

Leaping Without Looking: Chapter 142's Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota

Mary Schouvieller*

Introduction	594
I. Ex Parte Protection Orders	598
A. Origin and Purpose	598
B. Ex Parte Protection Orders Before Chapter 142 ...	599
II. Chapter 142 and Its Impact	600
A. The Impetus and Rationale for Change	600
B. An Overview of Chapter 142	603
C. The Response of Advocates and the Courts to Chapter 142	604
III. The Constitutionality Question	610
A. <i>Baker</i> and the Validity of Ex Parte Protection Orders Before Chapter 142	613
B. Reconsidering Chapter 142: Due Process Concerns	618
IV. Other Considerations: Effectiveness, Enforceability and the Impact of Self-Finalizing Ex Parte Protection Orders on Women as Victim/Survivors	626
A. Implementation Issues: The Judiciary	626
B. Enforcement Issues	628
1. Law Enforcement Officials	628
2. Service of Notice	630
C. The Benefits and Costs to Women as Victim/ Survivors	632
V. Making Ex Parte Protection Orders Work	637
Conclusion	643

* J.D., University of Minnesota Law School, expected 1997; B.A., Journalism, University of Minnesota, 1990. The author wishes to thank the many members of the domestic abuse advocacy community who were kind enough to share their insights and opinions, colleagues Amy Dugal, Randi Levine and Ann Hale for their constructive criticism, and Professors Beverly Balos and Mary Lou Fellows for their comments on an earlier draft of this Note.

Introduction

Victims are empowered . . . by their alliance with criminal justice agencies. Threatened sanctions for continuing abuse, whether made explicitly by victims or implicitly by the attention of the state, are made credible by the state's willingness to exercise its power As long as the alliance holds . . . [a victim] should find protection . . . [b]ut the alliance must also be potent.¹

In the wake of growing public awareness of violence within family structures² and the justice system's ineffectiveness in dealing with the needs of victims,³ a number of progressive legal re-

1. David A. Ford & Mary Jean Regoli, *The Preventative Impact of Policies for Prosecuting Wife Batterers*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 181, 204 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (reporting on the effectiveness of various prosecutorial responses to domestic abuse and suggesting that the key to preventing future violence against a woman/victim is not prosecution, but the existence of a strong victim-system alliance).

2. Recently domestic violence has received unprecedented publicity in Minnesota, largely because of a number of cases involving "celebrity batterers" such as football great O.J. Simpson, Minnesota Vikings football quarterback Warren Moon and Minnesota Senator Kevin Chandler. See Kay Harvey & Jim Ragsdale, *Big Names Put Domestic Abuse in Less Forgiving Light*, ST. PAUL PIONEER PRESS, July 29, 1995, at A1 (commenting that "not long ago similar incidents would have been shoved into the family closet when victims refused to press charges," but now, because of a "new community standard" and a "shrinking tolerance for domestic abuse," such incidents are becoming "everybody's business").

Publicity is often recognized as a remedy for societal ills. See, e.g., Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed., 1933)). "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Id.* Although increasing attention and public denouncement of domestic abuse is a step toward change, one should not infer that great strides have been made in stopping domestic abuse or eliminating its causes.

In fact, we have only recently begun to assess the pervasive effects of domestic abuse. In the United States, three to four million women are beaten in their homes each year by their husbands or partners. MINNESOTA COALITION FOR BATTERED WOMEN ET AL., ARTS ACTION AGAINST DOMESTIC VIOLENCE: THE FACTS (1992) [hereinafter ARTS ACTION AGAINST DOMESTIC VIOLENCE]. Thirty-four percent of female homicide victims aged 15 years or older are killed by their husbands, ex-husbands or boyfriends. *Id.* Employers lose millions annually to turnover, absenteeism and excessive use of medical benefits because of domestic abuse. *Family Life as a Workplace Issue: Twin Cities Companies Work to Prevent Domestic Abuse and Violence*, WORKING WOMAN, Jan. 1991, at 6. At least 25% of workplace performance problems are a result of conflicts at home. *Id.* In 1993, the American Medical Association announced that violence had reached "epidemic proportions" and called on doctors to examine patients routinely for abuse. Sarah Glazer, *Violence Against Women*, CONG. Q. RESEARCHER, Feb. 26, 1993, at 171. See also *Violence Against Women is Now Grounds for Asylum*, STAR TRIB. (Minneapolis), May 27, 1995, at A4 (announcing the Immigration and Naturalization Service's new guidelines formally recognizing rape, domestic abuse and other forms of violence against women as potential grounds for political asylum).

3. Headlines and accounts of vicious and sometimes fatal violent acts committed against family members and the criminal justice system's failure to intervene served as an impetus for the "spreading network" of shelters designed to assist vic-

forms have emerged.⁴ These reforms include warrantless arrests (pro-arrest policies),⁵ anti-stalking laws,⁶ prosecutions without vic-

tims of "wife battering." Eve S. Buzawa & Carl G. Buzawa, *Introduction, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE*, *supra* note 1, at vii. This network of advocates began to recognize and articulate the existence of a "profoundly unresponsive criminal justice system" in which "the police and courts extended, often deliberately, only the scantest attention to the needs of such victims." *Id.* See also Blake Morrison, *Hennepin County to Open New and Improved Domestic Abuse Victim Service Center in Fall*, ST. PAUL PIONEER PRESS, June 28, 1994, at C5.

[D]omestic abuse arrests by Minneapolis police appear to be increasing, from about 3,000 in the first 11 months of 1990 to 3,646 in the same period in 1993. Given the current system . . . about half of the victims aren't likely to have the strength or desire to push forward with the prosecution of their abusers.

Id.

This Note uses the term "domestic abuse victim" rather than "battered woman" wherever possible in recognition of Elizabeth Schneider's observation that the term "battered woman" focuses on the woman, as opposed to the perpetrator of the harm caused. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman Abuse*, 67 N.Y.U. L. REV. 520, 530 (1992). Because the overwhelming majority of victims of domestic violence are women, this Note will also use the terms "victim," "woman," "petitioner," or "she" interchangeably when referring to abuse victims. See *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 n.1 (1993) [hereinafter *Developments*] (acknowledging that while victims and perpetrators of domestic violence do not always divide along gender lines, batterers tend to be male and victims tend to be female in the vast majority of cases). Similarly, this Note will use "respondent," "he," or "batterer" when referring to alleged abusers. See U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983) (citing statistics that men commit 95% of all assaults on partners or ex-partners).

4. See Buzawa & Buzawa, *supra* note 3, at xi (discussing the public and political pressures that led to "wholesale changes" in how state statutes addressed domestic violence). The minimal responses of societal institutions to advocates' demands to do more to protect women led to the "uncovering and publicizing of major attitudinal and structural impediments to performance." *Id.* at vii. As a result, feminists began to "discern a clear, if perhaps unconscious, pattern by which the criminal justice system ignored crimes committed against women" and to rally themselves to combat it. *Id.* at vii-viii. Pressure mounted, and from the late 1970s through the 1980s, feminists pushed to change the criminal justice system's policies of intervention and interaction with family violence. *Id.* at viii. Accordingly, successive movements have advocated different structural and procedural approaches for deterring, stopping and punishing domestic violence. *Id.*

See generally Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 854 (1994) (referring to the "veritable explosion" in the number of laws enacted since the 1970s to combat the problem of domestic abuse); *Developments*, *supra* note 3, at 1528-51 (explaining and evaluating recent state and federal responses to domestic violence); 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 (1993) (providing a summary of state initiatives for combating domestic abuse).

5. See generally J. David Hirschel & Ira Hutchinson, *Police-Preferred Arrest Policies*, in WOMAN BATTERING: POLICY RESPONSES 49 (Michael Steinman ed., 1991); Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, 36 AM. BEHAVIORAL SCIENTIST 651 (1993); Corsilles, *supra* note 4, at 854; *Developments*, *supra* note 3, at 1535-40.

tim cooperation,⁷ and modified orders for protection (mutual and ex parte).⁸ Although some praise such reforms for providing committed justice personnel with creative tools to aggressively pursue batterers,⁹ others criticize the reforms for failing to address obstructionist attitudes and operational practices¹⁰ that lead to the uneven and uncoordinated implementation of current laws.¹¹ As a result, a number of progressive reforms have stalled in practice even though they seemed promising on the books.¹²

One such promising yet troubling reform is Chapter 142,¹³ a controversial 1995 amendment to Minnesota's Domestic Abuse Act.¹⁴ Chapter 142 allows victims of immediate and threatened vi-

6. See generally Cassandra Ward, *Minnesota's Anti-Stalking Statute: A Durable Tool to Protect Victims from Terroristic Behavior*, 12 LAW & INEQ. J. 613 (1994); Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525 (1993); Wayne E. Bradburn, Jr., *Stalking Statutes: An Ineffective Legislative Remedy for Rectifying Perceived Problems with Today's Interjunction System*, 19 OHIO N.U. L. REV. 271 (1992); Richard A. Lingg, *Stopping Stalkers: A Critical Examination of Anti-Stalking Statutes*, 67 ST. JOHN'S L. REV. 347 (1993); Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation*, 31 HARV. J. ON LEGIS. 1 (1994).

7. See generally Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse, in WOMAN BATTERING: POLICY RESPONSES*, *supra* note 5, at 95; *Developments, supra* note 3, at 1540-41; Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 321-27 (1985).

8. See generally Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not*, 67 IND. L.J. 1039 (1992); Klein & Orloff, *supra* note 4, at 1031-43, 1074-77; Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163 (1993); Dorothy Carl Quinn, *Ex Parte Protection Orders: Is Due Process Locked Out?*, 58 TEMP. L.Q. 843 (1985).

9. See Corsilles, *supra* note 4, at 855 (proclaiming that despite the "criminal justice system's continued ineffectiveness . . . committed police commissioners, district attorneys, and attorneys general have seized the tools provided to them by their respective legislatures to vigorously enforce domestic violence laws").

10. *Id.* ("[A]lthough legislative enactments have removed many structural impediments to prosecuting batterers, operational practices remain unchanged."); Kinports & Fischer, *supra* note 8, at 165 (asserting that apparently progressive domestic violence laws fail because they are reshaped to "reflect longstanding cultural attitudes that demean, discredit, and subordinate women").

11. *E.g.*, Buzawa & Buzawa, *supra* note 3, at viii ("Responses are uneven and uncoordinated among jurisdictions, even within municipalities, among the police, the prosecutors, and the courts.").

12. See, *e.g.*, Lynne Henderson, *Getting to Know: Honoring Women in Law and Fact*, 2 TEX. J. WOMEN & L. 41 (1993) (asserting that societal norms are a major reason for the failure of seemingly progressive rape statutes); Kinports & Fischer, *supra* note 8, at 165 (expanding Henderson's assertion to apply to provisions in domestic violence reform legislation governing protection orders).

13. Domestic Abuse Act, ch. 142, sec. 5, § 7(c), 1995 Minn. Laws 258, 260 (codified as amended at MINN. STAT. § 518B.01). See *infra* Appendix A.

14. MINN. STAT. § 518B.01 (1994).

olence to obtain a one-step, *self-finalizing* ex parte protection order. The reform replaces the previous two-step, *temporary* ex parte protection order which did not become a final remedy until after a mandatory hearing.¹⁵ Although heralded by proponents as a means for increasing victim access to ex parte relief,¹⁶ Chapter 142's critics have expressed concern that the amended protection order will cause new, unanticipated problems and may even be unconstitutional.¹⁷

The controversy generated by innovative domestic abuse reforms leads one to question just what impact problematic reforms have on women already victimized by violence. In other words, what is the effect of reforms that are neither credible (because the state is unwilling to fully use them) nor potent (because they are ultimately ineffective)? This Note seeks to explore these issues by examining them in the context of Chapter 142.

Part I of this Note provides background on the significance of, and apprehensions related to, the use of ex parte protection orders to combat domestic abuse. Part II spells out the changes Chapter 142 makes in ex parte protection order relief and discusses courts' and domestic abuse advocates' concerns about the amendment. Part III evaluates the merits of these concerns. Part IV argues that the modified ex parte protection order created by Chapter 142, although well-intentioned and in many respects beneficial to abuse victims, is a flawed remedy that is unlikely to have any real impact on domestic violence against women. Part V concludes, however, that with some modification Chapter 142 can be shaped into a more

15. See MINN. STAT. § 518B.01(7) (1994) (containing the unmodified text of the previous temporary ex parte order). See generally Kinports & Fischer, *supra* note 8, at 165-66 (explaining the two-step process typically used in temporary or emergency ex parte protection orders); Quinn, *supra* note 8, at 846-47 (discussing the origin and characteristics of temporary ex parte relief).

Prior to Chapter 142, victims confronting situations of immediate and threatened violence could obtain only temporary ex parte orders that expired after two weeks if not renewed at a "final" or full hearing. MINN. STAT. § 518B.01(7)(a), (e) (1994), amended by ch. 142, sec. 5, § 7(a), (e) (Supp. 1995). Chapter 142 changes this by providing that "[i]f neither the petitioner [nor the respondent requests a hearing, then the ex parte order for protection becomes the final order." BATTERED WOMEN'S LEGAL ADVOCACY PROJECT, SOUTHERN MINNESOTA REGIONAL LEGAL SERVICES, INC., ORDERS FOR PROTECTION WITHOUT HEARINGS: SUMMARY AND TIPS 1 (July 13, 1995) [hereinafter SUMMARY AND TIPS] (on file with author). The mandatory hearing provision, therefore, is discretionary. A petitioner's initial order for protection becomes the final order for protection and is valid for up to one year without any need for a hearing. *Id.*

16. See *infra* text accompanying notes 36-48, 69-74 (discussing perceived benefits of Chapter 142).

17. See *infra* text accompanying notes 75-100 (discussing concerns levied against Chapter 142).

meaningful tool that better enables victim/survivors to leave violent situations.

I. Ex Parte Protection Orders

A. Origin and Purpose

A civil protection order (hereinafter protection order) is a binding court mandate prohibiting an abuser from committing further acts of violence against his victim.¹⁸ Although a protection order's effectiveness is limited,¹⁹ it does offer a domestic violence victim an alternative and supplement to the more severe and stigmatic options of criminal prosecution or divorce.²⁰ In addition to ordering a batterer to stop his violent conduct, a protection order often requires him to vacate a shared residence,²¹ thus providing a victim with a means for immediate physical separation from her abuser.²²

An ex parte motion is a request made to the court by one party to an action in the absence, and often without the knowledge, of the other party.²³ An ex parte protection order, therefore, grants a domestic violence victim relief without providing her abuser with no-

18. PETER FINN & SARAH COLSON, NATIONAL INSTITUTE OF JUSTICE, ISSUES & PRACTICES, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT (1990); see also Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43 (1989) [hereinafter Finn, *Statutory Authority*] (reviewing civil protection order legislation). "These orders may provide further protection by evicting the batterer from a shared residence, arranging for temporary custody of children, limiting child visitation rights, requiring payment of child support, and ordering the batterer to attend mandatory counseling." *Id.*

19. Finn, *Statutory Authority*, *supra* note 18, at 45 (listing criticisms of ex parte orders including susceptibility to fraud, reinforcement of a "soft" approach to serious crime, and widespread lack of enforcement); see also *infra* notes 84-86 and accompanying text (discussing the perception of orders as "worthless pieces of paper").

20. Finn, *Statutory Authority*, *supra* note 18, at 45; see also Quinn, *supra* note 8, at 846 ("Civil protection orders . . . avoid the need to rely on socially stigmatizing criminal sanctions."); see *infra* notes 89, 184-86, 192 and accompanying text (discussing the importance of the victim-system alliance as a means for empowering victims).

21. Quinn, *supra* note 8, at 847; see Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 247-48 (1994) (arguing that evicting the abuser is the only fair solution because any other response further victimizes the woman by forcing her to flee her home when she has committed no crime).

22. Quinn, *supra* note 8, at 846.

23. Nadine Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95, 99 (1980). See also BLACK'S LAW DICTIONARY 517 (5th ed. 1979) (defining ex parte as "a judicial proceeding, order, injunction, etc. . . taken at the instance and for the benefit of one party only, and without notice to or contestation by, any person adversely interested").

tice or a hearing.²⁴ An ex parte protection order is important because it facilitates a victim's immediate safety by not delaying protection until her alleged abuser is notified and a hearing is held to validate the order.²⁵

B. Ex Parte Protection Orders Before Chapter 142

Prior to the promulgation of Chapter 142, a court could issue an ex parte protection order only if the petitioning victim alleged immediate and present danger of domestic abuse²⁶ and provided a sworn and factually specific affidavit.²⁷ The resulting order was temporary in nature, and renewable only following a mandatory hearing held no more than seven days after the order's issuance.²⁸ Notice outlining the conditions and consequences of the order was served on the alleged abuser either in person,²⁹ by mail or by publication.³⁰ If the respondent did not appear at the scheduled,

24. Quinn, *supra* note 8, at 847; see, e.g., MINN. STAT. § 518B.01(7)(a)(1)-(2); see *infra* Appendix A.

Ex parte protection orders are themselves the product of legislative reforms designed to address some of the "clarity" problems generally associated with protection orders. Finn, *Statutory Authority*, *supra* note 18, at 45-46. These problems include a lack of clarity regarding the scope of protection orders, the kinds of relief available, and the types of victims and offenses eligible for protective relief. *Id.* One approach for resolving these problems was to develop more numerous and clearly-defined statutory tools. *Id.* at 46. Ex parte protection orders developed as a result of this proliferation of distinct procedural tools. See *id.* See generally Quinn, *supra* note 8, at 846 (addressing the origins of civil protection orders generally and ex parte orders specifically).

25. Peter Finn, *Civil Protection Orders: A Flawed Opportunity for Intervention*, in WOMAN BATTERING: POLICY RESPONSES, *supra* note 5, at 155, 171.

26. MINN. STAT. § 518B.01(7)(a) (1994), amended by ch. 142, sec. 5, § 7(a) (Supp. 1995); see also *Baker v. Baker*, 494 N.W.2d 282, 285 (Minn. 1992) (comparing the Act to a "band-aid" because it was designed to curtail, only in the short term, the harm one member of a household might be doing to another).

27. MINN. STAT. § 518B.01(4)(b) (1994); see also *Baker*, 494 N.W.2d at 287 (citing MINN. STAT. § 518B.01(4)(b)) ("[T]he petition must be 'accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.'").

28. MINN. STAT. § 518B.01(7)(c) (1994), amended by ch. 142, sec. 5, § 7(c). The temporary order was valid for a fixed period which was not to exceed 14 days. *Id.* The order automatically expired unless renewed at the mandatory hearing. *Id.* § 518B.01(7)(d).

29. *Id.* § 518B.01(8)(a) ("The petition and any order issued under this section shall be served on the respondent personally.").

30. *Id.* § 518B.01(8)(c) ("If personal service cannot be made, the court may order service . . . by alternate means, or by publication . . . as in other actions.") (emphasis added). Thus, where the petitioner properly applied for alternative service with the court, the court could, where it deemed appropriate, order "service by first class mail, forwarding address requested, to any addresses where there is a reasonable possibility that mail or information will be forwarded or communicated to the respondent." *Id.* Similarly, service by publication was available where the court believed "it might reasonably succeed in notifying the respondent of the proceeding." *Id.* The terms of service by publication were defined as follows:

mandatory hearing, the petitioner's protection order would usually be renewed by default.³¹ If, however, *the petitioner* did not appear for any reason, the protection order was usually dismissed.³²

II. Chapter 142 and Its Impact

A. *The Impetus and Rationale for Change*

The impetus for Chapter 142 was a letter sent by a family court judge³³ in outstate Minnesota to his elected official³⁴ in the Minnesota House of Representatives.³⁵ In his letter the judge suggested changes to the temporary ex parte protection order provision as a way to conserve judicial resources and remedy two troubling trends he observed relating to mandatory, ex parte protection order hearings.³⁶

[S]ervice may be made by one week published notice, as provided under section 645.11, provided petitioner files with the court an affidavit stating that an attempt at personal service made by a sheriff was unsuccessful because the respondent is avoiding service by concealment or otherwise, and that a copy of the petition and notice of hearing has been mailed to the respondent at the respondent's residence or that the residence is not known to the petitioner. Service under this paragraph is complete seven days after publication. The court shall set a new hearing date if necessary to allow the respondent the five-day minimum notice required under paragraph (a).

Id. § 518B.01(5)(b), amended by ch. 142, sec. 4, § 5(b) (Supp. 1995). Moreover, the court could "require the petitioner to make telephone calls to appropriate persons." *Id.* § 518B.01(8)(c). Service was "deemed complete" 21 days after mailing or after court-ordered publication. *Id.*

31. Telephone Interview with the Honorable Judge Gerard Ring, Minnesota State Court, Third Judicial District, Olmstead County (Oct. 13, 1995) (noting that of the nearly 90 counties in Minnesota, Hennepin County was the only one to issue arrest warrants for respondents who failed to appear at the mandatory hearing).

32. *Id.*

33. Judge Gerard Ring is a member of the state court bench for the Third Judicial District. Judge Ring developed the idea for the amendment and sought feedback and initial support from the women's advocacy agency in his local community of Rochester, Minnesota. Telephone Interview with Jody Tharp, Facilities Manager, Rochester Women's Shelter, Inc. (Feb. 23, 1996).

34. Representative David Bishop is the State Representative for the Third Judicial District.

35. *Hearings on H.F. 927 Before the House Judiciary Comm.*, 79th Sess. (Mar. 31, 1995) [hereinafter *Hearings*] (statements of Representative David Bishop) (available on tape at the Minnesota Legislative Library, Tape 5). Chapter 142 began as a bill introduced by State Representative Bishop in March 1995. Telephone Interview with Representative David Bishop, Minnesota House of Representatives (Sept. 25, 1995). Olmstead County, the site of Judge Ring's court, is located in Representative David Bishop's district.

36. Telephone Interview with Judge Gerard Ring, *supra* note 31; see also *Hearings*, *supra* note 35.

First, over half of the scheduled hearings went uncontested and unattended by alleged abusers.³⁷ These "non-hearings" consumed valuable time and resources on an already overcrowded court calendar.³⁸ Given that hearings were mandatory and scheduled by the court, delay and administrative inefficiency were unavoidable.³⁹ Moreover, because petitioners were compelled to appear,⁴⁰ hearings without the alleged batterer in attendance wasted not only the court's time, but also the victims'.⁴¹

Second, some of the victims who appeared at the hearings were unprepared for the procedure awaiting them.⁴² Petitioners would sometimes come to court uninformed and pro se, only to face abusers who arrived with counsel and/or witnesses.⁴³ These wo-

37. Telephone Interview with Judge Gerard Ring, *supra* note 31; see, e.g., Finn, *supra* note 25, at 171 (noting it is "unusual for a batterer to request an emergency hearing to oppose his eviction"). Judge Ring's experience seems borne out in other jurisdictions. One example is Springfield, Illinois where "even with a court summons only one-third of all respondents show up at scheduled hearings for permanent orders. Furthermore, when they do come, they generally admit to having assaulted their wives or girlfriends (but claim that the beatings were not 'serious')." *Id.* Interestingly, "[t]he reason [respondents] appear at all is usually to contest custody or visitation provisions, not eviction." *Id.*

38. Telephone Interview with Representative David Bishop, *supra* note 35. The term "non-hearing" was used to describe scheduled hearings at which one of the necessary parties did not appear. *Id.*; see also *Hearings*, *supra* note 35. Representative Bishop, the House sponsor of the bill, stated that the idea "came from Judge Ring who was disturbed by how many times his court calendar for hearings was full of . . . scheduled hearings at which nobody showed up." Telephone Interview with Representative David Bishop, *supra* note 35.

39. Telephone Interview with Representative David Bishop, *supra* note 35; see also *Hearings*, *supra* note 35.

40. If the petitioner failed to appear the order would be dismissed. Telephone Interview with Judge Gerard Ring, *supra* note 31.

41. *Id.* See generally Judge Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 430 (1990) (identifying the various hardships victims face by simply appearing in court).

42. Telephone Interview with Judge Gerard Ring, *supra* note 31; see, e.g., *Metchel v. Metchel*, 528 N.W.2d 916, 918 (Minn. Ct. App. 1992) (providing a vivid example of the risks that exist when a petitioner appears pro se). See generally Donna Halvorsen, *Victim's Advocates Press Legislators for Help*, STAR TRIB. (Minneapolis), Mar. 26, 1992, at B1 (stating that 95% of those seeking protective orders are women and most of these appear pro se).

43. Telephone Interview with Judge Gerard Ring, *supra* note 31; see Voris, *supra* note 41, at 430 (observing that "[r]arely is a victim schooled in pleading a case, and she often recites the same statements that appear on the sworn affidavit before the Judge or Referee"); cf. *id.* (commenting that judges are placed in a "distinctly unjudicial position . . . if one, or both are unrepresented").

Although they seldom are legal counsel, advocates can play a major role in mitigating this potential disparity. See Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 340-41 (1994) (asserting that the importance of volunteer "domestic abuse clerks" cannot be overestimated). Interestingly, advocates did not seem to play a particularly prevalent role in Third Judicial District hearings. Only in approximately one-tenth of the cases did domestic abuse advo-

men would be caught "flat-footed," possibly losing their protection order as a result.⁴⁴ In other instances, petitioners might invest considerable time and money preparing their cases, only to find the respondents failed to appear.⁴⁵

Making hearings discretionary would ideally prevent victims from having to come to court or face their abusers unnecessarily.⁴⁶ Victims would not be forced to risk or worry about their safety or their jobs,⁴⁷ only to find their abusers never intended to appear at the final hearing. Doing away with the automatic mandatory hearing for obtaining an ex parte protection order, therefore, was seen as a way to save already strained judicial resources and unnecessary petitioner hardship.⁴⁸

A discretionary hearing policy was believed to take nothing from alleged abusers because they would still have the right to a hearing, only now they would have to request one.⁴⁹ Moreover, all interested parties would benefit because any hearings that occurred would be "real hearings."⁵⁰ Thus, the bill was introduced on the theory that everyone would "win"—respondents would still have the right to contest bad orders, petitioners would not have to endure the hardship of facing their abusers unnecessarily, and courts

cates accompany petitioners to their ex parte protection order hearings. Telephone Interview with Judge Gerard Ring, *supra* note 31.

44. Telephone Interview with Judge Gerard Ring, *supra* note 31. A continuance was not viewed as an appropriate option for the unprepared petitioner because she was required by law to be ready for the hearing. *Id.*; see also Voris, *supra* note 41, at 430 (noting that a victim representing herself may often appear "insincere and inarticulate").

45. Telephone Interview with Judge Gerard Ring, *supra* note 31.

46. *Id.*; see also *Hearings*, *supra* note 35 (explaining that after Chapter 142, hearings will not take place "just as a formality"); Voris, *supra* note 41, at 430 (describing the ex parte process and final hearing as "unnerving at best for the victim even if the [j]udge or [r]eferee is sensitive to the domestic violence issues").

47. See SUMMARY AND TIPS, *supra* note 15, at 8 (due to Chapter 142 "women now have a procedure that meets their needs better"); Telephone Interview with Maria Pastoor, Staff Attorney, Battered Women's Legal Advocacy Project (Sept. 28, 1995) (commenting that some women will lose their jobs if they take time off from work to go to court hearings).

48. See *Hearings*, *supra* note 35 (noting that parties ordered to attend scheduled hearings would often be "very angry" and concluding that "obviating the hearing" would be useful to the parties as well as the court).

49. Telephone Interview with Representative David Bishop, *supra* note 35; see, e.g., Domestic Abuse Act, ch. 142, sec. 5, § 7(c), 1995 Minn. Laws 259, 260 (providing that the order served on a respondent "must include a notice advising the respondent of the right to request a hearing," must be accompanied by "a form that can be used by the respondent to request a hearing and must include a conspicuous notice that a hearing will not be held unless requested by the respondent within five days of service of the order").

50. Telephone Interview with Representative David Bishop, *supra* note 35; see also *Hearings*, *supra* note 35 (remarking that hearings occurring after the Act's amendment would be more than a mere "formality in the statute").

would save scarce administrative resources and better allocate precious court time to "real hearings."⁵¹

B. An Overview of Chapter 142

Enacted in August 1995, Chapter 142⁵² substantially altered the existing terms of ex parte relief available in situations of immediate and threatened violence. Although an ex parte protection order remains available only on the sworn affidavit of the petitioner,⁵³ the order as initially issued is no longer clearly temporary in nature,⁵⁴ nor does it mandate a hearing to become a final remedy.⁵⁵ Instead, an ex parte protection order can be initially issued for up to a year⁵⁶ and, assuming proper service,⁵⁷ will not lapse unless directly and successfully challenged by the alleged abuser.⁵⁸

Thus, although a hearing remains available to the alleged abuser, that hearing is now discretionary in nature. If the petitioner does not ask for a hearing, and the respondent does not request a hearing within five days of receiving personal service of the order,⁵⁹ the ex parte protection order automatically becomes a final

51. See *Hearings*, *supra* note 35.

52. See Domestic Abuse Act, ch. 142, sec. 5, § 7(c), 1995 Minn. Laws 258. The amendment was signed by the governor on May 10, 1995, and went into effect three months later in August 1995. *Id.*

53. MINN. STAT. § 518B.01(7)(a) (1994), *amended by* ch. 142, sec. 5, § 7(a), 1995 Minn. Laws 258.

54. This is clearly demonstrated by the deletion of the word "temporary" in the heading for subdivision 7, as well as throughout Chapter 142's text. See, e.g., Domestic Abuse Act, ch. 142, sec. 5, § 7(a), 1995 Minn. Laws 258, 259.

55. The deletion of the conditional language "pending a full hearing" from subdivision 7(a) indicates that a hearing is now discretionary. *Id.*; see also *id.* sec. 5, § 7(c) (inserting the phrase "[u]pon request" to indicate that hearings are no longer mandated).

56. *Id.* § 7(c) (providing that "an ex parte . . . order for protection shall be effective for a fixed period . . . set by the court, as provided in subdivision 6 paragraph (b), or until modified or vacated by the court"). MINN. STAT. § 518B.01(6)(b) (1994) (designating that "any relief granted by the order for protection shall be for a fixed period not to exceed one year. . .").

57. See Domestic Abuse Act, ch. 142, sec. 5, § 7(d), 1995 Minn. Laws 258, 260 ("If personal service is not made or the affidavit is not filed within 14 days of issuance of the ex parte order, the order expires. . . . Unless personal service is completed, if service by published notice is not completed within 28 days of issuance of the ex parte order, the order expires").

58. See *id.* § 7(c) (detailing that "an ex parte order for protection shall be effective for a period . . . set by the court . . . or until modified or vacated by the court pursuant to a hearing"). The petitioner, of course, can also request a hearing when requesting the ex parte protection order, however, "[i]f the petitioner does not request . . . [a hearing, one] will not be held unless requested by the respondent within five days of service of the order." *Id.*

59. See *id.*

remedy effective for up to a year.⁶⁰ Alternate service by publication or mail is also possible where personal service proves unsuccessful.⁶¹

C. *The Response of Advocates and the Courts to Chapter 142*

Domestic abuse advocates and attorneys were among the first to voice concerns about Chapter 142.⁶² The local judiciary soon followed. Less than two months after Chapter 142's adoption, Hennepin County's Family Court Division issued a standing "no use" order barring the use of Chapter 142's revised ex parte protection order.⁶³

Advocates, even those with an active lobbying body, were initially caught off guard by the bill's introduction.⁶⁴ The modifications proposed in Chapter 142 were simply not a priority on the advocates' agenda.⁶⁵ Given the amendment's unique origin and its introduction late in the legislative session,⁶⁶ domestic abuse advo-

60. See *supra* note 56. The period of protection guaranteed by the ex parte protection order is a discretionary matter left to the presiding judge or referee at petitioner's initial ex parte protection order hearing. Telephone Interview with Nancy Libman, Supervisor, Ramsey County Domestic Abuse Intake and Harassment Office (Oct. 20, 1995). Interestingly, initial use of Chapter 142's revised ex parte order in Ramsey County seems to indicate judges are willing to issue the new protection orders for the full year maximum. *Id.*

61. Alternate service is possible, yet disfavored in Hennepin and Ramsey Counties. Telephone Interview with Ann Leppanen, Staff Attorney, Southern Minnesota Regional Legal Services (Feb. 22, 1996) (commenting that Ramsey County courts sometimes permit a hearing to be stayed to allow more time for personal service). Usually only after repeated attempts at personal service prove fruitless is service by publication permitted. *Id.* Hennepin County also favors personal service. Telephone Interview with Judge Diana S. Eagon, Hennepin County District Court, Fourth Judicial District, Hennepin County (Oct. 23, 1995). See *supra* note 30; see *infra* note 84 and accompanying text (discussing alternate service).

62. Telephone Interview with Shawn Fremstad, Staff Attorney, Legal Services Advocacy Project, (Oct. 10, 1995); see also Telephone Interview with Representative David Bishop, *supra* note 35 (expressing concern that initial opposition to Chapter 142 might have been based more on mistrust of the House sponsor's motives than on the substance of the bill).

63. In the Matter of Orders for Protection for Longer than 14 Days Issuing Without a Hearing, Judge William R. Howard, Fourth Judicial District Court, Family Court Division (Sept. 26, 1992) [hereinafter In the Matter of Orders] (banning issuance of orders for protection for a period of longer than 14 days without a hearing); see *infra* notes 94-96 and accompanying text (discussing Hennepin County's concerns).

64. Telephone Interview with Shawn Fremstad, *supra* note 62.

65. *Id.*

66. The bill was introduced by Representative Bishop without input or initiative from the statewide advocacy community. *Id.* The first reading of the bill occurred in March 1995. Minutes of House Judiciary Comm., Twenty-Third Meeting, 79th Sess. (Mar. 31, 1995) (on file with author). Chapter 142's late introduction left only two months for the bill to pass through both the House and Senate.

cates were confronted with a difficult choice—scramble to fight the amendment's passage,⁶⁷ or try to identify and fix troublesome issues in hopes of passing a worthwhile tool that could be fine-tuned later.⁶⁸ Advocates chose the latter option.

The benefits perceived by advocates were largely the same as those originally anticipated by the judge and legislator responsible for the bill's introduction. First, victims would not have to go to court unnecessarily.⁶⁹ Second, petitioners would stand a better chance of not "losing" their orders if they were unable to attend the hearing.⁷⁰ Finally, petitioners would have more control because

67. See Telephone Interview with Shawn Fremstad, *supra* note 62. Fighting the proposed legislation might have been taken as a show of bad faith. Indeed, Representative Bishop indicated some surprise and dismay at the advocacy community's initial resistance to his bill. Telephone Interview with Representative David Bishop, *supra* note 35. Further, advocates were concerned that resistance to non-advocate initiated legislative assistance to the problem of domestic violence might chill cooperation between advocates and politicians. See Telephone Interview with Shawn Fremstad, *supra* note 62.

68. See Telephone Interview with Shawn Fremstad, *supra* note 62. Despite the fact that the amendment was not on their "radar screen," domestic abuse advocates were quick to recognize that the bill had some good things to offer. *Id.* Because advocates recognized the difficulties of getting such a comprehensive piece of legislation passed, the advocacy community generally agreed that it would be better to focus on getting a workable version of the amendment enacted and then iron out its problems through subsequent amendments. *Id.* Oregon has had a similar self-finalizing ex parte protection order in place since 1977. Telephone Interview with Judith Armatta, Legal Counsel, Oregon Coalition Against Domestic and Sexual Violence (Feb. 22, 1996); see also OR. REV. STAT. ANN. § 107.718 (Butterworth Supp. II 1994).

69. See SUMMARY AND TIPS, *supra* note 15, at 8. An advantage of the amendment is that "women who will not petition for OFPs [orders for protection] knowing that a hearing is necessary now have a procedure which meets their needs." *Id.* In addition, "Southeast Asian women may be reluctant to subject themselves to court proceedings," and "[s]ome women will lose their jobs if they take time off for court hearings." *Id.*

70. See *id.* ("Some women do not attend the court hearing currently necessary to finalize OFPs, resulting in dismissal of the OFP."); see also *The Danger in Tipping Off Abusers*, STAR TRIB. (Minneapolis), Mar. 31, 1992, at A10 (discussing the need for ex parte protection orders and commenting on "last ditch efforts" by abusers to "dominate and silence their partners" when ex parte protection orders are not available); see, e.g., William F. Woo, *A Story That Never Made it to Page 1*, PLAIN DEALER (Cleveland), July 1, 1994, at B11 (discussing why one-half of petitioners did not appear at their final ex parte order hearings).

Under the old provision, the ex parte protection orders of women who did not attend their hearing would be dismissed regardless of whether the respondent appeared. Telephone Interview with Maria Pastoor, *supra* note 47. The new provision makes a petitioner's non-appearance grounds for dismissal only where the respondent has requested a hearing. Thus, a petitioner has a better chance of emerging from the ex parte protection order process with a valid and lasting order under the new provision.

This feature may be particularly important for same-sex abuse victims who otherwise must "out" themselves (expose themselves to the public as homosexual) when a hearing is required to obtain an ex parte protection order. Telephone Interview with Kim Clements, Legislative Coordinator, Minnesota Coalition for Battered Women (Feb. 22, 1996).

they now could choose a level of judicial intervention appropriate for their unique situations.⁷¹ For example, if a victim believes her batterer would benefit from being hauled into court, she could force his court-ordered appearance by requesting a hearing.⁷² On the other hand, if she does not wish to face her abuser, a petitioner could forego requesting the hearing and stand a good chance of emerging with a valid, lasting order.⁷³ Advocates hoped that eliminating the disadvantages to using *ex parte* protection orders would encourage more victims to file for them.⁷⁴

The drawbacks advocates perceived included concerns that Chapter 142's revised protection order would be ineffective and possibly unconstitutional. The modified notice provision was believed to have three fundamental flaws. First, if a victim is not personally notified that the respondent requested a hearing, she could be left dangerously exposed. When the respondent asks for a hearing, it must be set by the court within eight to ten days after the request.⁷⁵ Chapter 142 only requires notification of a victim by mail at least five days prior to the scheduled hearing date.⁷⁶ If mail is

71. See Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 97 (1984) (noting that where a victim does not receive all the relief requested in her *ex parte* petition, she may "request a full hearing in order to obtain all of the relief for which she initially applied"). The importance of providing victims with "control over their destiny" is well established. See, e.g., Stark, *supra* note 5, at 673 (emphasizing that "depriv[ing] women of control over their destin[ies] reinforc[es] the sense of powerlessness already inflicted by their batterer[s]" and undermines a victim's "satisfaction" with the justice system).

72. See Lerman, *supra* note 71, at 97 ("[S]ometimes the victim knows that the abuser will not obey the order unless he is told in person by a judge that he must do so.").

73. This leaves a victim free from the coercive choice of either appearing or having her order dismissed. See SUMMARY AND TIPS, *supra* note 15, at 1-2. Of course, if the respondent requests a hearing the victim will be required to appear. See Domestic Abuse Act, ch. 142, sec. 5, § 7(c), 1995 Minn. Laws 258, 260 (codified as amended at MINN. STAT. § 518B.01).

74. Telephone Interview with Maria Pastoor, *supra* note 47; see also *The Danger in Tipping Off Abusers*, *supra* note 70, at A10 (noting that victims' unwillingness to use protection orders "often hinges on assurances that a partner won't learn of a protective order"); SUMMARY AND TIPS, *supra* note 15, at 8 (stating that "women now have a procedure which meets their needs better"); see, e.g., Telephone Interview with Shawn Fremstad, *supra* note 62 (remarking that women of Southeast Asian descent are often reluctant to employ remedies that require them to go into court). See generally Stacy Brustin, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 248-52 (1994) (explaining the "double bind" minority women face of protecting and empowering themselves only by outwardly discrediting male members of their community).

75. See Domestic Abuse Act, ch. 142, sec. 5, § 7(4)(c), 1995 Minn. Laws 258, 260.

76. *Id.* sec. 4, § 5(a):

If the hearing was requested by the respondent . . . service of the notice . . . must be made upon the petitioner not less than five days prior to the hearing. The court shall serve the notice of hearing upon the petitioner

delayed, a victim may not receive timely notice of a hearing.⁷⁷ Some victims may be so deep in hiding (especially right after separation) that they do not receive the notice. Either way, victims may miss the scheduled hearings and lose their protection orders.⁷⁸ Moreover, a victim who mistakenly believes her order is still in force may face increased danger of physical or emotional abuse.⁷⁹

Second, the ambiguity inherent in the revised protection order form itself may make it difficult for police officers to enforce. Under the previous, two-step, temporary ex parte protection order, the terms of the order were easily understood because the temporary order and final order were separate documents.⁸⁰ The temporary order was always valid for only fourteen days. If extended, a separate final order was issued, thereby making it easy for a law en-

by mail in the manner provided in the rules of civil procedure for pleadings subsequent to a complaint and motions.

Id.

77. Telephone Interview with Maria Pastoor, *supra* note 47; see also Memorandum from Shawn Fremstad, Legal Services Advocacy Project, to Representative David Bishop (Jan. 11, 1996) (on file with author) [hereinafter Legal Services Memorandum].

78. Telephone Interview with Maria Pastoor, *supra* note 47; see also SUMMARY AND TIPS, *supra* note 15, at 8 (describing this very scenario as one of the "disadvantages" to the revised ex parte relief created by Chapter 142). If a petitioner fails to appear at the hearing, the order is usually dismissed. See *id.*

79. See Lerman, *supra* note 71, at 97 (asserting that an abuser may view the expiration of the ex parte order as "permission from the court to violate the terms of the order"). Moreover, once the order is dismissed, a respondent will have little incentive to stay away from his victim and may feel strengthened or even vindicated by the court's nullification of the protective order. Thus, a woman may be in increased danger that her batterer will approach and perhaps attack her should her protection order expire.

Interestingly, advocates in Oregon, a state that has used "no-hearing" ex parte protection orders for nearly twenty years, share this concern. Telephone Interview with Judith Armatta, *supra* note 68. As a result of a 1995 amendment, victims in Oregon now have only five days to react to a respondent-requested hearing contesting a temporary custody award. Abuse Prevention Act, ch. 637, sec. 4, § 107.716(6), 1995 Or. Laws. Although only passed in July 1995, this shortened time window for victim response is already proving problematic. Telephone Interview with Judith Armatta, *supra* note 68.

80. SUMMARY AND TIPS, *supra* note 15, at 8. Under the old temporary ex parte order, police responding to a violation of the order could easily tell whether the order was valid. Telephone Interview with Maria Pastoor, *supra* note 47. With the old order, police simply turned to the appropriate page to see whether or not 14 days had passed. *Id.* A separate "final" order was issued following the mandatory hearing. *Id.*; see also *supra* notes 26-32 and accompanying text (explaining the old, temporary ex parte orders). Now, however, the order as initially issued may be valid for any period up to a year from issuance. See *supra* note 56 and accompanying text. Furthermore, ex parte protection orders may automatically convert into a final protection order. See *supra* notes 57-58 and accompanying text. It is feared that confusion about the validity of a victim's documents will leave some law enforcement officers and judges reluctant to enforce the revised ex parte protection orders. Telephone Interview with Maria Pastoor, *supra* note 47.

forcement officer to ascertain the validity of a victim's protection order. Now, however, Chapter 142's revised ex parte protection order is a one-step process using only one form; the document initially issued becomes the final order. Given that the same legal form may represent a valid final order or an order dismissed following a hearing, it is impossible for a law enforcement officer to determine whether the victim's order is valid or not by looking at the document. Advocates assert that law enforcement officers should always assume a protection order is valid if within the date shown on the order's face.⁸¹ Nonetheless, concern exists that the new orders' inherent ambiguity may frustrate officers, or if viewed more cynically, may provide officers with an excuse not to enforce ex parte protection orders.⁸² Either way, the result is an ineffective order made so largely because officers are disinclined and perhaps even hostile to enforcing it.

Third, permitting service on an alleged abuser by publication or mail might mean less effort is placed on personal service.⁸³ If the court's resources are taxed because, as advocates hope, more victims request ex parte protection orders, the courts are likely to be pressured to use the least expensive and most efficient means of notification. Increased use of "non-personal" service may exacerbate enforcement difficulties, particularly where a respondent does not understand the order nor take seriously its terms.⁸⁴ Further

81. See SUMMARY AND TIPS, *supra* note 15.

82. Telephone Interview with Loretta Frederick, Associate Director, Battered Women's Justice Project (Feb. 22, 1996); see also SUMMARY AND TIPS, *supra* note 15, at 8; Telephone Interview with Maria Pastoor, *supra* note 47. Steps toward alleviating these concerns, however, could be taken if Minnesota, like other states, were to implement a state-wide electronic database system that could track and inform law enforcement agencies of the existence of protection orders. See, e.g., OR. REV. STAT. ANN. § 107.720(1) (Butterworth Supp. II 1994) (requiring the county sheriff to enter each "true" protection order into Oregon's computerized records system and imposing a duty on all law enforcement agencies to establish adequate procedures for being informed of the existence and terms of such orders). See also *infra* notes 249-50 and accompanying text (discussing the importance of such a data system, and its lack in Minnesota).

83. If, as anticipated, more victims seek orders, it is reasonable to expect the sheer increase in volume of ex parte order requests will hamper personal service and increase pressures on judges and referees to allow "alternate service." See MINN. STAT. § 518B.01(8)(c) (1994); *id.* § 518B.01(5)(b), amended by ch. 142, sec. 4, § 5(b) 1995 Minn. Laws 258, 259. See also *supra* note 30 and accompanying text (discussing service by mail or publication).

84. See Telephone Interview with Judge Diana Eagon, *supra* note 61. Hennepin County Family Court requires personal service in nearly all cases. The rationale for this policy is twofold: personal service ensures receipt of the order by respondent and also increases the likelihood a violation will result in a successful arrest and prosecution. *Id.* Moreover, Hennepin County requires that respondent's signed copy of the notice be provided to the court. *Id.* See generally Waits, *supra* note 7, at 308-19 (discussing numerous factors that impede effective arrests when protection orders

inhibiting the already weak enforcement of protection orders can only enhance the perception that orders are "worthless pieces of paper."⁸⁵ Aggravating this "paper tiger" problem might, in turn, heighten a victim's confusion, discomfort, and mistrust of the legal system.⁸⁶

Additional issues implicit in advocates' concerns include whether the state may require an alleged abuser to request a hearing, or if in doing so, it shifts an impermissible burden to the respondent. In addition, it seems unclear whether the minimum five-day window a respondent has for requesting a hearing permits enough time to make an adequately informed waiver of his right to a hearing. It is also unclear whether a factually specific affidavit alleging immediate and present danger of domestic abuse is sufficient to support a final order that evicts an alleged abuser from a shared home for up to a year. The overall worry is that these concerns, taken together, will make judges and police reluctant to use and enforce *ex parte* protection orders.⁸⁷

Critics were also concerned that important deterrence and credibility-enhancing opportunities would be lost if the legal system does not initially contact the batterer.⁸⁸ Pulling an abuser into court clearly demonstrates that the justice system is outraged at his abusive conduct, takes the matter seriously, and stands by the victim.⁸⁹ Making an abuser face a judge reinforces the idea that

are violated, including the fact that "many . . . male police officers will inevitably identify with the batterer"). See also *infra* notes 208-10 and accompanying text (discussing the advantages of personal service).

85. See James M. Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1202 (1995) ("[A] protection order that is not enforced is merely an expensive piece of paper.").

86. See Salzman, *supra* note 43, at 364 n.141 ("[F]ailure to use available sanctions and criminal penalties undermines the public's confidence in the judicial system's ability to respond to domestic violence and weakens the effectiveness of each protection order."); see also Waits, *supra* note 7, at 309 (noting that arrest is a strong signal of support for the victim, but is only the first of many messages of support a victim needs from the legal system in order to successfully leave a violent situation).

87. Telephone Interview with Maria Pastoor, *supra* note 47; see also SUMMARY AND TIPS, *supra* note 15 at 8 (listing judges' and law enforcement officers' reluctance to sign and enforce the new orders as one of the disadvantages of the new *ex parte* orders).

88. See, e.g., Legal Services Memorandum, *supra* note 77, at 2-3 (summarizing the chief concerns of battered women's advocates).

89. See Michael Dowd, *Battered Women: A Perspective on Injustice*, 1 CARDOZO WOMEN'S L.J. 1, 31 (1993) (warning that the prosecutor and judge must accompany the arrest with a "strong message of support for the victim" or else "the arrest will have little effect on the overall situation"); see also Truss, *supra* note 85, at 1198 (contending that the judiciary, by treating violations of protective orders too lightly, further endangers victims and "abdicates" its "judicial function"); Waits, *supra* note 7, at 310 (emphasizing the importance of strict post-arrest responses in order to ef-

domestic abuse is unacceptable.⁹⁰ The hearing is also an opportunity to require the respondent to attend counseling. Fewer hearings means fewer batterers will be ordered into treatment.⁹¹ Similarly, non-personal service does not send the powerful messages of condemnation or victim support that personal service does.⁹² It also denies the batterer an opportunity to ask questions about the significance and implications of the order. If early and critical opportunities to deter and inform alleged abusers are not utilized, a batterer will be more likely to consider the protection order against him a worthless piece of paper or a violation of his right to due process.

III. The Constitutionality Question

Almost from the outset there were rumblings that Chapter 142 might be unconstitutional.⁹³ In line with such concerns, Hennepin County Family Court issued a standing "no use" order less than two months after the enactment of Chapter 142.⁹⁴ The "no use" order prohibits issuing any protection orders for over fourteen days without a hearing.⁹⁵ Hennepin County indicated it was tak-

fectively begin "a process under which the batterer faces both the carrot and the stick; if he changes his actions, he will be rewarded; if he doesn't he will be punished"). See generally Nadine Taub, *Adult Domestic Violence: The Law's Response*, in *THE LAW OF SEX DISCRIMINATION* 327, 331 (J. Ralph Lindgren & Nadine Taub eds., 1988) (discussing the real and symbolic importance of a serious response to a woman's call for help).

90. See Legal Services Memorandum, *supra* note 77, at 2.

91. *Id.*; see, e.g., *State v. Redalen*, No. C9-94-945, 1994 WL 714348, at *1 (Minn. Ct. App. Dec. 27, 1994).

92. See, e.g., Finn, *supra* note 25, at 171 ("[M]any batterers will think twice about committing renewed violence when a police officer arrives, gives the abuser ten minutes to pack up and leave, and warns that if he returns he will be arrested and possibly jailed."). In addition, personal service provides the batterer an opportunity, albeit a brief one, to clarify the terms or significance of the order served. This is one of the reasons Hennepin County requires personal service in nearly all cases. Telephone Interview with Judge Diana S. Eagon, *supra* note 61. See also *supra* note 63.

93. Telephone Interview with Maria Pastoor, *supra* note 47.

94. See *In the Matter of Orders*, *supra* note 63, which provides as follows: After a review of MINN. STAT. § 518B.01, Subd. 7, as amended effective August 1, 1995 to provide for the issuance of orders for protection for a period of a year on an ex parte basis, this court finds that the implementation of this new provision is not possible in Hennepin County District Court. This court has concerns about the due process implications, . . . taking its direction from *Baker v. Baker*, 494 N.W.2d 282 (Minn. 1992).

IT IS ORDERED:

1. No order for protection for a period of longer than fourteen (14) days shall be issued without a hearing in Hennepin County Family Court.

Id.

95. *Id.*

ing its direction from the 1992 Minnesota Supreme Court decision of *Baker v. Baker*, which affirmed the constitutionality of two-step, temporary ex parte protection orders.⁹⁶

Although ex parte protection orders have been called "the single most effective protection the court can provide a battered woman,"⁹⁷ some critics have long contended the orders are unconstitutional.⁹⁸ They assert that ex parte orders requiring an alleged abuser to leave a shared residence involve a deprivation of constitutional magnitude,⁹⁹ and that the "one-sided nature" of the deprivation violates a respondent's right to due process under the Fourteenth Amendment.¹⁰⁰

"Judicial reticence" to issue ex parte protection orders because of concerns they violate a respondent's due process rights is discussed in numerous secondary sources. See, e.g., Mullins, *supra* note 21, at 246; FINN & COLSON, *supra* note 18, at 2; Lerman, *supra* note 71, at 91; Kinports & Fischer, *supra* note 8, at 209; Taub, *supra* note 23, at 118.

96. *Baker v. Baker*, 494 N.W.2d 282 (Minn. 1992). See *infra* part III.A (discussing the *Baker* decision).

97. Finn, *supra* note 25, at 171.

98. See, e.g., *id.* at 170 (remarking that some judges and defense attorneys have expressed concern "that an ex parte hearing that results in the exclusion of a batterer from the home might violate the respondent's due process rights").

99. Although federal courts have not directly considered the assertion that ex parte protection orders cause deprivations with constitutional implications, appellate courts have recognized the respondent's interest in remaining in the home. See, e.g., *Geisinger v. Voss*, 352 F. Supp. 104 (E.D. Wis. 1972) (upholding the constitutionality of an ex parte order to vacate a shared home in a divorce proceeding). The court stated:

There is an old saw that a man's house is his castle. If modern times will not permit him moats and battlements, it still remains, I strongly suspect, that the constitution insists that he be allowed, except in exceptional circumstances, a few words before the sheriff escorts him out the door.

Id. at 111. See also *infra* notes 130-31, 143 and accompanying text (discussing the respondent's interest in his home).

100. "The essential guarantee of the due process clause is that of fairness." JOHN E. NOWAK & RONALD D. ROTUNDA, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 17.8, at 656 (2d ed. 1992) [hereinafter *SUBSTANCE AND PROCEDURE*]. Any consideration of due process includes two components: substantive due process and procedural due process.

Substantive due process permits judicial review of governmental actions limiting the exercise of "fundamental" constitutional rights. JOHN E. NOWAK & RONALD D. ROTUNDA, *TREATISE ON CONSTITUTIONAL LAW* § 11.7, at 388 (4th ed. 1991). "Fundamental" rights are those rights recognized as "so essential to individual liberty in our society that they justify the justices reviewing the acts of other branches." *Id.* The concept of fundamental substantive rights is "no more than the modern recognition of . . . natural law" because under its banner, courts are able to protect fundamental rights not expressly enumerated in the Constitution. *Id.* at 388, 390; see, e.g., *Poe v. Ullman*, 367 U.S. 497, 541-43 (1961) (Harlan, J., dissenting) (advocating the protection of a right of privacy which includes the right of married persons to use contraceptives); see also Quinn, *supra* note 8, at 847 n.25 ("Substantive due process proscribes government action that so 'offends certain decencies of civilized conduct' that no amount of procedural protection is sufficient."); see, e.g., *Rochin v. California*,

In an effort to avoid due process challenges,¹⁰¹ legislators in Minnesota and elsewhere made *ex parte* protection orders temporary and limited to situations involving an "immediate threat of violence."¹⁰² The constitutionality of this limited two-step temporary

342 U.S. 165, 173 (1952) (invalidating the forcible extraction of incriminating substances from petitioner's stomach).

Procedural due process proscribes government action that denies an individual "the right to be heard before being condemned to suffer grievous loss of any kind." *Id.* (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). For procedural due process to be satisfied, procedures must be:

fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty and property. . . . If there is a deprivation of life, liberty or property which is based on disputed facts or issues, then the individual whose interests are affected must be granted a fair procedure before a fair decision-maker.

SUBSTANCE AND PROCEDURE, *supra*, at 656, 662.

101. Barbara E. Sanson, *Spouse Abuse: A Novel Remedy for an Historic Problem*, 84 DICK. L. REV. 147, 162 (1979) (arguing that procedural clarification, such as "immediate and present danger of abuse," would obviate the due process problems that plague *ex parte* orders); see also Taub, *supra* note 23, at 98 (outlining the concern that *ex parte* orders of protection raise "serious constitutional questions").

102. Prior to its amendment in 1995, Minnesota's Domestic Abuse Act offered precisely such limited *ex parte* relief. MINN. STAT. § 518B.01(7) (1994). The pertinent portions of the unamended 1994 Act provides as follows:

Subd. 7. Temporary order. (a) Where an application under this section alleges an *immediate and present danger of domestic abuse*, the court may grant an *ex parte temporary* order for protection, pending a *full hearing* and granting relief as the court deems proper, including an order:

(1) Restraining the abusing party from committing acts of domestic abuse;

(2) Excluding any party from the dwelling they share or from the residence of the other except by further order of the court. . . .

(b) a finding by the court that there is a basis for issuing an *ex parte temporary* order for protection constitutes a finding that sufficient reasons exist not to require notice under applicable court rules governing applications for *ex parte temporary* relief.

(c) An *ex parte temporary* order for protection shall be effective for a fixed period *not to exceed 14 days*, except for good cause as provided under paragraph (d). A *full hearing*, as provided by this section, *shall be set for not later than seven days from the issuance of the temporary order*. The respondent shall be served forthwith a copy of the *ex parte* order along with a copy of the petition and notice of the date set for the hearing.

Id. (emphasis added); see also *Baker*, 494 N.W.2d at 285 (characterizing the relief provided under MINN. STAT. § 518B.01(7) as "a 'band-aid' designed to curtail the harm one household member may be doing to the other in the short term, until a more permanent dispute resolution can be put in place").

In 1993, 42 states, Puerto Rico, and the District of Columbia provided for preliminary *ex parte* relief based on the petitioner's affidavit or testimony. Klein & Orloff, *supra* note 4, at 1037 n.1471 (providing a detailed accounting of temporary protection orders nationally).

ex parte relief requiring a hearing to become a final remedy was affirmed by a number of cases,¹⁰³ including Minnesota's *Baker*.¹⁰⁴

A. *Baker and the Validity of Ex Parte Protection Orders Before Chapter 142*

In *Baker*, the respondent challenged the ex parte temporary protection order sought by and provided to his estranged wife.¹⁰⁵ The respondent attacked the relief ordered by the court, which awarded his wife custody of their children and evicted him from the family home.¹⁰⁶ The alleged abuser also challenged the notice

103. Although no United States Supreme Court case directly addresses ex parte civil protection orders, a number of courts have addressed and rejected claims that such orders violate due process in domestic abuse cases. See *Blazel v. Bradley*, 698 F. Supp. 756, 768 (W.D. Wis. 1988) (holding that ex parte orders do not violate due process generally, but do if the order was wrongly issued); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 229-32 (Mo. 1982) (upholding the Missouri Adult Abuse Act's provision for temporary ex parte relief); *Marquette v. Marquette*, 686 P.2d 990, 995-96 (Okla. Ct. App. 1984) (upholding restrictions on respondent's visitation with his children because the procedural safeguards, which provided for a hearing within ten days, supplied adequate due process); *Boyle v. Boyle*, 12 Pa. D. & C.3d 767 (1979) (finding that Pennsylvania's Protection From Abuse Act, which provided for the ex parte eviction of respondent, was constitutional); *Schramek v. Borhen*, 429 N.W.2d 501, 504-06 (Wis. Ct. App. 1988) (rejecting respondent's claim that the notice provided him was insufficient). Like *Baker*, however, all of these cases, with the exception of *Blazel*, addressed temporary ex parte relief in cases of immediate threat of violence.

Even though there appear to be no cases addressing ex parte relief finalized without a hearing, a few authors have cursorily addressed the matter. See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 307, commentary at 29 (Nat'l Council of Juv. and Fam. Ct. Judges) (1994) [hereinafter MODEL CODE] (noting that as long as service of process affords both parties adequate time to respond to the option to request a hearing, due process should be satisfied); Lerman, *supra* note 71, at 95 (suggesting that ex parte orders that do not require a final hearing should survive a constitutional challenge if appropriate due process protections are provided).

104. *Baker*, 494 N.W.2d at 282 (holding that the procedures of the Domestic Abuse Act did not have to satisfy the notice requirements of Minnesota's marriage dissolution statute).

105. The temporary ex parte protection order initially excluded James Baker from Barbara Baker's residence, restrained him from harassing her at work, and awarded her custody of their child. *Id.* at 283. After a full hearing, the court ordered that temporary custody of the child remain with Barbara Baker. *Id.*

106. Upon Mrs. Baker's initial affidavit and motion, the trial court granted her temporary custody of the couple's infant and provided for the father's visitation. *Id.* at 283. A full hearing was scheduled, and Mr. Baker was notified pursuant to the statute. *Id.* At the full hearing, the trial court granted each party a final order for protection and ordered that temporary custody remain with Mrs. Baker for the next year. *Id.* at 284.

The respondent challenged the trial court's award of custody and authorization of visitation rights, alleging that the court's findings were inadequate. *Baker v. Baker*, 481 N.W.2d 871, 872, 874 (Minn. Ct. App. 1992). The respondent asserted, and the Minnesota Court of Appeals agreed, that "statutory provisions which govern the issuance of temporary restraining orders in dissolution proceedings also control in the domestic abuse setting." *Baker*, 494 N.W.2d at 289. Specifically, the court of

provided him as statutorily and constitutionally inadequate.¹⁰⁷

In rejecting these claims, the Minnesota Supreme Court noted that requiring pre-deprivation notice to an alleged abuser would endanger the victim, thereby defeating the Domestic Abuse Act's goal of providing victims with immediate protection.¹⁰⁸ The *Baker* court reasoned that because the Act is a unique provision offering relief to persons at risk of ongoing domestic violence,¹⁰⁹ *ex parte* protection

appeals held that MINN. STAT. § 518.131(3) controlled, providing that "no *ex parte* order may grant custody of minor children to 'either party except upon a finding by the court of immediate danger or physical harm' to the children." *Id.* Moreover, the court of appeals held that the appropriate standard for the custody inquiry was the "best interests" of the child, as outlined in MINN. STAT. § 257.025(a), rather than the "safety of the victim and child" called for by the Domestic Abuse Act. *Id.* Accordingly, the court of appeals remanded the custody order for further findings. *Baker*, 481 N.W.2d at 875.

On appeal, the Minnesota Supreme Court reversed the court of appeals, holding that "determinations of custody and visitation made at the time of the issuance of an *ex parte* order for protection are governed by MINN. STAT. § 518B.01(6)(a)(3), giving primary consideration to the safety of the victim and the children." *Baker*, 494 N.W.2d at 289. The court emphasized that custody orders, like the one at issue, are "intended to be temporary and generally either expire or are reviewed by the court one year from their issuance." *Id.* (emphasis added) (citation omitted). In addition, the court reasoned that while both parents have "strong interests in the custody and enjoyment of their child, a parent's love and affection must yield to considerations of the child's welfare." *Id.* at 287. Further, the court added that the Domestic Abuse Act recognizes the preeminence of the child's welfare by allowing temporary custody only when "primary consideration [is given] to the safety of the victim or the children." *Id.* at 288 (citations omitted).

107. Mr. Baker alleged that the *ex parte* order's issuance without an attempt to contact him (or explain why contact was not attempted) violated MINN. R. CIV. P. 65.01, MINN. GEN. R. PRAC. 3.01, and violated his right to due process. *Baker*, 481 N.W.2d at 873. The Minnesota Supreme Court, therefore, was asked to determine whether proceeding for temporary relief under the Domestic Abuse Act, MINN. STAT. § 518B.01 conformed to notice requirements under MINN. R. CIV. P. 65.01 and MINN. GEN. R. PRAC. 303.04. *Baker*, 494 N.W.2d at 284. The court held that while the other notice provisions did govern in a majority of cases, they did not apply in the present case because the Domestic Abuse Act incorporated alternative procedures into its statutory remedy as part of the substantive relief. *Id.* at 286. The court added, however, that this construction did not immunize the Act's notice provision from due process scrutiny. *Id.* at 287.

Interestingly, the court also added that even if it would have found that MINN. R. CIV. P. 65.01 and MINN. GEN. R. PRAC. 303.04 did control the issuance of *ex parte* protection orders, the outcome would have been the same because "in extraordinary circumstances where risk of injury is plain, relief may be granted without notice." *Id.* Thus, the court held that when a petitioner asserts fear of further domestic violence accompanied by a supporting affidavit under oath (as occurred in this case), it meets the requirements of MINN. R. CIV. P. 65.01 and MINN. GEN. R. PRAC. 3.01 and 303.04 as well as the requirements of the Domestic Abuse Act. *Id.*

108. *Baker*, 494 N.W.2d at 288. "The Domestic Abuse Act, MINN. STAT. § 518B.01, was enacted in 1979 as one way to protect victims of domestic assault." *Id.* at 285.

109. *Id.* at 285. The court reasoned that the Act was different from the marriage dissolution statute because the Act neither terminated nor established a legal rela-

is "central to the substantive relief provided for under the Act."¹¹⁰ The court held, therefore, that requiring pre-deprivation notice was simply inappropriate and could actually precipitate increased violence.¹¹¹

The *Baker* court acknowledged, however, that even where post-deprivation notice is preferred, the question of whether such notice violates an alleged abuser's due process rights remains a separate inquiry.¹¹² Recognizing that due process requirements must be flexible and particular to the situation,¹¹³ the *Baker* court determined that the applicable due process test combined "general *Mathews* factors"¹¹⁴ and "more specific *Fuentes* factors."¹¹⁵

The *Mathews* factors determine whether a post-deprivation hearing sufficiently protects the respondent's due process interests under the circumstances.¹¹⁶ The *Mathews* analysis consists of weighing three factors: the private interests affected; the procedural safeguards provided (looking specifically at the risk of erroneous deprivation resulting from the procedures and the probable value of additional safeguards); and the government's interest.¹¹⁷

tionship. *Id.* In addition, the court reasoned that the Act was like a "band aid" because it was designed to curtail the harm one member of a household might be doing to another in the short term until a more permanent resolution of the problem could be put in place. *Id.*

110. *Id.* at 286. The court added that notice or extensive justification for lack of notice prior to issuing an order would impede a victim's ability to obtain the immediate remedy and extraordinary relief the statute contemplates. *Id.*

111. *Id.* at 286 (citing *Blazel*, 698 F.Supp. at 763). Research on domestic abuse supports the assertion that a victim's risk of danger increases once she takes steps to leave the batterer. See *Waits*, *supra* note 7, at 283 (noting that "a batterer usually becomes even more abusive if his partner makes any attempt to assert control over her own life"); *Quinn*, *supra* note 8, at 870 ("The defendant might react to the news of a victim's action with anger or increased violence.").

112. *Baker*, 494 N.W.2d at 287.

113. *Id.* See *Fuentes v. Shevin*, 407 U.S. 67 (1972):

Although . . . due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case" . . . and "depending upon the importance of the interests involved and the nature of the subsequent proceedings" . . . the Court has traditionally insisted that whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

Id. at 82.

114. *Baker*, 494 N.W.2d at 288. See generally *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (applying a three-factor analysis to determine that a pre-termination hearing is not required before government officials can temporarily deprive a petitioner of social security benefits).

115. *Baker*, 494 N.W.2d at 288; *Fuentes*, 407 U.S. at 90, 92 (holding that Florida and Pennsylvania replevin provisions violate due process because they deprive individuals without the opportunity for a pre-deprivation hearing when no "extraordinary situation" exists to justify a post-deprivation hearing).

116. See SUBSTANCE AND PROCEDURE, *supra* note 100, at 663.

117. *Baker*, 494 N.W.2d. at 287. See also SUBSTANCE AND PROCEDURE, *supra* note 100, at 145 (Supp. 1995).

Using *Mathews*, the *Baker* court concluded that the respondent's significant interest in having custody of his child and in remaining in the home did not outweigh the value of the safeguards provided and the government's interest.¹¹⁸ The court paid particular attention to four components it said represented "extensive procedural safeguards" minimizing the risk of erroneous deprivation:¹¹⁹ (1) *ex parte* orders are issued only upon a petitioner's sworn and factually specific affidavit; (2) only judges or

[T]he majority's use of the *Mathews* three-factor analysis to determine whether a post-deprivation hearing would be sufficient to protect liberty or property interests almost certainly will stand the test of time. For two decades a majority of Justices have ruled that an individual should be given notice and an opportunity to be heard prior to a significant deprivation of a life, liberty, or property interest unless the Court, using the three-factor analysis, concludes that a post-deprivation process would provide fundamental fairness to the individual.

Id.

118. *Baker*, 494 N.W.2d at 288. Although the court reviewed the respondent's interest in remaining in his shared dwelling, it focused mostly on the respondent's parental interest in maintaining custody of his child. *Id.* at 287.

While custody merits consideration, it is not within the scope of this Note. This Note seeks only to address the "simple case" of eviction from a shared dwelling without a hearing for two reasons. First, this Note endeavors only to show the door of constitutionality is open; it does not seek to conjecture how wide. The issue of custody warrants its own balancing under the factors enumerated by the Minnesota Supreme Court in *Baker*. Second, the scope of the protection provided by the revised *ex parte* protection order is unclear and arguably may be limited to eviction and a prohibition on violent acts.

This confusion stems from the fact that Chapter 142 speaks equivocally as to the scope of appropriate relief. See MINN. STAT. § 518B.01(7) (1994) *amended by* ch. 142, sec. 5, § 7, 1995 Minn. Laws 258, 259. As amended, subdivision 7(a) expressly authorizes "granting relief as the court deems proper, *including* an order: (1) restraining the abusing party from committing acts of domestic abuse; (2) excluding any party from the dwelling." *Id.* (emphasis added). However, the newly added subdivision 7(e) adds that "[i]f the petitioner seeks relief in subdivision b, other than the relief described in paragraph (a), the petitioner must request a hearing to obtain the additional relief." *Id.* § 518B.01(7)(e). Thus, while Chapter 142 seems to set out a broad scope of protection with inclusive examples in subdivision (e), it goes on to require hearings for all relief not enumerated in subdivision 7(a). See *id.* § 518B.01(6) (discussing the additional relief available, including temporary custody and visitation, support, counseling and treatment, and temporary property awards).

As a result, some are unsure custody and visitation were intended to be part of the self-finalizing *ex parte* relief created by Chapter 142. See Telephone Interview with Maria Pastoor, *supra* note 47; see also SUMMARY AND TIPS, *supra* note 15, at 2 (stating that the Battered Women's Legal Advocacy Project "recommends that petitioners usually request hearings when obtaining an *ex parte* custody order"). Advocates are wary that including custody determinations would increase judicial reluctance to issue *ex parte* relief. In addition, some are doubtful *ex parte* custody orders would be upheld as constitutional under the limits of *Baker*. Telephone Interview with Maria Pastoor, *supra* note 47. But see OR. REV. STAT. ANN. § 107.718 (Butterworth Supp. II 1994). Oregon, a state that has used "no hearing" *ex parte* protection orders for nearly twenty years, includes custody and visitation in the list of remedies available to a qualified petitioner for up to one year. *Id.* § 107.718(1)(a).

119. *Baker*, 494 N.W.2d. at 288.

referees could issue the orders; (3) the orders were *temporary*; and (4) the respondent had to receive notice of a pending *full hearing*.¹²⁰ The court added that the government has an "extraordinary" interest in fostering a society free of violence and in protecting "vulnerable persons," particularly those at risk of harm.¹²¹ Thus, after balancing the interests at stake, the court concluded that a post-deprivation hearing pursuant to the Domestic Abuse Act would sufficiently protect an alleged abuser's right to due process.¹²²

Although the *Baker* court used *Mathews* to determine whether a mandatory post-deprivation hearing would adequately protect a respondent's right to due process, it relied on *Fuentes* to assess whether postponing notice and the opportunity for a hearing might be warranted by "extraordinary" circumstances.¹²³ Extraordinary circumstances is a narrow exception to the general pre-deprivation hearing requirement. The exception permits a government to seize an individual's property without opportunity for a prior hearing only where the seizure is directly necessary to secure an important governmental or public interest, where a special need for prompt action exists, or where the state strictly controls its power to seize property by limiting such authority to a government official acting under "the standards of a narrowly drawn statute."¹²⁴ *Fuentes*, therefore, considers only the needs and actions of the state in determining whether a post-deprivation hearing adequately protects a deprived individual's interests.¹²⁵

The *Baker* court concluded that the temporary ex parte order provision fell within the *Fuentes* exception because the state had a

120. *Id.*; see also Finn, *Statutory Authority*, *supra* note 18, at 53 (citing *Boyle v. Boyle*, 12 Pa. D. & C.3d 767 (1979)) (noting that the Pennsylvania district court, when faced with a similar constitutionality challenge, held that subordinating the respondent's interest and due process rights to the victim's right to immediate protection was consistent with *Fuentes*).

121. *Baker*, 494 N.W.2d at 288.

122. *See id.*

123. *Id.*; see *Fuentes*, 407 U.S. at 90.

That a hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Id. at 82 (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)); see also Finn, *Statutory Authority*, *supra* note 18, at 53 (defining *Fuentes* as standing for the premise that "a court may forego notice in certain . . . cases if . . . the situation has a special need for prompt action").

124. *Baker*, 494 N.W.2d. at 288.

125. *Id.* The cost to the individual is not a relevant consideration. See *Fuentes*, 407 U.S. at 91.

strong and undisputed interest in protecting the public from domestic violence.¹²⁶ Moreover, a special need for prompt action existed because the Act limited *ex parte* relief to situations of "immediate and present danger of domestic abuse."¹²⁷ Finally, the state strictly controlled its power to seize property because a judge or judicial officer had to first determine that the narrow terms of the Act were met before granting *ex parte* relief.¹²⁸ Based on these considerations, the court concluded that domestic violence constituted an "extraordinary situation" in which the government need not provide the alleged abuser with pre-deprivation notice and an opportunity for a hearing.¹²⁹

Baker affirmed that the Domestic Violence Act's two-step, temporary *ex parte* protection order, in its pre-Chapter 142 form, did not violate an alleged abuser's right to due process. Chapter 142, however, expands *ex parte* relief beyond the limits defined in *Baker*. The question implicit in advocates' concerns, and especially Hennepin County's standing "no use" order, is whether *Baker*'s affirmation of constitutionality can be extended to the one-step, self-finalizing *ex parte* relief created by Chapter 142.

B. Reconsidering Chapter 142: Due Process Concerns

An individual's interest in remaining in a shared domicile is likely to be considered a deprivation with constitutional implications.¹³⁰ Depriving an individual of this right, however, does not

126. *Baker*, 494 N.W.2d. at 288. "While at first blush, it may seem that the interest at issue here is a purely private one . . . it is also true that the general public has an extraordinary interest in a society free from violence." *Id.*

127. *Id.* "[T]here can be no argument that a special need for prompt action is shown." *Id.* See MINN. STAT. § 518B.01(7)(a) (1994), amended by ch. 142, sec. 5, § 7(a), 1995 Minn. Laws 258, 259 (stating that *ex parte* relief will issue only if the court, in its discretion, deems that petitioner has adequately alleged "an immediate and present danger of domestic abuse").

128. *Baker*, 494 N.W.2d. at 288. "[T]he statute is very narrowly drawn and, of course, compliance with its terms must be determined by a district court judge or other judicial officer before *ex parte* relief is available." *Id.* See MINN. STAT. § 518B.01(3) (1994) (establishing that either judges or referees may take evidence and report on *ex parte* actions).

129. *Baker*, 494 N.W.2d. at 288.

130. At least one member of the United States Supreme Court has suggested an occupancy interest rises to the level of a fundamental right. See *Moore v. City of East Cleveland*, 431 U.S. 494, 520-22 (1977) (Stevens, J., concurring in judgment); see also *Greene v. Lindsey*, 456 U.S. 444, 446-69 (1982) (holding that eviction notices posted on apartment doors do not provide adequate notice to protect residents' property interest). For a more exhaustive discussion of the asserted property interest in remaining in the home, see Quinn, *supra* note 8, at 858-63. See also *supra* note 99.

But see Quinn, *supra* note 8, at 847; Mullins, *supra* note 21, at 247-48 (asserting that evicting the abuser is the only fair solution because any other response further victimizes the woman by forcing her to flee her home when she has committed no

automatically amount to a constitutional violation. An individual's constitutional rights are violated only when a deprivation is accomplished without due process of law.¹³¹ The issue, therefore, is whether a self-finalizing ex parte protection order, which provides for a discretionary post-deprivation hearing, adequately provides due process of law.

In *Goldberg v. Kelly*,¹³² the United States Supreme Court found the termination of welfare benefits without a pre-deprivation hearing unconstitutional. The Court reasoned that a post-deprivation hearing was insufficient because the benefits were essential to the respondent's survival.¹³³ Consequently, the individual's interest outweighed the inadequate safeguards and nominal government interest at stake.¹³⁴ In its subsequent *Mathews v. Eldridge*¹³⁵ decision, however, the Court upheld the termination of social security disability benefits where only a post-deprivation hearing was available.¹³⁶ The Court reasoned that disability benefits were not essential in nature and,¹³⁷ therefore, did not outweigh adequate safeguards and a legitimate government interest.¹³⁸

crime); but cf. *Baker*, 494 N.W. 2d at 287 n.6 (noting that the victim's interest in her personal security also constitutes a liberty interest of considerable weight). See generally *Ingraham v. Wright*, 430 U.S. 651, 637 (1977) (discussing the nature of liberty interests); Topliffe, *supra* note 8, at 1056-57 (discussing potential liberty interests implicated by the issuance of mutual protection orders).

131. *Baker v. Collan*, 413 U.S. 137, 145 (1979) (stressing that the Due Process Clause "protects only against deprivation of liberty accomplished 'without due process of law'").

132. 397 U.S. 254 (1970).

133. *Id.* at 264. The Court focused on the urgency of the need for the benefit, emphasizing that recipients of welfare benefits are on the margin of subsistence. *Id.*

134. *Id.*

135. 424 U.S. 319 (1976).

136. *Id.* at 349.

137. The Court reasoned that social security disability benefits, unlike welfare benefits, were not likely to be the recipient's sole means of support. *Id.* at 341. The Court concluded that the potential harm resulting from an erroneous deprivation of social security disability benefits is less severe than an erroneous deprivation of welfare benefits. *Id.* at 340-41.

138. The Court reasoned that the deprivation decision was based on sufficient information (a periodic questionnaire) and that the post-deprivation procedure provided a sufficient means for the recipient to contest the decision. *Id.* at 345-46. The Court noted that the degree of harm and duration of the government-caused deprivation were important to its analysis. *Id.* at 341-42.

The Court's post-*Eldridge* decisions seem to give considerable deference to the public interest for several reasons. First, state statutes are presumed constitutional. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 201, 207 (1976) (opting not to construe a death penalty statute so broadly as to find it unconstitutional). Second, the Court has given considerable deference to the body formulating the procedure when applying the *Mathews* balancing test. See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 473 (1983) (using *Mathews* to uphold prison regulations because prison officials should be given great deference). Moreover, where individual interests are balanced against the public interest, the government usually wins. See, e.g., *Mackey v. Montrym*, 443

Although evicting a respondent from a shared dwelling for up to a year imposes a definite hardship, it does not constitute a matter of survival for most alleged batterers.¹³⁹ In addition, because the respondent can request a hearing at any time,¹⁴⁰ the deprivation need be no longer than it was at the time of *Baker*.¹⁴¹ Even at its most extreme, the pre-hearing deprivation is considerably less than the ten to eleven months upheld as constitutional in *Mathews*.¹⁴² Thus, the respondent's interest in access to a shared dwelling, although significant, does not constitute a deprivation so egregious it cannot be outweighed.¹⁴³

U.S. 1 (1979) (upholding a state law summary suspension of a driver's license on a refusal to take a breath analysis test because of the public's interest in safety).

139. See Quinn, *supra* note 8, at 864 n.180 (noting that men may be better able to find alternate shelter because they have more financial resources and are usually unencumbered by children); see also Mullins, *supra* note 21, at 247-48 (asserting that the only alternative to a batterer's eviction would be to force the victim to flee, thereby further victimizing her even though she was not the one who acted wrongly).

140. An ex parte order for protection remains effective until modified or vacated by the court. See Domestic Abuse Act, ch. 142, sec. 5, § 7(c), 1995 Minn. Laws 258, 260 (codified as amended at MINN. STAT. § 518B.01). Even if the alleged abuser does not request a full hearing during the window of time specified by Chapter 142, he can request a hearing to modify the order at any time during the year it is in effect. MINN. STAT. § 518B.01(11) (1994). Moreover, a protection order is appealable as a final order in a special proceeding. *Rigwald v. Rigwald*, 423 N.W.2d 701, 705 (Minn. Ct. App. 1988).

141. Under the old temporary ex parte order, a hearing was set for seven days from issuance of the order. MINN. STAT. § 518B.01(7)(a) (1994). Continuances were available to ensure the respondent would have at least five days notice. *Id.* sec. 4, § 5(a). Under the revised self-finalizing order, a hearing requested by the petitioner will occur in not less than seven days from the order's issuance. See *id.* sec. 5, § 7(b). If the hearing is instead requested by respondent, it will occur in not more than 10 days from the issuance of the order. *Id.* Again, both parties shall have a minimum of five days to respond to the order. See *id.* sec. 4, § 5(a), sec. 5, § 7(c).

142. *Mathews*, 424 U.S. at 341-42 (holding that no prior evidentiary hearing was required where social security disability benefits were cut off). The court reasoned that the potential harm of erroneous deprivation to a recipient of disability benefits is likely to be less than that of a *Goldberg* welfare recipient. *Id.*; cf. Kinports & Fischer, *supra* note 8, at 195 (contending that requiring the respondent to vacate "provides additional deterrence to criminal behavior, whereas requiring victims to do so would discourage them from seeking the needed protection," and reward the offender).

143. When violence has been alleged and found, the respondent's forced departure from a shared home in which the petitioner also has a legal interest is indeed a less severe deprivation than those set aside in other cases. See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979) (upholding a child's civil commitment without a hearing based on the independent judgment of physician).

In evaluating whether the deprivation outweighs the state interest, the Court has also examined the means-ends fit. See, e.g., *Bell v. Burson*, 402 U.S. 535 (1971) (invalidating a license revocation scheme because it failed to consider fault, the very factor the state itself deemed central to its statutory purpose); *Carrington v. Rash*, 380 U.S. 89 (1965) (rejecting a blanket exclusion depriving all servicemen the right to vote as an inadequate means to further the "powerful" state interest in restricting its electorate to bona fide residents).

On balance, the safeguards in place and the strong government interest in preventing domestic violence outweigh the respondent's interest in the shared dwelling.¹⁴⁴ In *Baker*, the court relied on four key safeguards inherent in the temporary ex parte order: (1) the order would issue only upon a petitioner's sworn and factually specific affidavit; (2) only judges or referees could issue orders; (3) the orders were temporary; and (4) the respondent had to receive notice of a pending full hearing.¹⁴⁵

Admittedly, Chapter 142 alters two of the safeguards. Ex parte protection orders are no longer "very short term," nor do they precede "notice of a full hearing."¹⁴⁶ These changes, however, do not mean that the revised ex parte protection order provision fails to provide adequate safeguards. On the contrary, the changes merely necessitate a reevaluation of the adequacy of the safeguards now provided by the revised ex parte protection order. Chapter 142 simply leaves the length of the deprivation and the need for a hearing to the discretion of the parties.¹⁴⁷ Nothing in the due process mandate indicates that such a change is per se unconstitutional.¹⁴⁸

In fact, "due process of law does not require a hearing 'in every conceivable case of government impairment of a private interest.'"¹⁴⁹ The essential guarantee is that the procedure be funda-

Evicting a batterer from the home is distinguishable from either *Bell* or *Carington*, however, because it is a means directly related to achieving the end of preventing domestic violence. See Mullins, *supra* note 21, at 246 (asserting that batterer eviction is one way to protect women from further abuse while increasing the likelihood that criminal prosecution will proceed). Admittedly, however, other deprivations, such as the denial of visitation and custody may involve more compelling individual interests. See *supra* note 118. These arguably more egregious deprivations must be weighed against the procedural safeguards and state's interest to determine whether due process has been adequately provided.

144. See, e.g., *Parratt v. Taylor*, 451 U.S. 527, 538 (1981) (affirming that "post deprivation remedies made available by the state can satisfy the Due Process Clause," especially where immediate state action is necessary), *rev'd on other grounds*, *Baker v. Baker*, 494 N.W.2d 282, 288 (Minn. 1992) (discussing the public's "extraordinary interest" in a society free from violence and the state's "strong interest" in preventing domestic violence).

145. *Baker*, 494 N.W.2d at 288.

146. See *supra* notes 53-61 and accompanying text (discussing the substance of Chapter 142).

147. *Id.*

148. See SUBSTANCE & PROCEDURE, *supra* note 100, at 662. Where there is a deprivation of life, liberty, or property, due process requires that "the individual whose interests are affected must be granted a fair procedure before a fair decision-maker. However, this principle does not mean that the individual has the right to a hearing before the action is taken or even to any personal hearing at any time." *Id.*; see, e.g., *Parratt*, 451 U.S. at 527 (affirming that "post deprivation remedies made available by the state can satisfy the Due Process Clause," especially where immediate state action is necessary); *Daniels v. Williams*, 474 U.S. 327 (1986).

149. *Stanley v. Illinois*, 405 U.S. 645, 650 (1972) (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894 (1961)). It is important to remember

mentally fair.¹⁵⁰ Due process requires that one be afforded an opportunity to make a meaningful response in a meaningful way.¹⁵¹ Courts have interpreted this mandate to require an impartial decision-maker and adequate notice.¹⁵² "[I]n any proceeding which is to be accorded finality . . . [notice must be] reasonably calculated, under all circumstances, to appraise interested parties of the pendency of the action and afford them an *opportunity* to present their objections."¹⁵³

Meaningful notice and opportunity to respond are not hindered by Chapter 142 because the modified Act provides several acceptable means for serving notice. Personal service on an alleged abuser is preferred, but where impossible or impracticable, notice may be served by publication or mail.¹⁵⁴ Publication and mail service have been found adequate in a number of civil contexts.¹⁵⁵ Moreover, given the victim's need for safety and prompt action,¹⁵⁶

that due process is a "flexible concept" and does not indicate a "procedure universally applicable to every situation." *Id.* The constraints required by due process are dependent on the circumstances and interests at issue. *Id.*

150. SUBSTANCE & PROCEDURE, *supra* note 100, at 656.

151. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

152. See SUBSTANCE & PROCEDURE, *supra* note 100, at 656-58.

153. *Id.* at 661 (emphasis added); see also *Quinn*, *supra* note 8, at 871-72.

154. See MINN. STAT. § 518B.01(8)(c) (1994). The decision to permit the use of such alternate service is left to the discretion of the judge. *Id.*

155. See, e.g., *McIntee v. State Dep't of Public Safety*, 279 N.W.2d 817, 820 (Minn. 1979) (holding that delivery of a license revocation notice via certified mail to a respondent's postbox of five years was sufficient to constitute "constructive delivery" of notice despite respondent's failure to pick up his mail); *Elliott v. Franklin*, No. CX-92-1968, 1993 WL 129633, at *2 (Minn. Ct. App. 1993), *review denied*, July 15, 1993. (finding service by publication in a personal injury case adequate when a respondent purposely avoided service pursuant to MINN. R. Crv. P. 4.04); *Har-Ned Lumber Co. v. Amagineers, Inc.*, 436 N.W.2d 811, 814-15 (Minn. Ct. App. 1989) (concluding that service of a mechanic's lien statement via certified mail was timely despite recipient's failure to respond to the notice). But see *Young v. Mt. Hawley Ins.*, 864 F.2d 81, 82 (8th Cir. 1988) (per curiam) (finding service by mail ineffective when a party received papers by certified mail and signed the return receipt, but did not return the acknowledgment of service form); *Etzler v. Mondale*, 151 N.W.2d 603, 611 (Minn. 1963) (deeming service by publication inadequate before a district court could order a platted street vacated pursuant to MINN. STAT. § 505.14).

Generally a party may secure service by publication or mail by making an appropriate affidavit that meets the statutory requirements of the relevant rule. See *Van Rhee v. Dysert*, 191 N.W. 53, 53 (Minn. 1922). However, due process is the ultimate inquiry regarding the adequacy of service. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950) (holding that statutory notice by publication was inadequate on judicial settlement of accounts by the trustee of a common trust fund); *Meadowbrook Manor, Inc. v. City of St. Louis Park*, 104 N.W.2d 540, 543 (Minn. 1960) (applying *Mullane* to a tax assessment case and holding statutory notice by publication did not comply with due process).

156. See *Baker*, 494 N.W.2d at 288 (citing MINN. STAT. § 518B.01(7)(a)) ("[I]nasmuch as the statute requires an allegation of an 'immediate and present danger of domestic abuse,' . . . there can be no argument that a special need for prompt action is shown.")

and the respondent's ability to vacate a wrongfully issued protection order at any time,¹⁵⁷ publication and mail service adequately protect due process under the circumstances.¹⁵⁸ Assuming the methods of service survive scrutiny,¹⁵⁹ the only other factor warranting evaluation is whether due process is satisfied when the state provides an alleged abuser notice of an opportunity to request a hearing, or whether the state is obliged to set a hearing and notify the respondent of it.

An unconstitutional burden does not result when a respondent is required to indicate his desire for a hearing. Neither *Goldberg* nor *Mathews* came close to suggesting that, in the interest of due process, the government agency responsible for the deprivation should go so far as scheduling a hearing for the deprived individual. Such a holding would lead to extreme administrative inefficiency and a misuse of scarce government resources.

The importance of administrative efficiency in judicial analysis should not be underestimated.¹⁶⁰ In *Califano v. Boles*,¹⁶¹ for example, the United States Supreme Court upheld ex parte deprivations on the basis of administrative convenience alone.¹⁶² The Court concluded that the Social Security system could not sustain the enormity of the cost which would result from the use of a full adversarial process for every alleged deprivation.¹⁶³ Similarly, in *Mackey v. Montrym*,¹⁶⁴ the Court upheld summary license suspensions for individuals who refused to take breath-analysis tests.¹⁶⁵ The Court reasoned that, on balance, the deprivation of a driver's license without a full factual finding and adversarial hearing was justified by the state's extraordinary interest in protecting the pub-

157. MINN. STAT. § 518B.01(11) (1994) ("Upon application, notice to all parties, and hearing, the court may modify the terms of an existing order for protection.").

158. This is similar to other cases in which post-deprivation procedures allow for rectifying an erroneous deprivation. See, e.g., *Mathews*, 424 U.S. 319 (allowing the respondent six months following the deprivation to levy and prove a claim of erroneous deprivation).

159. *Baker* did not address the validity of the mechanisms of service, therefore, for the purposes of this analysis, they will be presumed valid.

160. See, e.g., *Nashaar v. Nashaar*, 529 N.W.2d 13, 14 (Minn. Ct. App. 1995) (recognizing that "[i]n this era of crowded court calendars and limited judicial resources, the requirement for expedited hearings in domestic abuse proceedings can be burdensome").

161. 443 U.S. 282 (1979).

162. *Id.* at 284.

163. *Id.* See generally *Mathews v. Lucas*, 427 U.S. 495 (1976) (holding the Social Security Act's requirement that illegitimate children produce a higher burden of proof than their legitimate counterparts to qualify for their deceased parents' Social Security benefits is valid); *Weinberger v. Salfi*, 422 U.S. 749 (1975) (holding the duration of relationship requirements of the Social Security Act valid).

164. 443 U.S. 1 (1979).

165. *Id.* at 18-19.

lic from drunk drivers and its need to conserve administrative resources.¹⁶⁶ Although the threat of suspension offered little added deterrence value, it served the equally important purpose of showing that the state was serious about addressing the problem of drunk driving.¹⁶⁷

The holdings of *Califano* and *Mackey* support the strength of Minnesota's interest in preventing domestic violence and justify evicting a respondent from a shared domicile for several reasons. First, the state has an extraordinary interest in a violence-free society.¹⁶⁸ Second, the state acknowledges the need and importance of conserving limited judicial resources.¹⁶⁹ Finally, as in *Mackey*, the state's victim-responsive policy serves the important purpose of demonstrating that the state is serious about addressing the problem of domestic violence.¹⁷⁰

Furthermore, the notice provides an alleged abuser meaningful and sufficient time to prepare and proffer a reply to the allegations levied against him. In *Andrasko v. Andrasko*,¹⁷¹ the Minnesota Court of Appeals implicitly affirmed the validity of the minimum five-day notice outlined in the Domestic Abuse Act.¹⁷² *Andrasko* involved a domestic abuse protection order temporarily denying the respondent child custody, a deprivation arguably more severe than eviction.¹⁷³ Thus, it is reasonable to conclude that in a situation of domestic violence, notice of one's right to a hearing will be prima facie constitutional where it provides at least five days to prepare a defense.¹⁷⁴ In addition, the respondent's ability to con-

166. *Id.* at 19.

167. See *Mackey*, 443 U.S. at 17-18 (defining the preservation of public safety as "paramount" and discussing the "great leeway" accorded states in adopting summary procedures to protect public health and safety); see also Quinn, *supra* note 8, at 868.

168. *Baker*, 494 N.W.2d at 288.

169. See *Nashaar*, 529 N.W.2d at 14.

170. But see *infra* notes 211-18 and accompanying text (asserting that the justice system, in reality, is not all that serious about responding to domestic violence).

171. 443 N.W.2d 228 (Minn. Ct. App. 1989).

172. *Id.* at 230 (finding an abuse of discretion where the district court failed to grant a continuance to a respondent who received less than the five-day minimum notice provided in MINN. STAT. § 518B.01(5)(a)).

173. The loss of custody is arguably a more serious deprivation than eviction. See generally *May v. Anderson*, 345 U.S. 528, 533 (1953) (asserting that the interest in one's family is "far more precious than . . . property rights"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that the right to conceive and raise one's children has been deemed "essential"). Child custody was also one of the main issues the *Baker* court addressed. *Baker*, 494 N.W.2d at 282.

174. But see MODEL CODE, *supra* note 103, § 307 (recommending a 30-day window for respondent-requested hearings as a way to afford due process and give adequate time for the preparation of a defense); OR. REV. STAT. ANN. § 107.7186(a) (Butterworth Supp. II 1994) (allowing respondents precisely this 30-day response time); see also Lerman, *supra* note 71, at 94 (recommending 20 days for respondent to re-

test an order even after it becomes "final" serves to further minimize the risk of erroneous deprivation, and provides respondent with options for protecting his interests.¹⁷⁵ Thus, under *Mathews*, the self-finalizing ex parte protection order created by Chapter 142 should be constitutional.

Moreover, under *Fuentes*, ex parte relief in situations of immediate and threatened violence continues to be a response to an "extraordinary circumstance" as it was in *Baker*.¹⁷⁶ The changes to ex parte protection orders brought about by Chapter 142 did not affect the circumstances of immediate and threatened domestic violence, which remain emergency situations requiring prompt judicial action. Finally, the statute's terms are narrow enough to sufficiently limit the state's power to deprive the individual.

In addition, the resulting deprivation to the alleged abuser is based on an adequate standard of proof. Ex parte protection orders issued in situations of immediate and threatened violence need only be proven by a preponderance of the evidence in Minnesota.¹⁷⁷ In

quest a hearing where a second, final hearing is optional); ARIZ. REV. STAT. ANN. § 13-3602(d), (h) (Supp. 1995) (leaving the need for a hearing to the judge's discretion, providing an unlimited time for respondent to request a hearing, and granting each party one hearing as a matter of right during the life of the order).

175. See, e.g., *Mackey v. Montrym*, 443 U.S. 1, 14 (1979) ("[W]hen prompt postdeprivation review is available for the correction of administrative error, we have generally required no more than that the predeprivation procedures . . . provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be."). But see *Stanley v. Illinois*, 405 U.S. 645, 647 (1972) (citing *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969)) ("This court has not . . . embraced the general proposition that a wrong may be done if it can be undone.").

176. See *Baker*, 494 N.W.2d at 289.

177. Given that ex parte protection orders are civil, not criminal orders, abuse need only be shown by a preponderance of the evidence and not the stricter criminal standard of beyond a reasonable doubt. *Marquette v. Marquette*, 686 P.2d 990 (Okla. Ct. App. 1984). In recognition of respondents' interest, a few states employ an elevated, clear and convincing evidentiary standard for ex parte relief. *Quinn*, *supra* note 8, at 849. However, such an elevated standard is inadvisable and unnecessary, because it would subvert the intention of the law and deny relief in many of the cases for which ex parte provisions are intended. *Lerman*, *supra* note 71, at 92 n.88. Moreover, by limiting the evidence that can be considered in making this determination, Minnesota courts may make the standard a more difficult one to meet.

For example, in some states, past instances of abuse can be considered as sufficient to show the likelihood and threat of future abuse. See, e.g., OR. REV. STAT. ANN. § 107.718(2) (Buttworth 1994). In Minnesota, however, past abuse is insufficient to show present or future danger to petitioner. See *Andrasko v. Andrasko*, 443 N.W.2d 228, 230 (Minn. Ct. App. 1989) (invalidating a domestic abuse protection order as improperly issued because, despite the allegation of specific incidents of past abuse, there was no evidence of any intent to do present harm or a showing of present harm as required by the statute); *Bjergum v. Bjergum*, 392 N.W.2d 604, 605 (Minn. Ct. App. 1986) (holding that the evidence, including unsubstantiated allegations of abuse, was insufficient to warrant issuing a domestic abuse protection order). Thus, relative to other states that also employ a preponderance of the evidence

Metchel v. Metchel,¹⁷⁸ the Minnesota Court of Appeals held that issuing an ex parte protection order is, in effect, a probable cause finding of domestic abuse.¹⁷⁹ In terms of the quantum of evidence, probable cause and preponderance of the evidence are roughly equivalent.¹⁸⁰ Given the urgency of the circumstances, the state's strong interest in stopping domestic violence, and the batterer's ability to vacate wrongful orders at any time, it is reasonable to conclude an initial finding of domestic abuse will justify the eviction of a respondent from the home for up to a year.¹⁸¹

IV. Other Considerations—Effectiveness, Enforceability and the Impact of Self-Finalizing Ex Parte Protection Orders on Women as Victim/Survivors

Establishing the constitutionality of the revised ex parte protection order only shows that the self-finalizing ex parte order created by Chapter 142 may be considered legally credible. Still to be addressed, however, is whether the revised ex parte order will be credible in practice. In other words, will judges be likely to implement the revised ex parte protection orders fairly, will police enforce them appropriately, and will women, as victim/survivors, benefit from them sufficiently?

A. Implementation Issues: The Judiciary

Separation from an abuser marks the height of danger for a victim.¹⁸² It is the time when she most needs legal assistance, and also the most devastating time should the judicial system fail to

standard, Minnesota has, in reality, a slightly more stringent evidentiary standard for issuing domestic abuse ex parte protection relief.

178. 528 N.W.2d 916 (Minn. Ct. App. 1995).

179. *Id.* at 918 (holding that the issuance of an ex parte protection order should be treated as an implicit finding of probable cause of physical abuse in situations where mediation is considered).

180. Preponderance of the evidence means "the existence of a contested fact is more probable than its nonexistence." CHARLES McCORMICK, *McCORMICK ON EVIDENCE* § 339 (John W. Strong ed., 4th ed. 1992). Similarly, probable cause requires "only the probability, and not prima facie showing, of criminal activity . . ." *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (citing *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). Thus, both signify a standard of more likely than not.

181. One point not explored in this note is the nature of "temporary." One reason for Oregon's success with a similar self-finalizing ex parte protection order may be that the final remedy, involving deprivations of one year, is still considered temporary. Telephone Interview with Judith Armatta, *supra* note 68; see also OR. REV. STAT. ANN. § 107.718 (Butterworth Supp. II 1994).

182. See Waits, *supra* note 7, at 283 (stating that a batterer usually becomes more abusive if his partner makes any attempt to assert control over her life).

protect her.¹⁸³ At its best, going to court can be an empowering experience whereby a victim sees justice can indeed prevail;¹⁸⁴ however, it can also be traumatic and difficult.¹⁸⁵ The nature of the experience depends largely on the attitude of the judge.¹⁸⁶

In the past, victims requesting temporary ex parte protection orders typically met little resistance from the judiciary in obtaining them.¹⁸⁷ High issuance rates may be attributed to the limited nature of the relief sought.¹⁸⁸ Temporary ex parte orders provide immediate, short-term protection that lapses if not renewed.¹⁸⁹ As a result, little political risk exists for a judge who issues orders for all credible requests. Moreover, the mandatory hearing necessary to finalize the order minimizes the risk of erroneous deprivation. After Chapter 142, however, the initial order is likely to become the final order for protection.¹⁹⁰ In anticipation of an enhanced risk of

183. See Truss, *supra* note 85, at 1172-73 ("The most violent and deadly attacks often occur when abused women attempt to leave their abusers."); see also Waits, *supra* note 7, at 271 (commenting that although "[t]he law is not a panacea for domestic violence . . . [i]t does not mean it can or should do nothing").

184. Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, *supra* note 1, at 243. "For most women their experience with the legal process . . . was positive and empowering." *Id.* One important factor is "the possibility that a woman's attorney can deliver 'some justice' when cross-examining the assailant." *Id.* at 244. For some women, therefore, the measure of justice is when "the man admit[s] his violence, 'the worst things . . . every bit,' in the legal setting. This can be every bit as important to a woman as police protection." *Id.*

185. See *id.* at 243-44 (noting that battered women, like rape victims, often suffer a "second assault" by the legal system). Admittedly, there are emotional costs for some women associated with telling their stories of abuse in public. *Id.* at 244. Some are embarrassed by having to expose details of their personal life and abuses. *Id.* Some feel invaded by the hearing. *Id.* Others welcome the chance to tell their story, but prefer that the hearing take place in a judge's chambers. *Id.*

186. See *id.* When judges take a victim's complaint seriously, the victim is more likely to feel supported and respected by the system. As one victim remarked:

The judge seemed to understand my situation. He . . . never doubted my statements . . . [and] wanted me to know how important it was that I hold up my end of the deal with the TRO to make it work. . . . I assured him . . . I wouldn't blow it, he told me he admired my courage.

Id.

187. See, e.g., Salzman, *supra* note 43, at 337 (discussing the "high percentage of restraining orders granted"). According to one study, "Ninety-one percent of Massachusetts judges reported that they always issue a restraining order when there is a serious threat of physical or mental harm to a victim." *Id.* at 337 n.46. Discrepancy exists, however, as to whether the high issuance rate is attributable to a shift in judges' attitudes or to judges' fear of public criticism. *Id.*

188. See *supra* notes 18-32 and accompanying text (defining temporary ex parte protection orders generally and in Minnesota).

189. See, e.g., *supra* notes 22-32 and accompanying text (laying out the characteristics of Minnesota's pre-Chapter 142 temporary ex parte relief).

190. See *supra* notes 52-61 and accompanying text (explaining how ex parte protection orders work after Chapter 142's passage).

erroneous deprivation, it is reasonable to conjecture that judges will scrutinize protection order requests more diligently before issuing *ex parte* orders.¹⁹¹

Lost along with the mandatory hearing is the opportunity for a judge to publicly confront an abuser. The importance of this opportunity both to empower the victim¹⁹² and deter the abuser from engaging in future violence should not be underestimated.¹⁹³ Foregoing this opportunity means that a batterer may not be made publicly accountable for his abusive conduct until the police are called to enforce a violated order. This does a great disservice to a victim because it sends a message that the justice system will hold her batterer publicly accountable only after she has been abused again.¹⁹⁴ Moreover, it erroneously relies on the willingness of law enforcement personnel to effectively enforce a violated protection order.

B. Enforcement Issues

1. Law Enforcement Officials

Protection orders are riddled with problems that can render them ineffective and even dangerous. Orders for protection are prone to violation, rarely produce arrests, and usually fail to prevent future violence.¹⁹⁵ Although abusers who want to harm their

191. This is reasonable because not only is the respondent deprived for a potentially longer period of time under the revised *ex parte* order, but more petitioners with "improper purpose" may seek the more accessible self-finalizing orders. One possible unintended effect, therefore, is that judges will issue relatively fewer *ex parte* protection orders. As before, however, the respondent is still free to move to vacate the order. See *supra* note 175 and accompanying text.

192. See, e.g., Dowd, *supra* note 89, at 31 (asserting that "[i]f the prosecutor and judge fail to accompany arrest with a strong message of support for the victim, the arrest will have little [impact]"); see also Taub, *supra* note 89, at 331 (acknowledging the "symbolic value" of a serious response by the justice system as a factor enabling women to extricate themselves from abusive relationships).

193. See Lerman, *supra* note 71, at 97 ("[S]ometimes the victim knows that the abuser will not obey the order unless he is told in person by a judge that he must do so."); see also Pamela Hill Nettleton, *The First Question is to Ask Why Men Hit*, STAR TRIB. (Minneapolis), Mar. 29, 1995, at A4 (observing that "[h]e only stopped because the judge told him next time he would go to jail"); Waits, *supra* note 7, at 278 (noting the legal system's "important role in confronting and motivating batterers" because batterers "will change, if at all, only if they are forced to face the consequences of what they have done").

194. Cf. Waits, *supra* note 7, at 303 ("The legal system must do everything it can to encourage the victim to say 'no' to further abuse . . . [including] support[ing] her in every act that reduces her isolation and promotes her safety.").

195. *Developments*, *supra* note 3, at 1510; see also Kinports & Fischer, *supra* note 8, at 220 (noting that less than six percent of domestic abuse service providers surveyed described their county's enforcement procedures as working very well, while almost half said procedures are poor or very poor).

victims will clearly not be stopped by a piece of paper, inadequate police responses to calls for assistance only reinforce petitioners' exposure to violence.¹⁹⁶ Moreover, an officer's unwillingness to arrest may foster a victim's expectation that the justice system simply does not care to help her.¹⁹⁷

Police called to the scene of a violation do not arrest for a number of reasons. First, even where authorized to make warrantless arrests whenever probable cause exists, many officers only arrest when a violation was committed in their presence.¹⁹⁸ Second, some officers will not arrest unless the violation itself constitutes a separate offense, such as battery.¹⁹⁹ Third, police may refuse to enforce an order for protection when they believe the victim also "broke the order" by having voluntary contact with the abuser.²⁰⁰ Fourth, many officers will identify with the abuser, not the victim.²⁰¹ Finally, police often make no further effort to find an abuser who fled the scene prior to their arrival.²⁰² The variable nature and ambiguity inherent in the revised ex parte order may further compound these problems by confusing or frustrating officers.²⁰³ Thus, instead of fulfilling their obligation to help women victimized by abuse, law enforcement officers may send victimized

196. See, e.g., Anthony Bouza, *Responding to Domestic Violence*, in WOMAN BATTERING: POLICY RESPONSES, *supra* note 5, at 191 (explaining that domestic abuse "begins with angry words, then maybe a shove or a slap . . . [and if] not treated at this crucial juncture, it escalates, frequently culminating in murder"). See *infra* notes 216-20 and accompanying text (introducing the idea of domestic violence as a tool for the subordination of women).

197. See Dowd, *supra* note 89, at 31; see also Waits, *supra* note 7, at 309 ("[A]rrest is a strong signal of support to the victim.").

198. Kinports & Fischer, *supra* note 8, at 224 (reporting trends and statistics emerging from a national survey of domestic violence advocacy services); see also FINN & COLSON, *supra* note 18, at 54-55 (reporting that most states permit or require a warrantless arrest whenever an officer has probable cause to believe a protection order was violated or domestic abuse occurred).

199. Kinports & Fischer, *supra* note 8, at 225 (noting that approximately 18 percent of respondents indicate the unwillingness to arrest for an order violation alone is a problem despite the fact that most states make an order violation itself a misdemeanor or criminal contempt).

200. *Id.* (stating that more than 88% of those surveyed indicated that officer unwillingness to arrest because of voluntary victim contact is a problem in their communities, and more than half (56%) considered it a very serious or significant problem). The survey responses noted that police sometimes chastise the woman and have even gone as far as arresting her for having voluntary contact with her abuser. *Id.* at 225 n.256.

201. Waits, *supra* note 7, at 314 (asserting that because police forces are primarily male, as are most batterers, officers will find it harder to identify with the victim).

202. Kinports & Fischer, *supra* note 8, at 226-27 (indicating that 44% of survey responses report that no effort is taken to find an abuser who has fled, and some add that police have even refused to file charges in such cases).

203. See *supra* notes 80-86 and accompanying text (discussing the inherent ambiguity of new orders).

women a clear message that they will need to look elsewhere for support.

2. Service of Notice

A petitioning victim's low expectations of police assistance may begin even earlier because the first opportunity to "enforce" an order for protection is the initial service on the abuser.²⁰⁴ Although service of notice is an opportunity to show the justice system's support for a victim, it can become a frustrating experience of "inordinate delays" that jeopardize her safety.²⁰⁵ Compounding the problem is the fact that the revised ex parte protection order may be served by publication or mail.²⁰⁶ Pressure to use simpler, alternative methods may mount if, as is hoped, Chapter 142 encourages more women to seek ex parte relief.²⁰⁷ Given sheer volume, overworked law enforcement personnel may have little incentive to doggedly locate and personally serve a batterer.

Personal service, however, is undoubtedly the most desirable service method for several reasons. It conveys a far more persuasive and concrete message that an abuser's conduct is intolerable. It positively and unequivocally supports the victim-system alliance. Most importantly, it confirms that the abuser indeed knows about the order and its terms.²⁰⁸ Such knowledge is important because

204. See Kinports & Fischer, *supra* note 8, at 221-22; cf. Waits, *supra* note 7, at 306 (arguing that "the legal system should constantly and consistently convey a message that abuse is unacceptable conduct").

205. Kinports & Fischer, *supra* note 8, at 221 n.236 (noting that approximately 34% of those surveyed reported that service took three days or longer).

206. See *supra* notes 26-32 and accompanying text (explaining alternatives for service).

207. Preliminary statistics from Ramsey County seem to indicate Chapter 142's self-finalizing ex parte relief is a success. Telephone Interview with Nancy Libman, Supervisor, Ramsey County Domestic Abuse Intake and Harassment Office (Mar. 1, 1996). Comparing 1994 and 1995 figures reveals that the total number of protection orders issued jumped by approximately one-third. *Id.*; Statistics from Ramsey County Domestic Abuse Intake and Harassment Office (Mar. 1, 1996) (on file with author). This figure would seem to initially affirm advocates' hopes for increased victim access to protection order relief. See *supra* notes 69-86 and text (discussing advocates' hopes and concerns for Chapter 142).

It should be noted, however, that Ramsey County embraced the self-finalizing order created by Chapter 142 and proactively implemented systems to enhance its effectiveness. See Legal Services Memorandum, *supra* note 77, at 3. To its credit, the Domestic Abuse Intake and Harassment Office developed a simplified application, computerized tracking system, and reminder forms designed to help petitioners through the process of requesting protection orders. Telephone Interview with Nancy Libman, *supra* note 60. *Id.* To help it in its work, the Office created multilingual instruction sheets which inform respondents of their rights and obligations when served with an ex parte protection order. *Id.*

208. Telephone Interview with Judge Diana S. Eagon, *supra* note 61. One of the statutory elements of a violation of an order for protection is that the defendant

without it an abuser has a stronger basis for collaterally attacking an alleged violation of the protection order.²⁰⁹ In addition, service by mail or publication strengthens the assertion that ex parte protection orders are fundamentally unfair because the alleged abuser may be deprived of rights without ever having been provided actual notice.²¹⁰

Even when an arrest takes place, it will not affect a victim's situation if the judicial system fails to reinforce the arrest with a "strong message of support for the victim."²¹¹ Unfortunately, at times the judiciary is unable or unwilling to fully prosecute protection order violations.²¹² While courts are more responsive to victims' needs than ever, some judges still demonstrate a dangerous lack of understanding of domestic violence.²¹³ In extreme cases, judges have even engaged in inappropriate jokes, commentary, or reproach of victims.²¹⁴ Such abdication of the judicial and law en-

"knows of the order." MINN. STAT. § 518B.01(14)(a) (West 1994); *see, e.g.*, *State v. Dumas*, No. CX-93-1608, 1994 WL 71403, at *2 (Minn. Ct. App. Mar. 8, 1994) (explaining that the knowledge requirement is distinct from actual personal service because it mandates only that the respondent knows of the order); *see also* *Engstrom v. Farmers & Bankers Life Ins. Co.*, 41 N.W.2d 422, 424 (Minn. 1950) (defining waiver as the relinquishment of a known right and both intent and knowledge are essential elements); *Blaeser and Johnson, P.A. v. Kjellberg*, 483 N.W.2d 98, 102 (Minn. Ct. App. 1992) (holding that a defendant waived his right to later claim insufficiency of process where the defendant received a summons and complaint by certified mail, personally signed the return receipt and communicated with the plaintiff regarding the filing of an answer in a breach of contract suit).

209. *Dumas*, 1994 WL 71403, at *2; *see, e.g.*, *State v. Redalen*, No. C9-94-945, 1994 WL 714348, at *2 (Minn. Ct. App. 1994) (invalidating an alleged abuser's challenge based on his assertion that he lacked the requisite knowledge of the protection order's existence). The Minnesota Court of Appeals noted that "[t]he statute's requirement that the defendant 'knows of the order' is not a requirement of formal notice, only a state-of-mind requirement." *Id.* at *2. *Cf.* *State v. Cook*, 148 N.W.2d 368, 369-70 (Minn. 1967) (noting that failure to appeal a court order precludes a collateral attack in a subsequent prosecution for violating the order); *see also* *Rigwald v. Rigwald*, 423 N.W.2d 701, 705 (Minn. Ct. App. 1988) (establishing that a final protection order is appealable in a special proceeding).

210. Actual personal service, however, is not a requirement for a criminal violation of an ex parte protection order. *See supra* notes 206-07.

211. Dowd, *supra* note 89, at 31.

212. *See* Waits, *supra* note 7, at 321-24 (discussing the difficulties prosecutors face).

213. Truss, *supra* note 85, at 1164; *see also* Salzman, *supra* note 43, at 353-56 (noting that judicial insensitivity presented the "most significant obstacle" to the program's success); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 3 (1993) (citing the failure of judicial officials to recognize the unique nature of the "victim-offender relationship and other family dynamics").

214. *See, e.g.*, Truss, *supra* note 85, at 1164-65 (citing a recent "stark example" of an inappropriate joke that was circulated at the November 1994 State Bar of Texas directors meeting); Mark Ballard, *Edinburg Judge Awash in Criticisms*, TEX. LAW., Feb. 17, 1992, at 8 (discussing a judge who, after denying a victim's protective order request, said "[i]f he hits her again . . . she can always file assault charges, and if he

forcement functions shakes a victim's confidence in the justice system, reinforces an abuser's control, and may even cause an abuser to think his behavior is above, or worse yet, endorsed by the law.²¹⁵

C. *The Benefits and Costs to Women as Victim/Survivors*

Our justice system's historical unwillingness to implement and enforce domestic violence laws demonstrates, in word and deed, the reality that women are still subordinate in our society. It has been said that the common law "rule of thumb" sanctioning male violence against women²¹⁶ is not really dead, but only transformed into its modern and more insidious manifestation: the idea that domestic violence is not a serious matter.²¹⁷ In one light, therefore, domestic violence can be seen as the age-old product of society's acceptance of, and reverence for, male authority.²¹⁸

hits her hard enough she can file aggravated assault [a]nd if he kills her, you can put him away for murder"); Salzman, *supra* note 43, at 337 nn.42-44 (discussing a "classic case" in which a judge "admonished [a victim] for requesting legal intervention and squandering judicial time and resources"—the victim received a protection order and was later murdered by her abuser).

215. Truss, *supra* note 85, at 1198-99. Women's and advocates' frustrations with inadequate protection are evidenced by the rising use of civil suits as a way to hold the criminal justice system accountable for its failure to adequately protect abuse victims. *Id.* at 1162. See also Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183 (1995) (outlining tort and other alternative legal remedies).

216. Truss, *supra* note 85, at 1157-60 (asserting that our society has not completely rejected the idea that intimate abuse by a husband toward his wife is a fundamentally private concern). The infamous "rule of thumb" permitted a man to beat his wife with a rod or stick as long as the weapon used was "no larger than a man's thumb" or, more perversely, "small enough to 'pass through a wedding band.'" *Id.* at 1157. The rule was denounced by early American courts as barbaric. *Id.* at 1158.

217. *Id.* at 1160; see also Waits, *supra* note 7, at 298-99, 304 (noting that in any other context the same violence would swiftly be met with retaliation and calling for the law to take the burden of prosecution entirely off of the victim). Sadly, the danger of law enforcement and judicial officials not taking allegations of domestic violence seriously already occurs. See, e.g., Hynson v. City of Chester, 864 F.2d 1026, 1028 (3d. Cir. 1988) (addressing law enforcement officers' failure to arrest an abuser who killed his victim only 20 hours after police responded to her call for help); see also Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) (arguing that police attitudes demonstrate that domestic violence is not a serious matter and, therefore, does not merit police concern).

218. See Waits, *supra* note 7, at 269 ("[P]owerful social forces permit and even encourage abuse."). Judge William Sweeney of Minnesota has stated that battering is directly associated with sexism. Address to Minnesota Conference on Criminal Justice Policies in Domestic Violence Cases, quoted in Ellen Pence, *The Duluth Domestic Abuse Intervention Project*, 6 HAMLIN L. REV. 247, 251-52 (1983). When asked, "Why do we have so many victims of battering?" he responded, "This society, historically, presumes male superiority: If you grant this presumption, that superiority has to be validated if challenged. How does one validate it? Ultimately by physical force." *Id.* See also Murray A. Straus, *A Sociological Perspective on the Prevention and Treatment of Wifebeating*, in BATTERED WOMEN: A PSYCHOSOCIO-

Failing to implement laws when a woman/victim most needs them not only reinforces her inferior status, but also sustains a "veil of normalcy" for the violence against her.²¹⁹ Moreover, the courts' failure to use available sanctions when women stand up for themselves in situations of violence can only undermine women's confidence that the system truly desires them to be strong and independent.²²⁰ Generally, society is uncomfortable with having strong women as members.²²¹ This discomfort is evident in the disparate way we, through our justice system, treat assertive, self-interested women.²²²

Ironically, as both a side effect of and a tactic for combatting domestic violence, abused women and their advocates have come perilously close to embracing the very stereotypes that disadvantage women. For example, Battered Woman Syndrome, recognized as the best explanation of "why women stay," feeds into and gives credence to the idea that women are weak (at least from a traditionally male perspective).²²³

LOGICAL STUDY OF DOMESTIC VIOLENCE 194, 208-17 (Maria Roy ed., 1977) (listing nine sociological factors that encourage abuse of women); Donald G. Dutton et al., *Arrest and the Reduction of Repeat Wife Assault*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, *supra* note 1, at 111-13 (contending that men who repeatedly abuse their wives do so because aggression serves an expressive and cathartic function, establishes dominance roles in a relationship, resolves the conflict at hand, and is rewarding—all of which make the behavior likely to be repeated); D.J. Tice, *Modern Society Hasn't Shown Much Progress in Taming Male Aggression*, ST. PAUL PIONEER PRESS, Aug. 16, 1995, at A10 (asserting that Minnesota's 1995 record homicide rate and the domestic abuse epidemic stem from society's inability to adequately deal with the uniquely "male problem" of aggression).

219. Truss, *supra* note 85, at 1166. The fact is that men who abuse women come in all shapes, sizes, and socio-economic classes. Society's sanctioning of violence just because it occurs in the home allows abusers to "conceal the darker side of their personality" under a "veil of normalcy." *Id.* at 1166-67.

220. Buzawa & Buzawa, *supra* note 3, at ix (reporting on the feminist movement's finding that the criminal justice establishment consists of "male-dominated paramilitary command structures" whose "prime implicit tenet has been to reinforce the patriarchal hierarchy of Western society, even to the extent of tacitly condoning, by inaction, violence that effectively 'puts women in their place'").

221. Katherine Dunn, *Just as Fierce: Men and Women*, MOTHER JONES, Nov.-Dec. 1994, at 34, 34. "American women have proven their efficacy in every law enforcement agency . . . the idea that women can't take care of themselves still permeates our culture." *Id.* at 36. The author goes on to argue that women's aggression is not taken seriously and, instead of being seen as dangerous, is only viewed as "cute" or "self defense." *Id.* at 39.

222. See, e.g., Henderson, *supra* note 12, at 66-67 (1993) (highlighting a jury's unwillingness to indict an alleged rapist because the victim had asked her armed assailant to use a condom); see also Dowd, *supra* note 89, at 45-46 (discussing the "good battered woman" stereotype and its effect on the legal system's treatment of women).

223. Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 353-54 (1995). "The stereotype of battered women as dysfunctional, passive, and weak has emerged in part from the

Admittedly, Battered Woman Syndrome and its companion concept of "learned helplessness" raised public consciousness and garnered support for addressing the problems of domestic abuse; however, it is this very stereotype of women as the weaker sex that has traditionally held women back.²²⁴ It is bitterly ironic, therefore, that at a time when women work shoulder to shoulder with men in more fields than ever, they find their most credible legal options²²⁵ require the invocation of traditional stereotypes of dependency and weakness that ultimately disadvantage women.²²⁶ The substantive remedy of Chapter 142 and the process by which the amendment was adopted are particularly troublesome because they presuppose and perpetuate the idea that women are weak. Thus, although Chapter 142 seems beneficial on its face, the amendment exacts a costly hidden price from abused women.

The amended ex parte protection order seems beneficial because it leaves the decision of whether to have a final hearing largely up to the victim.²²⁷ "Victim control" is a crucial and well-

clinical concept of the 'battered woman syndrome.' " *Id.* at 353. At least this is how our male-dominated societal structures, which tend to view power as "either/or" seem to define women. Admittedly legal feminists have a very different perspective. Because they recognize differences in women's experiences, legal feminists tend not to see weakness as inherent in Battered Woman Syndrome. Moreover, they revolt against the idea of women as 'homogenous' and easily categorized, instead calling for systems to recognize women's world view as distinct from men's. See Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1 U. CHI. LEGAL F. 23 (1989); see also Dunn, *supra* note 221, at 39 ("It is time to recognize the variability of females, just as we do males.").

224. Women's physical or emotional inferiority to men has always been a justification for keeping them out of male-dominated employment and societal positions. See Dunn, *supra* note 221, at 36, 39 (noting that "the mythology of females as essentially non-violent" embodies a dangerous message: women can still get hurt, but they are not allowed to fight back). See also *Developments*, *supra* note 3, at 1503 (acknowledging the cultural perceptions of weakness and dysfunctionality which abuse victims must overcome in child custody proceedings).

225. See Weiner, *supra* note 215, at 241 (conceding that under current law, women's best chance for proceeding successfully in tort may require employing traditional female stereotypes of "dependency and helplessness"). Notably, women's "weakness" seems to be the only justification of why women stay that courts and society will accept as credible. Again, this supports the idea that society is uncomfortable with strong women.

226. See Dunn, *supra* note 221, at 38. Dunn observes:

[I]t is still popular to assert that all female criminals are driven by male threat or patriarchal pressure. (The characters of 'Thelma & Louise' . . . are good examples of this stereotype.) Although on the surface this presumption of female innocence corrupted by male aggression seems complimentary, in fact it is deeply patronizing. . . . [A] failure to acknowledge the bad that women can do is a failure to take women seriously.

Id.

227. See *supra* notes 59-61 and accompanying text (discussing the revised process for obtaining a hearing)

established principle in effective advocacy.²²⁸ This purported benefit, however, is hollow for two reasons. First, it seems unlikely that victims, when given a choice, will opt for the discomfort, fear, and inconvenience associated with a full court hearing, even where such hearings may be in their best interest. This is especially true when the same result (a valid protection order) can be obtained without a hearing. Thus, while victim/survivors may save themselves the difficulty of facing their batterer or telling their story in court, they sacrifice an opportunity, albeit bittersweet, for empowerment.²²⁹ Second, women can only hold the judicial system accountable for its inadequacies when such problems are exposed. Exposure, however, only comes from experience. By opting not to be a presence in the courts, women risk losing the ability to expose mistreatment and demand change.

Another apparent benefit of the amended *ex parte* protection order which is troublesome on examination is that women who otherwise might not seek protection orders will be encouraged to use them.²³⁰ The problem is that without addressing existing enforcement problems, any gains in access will likely be short lived.²³¹ Increasing the volume of *ex parte* protection orders issued without also attempting to remedy existing enforcement problems can only exacerbate the obstacles to enforcement,²³² thereby frustrating all parties and fostering the perception that a protection order is just a worthless piece of paper.

Finally, because uncooperative abusers will not be hauled into court to account publicly for their behavior,²³³ batterers can continue denying (at least to themselves) the impropriety of their actions.²³⁴ Where no hearing occurs, the only manifestation of

228. See *supra* note 71 and accompanying text.

229. See *supra* note 184 and accompanying text (discussing court as a potentially empowering experience).

230. See *supra* note 74 (noting that protection orders are underutilized by women of Southeast Asian decent). This is particularly important because the Minneapolis/St. Paul metropolitan area has a sizable Southeast Asian population. See also *supra* note 70 (discussing the benefits of discretionary hearings for some same-sex petitioners).

231. See Taub, *supra* note 89, at 331 (discussing the need for society to put its resources behind its prohibitions of battering as a way to help the victim and change social attitudes).

232. This will surely overwhelm already frustrated officers. See *supra* notes 197-215 and accompanying text (discussing obstacles to police enforcement).

233. See *supra* note 192-94 and accompanying text.

234. See Waits, *supra* note 7, at 278 ("The necessity of intervention arises from the batterer's refusal to accept responsibility for his actions."). Indeed as the author notes:

Denial and minimization are crucial defense mechanisms for the batterer, because they allow him to evade accountability for his actions.

society's outrage at a respondent's conduct will be the order itself. An order is all too often seen by a batterer as a meaningless piece of paper.²³⁵ This detrimental perception is supported when the official "paper" is not personally served by a legal representative. Instead, the order may arrive as would any piece of unwanted mail—an act that speaks volumes to the half-heartedness with which society condemns a batterer's violent conduct.

As a process, Chapter 142 is in some respects an example of how not to legislate on behalf of domestic violence victims. In addition to being developed as a "one size fits all" reform,²³⁶ the amendment may have tried to do too much. Chapter 142 was as much or more a solution to the problem of crowded court dockets as it was a scheme to assist domestic violence victims.²³⁷ Self-finalizing ex parte orders were simply not a priority on the agenda of domestic violence advocates.²³⁸ Dialogue between lawmakers and victims' advocates at all stages of policymaking is crucial for passing meaningful and effective legislation; without it even the best of intentions can fall flat, or worse, be counterproductive to the work of the advocacy community. Despite the advocates' recognized value to the lawmaking process,²³⁹ however, they were not fully consulted before Chapter 142 was introduced.²⁴⁰ Such disconnected lawmak-

By refusing to believe that any problem exists, he thus feels no need to change. Even when confronted with undeniable evidence of his violence, he will minimize its severity.

Id. at 289. See also Curt Brown & Selena Roberts, *Warren Moon Hit and Choked Her, Wife Felicia Says*, STAR TRIB. (Minneapolis), July 20, 1995, at A1 (quoting Moon as having said, "These are personal problems. It was not a case of domestic violence. It was a domestic dispute." Moon's statements came after he was arrested for choking his wife to the point of nearly passing out).

235. See *supra* notes 85-86 and accompanying text (discussing protection orders' "paper tiger" problem).

236. The tendency to assume that what is needed in one district will work in all districts was a common criticism offered by the nearly one dozen advocates interviewed. See, e.g., Legal Services Memorandum, *supra* note 77, at 3 (suggesting one potential remedy for Chapter 142's pitfalls is to allow counties to adopt the option of adopting the "no hearing system").

237. See *supra* notes 33-51 and accompanying text.

238. See *supra* notes 62-68 and accompanying text. At least these were not a priority in the Minneapolis/St. Paul metropolitan area. There may have been support for the idea in Olmstead County. However, it appears there was no pre-introduction support for the amendment anywhere else. Telephone Interview with Jody Tharp, *supra* note 33.

239. See, e.g., Finn, *supra* note 25, at 178, 185 (discussing Duluth judges' close coordination with the local advocacy community); see also Cahn & Lerman, *supra* note 7, at 102 ("It is well-established that the use of victim advocates as contact points for abused women increases the rate of cooperation and increases the victims' satisfaction with the justice system."); Quinn, *supra* note 8, at 340-41 (discussing the importance of advocates and their role in assisting abuse victims).

240. See, e.g., *supra* notes 64-67 and accompanying text (noting that Chapter 142 was introduced late in the session and was not a priority on the advocates' agenda).

ing has no place in the struggle against domestic violence; it is risky and arguably patronizing. A swift and effective attack on domestic violence, therefore, necessitates a unified effort between advocates and lawmakers.

Chapter 142, therefore, is based on misguided perceptions and priorities which put it substantively and procedurally off the mark in effectively assisting domestic violence victims. For example, if the problem is that a victim fears or is embarrassed about asking her employer for time off to go to a hearing,²⁴¹ the answer is not to excuse her absence from court as a blanket policy. Although this certainly solves the immediate problem, and may even be best in some instances,²⁴² it also has the negative effect of both hindering the woman from learning to assert her rights and keeping domestic violence in the closet and out of the public eye.²⁴³ Instead, it is the employer's attitude that should change. Legislators can assist by working with abused women and their advocates to help make this type of change happen.

V. Making Ex Parte Protection Orders Work

Ex parte protection orders offer an abuse victim the opportunity to obtain the support of the justice system in making a break from her abuser. This support, however, must be more than just a piece of paper if the system is to follow through on its promise to protect a woman who risks much, maybe even her life, in obtaining a protection order. In the case of Minnesota's revised ex parte protection orders, there are five steps that could be taken to make or-

In fairness, it should be noted that Judge Ring did consult with the Rochester Women's Shelter. Telephone Interview with Judge Gerard Ring, *supra* note 31. Advocates there were excited by the amendment. *Id.* However, as discussed, one policy seldom fits all. What makes sense for an outstate area like Olmstead County simply may not work for urban counties such as Hennepin or Ramsey. *See supra* note 236.

241. The problem of victims' shame and reluctance to let others in on their "dark secret" is a recognized hindrance to victims' participation in the legal process. *See Chaudhuri & Daly, supra* note 184, at 245 (naming job-related issues, and not legal steps, as the greater obstacle to women seeking restraining orders). A problem frequently mentioned by abused women was explaining their absence from work: "[W]hat 'good story' would they give supervisors or co-workers?" *Id.* Moreover, evidence suggests women's fear of stigma is well-founded because "employers view battered women as high risk-employees." *Id.*

242. There are certainly times when a petitioning victim should not be forced to come to court. Obviously, a victim should not appear in court when doing so would be dangerous for her or cause her serious hardship; however, such victim absence from the courts should be the exception, not the rule.

243. *See Buzawa & Buzawa, supra* note 3, at vii (concluding that the "privacy" accorded to the traditional patriarchal family unit was one of the key structural barriers to the fulfillment of women's rights"). Admittedly, facing one's abuser is distinguishable because a victim's safety may be at issue. But the best solution still may not include excusing a victim's presence from court.

ders more credible and effective: (1) increase the length of time an alleged batterer has to opt for a hearing; (2) strengthen personal service of the order on the respondent; (3) improve victim access to protection orders; (4) clarify statutory ambiguities; and (5) educate justice system and law enforcement personnel.

First, increasing the length of time a batterer has to opt for a hearing will help avoid potential due process problems. The Model Code for Domestic and Family Violence calls for,²⁴⁴ and at least one other state uses, a response window of thirty days.²⁴⁵ Giving an alleged abuser more time to request a hearing should ameliorate concerns regarding the adequacy of time provided for making an informed waiver of his right to a hearing.²⁴⁶

Second, strengthening personal service on the alleged abuser will help both to deter constitutional challenges and to increase the overall efficacy of protection orders. Personal service should be sought in all cases.²⁴⁷ The server should explain the terms of the order, leave a written summary of this explanation with the respondent (preferably in the respondent's native language), and obtain the respondent's signature on a second copy of the explanatory form.²⁴⁸ This signed form thus constitutes proof of service and confirms that the respondent received notice of the protection order and comprehended its terms. Ideally, these documents would be added to the state's computerized records system;²⁴⁹ however, such

244. See *supra* notes 103, 174 and accompanying text (discussing the importance of providing the respondent with adequate time to respond to service).

245. See, e.g., *supra* note 174 (referring to Oregon's 30-day response window and highlighting Arizona's unlimited response window which lasts for the life of the order).

246. See Lerman, *supra* note 71, at 95 (commenting that a more conservative statutory approach to ex parte protection order relief is less likely to elicit a constitutional challenge); see also notes 208-09 and accompanying text (explaining the significance of knowledge and waiver).

247. See *supra* notes 204-10 (discussing issues supporting personal service of notice).

248. See, e.g., OR. REV. STAT. ANN. § 107.178(4)(b) (Butterworth Supp. II 1994) (requiring personal service either by a sheriff or, if the petitioner requests, a third party). In addition, Oregon requires that the "return of service" (consisting of copies of the affidavit of proof of service, petition, and protection order) be delivered to the sheriff's office for entry onto Oregon's Law Enforcement Data System. *Id.* § 107.720(1).

Notably, Ramsey County's Domestic Abuse Intake and Harassment Office is taking a number of these steps. Telephone Interview with Nancy Libman, *supra* note 60; see *supra* note 207 (describing some of the steps taken by Ramsey County).

249. See OR. REV. STAT. ANN. § 107.718(4)(b) (Butterworth Supp. II 1994) ("Entry into the Law Enforcement Data System constitutes notice to all law enforcement agencies of the existence of such order."); see also MODEL CODE, *supra* note 103, § 315, commentary at 32 (calling for the creation and use of a state "registry" for protection orders that would make order information available to courts and law enforcement agencies "around the clock"). See generally *Get Those Records in Shape*,

a system does not yet exist in Minnesota.²⁵⁰ Service by mail should only be permitted in rare instances and only when receipt by the respondent can be verified. Similarly, service by publication should be permitted only in extreme cases.

Third, improving victim access to protection orders will help provide relief to many women who otherwise might not seek such orders. Often abuse victims do not obtain protection orders because they are unaware of their options, unable to take the requisite procedural steps, or unsure of how the justice system will treat them.²⁵¹ However, a number of these access obstacles can be overcome by educating the community about the availability of ex parte relief, making ex parte protection orders available after business hours and over the phone, eliminating all fees for protection orders, and enhancing the role of advocates and clerks.

Educating the community about the existence of ex parte protection orders lets abused women know they have an option for remedying their situations.²⁵² Education efforts build awareness by reaching and teaching the community through a variety of media and networking opportunities.²⁵³ Without such victim awareness, even the most ideal system for obtaining protection order relief will go under-utilized.

Making emergency ex parte protection orders available after hours and by phone will eliminate judicial unavailability as an obstacle to obtaining a protection order.²⁵⁴ Extending normal court

PORTLAND OREGONIAN, Feb. 15, 1994, at D8 (discussing a potential federal effort for improving states' computer records systems, including Oregon's). Oregon's system has been in existence since 1974 and currently contains criminal histories on 702,000 individuals and case outcomes for 75-80% of criminal cases. *Id.*

250. Minnesota has used databases in isolated instances including the tracking of alleged gang members and sexual offenders, and is presently considering implementing a large-scale database system. Telephone Interview with Loretta Frederick, *supra* note 82; see also *Legislative Briefing: Crime Prevention Committee Passes Expanded Sex-Offender Registration Bill*, STAR TRIB. (Minneapolis), Apr. 13, 1993, at B2 (announcing the expansion of a central database designed to notify authorities of sex offenders in their areas); Ann O'Connor & Chris Graves, *Gang Awareness Up, But Actual Threat Low in Twin Cities*, STAR TRIB. (Minneapolis), Mar. 20, 1995, at B1 (discussing Minneapolis' database containing 6,000 names of alleged gang members and their associates).

251. See Kinports & Fischer, *supra* note 8, at 169-82 (examining the reasons why women do not readily seek protection order relief); see also Chaudhuri & Daly, *supra* note 184, at 235-45 (presenting victims' views on the potential benefits and limitations of protection orders).

252. Kinports & Fischer, *supra* note 8, at 182.

253. The Ramsey County Domestic Abuse Intake and Harassment Office is exploring the production of a video explaining how to obtain protection order relief. Telephone Interview with Nancy Libman, *supra* note 60. The office hopes to show the video in its office and on cable television. *Id.*

254. Kinports & Fischer, *supra* note 8, at 185.

hours in the morning or evening would minimize access problems for victims who work or who must travel long distances to request a protection order. Issuing protection orders by phone should help alleviate such external pressures on a victim.

For example, the Model Code for Domestic and Family Violence recommends that courts always have a judicial official on duty to issue oral emergency protection orders whenever a law enforcement officer convincingly states by telephone that a petitioner is in immediate danger of domestic violence.²⁵⁵ Using law enforcement officers as judicial agents in this way creates twenty-four-hour access to emergency protection orders.²⁵⁶ Telephone orders should also lessen the strain on crowded court calendars,²⁵⁷ and may even bring about positive "judicial attitudes and behavior" because phone orders take up little of a judge's time.²⁵⁸

Eliminating all protection order fees will increase access by ensuring that no victim is prevented from obtaining a protection order because she lacks financial resources.²⁵⁹ Although many states permit fee waivers for indigent petitioners,²⁶⁰ implementation problems mean it is unlikely waivers are granted in every appropriate case.²⁶¹ Even if these problems are remedied, and waivers are granted to all eligible petitioners, protection orders

255. MODEL CODE, *supra* note 103, at § 305, commentary at 26. See, e.g., ARIZ. REV. STAT. ANN. § 13-3624(A) (Supp. 1995). The statute provides:

In counties with a population of one hundred fifty thousand persons or more . . . the presiding judge of the superior court, during the hours that the courts are closed, shall make available on a rotating basis a judge, justice of the peace, magistrate or commissioner who shall issue emergency orders of protection by telephone.

Id.; see also OR. REV. STAT. ANN. § 107.718(1) (Butterworth Supp. II 1994) ("When a petitioner files a petition . . . the circuit court shall hold an ex parte hearing in person or by telephone on the day the petition is filed or on the following judicial day.")

256. MODEL CODE, *supra* note 103, at § 305, commentary at 26.

257. Easing pressure on crowded court calendars was one of the original concerns leading to the introduction and enactment of Chapter 142. See *supra* notes 33-51 and accompanying text.

258. Kinports & Fischer, *supra* note 8, at 185.

259. *Id.* at 186. See, e.g., OR. REV. STAT. ANN. § 107.71(4)(c) (Butterworth Supp. II 1994) ("No filing fee, service fee or hearing fee shall be charged for proceedings seeking only the relief provided under ORS 107.700 to 107.730.")

260. Kinports & Fischer, *supra* note 8, at 180-81; see, e.g., MINN. STAT. § 518B.01(4)(e) (1994) ("The court shall advise a petitioner . . . of the right to a motion and affidavit and to sue in forma pauperis pursuant to section 563.01."); *Id.* § 563.01(c) (Supp. 1995) (permitting courts to waive civil action fees and costs for a person who receives public assistance, who is represented by a legal services agency as an indigent client, or whose annual income is less than 125% of the poverty line).

261. Kinports & Fischer, *supra* note 8, at 181. Judges are sometimes reluctant or unwilling to grant fee waivers in appropriate cases. *Id.* Similarly, court clerks may fail to inform petitioners that waivers are available, and may even discourage petitioners from requesting a fee waiver. *Id.*

may remain unaffordable for women with minimal resources.²⁶² Moreover, waiving all fees would demonstrate that the justice system is serious about ending domestic violence against all populations of women.²⁶³

Enhancing the role of clerks and advocates will increase victim access to protection orders by helping more women successfully complete the process of obtaining valid orders. Each family court (or other appropriate court) should have at least one domestic violence advocate or clerk who is required to help victims complete protection order petitions. These clerks should be given specialized training.²⁶⁴ Clerks should also use simplified forms, written explanations of procedures and requirements, and tracking systems that will help them remind petitioners of important upcoming steps in obtaining a valid order.²⁶⁵

Fourth, clarifying statutory ambiguities will help advocates and victims more effectively use Chapter 142's amended ex parte protection order relief. Because the scope of the relief authorized is arguably unclear, Chapter 142 can be construed as limited to proscribing violent acts and evicting the respondent from a shared dwelling.²⁶⁶ The state's "petition for order" form mirrors this confusing language.²⁶⁷ As a result, a number of advocates are reportedly either whitening out the troublesome language, or requesting hearings whenever more relief than a simple eviction is at issue.²⁶⁸

262. *Id.* at 181-82. Advocates report that it is not the women with the fewest economic resources who face the greatest access problems, but rather women with some economic resources. *Id.* at 182.

263. *Id.* at 186.

264. See Salzman, *supra* note 43, at 359 (asserting that training that teaches advocates and clerks to remain attentive to a victim's unique needs is necessary because advocates tend to recite directions that sometimes do not apply to an individual's particular situation); see also Kinports & Fischer, *supra* note 8, at 184 (recommending that clerks also be educated about statutory requirements, the nature of abusive relationships, and how to work with special-needs populations, including illiterate and non-English speaking petitioners).

265. Ramsey County, the only Minnesota county that appears to be experiencing success with the revised ex parte protection order, has a number of these systems in place. See *supra* note 207 (discussing Ramsey County's apparent success with Chapter 142 and some of the safeguards it has developed); see also Legal Services Memorandum, *supra* note 77, at 3 (noting that Ramsey County is "unique" because it has a separate domestic abuse intake office and has developed procedural safeguards to ensure petitioners stay informed of important developments). In addition, Ramsey County is unusual because it has "probably spent more time on implementation than other counties." *Id.*

266. See *supra* note 118 (discussing the language causing confusion about the scope of relief under Chapter 142).

267. Telephone Interview with Jody Tharp, *supra* note 33; Telephone Interview with Kim Clements, *supra* note 70.

268. Telephone Interview with Maria Pastoor, *supra* note 47; Telephone Interview with Kim Clements, *supra* note 70. Some advocates and clerks are whitening out

Clarifying this language would help victims and advocates more confidently request *ex parte* protection relief. Another possible solution would be to allow counties to "opt out" of using no-hearing, self-finalizing *ex parte* protection orders.²⁶⁹ An optional policy might help alleviate tensions some counties have demonstrated regarding the revised *ex parte* relief²⁷⁰ and allow time to work the "bugs" out of the amended statute.²⁷¹

Fifth, educating justice system personnel is vital for modifying judicial attitudes and behaviors.²⁷² Law enforcement officers should be informed of Chapter 142's revised *ex parte* protection order, its effects, and their anticipated role in enforcing it. Officers should also be trained in special techniques applicable to domestic violence disputes.²⁷³ Educating our judicial and law enforcement officers is indeed an important step; however, the actions and attitudes of officers only mirror society's views of women and domestic violence. Societal attitudes, therefore, must also change. This is a huge undertaking that will require the collaboration of many—especially advocates and lawmakers. Only with such cooperation can a sufficiently broad effort, one that condemns domestic violence without resorting to the use of stereotypes about women, be carried out.²⁷⁴

confusing language that seems to require a hearing where custody and visitation, support, maintenance, temporary awards of property, and counseling are requested. *Id.* See also *supra* note 118.

269. This optional policy was one idea suggested to Representative Bishop in January 1996. See Legal Services Memorandum, *supra* note 77, at 3. Allowing counties to decide whether the self-finalizing orders would be workable in their districts would resolve the inadequacies of a "one size fits all" reform. See *supra* note 236 and accompanying text.

270. See *supra* notes 63, 94-96 and accompanying text (discussing Hennepin County's refusal to implement Chapter 142).

271. See Legal Services Memorandum, *supra* note 77, at 3. A similar "opt out" approach was evidently used when the administrative process for child support was implemented. *Id.* The system "wasn't mandated statewide until all the bugs were worked out." *Id.* Thus, implementation of Chapter 142's no-hearing, self-finalizing relief also could remain discretionary "until some date a few years down the line when it would become mandatory." *Id.* See also *supra* notes 63, 94-96 and accompanying text (discussing Hennepin County's refusal to implement Chapter 142).

272. See Salzman, *supra* note 43, at 356. Comprehensive and ongoing training programs for judges should inform them about the range of sanctions available and the necessity for stringent measures in domestic violence cases. *Id.* Such training should assist judges in "assessing a batterer's level of dangerousness and [in] setting up a safety plan for the victim." *Id.* at 357.

273. See *id.* at 350-51 (providing examples and discussing the importance of special techniques for gathering evidence and adequately responding to reports of domestic abuse).

274. See ARTS ACTION AGAINST DOMESTIC VIOLENCE, *supra* note 2. "Until domestic violence is truly condemned by the community, batterers will continue their abuse and victims will remain trapped in a potentially lethal cycle of violence." *Id.*

Conclusion

Progressive reforms can be successful only if their design takes into account existing obstructionist attitudes and operational practices. If such factors are to be adequately considered, the relevant players must work together closely in crafting new laws. Although well-intentioned, Chapter 142 lacked such collaboration. As a result, the self-finalizing *ex parte* protection order that emerged from the legislative process is of limited value. But Chapter 142's flaws are not necessarily fatal. It may be possible to rethink and rework self-finalizing *ex parte* protection orders through amendments. However, if these orders are to be credible tools that have a meaningful place in the fight against domestic violence in Minnesota, lawmakers will need to better collaborate with members of the justice system, law enforcement, and advocacy communities from around the state.

Appendix A

Domestic Abuse Act, ch. 142, MINN. STAT. § 518B.01, sec. 5, § 7 (1995 Minn. Sess. Law) (additions are indicated by underlining; deletions by ~~strikeouts~~). The pertinent segments of the session law are as follows:

Subd. 7. ~~TEMPORARY~~ Ex Parte Order. (a) Where an application under this section alleges an immediate and present danger of domestic abuse, the court may grant an ex parte ~~temporary~~ order for protection, ~~pending a full hearing~~, and granting relief as the court deems proper, including an order:

(1) restraining the abusing party from committing acts of domestic abuse;

(2) excluding any party from the dwelling they share or from the residence of the other except by further order of the court. . . .

(b) A finding by the court that there is a basis for issuing an ex parte ~~temporary~~ order for protection constitutes a finding that sufficient reasons exist not to require notice under applicable court rules governing applications for ex parte ~~temporary~~ relief.

(c) Subject to paragraph (d), an ex parte ~~temporary~~ order for protection shall be effective for a fixed period not to exceed 14 days, except for good cause as provided under paragraph (d) set by the court, as provided in subdivision 6, paragraph (b), or until modified or vacated by the court pursuant to a hearing. Upon request, a full hearing, as provided by this section, shall be set for not later than seven days from the issuance of the ~~temporary~~ ex parte order, if a hearing is requested by the petitioner, or not later than ten days or earlier than eight days from receipt by the court of a request for a hearing by the respondent. Except as provided in paragraph (d), the respondent shall be personally served forthwith with a copy of the ex parte order along with a copy of the petition, if requested by the petitioner, and notice of the date set for the hearing. If the petitioner does not request a hearing, an order served on a respondent under this subdivision must include a notice advising the respondent of the right to request a hearing, must be accompanied by a form that can be used by the respondent to request a hearing and must include a conspicuous notice that a hearing will not be held unless requested by the respondent within five days of service of the order.

(d) ~~When Service is of the ex parte order may be made by published notice, as provided under subdivision 5, the petitioner may apply for an extension of the period of the ex parte order at the same time provided that the petitioner files the affidavit required under that subdivision. The court may extend the ex parte tempo-~~

rary order for an additional period not to exceed 14 days. The respondent shall be served forthwith a copy of the modified ex parte order along with a copy of the notice of the new date set for the hearing. If personal service is not made or the affidavit is not filed within 14 days of issuance of the ex parte order, the order expires. If the petitioner does not request a hearing, the petition mailed to the respondent's residence, if known, must be accompanied by the form for requesting a hearing and notice described in paragraph (c). Unless personal service is completed, if service by published notice is not completed within 28 days of issuance of the ex parte order, the order expires.

(e) If the petitioner seeks relief under subdivision 6 other than the relief described in paragraph (a), the petitioner must request a hearing to obtain the additional relief.

(f) Nothing in this subdivision affects the right of a party to seek modification of an order under subdivision 11.

