handles perhaps the most nearly analogous work, because the ten attorneys in that section handle approximately 1,000 abuse and neglect cases per month."[191] In addition, the D.C. Attorney General stated that "volunteer assistance efforts from other divisions" of the Office "could not possibly [provide the]

Superior Court, 237 Cal. Rptr. 5, 6-7 (Cal. Ct. App. 1987).

[187] *See* Br. of Amicus Curiae The National Crime Victim Law Institute, *supra* note 166, at 31-32.

[188] *Id.*

[189] Green v. Green, 642 A.2d 1275, 1280 n.7 (D.C. 1994). Because the Office of the Corporation Counsel was unable to meet the demand for the growing number of CPOs, the Council amended the intrafamily offenses statute in 1982, authorizing victims of domestic violence to seek CPOs on their own initiative. *See* Cloutterbuck v. *Cloutterbuck*, 556 A.2d 1082, 1084 n.2. (D.C. 1989). The Council did so in recognition that "violence among family members is a growing national problem as well as a local phenomenon. The public record on Bill 4-195 is replete with testimony regarding the seriousness and widespread nature of domestic violence. Domestic violence includes spouse abuse, child abuse, and parent abuse. It may be carried out by physical, sexual, or emotional violence." Report Of The Council Of The District Of Columbia Committee On The Judiciary On Bill 4-195, The Proceedings Regarding Intrafamily Offenses Amendment Act Of 1982, at 1 (May 12, 1982). Amendments to the statute were initiated in response to "the substantial number of cases coming to the Office of Corporation Counsel, the Citizens' Complaint Center, and then eventually to the Superior Court." *Id.* at 2. Specifically, D.C. Code § 16-1003 was amended "to facilitate the effectiveness of the civil protection remedy by not requiring all alleged victims to go through the already heavily burdened Office of the Corporation Counsel. Thirty-six states currently have intra-family civil protection laws with a private right of action. The establishment of a private right of action in the D.C. Code is supported by virtually all commentators on Bill 4-195 including the offices of the U.S. Attorney and the Corporation Counsel." *Id.* at 10 (holding that D.C. law authorizes private parties to initiate criminal contempt proceedings for violation of a CPO).

[190] *Green*, 642 A.2d at 1280 n.7

[191] *Id.*

additional resources needed to prosecute all contempt motions."[192] Thus, exclusive reliance on public prosecutors is inadequate in aiding victims in preventing further abuse.

Furthermore, existing remedies, such as civil contempt, have been shown to be inadequate to prevent further abuse.[193] Violations of protection orders, which may be persistent and have strong adverse effects on the domestic violence victim as well as any children present, may be unaffected by civil contempt proceedings.[194] Strong vindictive emotions may cause some litigants to ignore protection orders; therefore, reminding them of the possibility of punishment is an important judicial tool for deterring violations.[195] Other positive effects also result from punishment of the actors through criminal contempt, such as expressing society's disapproval over the relevant actions and conveying a deterrent message to others, regardless of whether the actor himself is deeply affected by it.[196] Thus, at times, civil contempt is not sufficient both to vindicate a court's authority and protect the legally recognized rights of the order's beneficiary in addition to the public interest in enforcement of particular orders.

2. Appointment of an Independent Private Special Prosecutor is Neither Viable nor Necessary

Since state and local governments have insufficient resources to assign an adequate number of government prosecutors to domestic violence cases, it is unsurprising that they lack sufficient resources to reimburse private independent prosecutors.[197] Furthermore, no funds at the state level recompense private counsel employed to prosecute criminal contempt actions.[198] So, not only would an appointment of an independent private special prosecutor impose "tremendous fiscal and administrative burdens on the states,"[199] it would also "inject delay and

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[192] *Id.*

[193] *See id.* (citing Report Of The Council Of The District Of Columbia Committee On The Judiciary On Bill 4-195, The Proceedings Regarding Intrafamily Offenses Amendment Act Of 1982, at 2 (May 12, 1982).

[194] Brief for Amici Curiae Family Law Judges, Practitioners & Scholars In Support Of Respondent at 5, Robertson v. United States ex rel. Watson, 130 S. Ct. 2184 (2010) (No. 08-6261) ("Civil contempt alone is an insufficient remedy to vindicate the interests either of courts or of litigants in the enforcement of orders relating to family law.").

[195] *Id.* at 11 ("By necessity, family law judge[s] bea[r] the special burdens of enforcing not only prohibitory but also mandatory injunctive relief. That judge needs to be able to say: 'Next time you come into this court having violated my order, you had better bring your toothbrush.' That direct threat and its deterrent value are not achieved by threatening to call the prosecutor or to appoint a private person as a special prosecutor. Street knowledge that the prosecutor lacks the resources and/or interest, and that the Court lacks the funds to compensate the special prosecutor, will render the Court's words entirely hollow.").

[196] *See id.* at 12.

[197] *See id.* at 19.

[198] Gordon v. State, 960 So. 2d 31, 40 (Fla. 2007).

[199] Wilson v. Wilson, 984 S.W.2d 898, 903 (Tenn. 1998).

additional expense into proceedings where litigants are often of limited means."[200] In addition, "[t]he inherent delay and uncertainty of referral to an independent prosecutor reduces the deterrent effect of the criminal contempt sanction and thereby reduces the judiciary's ability 'to vindicate its own authority without complete dependence on other Branches.'"[201]

Apart from not being viable, in terms of fairness, a governmental or private special prosecutor is not required in criminal contempt proceedings.[202] First, although the independent prosecutor may be less zealous than a spiteful private party, the judge can certainly stop any undesirable consequences of overzealousness by refusing to continue the application.[203] Second, no unfairness is present in making the court play a more central and inquisitorial role in establishing the facts that call for criminal penalties in such cases where the court has the relevant witnesses and documents concerning the case.[204] Third, criminal contempt is likely to be used in the context of petty criminal contempt, which would not be tried by a jury under *Bloom v. Illinois*.[205] Therefore, as is the case with civil contempt, the judge would be able to entirely control the outcome.[206]

3. Private Enforcement is Critical to the Effectiveness of Protection Orders

Foreclosing private parties' right to bring contempt actions creates a risk of silencing vulnerable populations.[207] The Due Process Clause mandates the states to give certain litigants a "meaningful opportunity to be heard" by eliminating hindrances to their full participation in judicial proceedings.[208] Such meaningful opportunity can be presented by permitting private parties—specifically domestic violence victims—to bring contempt actions, which would draw the courts' attention to the perpetrator's violations and defiance.[209]

Moreover, mandating the appointment of a disinterested prosecutor risks foreclosing effective redress for the victim.[210] Prosecutors have an "institutional disinterest" in protection orders regarding private parties.[211] One should be wary to assume that prosecutors will pursue all contempt actions arising from alleged violations of civil court orders.[212] In the absence of an interested prosecutor,

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200 *Gordon*, 960 So. 2d at 39.

201 Brief for Amici Curiae Family Law Judges, *supra* note 194, at 21 (citing Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 796 (1987).

202 *See id.*

203 *See id.*

204 *See id.*

205 *See id.* (citing Bloom v. Illinois, 391 U.S. 194 (1968)).

206 *See* Brief for Amici Curiae Family Law Judges, *supra* note 194, at 21.

207 *See id.* at 22.

208 Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

209 *See id.*

210 Brief for Amici Curiae Family Law Judges, *supra* note 194, at 22.

211 *Id.* at 23.

212 Gordon v. State, 960 So. 2d 31, 39 (Fla. 2007); *see also* Wilson v. Wilson, 984 S.W.2d 898, 903

criminal contempt proceedings brought by the aggrieved private party would likely be the most effective remedy to prevent recurrence.[213] Practitioners in family law are "all too aware of the identified noncompliance" in this area.[214] These persistent violations—revealing a blatant lack of respect by intractable violators and destroying the ability of courts to safeguard the rights of continually victimized parties—are likely not going to be effectively combated by disinterested prosecutors.[215]

CONCLUSION

Domestic violence legislation preceding and succeeding the Battered Women's Movement has brought forth various remedies by the justice system. While many remedies neglect the wide-ranging needs of the victims, civil protection orders are one remedy that can prove to be an effective sword if effectively honed by the strength of private contempt actions. Although domestic violence victims and groups achieved a victory in *Robertson v. United States ex rel Watson*, it is likely that this issue will be revisited in the future owing to the strong dissent in the same.

This Note promotes private criminal contempt actions by refuting Robertson's contentions that the Constitution declares criminal contempt a public wrong and that the Constitution and common law mandate that criminal contempt actions be brought only by the government. As seen in the rationales disproving several allegations by Robertson against private criminal contempt actions, this nation's history, public policy and modern day case law all support the absence of any bar—constitutional or otherwise—to criminal contempt proceedings brought by private parties. In light of the inadequacy of public enforcement, privatizing criminal contempt actions to enforce civil protection orders is a necessary tool for domestic violence victims to seek immediate and more effective recourse for violations of such orders. The deficient resources of law enforcement agencies and the infeasibility of appointing independent private special prosecutors are two-fold grounds for private enforcement being critical to the effectiveness of civil protection orders. The relative ease, autonomy and efficacy of private criminal contempt actions will likely aid in the prevention of recurrent abuse by improving the benefits of court-ordered protections. Hence, in light of the dangerous picture painted by domestic violence on the victims' lives, this Note recommends that victims bringing criminal contempt actions in their private capacity become an incontestable reality and one small leap into a liberated future.

(Tenn. 1998) ("It is unrealistic to expect district attorneys to prosecute contempt actions arising from alleged violations of civil court orders. District attorneys already have a heavy case load prosecuting violations of the general criminal laws.").

213 Brief for Amici Curiae Family Law Judges, *supra* note 194, at 24.

214 *Id.*

215 *See id.*