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## ESSAY

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### PROTECTING, RESTORING, IMPROVING: INCORPORATING THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE CONCEPTS INTO CIVIL DOMESTIC VIOLENCE CASES

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## INTRODUCTION

Domestic violence<sup>1</sup> is generally seen through the lens of the criminal justice system, but such cases also pervade the civil justice system. All fifty states currently afford domestic violence victims the right to petition for civil protection orders.<sup>2</sup> Through a civil protection order, a victim may obtain an injunction, which offers several forms of relief outside of criminal prosecution.<sup>3</sup> While civil protection orders should guard against further abuse, both their obtainability and their effectiveness are questionable. The experiences of Petitioners One and Two<sup>4</sup> illustrate some of the underlying issues surrounding civil protection order proceedings:

Petitioner One, a twenty-four-year-old female, has dated Respondent One for two years. They have a volatile relationship. One night, Respondent confronted Petitioner about suspicious text messages on her cell phone. He grabbed her by her arms, shook her, screamed at her, and threatened to hurt her. Petitioner filed a petition for a civil protection order against Respondent. On the day of the scheduled hearing, Petitioner informed the court that she no

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<sup>1</sup> For purposes of this Essay, the term “domestic violence” refers to a pattern of behavior—including physical, sexual, verbal, and emotional abuse—used by one partner against another in an intimate relationship. Margeret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1116 (2009).

<sup>2</sup> See Laurie S. Kohn, *What’s So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 519–20 n.3 (2010) (citing each state’s respective statute authorizing protection orders).

<sup>3</sup> *Id.* at 519–20.

<sup>4</sup> These examples have been adapted from the experiences of one of the author’s clinical clients. As a law student, Elia Robertson spent a semester as a clinical student at Philadelphia Legal Assistance, where she represented low-income clients in their domestic abuse and child custody matters, including protection order proceedings.

longer wished to pursue a protection order against Respondent and withdrew her petition. Petitioner and Respondent left the courthouse together.<sup>5</sup>

Petitioner Two is a thirty-three-year-old female. She and Respondent Two recently divorced. They have one child together. Respondent has physically abused Petitioner in the past. Petitioner now seeks custody of their child. She recently filed a petition for a protection order on behalf of the child. On the day of the scheduled hearing, both parties entered the courtroom. Respondent hired an attorney. Petitioner did not. After closing arguments, the judge ruled that he did not find the Petitioner's testimony credible and dismissed her petition for failing to present adequate evidence of abuse.<sup>6</sup>

Neither petitioner left the process with what she sought to obtain—a protection order.<sup>7</sup> Domestic violence continues to plague the United States despite the availability of civil remedies.<sup>8</sup> Protection order petitions are filed at an alarming rate<sup>9</sup> and the number of women who become victims of violent

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<sup>5</sup> Notes of Elia Robertson from Philadelphia Family Court proceedings (Jan.–May 2015) (on file with author).

<sup>6</sup> *Id.*

<sup>7</sup> Scholars and practitioners note the difficulties that domestic abuse victims face in obtaining civil protection orders. *See, e.g.*, Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 44 (2000) (noting that the difficulty of proving domestic violence in court is a major barrier to the effectiveness of civil protection orders). As a substantive matter, proving abuse in court may be difficult because survivors are often the only witnesses. *Id.* From a practical standpoint, even when survivors report abusive incidents, fear of retribution might undermine their willingness to testify in court. *Cf.* Suraji R. Wagage, *When the Consequences Are Life and Death: Pretrial Detention for Domestic Violence Offenders*, 7 DREXEL L. REV. 195, 206 (2014) (“Victims’ desire not to press charges or testify, stemming from fear of or attachment to their abusers, ha[s] frequently hindered . . . prosecution.”). For certain minority demographics, these problems are compounded by social and economic considerations. *See* Sudha Shetty & Janice Kaguyutan, *Immigrant Victims of Domestic Violence: Cultural Challenges and Available Legal Protections*, NAT’L RESOURCE CTR. ON DOMESTIC VIOLENCE (2002), [http://www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=384](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=384) [<https://perma.cc/4SPW-J45V>] (noting that many abused immigrant women—alienated from family and other support networks—must tolerate and endure their abusive husbands, who are their sole means of support and livelihood).

<sup>8</sup> *See* PATRICIA TJADEN & NANCY THOENNES, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 10 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> [<https://perma.cc/D7RW-BEA2>] (finding that 22% of surveyed women report being physically assaulted by an intimate partner at some point in their lifetime); Will Dunham, *Quarter of U.S. Women Suffer Domestic Violence: CDC*, REUTERS (Feb. 7, 2008), <http://www.reuters.com/article/2008/02/07/us-violence-domestic-usa-idUSN0737896320080207> [<https://perma.cc/56RP-ELS4>] (citing a 2005 Center for Disease Control study in which 23.6% of women reported being a victim of intimate partner violence and a 1995 government survey in which 24.8% of women reported suffering domestic violence).

<sup>9</sup> *See, e.g.*, *Domestic Violence in the District of Columbia: 2014 Statistical Snapshot*, DCCOALITION AGAINST DOMESTIC VIOLENCE, <http://dccadv.org/img/fck/file/Domestic%20Violence%20in%20the%20District%20of%20Columbia%202014.pdf> [<https://perma.cc/4EZE-GE6U>] (last visited Apr. 15, 2016) (reporting that petitions for civil protection orders increased 7% from 2012 to 2014).

crime by intimate partners each year remains staggeringly high.<sup>10</sup> In light of these statistics, many scholars have criticized the current civil response to domestic violence as being ineffective.<sup>11</sup> Suggestions for improvements range from strengthening the criminal justice system's involvement<sup>12</sup> to eliminating formal judicial systems and returning to community-based interventions.<sup>13</sup>

This Essay calls attention to various deficiencies underlying the civil protection order process. It argues that the parties in the above scenarios would have benefited from a more holistic and less adversarial approach to their disputes. Specifically, this Essay advocates for an alternative approach to protection order proceedings that draws on two legal theories, therapeutic jurisprudence<sup>14</sup> and restorative justice.<sup>15</sup> This approach better addresses litigants' needs by acknowledging that complex relationships permeate domestic violence incidents. Such an approach could alleviate systemic issues currently facing family courts and have a lasting, positive impact on entire communities. This Essay uses the Pennsylvania Protection from Abuse Act and the Philadelphia Family Court Division as a template to highlight the shortcomings of current family court systems. It then offers a solution to supplement and improve upon current civil protection order proceedings.

Part I of this Essay sets forth the current civil response to domestic violence cases, including Pennsylvania's Protection from Abuse Act. Part II provides an overview of both therapeutic jurisprudence and restorative justice and their relationship to one another. Part III outlines the main arguments against therapeutic jurisprudence and restorative justice as alternative responses to domestic violence. Part IV tackles those criticisms and argues that both theories can successfully coexist within the current paradigm. It highlights the parallel goals of the current system and the two approaches and explores their potential inclusion in existing statutes, such as Pennsylvania's Protection from Abuse Act. The Essay concludes by discussing how the case

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<sup>10</sup> Each year, about 588,490 women are victims of violence by an intimate partner. CALLIE MARIE RENNISON, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 197838, BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993–2001, at 1 tbl.1 (2003), <http://www.bjs.gov/content/pub/pdf/ipv01.pdf> [<https://perma.cc/C6CS-VGFR>].

<sup>11</sup> See, e.g., Elizabeth L. MacDowell, *VAWA @ 20: Improving Civil Legal Assistance for Ending Gender Violence*, CUNY L. REV. FOOTNOTE FORUM (Nov. 21, 2014), <http://www.cunylawreview.org/vawa-20-improving-civil-legal-assistance-for-ending-gender-violence-by-elizabeth-macdowell> [<https://perma.cc/M3QF-CMT4>] (discussing the failure of the Violence Against Women Act to address the limitations of civil responses to domestic violence).

<sup>12</sup> See, e.g., Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1507–08 (1998) (arguing that the criminal justice system's "preference for treatment as punishment for domestic violence offenders is misguided").

<sup>13</sup> See *infra* notes 155–56 and accompanying text.

<sup>14</sup> See *infra* subsection II.A.1.

<sup>15</sup> See *infra* subsection II.A.2.

studies of Petitioner One and Two could benefit from therapeutic jurisprudence and restorative justice principles.

## I. BACKGROUND

The current civil response to domestic violence cases consists primarily of civil protection order proceedings. This Part provides a brief history of civil protection order statutes and a detailed explanation of Pennsylvania's Protection from Abuse Act.<sup>16</sup> It then discusses the inherent challenges underlying protection order proceedings and their ineffectiveness in family courts.

### A. Traditional Civil Remedies for Domestic Violence Cases

Civil protection order statutes serve as a critical resource for domestic violence survivors.<sup>17</sup> Civil protection orders function as both an alternative and a supplement to the criminal justice system.<sup>18</sup> Criminal sentences are typically reserved for “well-documented, long-standing patterns of violence or [for] particular violent acts.”<sup>19</sup> Where criminal proceedings fail, civil protection orders become essential to maintaining the safety of survivors whose abusers are not criminally liable for abuse.<sup>20</sup>

#### 1. Protection Orders Generally

Since their inception in the 1970s,<sup>21</sup> civil protection order statutes have expanded, both in their scope of coverage and breadth of relief.<sup>22</sup> For example, statutes historically only afforded relief to those in state-recognized relationships but now extend protection to a broader array of relationships, including current and past intimate partners and individuals who share a home.<sup>23</sup> Similarly, while older statutes only offered limited forms of relief (such as stay away orders), many statutes now include “child custody, visitation, spousal and child

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<sup>16</sup> 23 PA. CONS. STAT. § 6101–6122 (2016).

<sup>17</sup> Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOCIAL POL'Y & L. 567, 584 (2003).

<sup>18</sup> *Id.* at 586.

<sup>19</sup> *Id.*

<sup>20</sup> *See id.* at 585-86 (noting that criminal prosecution is usually limited to ongoing or more extreme instances of domestic violence).

<sup>21</sup> Kohn, *supra* note 2, at 524.

<sup>22</sup> *See, e.g.*, Richard A. DuBose III, *Katsenelenbogen v. Katsenelenbogen: Through the Eyes of the Victim—Maryland's Civil Protection Order and the Role of the Court*, 32 U. BALT. L. REV. 237, 242-43 (2003) (comparing the expanded definition of abuse, the classes of persons eligible for relief, and the relief provided for in Maryland's 1992 domestic violence statute with the previous 1980 Act).

<sup>23</sup> *See* Kohn, *supra* note 2, at 524-25.

support, and participation in court-ordered alcohol, drug, and batterer intervention programs” as alternative forms of relief.<sup>24</sup>

## 2. The Pennsylvania Protection from Abuse Act: A Case Study

The Pennsylvania Protection from Abuse Act serves as one example of a typical civil protection order statute.<sup>25</sup> The Act provides a civil remedy for domestic violence survivors through Protection from Abuse (PFA) orders.<sup>26</sup> A Pennsylvania citizen may seek a PFA against any household or family member including a spouse, sibling, parent, child, or current or former intimate partner.<sup>27</sup> A judge may issue a PFA order that is classified as protection-only,<sup>28</sup> full no contact,<sup>29</sup> or no contact with eviction.<sup>30</sup> It also may include custody<sup>31</sup> and support provisions for cases involving minor children,<sup>32</sup> as well as a weapons provision ordering the perpetrator to surrender weapons in his or her possession.<sup>33</sup>

The Act defines abuse to include:

- (1) Attempting to cause or intentionally, knowingly, or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault, or incest with or without a deadly weapon[;]
- (2) Placing another in reasonable fear of imminent serious bodily injury[;]
- (3) The infliction of false imprisonment . . . [;]
- (4) Physically or sexually abusing minor children . . . [; and]
- (5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including

<sup>24</sup> *Id.* at 525.

<sup>25</sup> 23 PA. CONS. STAT. §§ 6101–6122 (2016).

<sup>26</sup> *Id.* § 6108(a). While the statute itself only refers to “protection orders,” orders entered pursuant to the Protection from Abuse Act are referred to as PFA orders in common practice. *See, e.g., Protection from Abuse Orders (PEA)*, WOMENSLAW.ORG, [http://www.womenslaw.org/laws\\_state\\_type.php?id=10027&state\\_code=PA](http://www.womenslaw.org/laws_state_type.php?id=10027&state_code=PA) [<https://perma.cc/F6R7-RUBQ>] (last updated Jan. 9, 2015) (describing the process for obtaining protection orders in Pennsylvania and using the term “PFA” or “protection from abuse order”).

<sup>27</sup> *See* 23 PA. CONS. STAT. § 6108(a) (allowing a court to grant a PFA to prevent “abuse” of a plaintiff or minor children); *see also id.* § 6102(a) (defining “abuse” as any of an enumerated list of acts committed between “family or household memers, sexual or intimate partners or persons who share biological parenthood”).

<sup>28</sup> *See id.* § 6108(a)(1) (providing protection-only relief, which “[d]irect[s] the defendant to refrain from abusing the plaintiff or minor children”).

<sup>29</sup> *See id.* § 6108(a)(6) (prohibiting the defendant “from having any contact with the plaintiff or minor children”).

<sup>30</sup> *See id.* § 6108(a)(2) (granting “possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant or restoring possession to the plaintiff . . .”).

<sup>31</sup> *See id.* § 6108(a)(4) (providing “temporary custody of or establishing temporary visitation rights with regard to minor children”).

<sup>32</sup> *See id.* § 6108(a)(5) (ordering “the defendant to pay financial support to those persons the defendant has a duty to support”).

<sup>33</sup> *Id.* § 6108(a)(7).

following the person . . . under circumstances which place the person in reasonable fear of bodily injury.<sup>34</sup>

A person seeking a PFA must first file a petition in the Court of Common Pleas.<sup>35</sup> If the petitioner alleges “immediate and present danger of abuse,” a judge must hold an *ex parte* hearing to review the petition.<sup>36</sup> There, the judge decides whether to issue a temporary PFA and schedule a full hearing, schedule a full hearing without issuing a temporary PFA, or dismiss the petition.<sup>37</sup> If a temporary PFA is granted, it remains in effect until the full hearing.<sup>38</sup> Regardless of whether the judge issues a temporary order, a full hearing must be scheduled within ten business days of the filing of the petition.<sup>39</sup> Between the *ex parte* hearing and the full hearing, the petitioner must serve the respondent with the PFA petition.<sup>40</sup>

At the full hearing, a judge will decide whether to issue a final PFA.<sup>41</sup> A final PFA may be issued after: (1) an agreement between the parties, (2) an agreement without admission, (3) a hearing and decision by the court, or (4) by “default,” after a hearing where the defendant failed to appear despite proper service.<sup>42</sup> At the hearing, both parties will have an opportunity to testify and present evidence.<sup>43</sup> While both parties have the right to be

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<sup>34</sup> *Id.* § 6102(a).

<sup>35</sup> See PA. R. CIV. P. 1901.3(a) (providing that, with one exception, protection order actions must begin with a petition to a court of common pleas describing the alleged acts of abuse by the defendant).

<sup>36</sup> 23 PA. CONS. STAT. § 6107(b)(1).

<sup>37</sup> *Id.* § 6107(b).

<sup>38</sup> *Id.* § 6107(b)(2).

<sup>39</sup> *Id.* § 6107(a).

<sup>40</sup> *Id.* At a judge’s discretion, a sheriff or other designated official may serve the defendant. *Id.* § 6106(f). However, in practice, petitioners often bear the responsibility of seeking assistance from the police. See FAMILY LAW SECTION OF THE PHILA. BAR ASS’N, PETITION FOR PROTECTION FROM ABUSE: INSTRUCTION SHEET ¶ 5 (2011), [www.courts.phila.gov/pdf/forms/domestic-relations/Petition-for-Protection-From-Abuse-w-instructions.pdf](http://www.courts.phila.gov/pdf/forms/domestic-relations/Petition-for-Protection-From-Abuse-w-instructions.pdf) [<https://perma.cc/D6ZR-CMVK>] (suggesting that petitioners seek service assistance from the police).

<sup>41</sup> See 23 PA. CONS. STAT. § 6108(a) (allowing a judge to issue a PFA “to bring about a cessation of abuse of the plaintiff or minor children”).

<sup>42</sup> See PA. R. CIV. P. 1905(e) (requiring a PFA to indicate which of the above situations led to the order being issued).

<sup>43</sup> See WOMEN’S LAW PROJECT, DECIDING CHILD CUSTODY WHEN THERE IS DOMESTIC VIOLENCE: A BENCHBOOK FOR PENNSYLVANIA COURTS 49-60 (rev. 2013), [http://www.womenslawproject.org/resources/Benchbook\\_FINAL\\_Mar2013.pdf](http://www.womenslawproject.org/resources/Benchbook_FINAL_Mar2013.pdf) [<https://perma.cc/C7KP-35K3>] (noting that evidence presented in PFA hearings is governed by the Pennsylvania Rules of Evidence and discussing considerations for particular types of evidence presented in the domestic violence context, including victim testimony, evidence of criminal conduct, photographs, business records, and expert testimony).

represented,<sup>44</sup> most are not.<sup>45</sup> If a final PFA is issued, a petitioner is entitled to court-ordered protection for up to three years.<sup>46</sup> When a respondent violates either a temporary or a final PFA, a petitioner may call the police, who will arrest the respondent and charge him or her with criminal contempt, or may file a complaint for criminal contempt even in the absence of an arrest.<sup>47</sup>

Statistics from Philadelphia illustrate the relative frequency of the varying levels of protection available through the courts. In 2013, the Philadelphia Family Court, the largest family court system in Pennsylvania, disposed of almost 10,000 PFA petitions.<sup>48</sup> In over half of those cases, the petitioner did not appear for the hearing.<sup>49</sup> In 1103 cases, the petitioner withdrew the petition.<sup>50</sup> Among the remaining approximately 3000 dispositions, almost half resulted in stipulations or agreements between the parties.<sup>51</sup> Of 12,000 total petitioners who filed for protection orders in 2013, only 1060 received final orders.<sup>52</sup>

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44 See 23 PA. CONS. STAT. § 6111 (“A domestic violence counselor/advocate may accompany a party to any legal proceeding or hearing under this chapter.”).

45 See, e.g., Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 109 (2001) (citing a study of Maricopa County, Arizona, which found that in 1990, at least one of the parties in family law cases was unrepresented in over 88% of cases). An abused litigant’s ability to secure a PFA—specifically, one that affords adequate relief—often turns on whether that party retained representation in the matter. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 845 (1993) (“[B]attered women who can obtain legal assistance from trained counsel are much more likely to receive civil protection orders which contain complete and effective relief.”). The disparity in results between represented and unrepresented parties is particularly troubling given that a sizable majority of litigants in domestic violence cases proceed without representation. See, e.g., Susan B. Sorenson, *Violence Against Women in Philadelphia—A Report to the City 15* (2012) (unpublished manuscript), [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1180&context=spp\\_papers](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1180&context=spp_papers) [https://perma.cc/5SRQ-5S4H] (indicating that about four out of five petitioners in Philadelphia proceed without representation). In addition to enduring the emotional and physical trauma, a litigant without counsel must be vigilant to become acquainted with and abide by the many nuanced procedural and substantive rules attendant to civil litigation. Cf. Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 748 (2015) (“[P]ro se parties routinely flunk basic procedural entrance exams . . . . Failure to clear procedural hurdles often results in negative case outcomes . . . .”). For further discussion on pro se litigants see *infra* Section I.B.2.

46 23 PA. CONS. STAT. § 6108(d).

47 PA. R. CIV. P. § 1901.5.

48 Admin. Office of Pa. Courts, *Protection from Abuse*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/news-and-statistics/research-and-statistics/protection-from-abuse> [https://perma.cc/RPW7-9H6X] (last visited Apr. 15, 2016) (select “Philadelphia”).

49 In 5533 cases, the plaintiff did not appear. *Id.*

50 *Id.*

51 See *id.* (reporting that 1346 cases were resolved by stipulation or agreement).

52 A number of variables account for the discrepancy between the volume of PFA filings and the limited number of petitioners receiving final orders. For instance, petitioners may decline to pursue their PFA on account of fear or attachment to their abuser. See *supra* note 7. Procedural mechanisms may also impede or wholly deter service of process. See Sorenson, *supra* note 45, at 17 (“[P]etitioner[s] . . . risk[] further abuse when attempting to serve court papers on the defendant.”). The inherent complexity of filing and subsequently prosecuting a PFA may also attribute to the

### B. Unique Challenges Presented by Protection Order Proceedings

While crucial, the process to obtain a PFA is far from ideal. Nationwide, scholars and practitioners alike cite to logistical infirmities that pervade the process of both obtaining and enforcing PFA orders.<sup>53</sup> Protection order proceedings pose unique challenges for litigants and attorneys alike. Among them, congested court dockets, inadequate resources, unrepresented litigants, and challenging subject matter are most prominent. This Section analyzes each challenge in turn.

#### 1. Congested Court Dockets and Inadequate Resources

Most family court systems operate without essential resources. They lack adequate judicial training,<sup>54</sup> evidence gathering assistance, expert witness services, and the capability to handle high-risk cases.<sup>55</sup> Some scholars attribute this lack of resources in part to the sheer volume of case filings.<sup>56</sup> In

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inverse ratio between filings and final orders; *cf. id.* (“The process is complex, particularly for the more than one in five Philadelphia residents who lack basic literacy skills.”).

<sup>53</sup> See *supra* note 7.

<sup>54</sup> Judges receive specialized training with which to treat domestic violence cases. See, e.g., Sorenson, *supra* note 45, at 18 (“[J]udges [in Philadelphia] participate in two statewide conferences each year as well as self-initiated in-service training over a lunch hour each month.”). That said, such trainings alone are likely insufficient. See, e.g., Lynn Hecht Schafran, *There’s No Accounting for Judges*, 58 ALB. L. REV. 1063, 1072 n.52 (1995) (“The judicial education provided should be much more than an hour or two of talking heads.”). This problem becomes exacerbated in light of family courts’ resource deficiency. See WOMEN’S LAW PROJECT, JUSTICE IN THE DOMESTIC RELATIONS DIVISION OF PHILADELPHIA FAMILY COURT: A REPORT TO THE COMMUNITY 11 (2003), [http://www.womenslawproject.org/resources/WLP\\_FamlyCourt.pdf](http://www.womenslawproject.org/resources/WLP_FamlyCourt.pdf) [<https://perma.cc/HD5B-NCLB>] (“While court administrators have been working hard to improve the experience of litigants in the Domestic Relations Division, they are severely limited by the amount of available resources.”); FAMILY COURT TASK FORCE, THE FUND FOR MODERN COURTS, A CALL TO ACTION: THE CRISIS IN FAMILY COURT 9-11, 16-17 (2009), [http://moderncourts.org/files/2013/10/a\\_call\\_to\\_action.pdf](http://moderncourts.org/files/2013/10/a_call_to_action.pdf) [<https://perma.cc/D56M-LJQW>] (identifying judicial training and resources as areas in need of improvement in New York family courts).

<sup>55</sup> See Freedman, *supra* note 17, at 578-79 (“[D]ecision-making resources—such as . . . resources for evidence gathering; the services of expert witnesses; [and] rapid response capability for high risk cases—are far outmatched by the demand for case resolution.” (footnote omitted)); see also Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1093-96 tbl.2 (2003) (concluding that certain risk factors exist and can be used as a proxy to identify “high risk” domestic abuse cases more likely to result in death; such factors include incidents of prior abuse, abuser’s access to a gun, stalking, forced sex, and abuse during pregnancy).

<sup>56</sup> See, e.g., Freedman, *supra* note 17, at 577-78 (“One reason for the resource inadequacy is the huge volume of cases in many jurisdictions, both in family law generally, and in civil protective order proceedings in particular.”).

the United States, an estimated five million domestic relations cases were filed in 2008.<sup>57</sup> Filings continue to increase but resources remain limited.<sup>58</sup>

As a result of the lack of resources, judges presiding over protection order proceedings may favor efficiency over thoroughness.<sup>59</sup> Hearings are generally brief<sup>60</sup> and discovery requests are often discouraged or even precluded.<sup>61</sup> Thus, even to the extent that victims of domestic violence are provided protections by the law and the opportunity to obtain PFAs, busy court dockets, a lack of court resources, and a lack of judges often prevent those victims from vindicating their rights.

## 2. Unrepresented Litigants

Many family court litigants are unrepresented, especially in protective order and custody cases.<sup>62</sup> In a survey conducted by the American Judicature

57 R. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 14 (2012), [http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/data%20pdf/csp\\_dec.ashx](http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/data%20pdf/csp_dec.ashx) [<https://perma.cc/X93Q-H86E>]. “Domestic relations” cases are typically adjudicated in specialized family court systems that operate as appendages of civil courts. In Philadelphia, domestic relations cases are handled in the Family Division. *Family Division*, PHILA. CTS., <http://courts.phila.gov/common-pleas/family/> [<https://perma.cc/U8EP-36LD>] (last visited Apr. 15, 2016). The juvenile branch involves juvenile court operations, juvenile probation, and adoption proceedings. *Id.* Domestic relations matters involve paternity, support, custody, visitation, and divorce—and of most relevance, domestic violence. *Id.*; see also PA. R. CIV. P. 1931(a) (enumerating the types of actions governed by Pennsylvania family court’s procedural rules). More broadly, domestic relations cases are generally thought to include divorce/dissolution, paternity, custody, support, visitation, adoption, and civil protection/restraining order cases. See LAFOUNTAIN ET AL., *supra*, at 17 (listing the types of domestic relations cases).

58 See *supra* note 9 and accompanying text. Progressive legislation has improved substantive remedies available to domestic violence victims. See Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1291 (2000) (noting that 1990 legislation, which both criminalized domestic violence and provided victims with greater remedies, marked a turning point in public discourse and perception of domestic violence as a criminal transgression). Despite these substantive improvements, pragmatic deficiencies often preclude abused parties from realizing them. See Freedman, *supra* note 17, at 578 (“[Protective order] case loads have expanded significantly in recent decades, but resources within the family court system have not increased sufficiently to meet the need.”). Such deficiencies include, “inadequate or no legal representation [for the abused]; overburdened, inexperienced or poorly trained judges; and informal, rushed, often very brief legal hearings.” *Id.* at 568 n.1. In Philadelphia, only two judges are assigned to handle all PFA petitions, which routinely total over 12,000 annual filings. WOMEN’S LAW PROJECT, *supra* note 54, at 10; see also *supra* note 48 and accompanying text.

59 See Freedman, *supra* note 17, at 584 (“Proceedings in which domestic violence issues are at the forefront are especially likely to be mishandled.”).

60 See *id.* at 579 (“[I]n family law cases, proceedings are often brief.”).

61 *Id.* Discovery in civil protective order cases is generally difficult because of the short time between the entrance of a temporary restraining order and the final restraining order hearing. See 23 PA. CONS. STAT. § 6107(a) (2016) (requiring a plaintiff to prove his or her allegations within ten days of the filing of a petition). Many state rules permit discovery only upon a showing of “good cause” and requests are rarely made or granted. See Freedman, *supra* note 17, at 579 n.35.

62 See *supra* note 45 and accompanying text.

Society and the State Justice Institute (AJS/SJI), 65.1% of all judges surveyed—both from family courts and nonfamily courts—indicated that the number of self-represented litigants in their courtrooms increased moderately or greatly over the past five years.<sup>63</sup> These statistics are only amplified in family courts; pro se appearances are extremely common in domestic relations cases.<sup>64</sup> One explanation for this is that many low and moderate income litigants cannot afford to hire a lawyer.<sup>65</sup>

The increasing number of self-represented litigants<sup>66</sup> further burdens family court systems. Pro se litigation presents due process concerns.<sup>67</sup> Litigants who appear in court without representation are substantially less likely to understand legal proceedings than represented litigants.<sup>68</sup> Self-represented litigants may also fail to present their cases effectively because they struggle with legal procedures, courtroom decorum, and rules of evidence.<sup>69</sup> This lack of knowledge translates to a lack of access to justice for litigants who cannot effectively navigate the system without an attorney.<sup>70</sup> This issue is exacerbated when a pro se litigant faces a party who has counsel.<sup>71</sup>

Pro se appearances also complicate court processes and the roles of court staff, administrators, and judges.<sup>72</sup> Self-represented litigants often seek assistance when filling out court forms and other documents, which takes

63 JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 117 (1998).

64 See, e.g., WOMEN'S LAW PROJECT, *supra* note 54, at 48 tbl.8 (concluding that nearly 80% of petitioners and 75% respondents in protection from abuse and custody cases proceeded without counsel).

65 Berenson, *supra* note 45, at 117.

66 See *id.* at 105 (“[T]he number of self-represented litigants continues to expand.”).

67 Unlike in the criminal realm, litigants in civil proceedings are not entitled to representation. See *supra* notes 44–45 and accompanying text. However, many argue that family court proceedings involve constitutionally protected liberty interests. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (finding a “fundamental liberty interest of natural parents in the care, custody, and management of their child”).

68 See Berenson, *supra* note 45, at 115 (discussing the “difficulties of navigating complex, confusing, and often convoluted legal procedures without the assistance of counsel”).

69 See *id.* (stating that judges realize that “self-represented parties’ unfamiliarity with legal procedures or the rules of evidence may result in the denial of meritorious claims”).

70 See LeeAnn Iovanni & Susan L. Miller, *Criminal Justice System Responses to Domestic Violence: Law Enforcement and the Courts* (reporting that victims not represented by counsel are less likely to receive protective orders, or if they do, the orders are likely to lack needed provisions excluding the offender from the residence and concerning child custody, visitation and child support), in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 303, 313–14 (Claire M. Renzetti et al. eds., 2001).

71 When this occurs, studies suggest that pro se litigants must not only navigate an unfamiliar legal system but overcome a certain degree of perceived nepotism where an opposing counsel and judge have a prior familiarity. See WOMEN'S LAW PROJECT, *supra* note 54, at 91 (“Some [litigants] express concern about spousal relatives on court staff or their spouse’s attorney winning based on a relationship with the judge, rather than the merits of the case.”).

72 See Berenson, *supra* note 45, at 112 (stating that pro se litigants place burdens on the court system “that would not exist if all litigants were represented by lawyers,” such as increased time or court resources needed to process cases).

court personnel away from their other duties.<sup>73</sup> As one judge responded to the AJS/SJI survey, “self-represented litigants’ ‘lack of experience and inability to understand elementary proceedings’ . . . caus[es] the prolonging of proceedings [and] plac[es] ‘a great burden on the court.’”<sup>74</sup> Thus, the high percentage of unrepresented litigants in family court presents challenges both to the courts and to the litigants themselves. Courts’ resources are scarce and caseloads are high, while self-represented litigants have a more difficult time obtaining the desired relief and often feel like the deck is stacked against them.

### 3. Challenging Subject Matter

Protection order proceedings involve a complex and often personal subject matter.<sup>75</sup> Domestic violence cases involve a range of circumstances, including relationships characterized by dominance and control, incidents of violence that may vary in significance depending on circumstances about which little or no reliable evidence may be available, parties’ psychological dysfunctions, and conflicts where both parties’ behavior arguably violates a statute, but it is unclear whether either party is a danger to the other.<sup>76</sup>

In light of these complicated topics, factfinders tasked with deciding whether to issue a protection order must weigh a host of concerns, such as balancing competing social priorities.<sup>77</sup> For example, where proceedings involve custody disputes, promoting parent–child relationships often conflicts with the need to protect children from physical and emotional

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<sup>73</sup> See *id.* at 113 (describing the disproportionate share of their “scarce time” that judges spend “guiding self-represented litigants through the labyrinth of pre-trial and trial practice”).

<sup>74</sup> GOLDSCHMIDT ET AL., *supra* note 63, at 53.

<sup>75</sup> See Tsai, *supra* note 58, at 1293 (noting that the complex matters in domestic violence involve issues relating to family dynamics and emotional relationships that are not paralleled in other crimes).

<sup>76</sup> For a discussion on the nuanced aspects of domestic violence cases, see Freedman, *supra* note 17, at 580-83. Freedman states that

[d]omestic violence issues typically include[] a variety of circumstances, including: textbook examples of male dominance . . . ; specific incidents of violent or threatening behavior by one or both parties . . . ; cases in which, in addition to evidence of domestic violence, the non-violent partner seems to be suffering from serious personal dysfunctions . . . ; cases in which the parties are engaged in intense conflict and both parties’ behavior is arguably in violation of the civil protective order statute, but it is not clear whether either party is dangerous.

*Id.* at 580-81. Despite this complex range of issues, lack of funding and other resources preclude judges from dedicating sufficient time to such issues. See WOMEN’S LAW PROJECT, *supra* note 54, at 59 tbl.9 (reporting that, of the observed proceedings in 2002, more than half of the PFA hearings filed in Philadelphia were completed in five minutes or less).

<sup>77</sup> See Freedman, *supra* note 17, at 584 (describing how courts might weigh the abuse of the parent or child against other factors in determining custody).

harm.<sup>78</sup> Judges must also make important determinations that affect litigants' personal lives through the limited lens of a single hearing.<sup>79</sup> Ann Freedman posits that judicial decisions made in light of testimony taken during a protection order hearing "may have little or no relationship to the lived reality of family life."<sup>80</sup> The complex subject matter of domestic violence cases thus compounds the problems presented by crowded court dockets and the high percentage of unrepresented litigants, which taken together may lead to results that are not founded on the realities of the situation.

### C. Courts' Mishandling of Civil Domestic Violence Cases

Due in part to the challenges facing family courts, protection order statutes have been left compromised and improperly enforced. Protective order petitions that should be granted may be denied or inadequately enforced when violated.<sup>81</sup> Rather than pursue their PFA formally before the court, victims may reach an agreement<sup>82</sup> with their alleged abuser when testifying could risk their safety or require more resources than are available to them.<sup>83</sup> Additionally, when proceedings involve children, their well-being may be neglected.<sup>84</sup> This may occur because a false claim of abuse succeeds or, even more concerning, because abuse cannot be demonstrated to the

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<sup>78</sup> But see generally Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003) (arguing that, despite concerns to protect children's relationships with both parents, domestic violence should be given decisive weight when making custody decisions).

<sup>79</sup> See Freedman, *supra* note 17, at 581-82 ("The task of deciding which cases deserve legal intervention . . . is extremely difficult even with time for reflection, which is generally not available.").

<sup>80</sup> *Id.* at 582.

<sup>81</sup> For example, Philadelphia's City Council has conducted hearings and heard testimony regarding enforcement issues surrounding protective orders. See WOMEN'S LAW PROJECT, *supra* note 54, at 78. Testimony highlighted the administrative difficulty of enforcing orders confiscating an abuser's weapon, as only one sheriff was assigned to perform that task. *Id.* Batterers ordered to attend anger management class may be disinclined to do so, because no adequate mechanism exists to ensure compliance. *Id.* "While court judgments mark the end point of many legal disputes . . . domestic violence . . . cases often require longer term judicial oversight and extended social services . . . [T]hese cases begin rather than end with a judge's ruling." Freedman, *supra* note 17, at 569.

<sup>82</sup> The relief afforded by Pennsylvania's Protection from Abuse Act can come by way of a protection from abuse order or a consent agreement between the parties. 23 PA. CONS. STAT. § 6108(a) (2016) ("The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children."). Because a consent order is by agreement of the parties, any factfinding is rendered superfluous and thus victims are not required to testify against their abuser in court.

<sup>83</sup> See, e.g., Meier, *supra* note 78, at 664-65 (describing a child custody case in which a mother gave up custody of her child to the abuser rather than continuing to litigate before a hostile judge).

<sup>84</sup> See Freedman, *supra* note 17, at 581-82 (describing factors courts consider in these cases that might conflict with the child's safety, such as "encouraging cooperation between parents").

court's satisfaction.<sup>85</sup> In sum, protection order statutes currently do not serve the single most important purpose underlying their enactment: to protect domestic violence victims and decrease incidents of domestic violence.<sup>86</sup>

## II. THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE: A PARADIGM SHIFT

This Part discusses a recent paradigm shift within the legal community: the comprehensive law movement. It focuses specifically on two alternative approaches proposed by the movement: therapeutic jurisprudence and restorative justice. It details the foundational principles of both theories and their growing popularity within the United States and internationally, and highlights the benefits and drawbacks of each. Finally, this Part discusses the similarities and differences between the two theories, and suggests that both can be combined to further one holistic, therapeutic approach to legal practice, which can then be applied to the civil protection order process.

### A. *The Comprehensive Law Movement*

Over the last two decades, attorneys and scholars alike have expressed dissatisfaction with traditional legal systems, particularly in family law.<sup>87</sup> Specifically, critics assert that the complexities surrounding family law issues are not adequately addressed by ordinary legal means.<sup>88</sup> As a result, alternative forms of law practice have emerged in an effort to incorporate interdisciplinary approaches into historically adversarial paradigms.<sup>89</sup> A number of these approaches are rapidly gaining popularity, including

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<sup>85</sup> See *id.* at 584 (discussing the problem of false claims and skeptical courts with “limited fact-finding resources”).

<sup>86</sup> The current system's failures to protect domestic violence victims are not limited to the courts. For example, in 2011, nearly one in ten emergency calls to the Philadelphia Police Department for assistance were determined by the dispatcher to be domestic violence related, and of these, the response time was sixteen minutes. Sorenson, *supra* note 45, at 9.

<sup>87</sup> See Marsha B. Freeman, *Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flinstones vs. The Jetsons*, 13 CHAP. L. REV. 249, 254 (2010) (“There is no dearth of voices in the United States today advocating the use of collaborative and therapeutic jurisprudential philosophies and methodologies in a multitude of family law issues.”). See generally Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1 (2006) (comparing the integrative practice “vectors” that characterize the comprehensive law approach with the dominant traditional lawyering model).

<sup>88</sup> See, e.g., Daicoff, *supra* note 87, at 24 (discussing the “concrete processes” that emerge from more therapeutic approaches to family law and highlighting that the comprehensive process vector of “collaborative law” emerged from a search for a less emotionally damaging and more economical way to resolve divorce cases).

<sup>89</sup> See *id.* at 8 (“Because of the emotional devastation that can result from traditional adversarial litigation, many of the vectors explicitly seek non-litigious solutions to legal problems . . . . Many utilize collaborative methods in solving legal problems.” (footnotes omitted)).

collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation.<sup>90</sup> Together, they represent “the comprehensive law movement.”<sup>91</sup>

Although individual approaches vary, the comprehensive law movement generally seeks to advance two common goals: (1) maximizing the emotional, psychological, and relational well-being of individuals and communities involved in legal proceedings, and (2) focusing on concerns outside of strict legal rights, responsibilities, duties, obligations, and entitlements.<sup>92</sup> Many approaches seek nonlitigious solutions to legal problems and instead utilize collaborative and therapeutic methods to achieve legal objectives. This Essay focuses specifically on two related theories within the comprehensive movement—therapeutic jurisprudence and restorative justice—and their potential effect on protection order proceedings.

### 1. Therapeutic Jurisprudence

Therapeutic jurisprudence is “the study of the role of the law as a therapeutic agent . . . .”<sup>93</sup> It involves the use of various social sciences to

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<sup>90</sup> *Id.* at 1-2.

<sup>91</sup> Although it lacks a precise definition, the term “comprehensive law movement” first appeared in 2000. Daicoff, *supra* note 87, at 3. The term now appears throughout recent literature. *See, e.g.*, James Coben & Penelope Harley, *Intentional Conversations about Restorative Justice, Mediation and the Practice of Law*, 25 *HAMLIN J. PUB. L. & POL’Y* 235, 260 (2004) (“The lawyer as a healer is part of a wider evolution in practice approaches collectively labeled the comprehensive or transformational law movement . . . .”); Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 *WASH. U. J.L. & POL’Y* 133, 135 (2004) (“One of the key attributes of this comprehensive law movement is its interdisciplinary approach.”); Katerina P. Lewinbuk, *Lawyer Heal Thy Self: Incorporating Mindfulness into Legal Education & Profession*, 40 *J. LEGAL PROF.* 1, 23 (2015) (“Today, many law schools, bar associations, and legal practitioners have endorsed the training and joined the Comprehensive Law movement. . . .”); Pauline H. Tesler, *Collaborative Family Law*, 4 *PEPP. DISP. RESOL. L.J.* 317, 333 (2004) (“Susan Daicoff sees collaborative law as one of a variety of ‘vectors’ in what she calls the ‘comprehensive law’ movement . . . .”); David Wexler, *Therapeutic Jurisprudence*, 20 *TOURO L. REV.* 353, 353 (2004) (“What I would like to do is talk a little bit about therapeutic jurisprudence and its relationship to the bulk of the other vectors in the comprehensive law movement.”). *See generally* Susan Swaim Daicoff, *Families in Circle Process: Restorative Justice in Family Law*, 53 *FAM. CT. REV.* 427 (2015) (explaining the use of the “circle process” within the broader context of the “comprehensive law movement”).

<sup>92</sup> *See* Daicoff, *supra* note 87, at 4 (“[The movement] values the law’s potential as an agent of positive interpersonal and individual change . . . [and] integrates . . . extralegal concerns . . . into law and legal practice.”).

<sup>93</sup> David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 17, 18 (David B. Wexler & Bruce J. Winick eds., 1991). Wexler and Winnick were the first to formalize the application of therapeutic jurisprudence and continue to promote therapeutic jurisprudence and advocate for its incorporation into the traditional courtroom setting. BRUCE J. WINICK & DAVID B. WEXLER, *Introduction to JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 3, 3-7 (David B. Wexler & Bruce J. Winick

determine “the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.”<sup>94</sup> Rather than defining law as a set of formal principles, therapeutic jurisprudence regards law as a “social force that produces behaviours and consequences.”<sup>95</sup> It aims to achieve positive therapeutic consequences and eliminate or minimize antitherapeutic consequences for all parties involved, all else being equal.<sup>96</sup>

Often regarded as an academic discipline, therapeutic jurisprudence serves as a “lens or perspective” through which other alternative forms of law practice may be viewed.<sup>97</sup> Its principles inform other aspects of the comprehensive law movement, including restorative justice practices.<sup>98</sup> Therapeutic jurisprudence thus serves as a foundational or supplemental aspect of alternative approaches.<sup>99</sup>

First applied to mental health law in the 1990s, therapeutic jurisprudence has since influenced several other legal fields, including workers’ compensation law, sexual orientation law, disability law, fault-based tort compensation schemes, contract law, and family law.<sup>100</sup> While therapeutic jurisprudence has been adopted in both the United States and Canada, it is far more widely practiced in Canada, especially in family law.<sup>101</sup> For example, in a majority of

eds., 2003) (highlighting a new style of court that is equipped to handle interdisciplinary problems to advocate for a more therapeutic approach).

<sup>94</sup> Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y. & L. 193, 196 (1995). For a discussion of therapeutic jurisprudence principles in practice, see generally Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25 (1997).

<sup>95</sup> Valmaine Toki, *Domestic Violence and Women: Can a Therapeutic Approach Assist?*, 78 REVISTA JURÍDICA UPR 61, 69 (2009).

<sup>96</sup> Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 188 (1997).

<sup>97</sup> See Wexler, *supra* note 91, at 357 (“[T]his lens or perspective of therapeutic jurisprudence has become an active partner of many . . . practical [legal] processes . . .”).

<sup>98</sup> See *infra* Section II.A.2.

<sup>99</sup> See Wexler, *supra* note 91, at 357-58 (noting that research motivated by therapeutic jurisprudence undergirds both the comparative law movement and practical professional innovations, yielding “new and effective legal arrangements”).

<sup>100</sup> See Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL’Y & L. 951, 953 (1999) (“Child welfare proceedings exhibit a number of characteristics that make them particularly well-suited for the application of [therapeutic jurisprudence] . . .”); Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33 (2000) (applying therapeutic jurisprudence to the processing of domestic violence cases); see also Dennis P. Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 18 (1997) (“Although the approach originated in the area of mental health law, it has quickly expanded beyond that context, and has become a mental health law approach to law generally . . . [T]he therapeutic jurisprudence perspective has recently been applied in the contexts of criminal law, family law, juvenile law, disability law, discrimination law, health law, evidence law, tort law, contracts and commercial law, labor arbitration, workers’ compensation law, probate law, and legal profession.”).

<sup>101</sup> See Freeman, *supra* note 87, at 256-57 (noting that in the United States, acceptance of therapeutic jurisprudence is primarily theoretical, while it is widely practiced in Canada).

Canadian family law cases, “family circles, or conferences, replace court procedures entirely to resolve the family law issues at hand in a far more collaborative method.”<sup>102</sup> Canadian courts applying therapeutic justice forego traditional trial and sentencing techniques<sup>103</sup> and instead engage in family conferencing to achieve a more therapeutic result.<sup>104</sup>

## 2. Restorative Justice

### a. Restorative Justice Defined

“Restorative justice” is the “process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime.”<sup>105</sup> Restorative justice practices focus not only on the crime itself, but also on “the aftermath of the offense and its implications for the future.”<sup>106</sup> It seeks to “restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.”<sup>107</sup> It places victims, offenders, and communities “in active roles to work together to . . . [e]mpower victims in their search for closure[,] [i]mpress upon offenders the real human impact of their behavior[, and p]romote restitution to victims and communities.”<sup>108</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> See, e.g., NAT’L JUDICIAL INST., PROBLEM-SOLVING IN CANADA’S COURTROOMS: A GUIDE TO THERAPEUTIC JUSTICE 7-19 (2011) (discussing Canadian courts’ application of restorative justice principles in domestic violence matters).

<sup>104</sup> See Freeman, *supra* note 87, at 255-56 (“[I]n Canada . . . traditional trial and sentencing techniques are generally replaced by collaborative family conferencing in an effort to effectuate results that take into account the needs of all and attempts to best arrive at a satisfactory solution.”). Stu Webb, who also writes extensively on restorative justice concepts, highlighted the success of therapeutic jurisprudence and collaborative methods in a small area of Canada and noted that in a community of about 50,000, 16 of the 17 family practitioners attended collaborative trainings; within a year, the family court docket had decreased significantly, and one family court judge was actually reassigned to a different court. Stu Webb, Note, *Collaborative Law: A Practitioner’s Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155, 164 (2008).

<sup>105</sup> John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999) [hereinafter Braithwaite, *A Future Where Punishment Is Marginalized*].

<sup>106</sup> John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 5 (1999) [hereinafter Braithwaite, *Restorative Justice*].

<sup>107</sup> Braithwaite, *A Future Where Punishment Is Marginalized*, *supra* note 105, at 1743.

<sup>108</sup> MARK S. UMBREIT ET AL., CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, DIRECTORY OF VICTIM–OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES, at vii (2000); see also J. KIM WRIGHT, LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW 323 (2010) (explaining that the goal of restorative justice is solving problems for the future rather than assigning blame for the past).

Primarily utilized in the criminal law context, restorative justice has become increasingly popular in Canada,<sup>109</sup> Australia,<sup>110</sup> the United Kingdom,<sup>111</sup> and Japan.<sup>112</sup> In some countries, it has even replaced traditional forms of criminal law proceedings.<sup>113</sup> However, the use of restorative justice in the United States remains relatively limited.<sup>114</sup> Given the United States' focus on preserving constitutional rights and procedural due process, restorative justice has been utilized "as an enhancement, rather than as a substitute for existing criminal law procedures."<sup>115</sup>

b. *Restorative Justice Processes*

In practice, restorative justice typically involves a collaborative process akin to victim-offender mediation.<sup>116</sup> The victim, the offender, and, if appropriate, other members of the community, meet to participate in some

<sup>109</sup> See Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 113, 118 (2009) ("Collaborative law is now found in most metropolitan areas in . . . Canada.").

<sup>110</sup> See generally, e.g., Lisbeth T. Pike & Paul T. Murphy, *The Columbus Pilot in the Family Court of Western Australia*, 44 FAM. CT. REV. 270 (2006). The Columbus Program seeks to assist divorced or separated parents in conflict resolution and was designed as an early intervention tool for complex cases, especially those involving multiple allegations of abuse and violence. *Id.* at 270-71. It succeeded the Magellan Project, another Australian program, which sought to manage high conflict, abusive relationships through therapeutic methodologies. *Id.*

<sup>111</sup> See Anna Bawden, *How Restorative Justice Is Steering Young Offenders Away from Crime*, GUARDIAN (London) (Sept. 17, 2014), <http://www.theguardian.com/society/2014/sep/17/restorative-justice-young-offenders-crime> [<https://perma.cc/YUN5-J23L>] (describing the growth of restorative justice in addressing youth crime in England).

<sup>112</sup> See generally John O. Haley, *Crime Prevention Through Restorative Justice: Lessons from Japan* (describing the robust use of confession apology and forgiveness in the Japanese criminal justice system), in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 349 (Burt Galaway and Joe Hudson, eds., 1996).

<sup>113</sup> See generally Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 257 (2003).

<sup>114</sup> Practitioners have made only limited attempts to institute restorative justice principles in resolving domestic violence cases. See James Ptacek, *Evaluation Research on Restorative Justice and Intimate Partner Violence: A Review and Critique 7* (2014) (unpublished manuscript), <http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1008&context=ipv> [<https://perma.cc/6P2J-QDES>] (noting that the restorative justice approaches to domestic violence are prohibited in many jurisdictions). Perhaps the most comprehensive attempt to do so was spearheaded by Joan Pennell and Galle Burford, whose "family group" decisionmaking model aimed "to eliminate or reduce violence against . . . adult family members and to promote their well-being." *Id.* at 8. Under this model, a conference facilitator oversees a collaborative process between the abuser, abused, and impacted community members. *Id.* at 9. All participants prepare beforehand for the family conference; once there, families create a plan to end the abuse after receiving input from community agencies. *Id.* at 8-9. The facilitator, with the consultation and approval of legal officials, must approve the plan. *Id.* at 9. Pennell and Burford found that families submitting their case to the conferencing process, unlike the comparison group who did not, saw abuser maltreatment decrease by half. *Id.*

<sup>115</sup> Daicoff, *supra* note 87, at 31.

<sup>116</sup> *Id.* at 30.

form of adjudication or sentencing.<sup>117</sup> The meeting is led by a facilitator and usually resembles a conference.<sup>118</sup> The process involves a discussion of the crime and its consequences.<sup>119</sup> The victim and the offender each have an opportunity to address each other; the victim may explain how the crime affected him or her and the offender has the opportunity take responsibility for his or her actions.<sup>120</sup> The participants then develop a plan to “heal” the crime’s negative effects on the victim and the community, including the possible ways that the offender can make reparations.<sup>121</sup> The conference usually concludes with all parties agreeing on a settlement or a solution.<sup>122</sup>

Restorative justice differs from criminal justice in both theory and practice. First, it promotes direct communication between victims and offenders.<sup>123</sup> This element, which is noticeably absent in traditional criminal proceedings, allows for the possibility of negotiation, understanding, confession, reconciliation, and forgiveness.<sup>124</sup> Additionally, unlike a criminal sentencing, the underlying goal of restorative justice is not punitive.<sup>125</sup> Instead, it gives the offender the opportunity to repair harm.<sup>126</sup> In turn, victims and communities have the ability to confront offenders and hold them accountable for their actions in a productive manner.<sup>127</sup>

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<sup>117</sup> *Id.* at 31.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 32 (detailing the practice of restorative justice in some adult criminal settings, including a discussion of the crime in which the victim may ask questions and express feelings about it).

<sup>120</sup> *See, e.g., id.* (using the story of a drunk driver and his victim to illustrate the practice of openly discussing the offense).

<sup>121</sup> *See, e.g., id.* (illustrating that restorative justice allowed a victim to express the best way for the offender to make amends).

<sup>122</sup> *See, e.g., id.* (describing the solution reached by restorative justice participants in which the offender promised to speak to the victim’s children and the victim agreed to join the offender in an outreach campaign against the crime at issue, drunk driving); *see also* NEW ZEALAND MINISTRY OF JUSTICE, RESTORATIVE JUSTICE FACILITATOR INDUCTION TRAINING 19-22 (2009) (detailing the procedures for conducting a restorative justice conference).

<sup>123</sup> *See* Mark S. Umbreit & Robert B. Coates, *Cross-Site Analysis of Victim–Offender Mediation in Four States*, 39 CRIME & DELINQUENCY 565, 572 (1993) (describing the victim–offender mediation process within the restorative justice framework, which requires both parties to meet and may put the offender in “the often uncomfortable position of having to face the person they victimized”).

<sup>124</sup> *See id.* at 575 (explaining that nine out of ten victims and offenders were satisfied with the outcome of the victim–offender mediation sessions in the study presented, which typically concluded with a restitution agreement).

<sup>125</sup> *See* Braithwaite, *A Future Where Punishment Is Marginalized*, *supra* note 105, at 1743 (“One value of restorative justice is that we should be reluctant to resort to punishment.”).

<sup>126</sup> *See* Daicoff, *supra* note 87, at 30 (explaining that restorative justice aims to repair the relationship between the offender and both the victim and the community).

<sup>127</sup> *See id.* at 31 (highlighting that the purpose behind restorative justice is to focus on restitution and rehabilitating the offender rather than merely imposing punishment).

c. *Restorative Justice Outcomes*

Restorative justice advocates cite several benefits to its processes. Most noticeably, participant satisfaction has been recorded as between 90% and 95%.<sup>128</sup> Participants' perceptions of fairness are significantly higher in restorative justice processes than in traditional legal proceedings.<sup>129</sup> Additionally, studies indicate that restorative justice practices decrease recidivism more effectively than other forms of punishment.<sup>130</sup> Finally, restorative justice practices may be less expensive than other legal proceedings and a less expensive punishment than incarceration.<sup>131</sup>

Despite its purported success, rebuttals abound. Skeptics argue that restorative justice's focus on rehabilitating offenders overshadows victims' needs.<sup>132</sup> Others allege that restorative justice forces victims to assist with offenders' rehabilitation.<sup>133</sup> Restorative justice practices have also been criticized

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128 Braithwaite, *A Future Where Punishment Is Marginalized*, *supra* note 105, at 1744. Restorative justice principles yield this result because of the emphasis placed on resolving disputes in the way most effective to meet each party's needs. See Susan Swaim Daicoff, *Families in Circle Process: Restorative Justice in Family Law*, 53 FAM. CT. REV. 427, 430 (2015) (describing a particular restorative justice practice—the circle process—which aims to bring all stakeholder voices together to find mutually beneficial outcomes). This approach may provide the victim a forum, otherwise unavailable via traditional legal avenues, “in which to address complex situations in a deep and meaningful way.” *Id.*; see also Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. 201, 208 (2010) (explaining that research supports concluding that restorative justice is effective “in increasing offender/victim satisfaction and restitution compliance, and decreasing offender recidivism”).

129 See Braithwaite, *Restorative Justice*, *supra* note 106, at 26 (citing studies which found that offenders perceived their criminal justice proceedings as fair in 89% of cases that utilized restorative justice mediations compared with 78% of cases that did not).

130 See Bloch, *supra* note 128, at 207-08 (describing a study that found that restorative justice programs reduce offender recidivism rates). While restorative justice practices encourage offenders to accept responsibility for the crime and its consequences, criminal proceedings may force offenders to deny responsibility, which has been shown to increase recidivism. See Braithwaite, *Restorative Justice*, *supra* note 106, at 48 (“The restorative process, by showing a path to redemption, provides an alternative to denial. This contrasts with the two paths the court proffers—guilt and punishment or innocence and impunity—a choice that makes denial an attractive possibility.”). Scholars have also called for incorporating therapeutic elements into family law. See, e.g., LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:16, Westlaw (database updated June 2015) (arguing that restorative justice can be used in the family law context to “empower[] victims in their search for closure, impress[] upon offenders the real human impact of their behavior, and promote[] restitution to victims and communities”).

131 See Braithwaite, *Restorative Justice*, *supra* note 106, at 70-71 (citing evidence that restorative justice processes have led to cost savings, particularly through the closing of juvenile institutions, but also admitting that studies on cost-effectiveness have limitations).

132 See, e.g., Harry Mika et al., *Listening to Victims—A Critique of Restorative Justice Policy and Practice in the United States*, 68 FED. PROB., June 2004, at 32, 33 (claiming that restorative justice processes not only considers the offender's needs but are driven by those needs, which may not be compatible with the victim's interests).

133 In the domestic violence context, critics of restorative justice are primarily concerned that its informal practices fail to implement safety mechanisms to address the dangers its forum poses for survivors. See, e.g., James Ptacek & Loretta Frederick, *Restorative Justice and Intimate Partner Violence*, NAT'L RESOURCE CTR. ON DOMESTIC VIOLENCE (2009), <http://www.vawnet.org/domestic->

for setting “unrealistic or unreasonable goals.”<sup>134</sup> Victims could experience harm again in circumstances where offenders do not meet expectations or do not truly engage in the process.<sup>135</sup> While restorative justice is not universally accepted, the next Section argues that therapeutic jurisprudence and restorative justice, if used in conjunction, would present a dramatic improvement from the current American system of handling accusations of domestic violence.

### B. *Therapeutic Jurisprudence and Restorative Justice as Counterparts*

Although therapeutic jurisprudence and restorative justice operate as two distinct legal theories, they share common foundational principles: both have a practical dimension—they are not merely analytical frameworks, but also propose actual ways to practice—and both serve a therapeutic purpose by emphasizing emotions, empathy, healing, and individuals’ psychological well-being.<sup>136</sup> Moreover, each retains elements of traditional theories of justice, while emphasizing problemsolving rather than punishment.<sup>137</sup>

Therapeutic jurisprudence and restorative justice also diverge in certain key respects, however.<sup>138</sup> For example, most therapeutic jurisprudence proponents do not support “shaming,” a concept that often accompanies restorative justice practices.<sup>139</sup> Restorative justice also retains a broader scope than therapeutic jurisprudence.<sup>140</sup> While therapeutic jurisprudence maintains a primarily theoretical focus, restorative justice incorporates specific practices and an

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violence/print-document.php?doc\_id=1656&find\_type=web\_desc\_AR [https://perma.cc/A43Z-LTPB] (acknowledging the criticism that “existing restorative justice models . . . fail[] to adequately address issues of safety and accountability”). Critics also argue that restorative justice processes may minimize the victim’s harm—especially given the potential to mislabel the parties as a “problem couple”—as opposed to recognizing it and the abuser–abused dynamic. *Id.* Other critics fear that participating in restorative justice while intimate partner violence is ongoing will pressure victims into taking responsibility for rehabilitating their partners and deprioritize their own victimization. *Id.*

<sup>134</sup> Mika et al., *supra* note 132, at 33.

<sup>135</sup> *See id.* (“[W]here offenders are not sorry for what they have done, victims may feel harmed again for this failure of justice.”).

<sup>136</sup> James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1546 (2003).

<sup>137</sup> *Id.*

<sup>138</sup> *See id.* at 1547 (noting that the two theories differ in some respects).

<sup>139</sup> Compare Victoria Pynchon, *Shame by Any Other Name: Lessons for Restorative Justice from the Principles, Traditions and Practices of Alcoholics Anonymous*, 5 PEPP. DISP. RESOL. L.J. 299, 300-01 (2005) (discussing the origins of the theory of “reintegrative shaming,” which, when put into practice, involves holding conferences with offenders, victims, and their families and friends to condemn the crime while forgiving the offender), with Nolan, *supra* note 136, at 1548 (explaining Bruce Winick’s belief that “shaming” is “unfortunate”).

<sup>140</sup> *See* John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 247 (2002) (noting that restorative justice is “concerned with a much wider net of consequences” than therapeutic justice).

identified set of process-oriented values.<sup>141</sup> In spite of these differences, therapeutic jurisprudence and restorative justice together can combine to create a more holistic approach to legal practice.<sup>142</sup>

### III. OPPOSITION TO ALTERNATIVE APPROACHES TO DOMESTIC VIOLENCE INTERVENTION

Most arguments against adopting alternative approaches to civil protection order proceedings stem from a supposed theoretical disconnect between the traditional civil response to domestic violence and newer, more therapeutic frameworks. Critics argue that therapeutic jurisprudence and restorative justice principles conflict with traditional theories behind domestic violence intervention. Private reconciliation opportunities, victim–offender collaboration, and community involvement are central to therapeutic jurisprudence and restorative justice, but these ideas remain foreign to traditional responses and are antithetical to traditional theoretical frameworks.

#### A. *Private Reconciliations*

The law has largely abandoned domestic violence interventions that enable private reconciliation.<sup>143</sup> Before the advent of civil protection order statutes, the criminal justice system encouraged victims to reconcile with their abusers outside traditional legal proceedings.<sup>144</sup> However, anti–domestic violence advocates claimed that this response “failed to acknowledge the severity of domestic violence and put victims at serious risk” of future harm.<sup>145</sup> Contemporary approaches reflect these concerns by urging active

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<sup>141</sup> See *id.* at 247–51 (identifying the “process ideal” that characterizes restorative justice and delineating three groups of restorative values).

<sup>142</sup> Good Shepherd Mediation Program, which originated in Philadelphia, Pennsylvania, provides a useful example of therapeutic jurisprudence and restorative justice principles working in tandem. Good Shepherd offers four types of mediation programs: (1) community group conferencing, (2) victim–offender conferencing, (3) circles, and (4) family group decisionmaking. *About Good Shepherd Mediation Program*, GOOD SHEPHERD MEDIATION PROGRAM, <http://www.phillymediators.org/about-gsmp> [<https://perma.cc/E2ZZ-ZQWH>] (last visited Apr. 15, 2016). Thus, although Good Shepherd Mediation models its programs after restorative justice practices, elements of therapeutic jurisprudence underlie the program’s mission.

<sup>143</sup> See Kohn, *supra* note 2, at 542 (discussing how the “movement against domestic violence” has moved away from “responses that urge private reconciliation between the parties”).

<sup>144</sup> See Brian R. Decker, *Violence and the Private: A Girardian Model of Domestic Violence in Society*, 11 U. PA. J.L. & SOC. CHANGE 105, 109–10 (2007–2008) (stating that even in the twentieth century, because domestic violence was traditionally considered a private family matter, police responses remained limited to attempts to reconcile the parties).

<sup>145</sup> Kohn, *supra* note 2, at 542.

state involvement.<sup>146</sup> However, therapeutic jurisprudence and restorative justice practices contradict this basic tenet of domestic violence intervention by instead supporting private reconciliations outside traditional justice systems.

### B. *Victim–Offender Collaboration*

Critics also assert that victim–offender collaboration in alternative domestic violence interventions contradicts traditional domestic violence intervention theory. Domestic violence studies indicate that abusers exert power and control over victims through coercive interactions.<sup>147</sup> For example, a 2009 study demonstrated “the inability of domestic violence victims to bargain effectively with their abusers” during legal interventions.<sup>148</sup> Therapeutic jurisprudence and restorative justice practices, which rely on a survivor’s meaningful participation, may be rendered ineffective if the victim cannot freely express emotions or remains in fear of the abuser.<sup>149</sup> Some critics believe that coming to a mutual agreement or solution—a vital aspect of both therapeutic jurisprudence and restorative justice—remains an impossibility where the “imbalance in power negates [the] victim’s ability to negotiate” with the offender.<sup>150</sup>

Similarly, the possibility of apologies and forgiveness during victim–offender collaborations are central to the restorative justice paradigm. However, these two values may contribute to a continuing cycle of violence between abusers and their victims.<sup>151</sup> Between violent episodes, an offender may apologize and promise cessation of violence in an effort to maintain the relationship and retain the status quo.<sup>152</sup> A survivor’s acceptance of an apology may also lead to further harm. Indeed, a victim may accept an offender’s apology and grant forgiveness when the victim’s acceptance is neither fully voluntary nor healing for the victim.<sup>153</sup> In

<sup>146</sup> See *id.* (“[C]ontemporary responses to domestic violence involve active state engagement.”).

<sup>147</sup> See, e.g., Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1121–22 (2009) (arguing that an abuser’s use of power and control deprives the victim of liberty and defines the victim’s experience as much as the abuser’s physical violence).

<sup>148</sup> Kohn, *supra* note 2, at 543 (citing Ruth Busch, *Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get It Wrong?*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 223, 223–34, 230 (Heather Strang & John Braithwaite eds., 2002)).

<sup>149</sup> See *id.* at 543 (noting that an “intervention that relies on the meaningful participation” of an empowered, uncoerced victim can be highly problematic in the context of domestic violence disputes).

<sup>150</sup> *Id.* (alteration in original) (quoting Susan S. Russell, *Using Restorative Justice in Family Violence Situations*, 4 CRIME VICTIMS REP. 65, 75 (2000)).

<sup>151</sup> See *id.* at 546 (discussing the role of the abuser’s apologies and promises to reform in maintaining the relationship and perpetuating the cycle of domestic violence, noting that they are “fraught with danger and complexity”).

<sup>152</sup> See *id.* (noting theories that suggest apologies “frequently serve as the glue that holds together a cycle of violence”).

<sup>153</sup> *Id.*

one study, victims admitted that even when they wanted to reject their abuser's apology, they rarely did so.<sup>154</sup> These complexities only increase concerns regarding victim-offender collaborations.

### C. Community Involvement

Community involvement in therapeutic jurisprudence and restorative justice practices may contradict the traditional role of the community in domestic violence cases.<sup>155</sup> In addition to accessing "both the shaming and nurturing influences of community in resolving conflict," restorative justice needs community support to provide both parties with a peaceful environment.<sup>156</sup>

However, critics argue that certain communities "may not be willing or able to fulfill [their] responsibilities" in domestic violence cases for two reasons.<sup>157</sup> First, victims may become isolated from friends and family as a result of continuing abuse and may lack meaningful community connections.<sup>158</sup> Second, family and community ties might fail to denounce domestic violence and instead perpetuate harm.<sup>159</sup> Communities may continue to believe "folk wisdom" and "myths about the causes of and treatment for domestic violence."<sup>160</sup> These belief sets can result in "victim blaming and minimization of abuse."<sup>161</sup> Given these concerns, critics argue that community involvement may result in more harm than good.<sup>162</sup>

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<sup>154</sup> See Mark Bennett & Christopher Dewberry, "I've Said I'm Sorry, Haven't I?" *A Study of the Identity Implications and Constraints That Apologies Create for Their Recipients*, 13 CURRENT PSYCHOL. 10, 19 (1994) (reporting that subjects in the study were "extremely unlikely to indicate that they would reject an apology").

<sup>155</sup> See Kohn, *supra* note 2, at 546 (noting that the emphasis on community involvement contravenes the "role community has traditionally played in domestic violence interventions").

<sup>156</sup> *Id.* at 546-47 (citation omitted).

<sup>157</sup> *Id.* at 547.

<sup>158</sup> *Id.*; see also Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 616-17 (2000) ("The batterer isolates the woman from friends, family, colleagues, and neighbors in an effort to maintain control. The battered woman may also choose to isolate herself from others in order to avoid embarrassment." (citation omitted)).

<sup>159</sup> See Ruth Lewis et al., *Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence*, 10 SOC. & LEGAL STUD. 105, 119 (2001) (noting research that suggests that battered women often live in communities that "simply reinforce[] and support[] traditional forms of patriarchal power").

<sup>160</sup> Kohn, *supra* note 2, at 548 (citation omitted); see also *id.* ("Community norms often tolerate or even support a certain level of domestic chastisement. In addition, community members might prefer that domestic violence remain a private matter and refuse to become involved." (citation omitted)).

<sup>161</sup> See *id.* (noting that restorative justice practitioners "must recognize the complicit role the community can play by its either ignoring or condoning domestic violence").

<sup>162</sup> See *id.* ("A central theoretical reliance on positive community influence . . . might prove incompatible with the reality of domestic violence.").

#### IV. REFRAMING “JUSTICE” IN PROTECTION ORDER PROCEEDINGS

Despite the legitimate concerns behind incorporating therapeutic approaches into domestic violence intervention, litigants involved in protection order proceedings would benefit from a combination of therapeutic jurisprudence and restorative justice practices. Many of the concerns outlined in Part III can be alleviated and, despite their different approaches, there are common goals among therapeutic jurisprudence, restorative justice, and the current civil domestic violence response. Incorporating therapeutic jurisprudence and restorative justice concepts into the existing civil protective system would address the system’s shortcomings and substantially improve litigants’ access to justice.

##### A. *Overcoming Criticisms: Why Therapeutic Approaches Prevail*

The critiques outlined in Part III of this Article raise significant concerns about the incorporation of alternative justice paradigms into civil domestic violence cases. This Section suggests that these critiques should serve as navigational tools, rather than roadblocks, in implementing alternative approaches to domestic violence in protection order proceedings.

First, concerns related to victim participation in alternative dispute resolution processes are mitigated by the voluntary nature of participating in therapeutic jurisprudence and restorative justice practices.<sup>163</sup> Affording a victim the opportunity to choose among several options for resolution not only affords a sense of autonomy, but also recognizes each victim’s individual needs. Indeed, rather than being forced to proceed in court, a victim may choose to engage in a therapeutic or restorative resolution tailored to his or her individual level of comfort.<sup>164</sup>

Second, more specific theoretical critiques, such as the potential dangers of collaboration among victims and offenders, are also misplaced. Critics argue that therapeutic and restorative justice concepts have adverse effects on domestic violence interventions because they place victims at an increased risk of coercion.<sup>165</sup> However, current domestic violence theories suggest that a portion—possibly even the majority—of violent relationships stem from “situational couple violence,” where violence is linked to the escalation of

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<sup>163</sup> See C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J.L. & GENDER 311, 341 (2012) (stating that any process that does not honor or place the wishes of the victim at its center is “not truly a restorative justice approach”).

<sup>164</sup> See *id.* at 322 (stating that the criminal process “often fail[s] to address the victims’ physical and emotional safety needs” and that it “may force victims to move more quickly . . . than is psychologically advisable”).

<sup>165</sup> See *supra* notes 147–50 and accompanying text.

specific conflicts rather than control.<sup>166</sup> Domestic violence affects a diverse set of relationships, some less intimate than others.<sup>167</sup> In cases where the parties have relatively little history between them or lack complex relationship dynamics, collaboration may not only be appropriate but may also be more effective than traditional protection order proceedings.<sup>168</sup> Further, in cases where survivors remain with their partners,<sup>169</sup> efforts to facilitate collaboration may also “assist in securing the victim’s safety.”<sup>170</sup>

### B. *Common Ground Shared by Current and Alternative Approaches*

Despite their procedural differences, traditional civil responses to domestic violence and alternative justice paradigms share many common goals. At the broadest level, civil protection order statutes aim to provide domestic violence survivors with a more comprehensive, more flexible range of relief than is available in the criminal justice system.<sup>171</sup> Therapeutic jurisprudence and restorative justice principles promote these same goals.<sup>172</sup> Indeed, where a survivor maintains a relationship or frequent contact with an abuser, therapeutic alternatives may even exceed the goals advanced by the current civil approach.<sup>173</sup>

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<sup>166</sup> Michael P. Johnson, *Domestic Violence: It's Not About Gender—Or Is It?*, 67 J. MARRIAGE & FAM. 1126, 1127 (2005). It is important to note that alternative approaches such as therapeutic jurisprudence and restorative justice may be most appropriate when limited to these scenarios, and where control issues do not predominate. See Ptacek, *supra* note 114, at 12 (describing how certain cases of intimate partner violence are not suited for mediation, including “where the domination of the male partner is demonstrated, ascertained, and defended by the use of physical violence” (citation omitted)).

<sup>167</sup> See Kohn, *supra* note 2, at 556 (discussing some of the less intimate relationships nonetheless covered under domestic violence protection statutes, including “those who share a common partner, or strangers who stalk or are being stalked”).

<sup>168</sup> *Cf. id.* (positing that less complicated relationships may not “merit restorative justice intervention” precisely because of “their lack of complexity”).

<sup>169</sup> See Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 512 (2003) (finding that 17.3% of women in their study were planning “to continue an intimate relationship with their batterer” and that 39.3% were planning to “at least remain in contact with their abusers in the future”).

<sup>170</sup> Kohn, *supra* note 2, at 556.

<sup>171</sup> See *id.* at 553 (noting that one of the goals in adopting protection order statutes was to make “broader and more flexible relief” available to survivors).

<sup>172</sup> See *id.* (arguing that restorative justice programs “may enhance the attainment” of the goals underlying civil protection order statutes).

<sup>173</sup> See, e.g., ALAN EDWARDS & SUSAN SHARPE, MEDIATION & RESTORATIVE JUSTICE CTR., RESTORATIVE JUSTICE IN THE CONTEXT OF DOMESTIC VIOLENCE: A LITERATURE REVIEW 6 (2004), [https://s3.amazonaws.com/mrjc/restorative\\_justice\\_DV\\_Lit\\_Review.pdf](https://s3.amazonaws.com/mrjc/restorative_justice_DV_Lit_Review.pdf) [<https://perma.cc/6LTK-K33P>] (reporting that the results of a South African restorative justice study implementing victim–offender mediation demonstrated that “[w]here couples had stayed together, the women reported improved communication and a reduction in verbal abuse”); see also Ptacek, *supra* note 114, at 9 (reporting on a study which found that when children are involved in the restorative justice process, extended family feels more compelled to intervene to end the abuse).

First, both traditional and alternative approaches aim to promote victim safety.<sup>174</sup> Although restorative justice advocates emphasize healing, they also uniformly measure recidivism and reabuse rates, which are then incorporated into program effectiveness analyses.<sup>175</sup> Second, just as protection order proceedings provide survivors with an avenue through which they may be heard, therapeutic alternatives also offer a forum for survivors to express themselves.<sup>176</sup> In fact, many survivors may find speaking informally in a conference setting to be “less daunting than [testifying in] the courtroom.”<sup>177</sup> Finally, both traditional protection order proceedings and alternative paradigms attempt to incorporate a holistic approach to domestic violence intervention, one which “address[es] complex situations in a deep and meaningful way.”<sup>178</sup> Finally, protection order statutes provide additional relief to survivors by making available family law and social service remedies.<sup>179</sup> Similarly, therapeutic approaches allow parties to craft specific resolutions to meet their needs.<sup>180</sup>

C. *Coming to an Agreement: Therapeutic Alternatives as a Supplement to Pennsylvania’s Protection from Abuse Act*

Considering alternative approaches as a supplement to, rather than a replacement for, the current civil justice system may help to alleviate lingering concerns about the role restorative justice practices may play in Pennsylvania.<sup>181</sup> This Essay suggests a gradual, voluntary introduction of alternative legal paradigms into preexisting civil justice systems. Therapeutic jurisprudence and restorative justice principles already have a place in most civil domestic violence statutes.<sup>182</sup> For instance, Pennsylvania’s Protection from Abuse Act could incorporate alternative justice approaches into the current system with minimal effort, yet those minor changes could have a dramatic impact on the lives of domestic abuse victims.

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<sup>174</sup> See Kohn, *supra* note 2, at 526-27 (surveying studies on the effectiveness of traditional and alternative approaches at increasing victim safety).

<sup>175</sup> See, e.g., Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Children and Women*, 79 CHILD WELFARE 131, 145-47 (2000) (highlighting that participants in family group decisionmaking therapies report greater interfamilial safety).

<sup>176</sup> See *supra* Section II.A.

<sup>177</sup> Kohn, *supra* note 2, at 554.

<sup>178</sup> *Id.*

<sup>179</sup> See *id.* (discussing how protection order statutes “have expanded the scope of relief . . . to include family law and social service remedies”).

<sup>180</sup> See *id.* at 555 (reflecting on how therapeutic programs “create time and space” for the parties to reach resolutions particular to the parties’ needs).

<sup>181</sup> Indeed, an optimal approach views restorative justice and the current legal paradigm as symbiotic, rather than mutually exclusive, and any restorative process would be an optional alternative to current programs. See *supra* note 163 and accompanying text.

<sup>182</sup> See, e.g., Kohn, *supra* note 2, at 554-55 (pointing out a District of Columbia statute affording the judge the power to “grant any relief that is ‘appropriate to the effective resolution of the matter’”).

Pennsylvania's Protection from Abuse Act allows for orders by agreement.<sup>183</sup> Excluding cases where the petitioner did not appear or withdrew the PFA petition, almost half of Philadelphia's remaining PFA adjudications resulted in an agreement between the parties.<sup>184</sup> However, the word "agreement" should be understood loosely in this context. An agreement between the parties does not necessarily require that the litigants actually speak directly to one another. Instead, litigants may communicate through their attorneys, or, in cases where the litigants are unrepresented, through court staff or even the presiding judge. As a result, agreements may be made without any real discussion between the parties regarding what precipitated the initial filing. This is problematic for two reasons. First, petitioners may agree to less protection than they actually need. Second, respondents may not understand what exactly they are agreeing to, or, more fundamentally, the lasting consequences of their actions.

Therapeutic jurisprudence and restorative justice principles stand as a viable way to address these problems. If a victim chooses to negotiate an order by agreement with the abuser, the incorporation of a restorative justice regime into the ensuing negotiation process would ensure an equitable bargaining dynamic, and, ultimately a more equitable result—assurances that are otherwise absent from the way in which parties currently bargain for an order by agreement.<sup>185</sup> While in theory this concept seems ideal, implementation does remain a problem. Most case studies examining the efficacy of therapeutic jurisprudence and restorative justice involved abused parties who participated on a volunteer basis.<sup>186</sup> Further, states have been reluctant to incorporate a sanctioned mediation system that uses restorative justice practices and therapeutic jurisprudence ideals into their PFA proceedings.<sup>187</sup> However, states can implement this process on a volunteer basis, as was the usual method for introduction in previous case studies.

For example, currently all PFA petitions in Philadelphia must first go before a judge in an *ex parte* hearing.<sup>188</sup> In filling out the relevant paperwork, a petitioner might indicate a willingness to adjudicate his or her petition through mediation. Thus, an *ex parte* hearing would be held—and an interim PFA order perhaps granted. However, where petitioners elected to submit their case to a mediator, the final PFA hearing—which is required to occur within ten days of the *ex parte* hearing<sup>189</sup>—would not need to be scheduled. Instead, the court

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<sup>183</sup> See *supra* note 82 and accompanying text.

<sup>184</sup> See *supra* note 51 and accompanying text.

<sup>185</sup> See Busch, *supra* note 148, at 229 (explaining that the inequitable dynamic between victim and abuser impedes meaningful negotiations).

<sup>186</sup> See, e.g., Ptacek, *supra* note 114, at 17 ("[P]articipation is strictly voluntary.").

<sup>187</sup> However, one realm in which states have incorporated this form of mediation is in the context of custody disputes. See, e.g., CHESTER CTY. CUSTODY RULES AND FORMS 1915.4.A(a)(1) ("All complaints for custody . . . shall be scheduled for meditation within thirty (30) days of filing . . .").

<sup>188</sup> See *supra* note 37 and accompanying text.

<sup>189</sup> See *supra* note 39 and accompanying text.

would refer the petition to mediation. The abused party would pursue this route knowing it would likely result in an order by agreement rather than an order unilaterally decided by a court. However, unlike the current status quo, a guided mediation process would ensure that abuse victims are not bullied or intimidated into inadequate agreements.<sup>190</sup> Instead, the mediation process would place an emphasis on both empowerment and resolution. That is, therapeutic jurisprudence and restorative justice ideals would inform the process.

These principles would provide an answer to the current deficiencies that corrupt the manner in which orders by agreement are reached. The typical agreement process attendant to PFA litigation typically stymies a victim's ability to attain both adequate and meaningful relief. In its place, the mediation would foster a supervised, open dialogue. The victim would direct the discourse; the mediator would act in a facilitative capacity. This collaborative process could also lead parties to explore other corollary alternatives to traditional civil protection orders, including counseling, coparenting opportunities, and drug and alcohol programs.

Utilizing alternative approaches as a supplement to the current civil protection order proceeding model—rather than replacing it entirely—serves many purposes. First, traditional proceedings would remain available for cases in which alternative approaches may not be appropriate. Second, alternative approaches positively contribute and potentially eliminate many challenges faced by family courts, particularly crowded court dockets and the increasing number of self-represented litigants. Finally, they address a host of litigants' needs outside of the need for physical protection and instead focus on restoring relationships and preventing future instances of domestic violence.

## CONCLUSION

Incorporating restorative justice and therapeutic jurisprudence concepts into civil protection order proceedings would resolve many issues facing litigants and courts alike. First, a therapeutic approach would facilitate a more sensitive response to one of the most sensitive areas of legal practice. Second, introducing a nonjudicial alternative to traditional protection order hearings would preserve valuable court resources. Finally, affording litigants more personalized avenues of relief would ensure victim autonomy and offender participation.

In the two scenarios set out in the introduction of this Essay, the traditional protection order process failed to adequately meet the litigants' needs. Neither Petitioner One nor Two benefited from the civil justice system's available resources. Likewise, neither Respondent One nor Two accepted responsibility

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<sup>190</sup> See Busch, *supra* note 148, at 245-46 (arguing that hybrid systems should only be utilized where safety mechanisms are in place).

for his actions. Finally, and most importantly, none of the parties involved acquired the necessary tools to decrease the likelihood of a future filing.<sup>191</sup>

This Essay argues that therapeutic jurisprudence and restorative justice principles could vastly improve both outcomes. If Petitioners One or Two chose to participate in an alternative approach akin to the solution proposed in this Essay, all parties, as well as the civil justice system as a whole, could have substantially benefited. Petitioner One and Respondent One could have had a meaningful, facilitated discussion about the incident that precipitated the Petitioner's filing. Respondent One may have better understood how he made Petitioner One feel, while Petitioner One could have made a more informed decision about whether to withdraw her petition. In the second case, both parties may have come to an agreement regarding custody if they had had an opportunity to openly share their concerns with each other. Petitioner Two's concerns could have been heard, rather than deemed "not credible" by a third party with limited access to evidence. Respondent Two may have been persuaded to take parenting classes or to undergo counseling.

These scenarios serve as only two examples of the lives that could be changed by incorporating the alternative approaches of therapeutic jurisprudence and restorative justice principles into protection order proceedings. Rather than merely protecting survivors, an enhanced, therapeutic civil response could restore relationships, redefine communities, and finally loosen the grip of domestic violence on our society today.

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<sup>191</sup> See *supra* notes 5–7 and accompanying text.