# WHO HOLDS THE POWER? THE ENFORCEMENT OF CUSTODY PROVISIONS OF DOMESTIC VIOLENCE PROTECTION ORDERS

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Across the country, survivors of domestic violence are leaving court with what may amount to false assurances and illusory relief. In all fifty states and the District of Columbia, victims of domestic violence can seek protection orders by petitioning the court.[1] The protection offered in these orders not only directs the abusive party to refrain from further abuse,[2] but across the nation, courts are empowered to also adjudicate custody and visitation within these injunctions.[3] If parties share a child,[4] the court in an expedited hearing, may resolve issues of physical and legal custody for the duration of

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[1] Klein?

[2] *See e.g.*

[3] ALA. CODE § 30-5-7 (c) (1975); ALASKA STAT. ANN. § 18.66.100(c)(9) (West 2015); ARK. CODE ANN. § 9-15-205(a)(3)(A) (West 2011); CAL. FAM. CODE § 6340(a) (West 2015); COLO. REV. STAT. ANN. § 13-14-105(1)(e) (West 2013); CONN. GEN. STAT. ANN. § 46b-15(b) (West 2015); DEL. CODE ANN. tit. 10, § 1045(a)(5) (West 2014); D.C. CODE § 16-1005(c )(6) & (7) (West 2013); FLA. STAT. ANN. § 741.30(6)(a)(3) (West 2014); GA. CODE ANN., § 19-13-4(a)(4) (West 2003); HAW. REV. STAT. § 586-5.5(a) (West 2015); Ch. 750 ILL. COMP. STAT. 60/214(b)(5) & (6) & (7) (West 2013); IOWA CODE ANN. § 236.5(1)(b)(5) (West 2014); KAN. STAT. ANN. 60-3107(a)(4) (West 2014); LA. REV. STAT. ANN. § 46:2136(A)(3) (2014); ME. REV. STAT. ANN. tit. 19-A, § 4007(1)(G) (2013); MD. CODE ANN., FAM. LAW § 4-506(d)(7) & (8) (2014); MASS. GEN. LAWS ANN. ch. 209A, § 3 (d); MINN. STAT. ANN. § 518B.01(6)(a)(4) (West 2014); MISS. CODE ANN. § 93-21-15(2)(a)(iv) (West 2015); MO. ANN. STAT. § 455.050(3)(1) & (2) (West 2013); NEV. REV. STAT. ANN. § 33.030 (West 2007); N.H. REV. STAT. ANN. § 173-B:5(I)(b)(5) & (6) (2014); N.J. STAT. ANN. § 2C:25-29 (b)(3) & (11) (West 2012); N.M. STAT. ANN. § 40-13-5(A)(2) (2008); N.Y. FAM. LAW § 842 (McKinney 2013); N.C. GEN. STAT. ANN. § 50B-3 (a)(4) & (a1) (West 2003); N.D. CENT. CODE ANN. § 14-07.1-02(4)(c) (West 2013); OHIO REV. CODE ANN. § 3113.31(E)(1)(d) (West 2015); OR. REV. STAT. ANN. § 107.718(1)(a) & (3) (West 2015); 23 PA. CONS. STAT. ANN. § 6108(a)(4) (West 2006); S.C. CODE ANN. § 20-4-60(C)(1) (2014); S.D CODIFIED LAWS § 25-10-5(3) (2014); TENN. CODE ANN. § 36-3-606(a)(6) (West 2014); TEX. FAM. CODE ANN. § 85.021(3) (West 2013); UTAH CODE ANN. § 78B-7-106(3)(b) & (2)(f) (West 1953); VT. STAT. ANN. tit. 15, § 1103 (c)(2)(C) & (D) (West 2015); VA. CODE ANN. § 16.1-279.1(A)(9) (West 2014); WASH. REV. CODE ANN. § 26.50.060(1)(d) (West 2010); W. VA. CODE § 48-27-503(3) (2010); WYO. STAT. ANN. § 35-21-105(b)(i) (West 1977). In some states, courts are authorized to adjudicate only custody but not parenting time: IDAHO CODE ANN. § 39-6306(1)(a) (West 2015); KY. REV. STAT. ANN. § 403.750(1)(f) (West 2015); NEB. REV. STAT. § 42-924(1)(f) (2014); R.I. GEN. LAWS § 15-15-3(a)(3) (2010).

[4] One study concluded that 57% of parties in protection order cases share a child in common. N.C. Criminal Justice Analysis Ctr., *Dispositional Outcomes of Domestic Violence Ex-Parte and Domestic Violence Protective Orders*, Sys. Stat, Winter 2002, at 1.5.

the order. Because domestic relations cases that adjudicate permanent custody and visitation can take substantial time to be resolved in court and because many parties never even make it to court to adjudicate long-term custody,[5] this expedited relief can be essential to the safety of domestic violence victims and to the wellbeing and stability of children during this tumultuous time in a family's life.[6]

Under protection order statutes, within several weeks parties can leave court with a protection order that establishes which parent has custody and when, where, and how often visitation or parenting time will occur with the nonresidential parent.[7] Protection orders can be enforced in a variety of ways. Statutes around the country criminalize the violation of a protection order as a misdemeanor crime.[8] Orders also can be enforced through criminal or civil contempt actions, authorized either through specific statutory or generally through equitable principles.[9] For violent breaches of protection orders and even for failure to make payments required in protection orders, this enforcement system has been fairly reliable. The government holds the power to enforce orders criminally and exercises that power quite reliably.[10] Aggrieved parties themselves or the

[5] Suzanne Reynolds & Ralph Peeples, *When Petitioners Seek Custody in Domestic Violence Court and Why we Should Take Them Seriously*, 47 WAKE FOREST L. REV. 935, 950 (2012) (stating, based on empirical data, that "many families experiencing violence and custody issues never made it to family court; they were in domestic violence court instead.").

[6] *See generally* Suzanne Reynolds & Ralph Peeples, *When Petitioners Seek Custody in Domestic Violence Court and Why we Should Take Them Seriously*, 47 WAKE FOREST L. REV. 935, 940-50 (2012) (discussing the history of domestic violence court's lack of attention to custody and visitation and the importance of that attention).

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[8] *See infra….*

[9] *See, e.g.*, ALA. CODE § 30-5 (1975); DEL. CODE ANN. tit. 10, § 1046 (West 2014); FLA. STAT. ANN. § 741.30(9)(a) (West 2014); GA. CODE ANN., § 19-13-6 (West 2003); Ch. 750 ILL. COMP. STAT. 60/223 (West 2013); LA. REV. STAT. ANN. § 46:2137 (2014); N.M. STAT. ANN. § 40-13-5(B) (2008); TENN. CODE ANN. § 36-3-606(a)(8) (West 2014) (all statutes setting forth both criminal and civil contempt enforcement remedies).

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government are authorized to enforce orders requiring payment, such as child support.[11] As long as defendant has the means to make the payment, a party can coerce that payment.[12]

What is unclear is where the power resides to enforce the custody and visitation provisions of the protection order. Legally, the power to enforce those remedies is vested with with same actors who have the power to enforce other relief. However, in practice, the power to enforce those remedies is often declined or is elusive, leaving the remedies themselves without value. In essence, those with the power to enforce these orders do not have the incentive to enforce it and those with the incentive to enforce it, cannot seem to locate the power. This Article explores the absence of deployable power to enforce the custody provisions of a protection order. This gap in enforceability has been previously unrecognized and analyzed and this Article seeks to surface the issue and to explore ways to locate and reify that power so that the family law provision of protection orders are more than illusory.

In Part I, this Article looks to a Washington D.C. protection order action as a case study that illustrates the unpredictability of custody and parenting time relief in protection orders. Against this backdrop in Part II, the Article considers the three avenues of enforcing family law remedies in protection orders that include criminal prosecution and criminal and civil contempt. Part III interrogates the central question of where the power actually resides to enforce the domestic relations provisions of protection orders through criminal contempt looking specifically at the court, protected parties, and at the prosecutors. This Part ultimately considers the implications that the actors who hold truly

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[12] Turner.

reliable power to enforce the family law remedies of the order have either little incentive or are severely curtailed in their ability to do so based on resources. In Part IV, the Article looks specifically at the power to enforce domestic relations provisions of protection orders through civil contempt, looking at why the power, which is officially held by the aggrieved party, is often so challenging to deploy.

In Part V, the Article considers the problem from a larger context, considering whether the power to enforce other civil orders and injunctions is similarly elusive. In acknowledging that civil orders often pose enforcement challenges, this Part considers the use criminal and civil contempt to enforce other types of civil orders and also analyzes the enforcement mechanisms that apply to longer term domestic relations orders. Finally, the Article concludes by considering avenues that might make the power to enforce domestic relations provision of protection orders more meaningful.

## I. *Problem in Context: D.C. Case of Cunningham v. Cunningham*

Mrs. Cunningham alleged her husband held her at gunpoint in their bedroom for almost ninety minutes, chambering a round into the barrel of the gun as he pressed it against her head.[13] Earlier that same year, she alleged he also pinned her against a wall with his forearm.[14] She also reported that when she was at the hospital with her sick child, Mr. Cunningham threatened to kill her.[15]

Mrs. Cunningham filed for a protection order in the District of Columbia. She sought an order that directed Mr. Cunningham to not abuse her and to enroll in a

[13] Petition and Affidavit filed in Watford-Cunningham v. Cunningham, 2011 CPO 809, March 16, 2011, D.C. Superior Court, p. 1.
[14] Id.
[15] Supplemental Petition and Affidavit filed in Watford-Cunningham v. Cunningham, 2011 CPO 809, March 16, 2011, D.C. Superior Court, p. 1.

complete a counseling program for domestic violence.[16] Because one of their children was ill, Mrs. Cunningham couldn't take the children to a shelter since he needed a sterile environment. Therefore, she sought an order that would place the children in Mr. Cunningham's home until she had permanent, safe housing.[17]

At court, Mr. Cunningham agreed to the protection order granting the no abuse provisions and requiring him to enroll in a domestic violence counseling program.[18] Under the order, the parties would share joint legal and physical custody, with the children living with Mr. Cunningham for the next three months.[19] The parties set a court hearing for six months hence to reassess custody.[20] Under the order, Mr. Cunningham was required to produce the children for visitation with Mrs. Cunningham twice weekly for up to fourteen hours each week.[21] During one of those visitations, she would take all the children to the hospital to obtain medical treatment for the child who was ill.[22]

But the visits did not go as planned. According to Mrs. Cunningham, Mr. Cunningham failed to produce the children for visitation any Sunday for six months, resulting in 26 violations of the court order.[23] At court, Mrs. Cunningham reported through counsel that she had not had Sunday visitation since the inception of the order.[24] In response, the court reminded Mr. Cunningham that the order was valid: "[i]t is my obligation to enforce an Order – a valid Order of this Court as written. And what is –

[16] Petition and Affidavit filed in Watford-Cunningham v. Cunningham, 2011 CPO 809, March 16, 2011, D.C. Superior Court, p. 2.
[17] Id. at 2 (requesting joint legal and physical custody).
[18] Consent Civil Protection Order in Watford-Cunningham v. Cunningham, 2011 CPO 809, March 30, 2011, pp. 1-3.
[19] Id.
[20] Id.
[21] Id.
[22] Id.
[23] Motion for Criminal Contempt filed in Watford-Cunningham v. Cunningham, 2011 CPO 809, Superior Court of the District of Columbia, filed 9/28/11.
[24] Official Transcript of Watford-Cunningham v. Cunningham, 2011 CPO 809, Superior Court of the District of Columbia 9/28/11, p. 3.

what is written down in this Order is that she'll have visitation on Sunday[s]….[T]he Order is what it is and – and he's responsible for making the ….children available there at that time."[25] After this warning, the judge asked if Mr. Cunningham was going to be able to produce the children the following Sunday.[26] Counsel responded: "He doesn't have the money [to produce the children]."[27] In this face of this refusal, the judge responded: ""All right then, I'll entertain a motion for contempt."[28] That day Mrs. Cunningham filed a motion for criminal contempt.[29]

The prosecutors reviewed her motion for contempt. They declined to prosecute.[30] Under D.C. law, she had no private right of action for criminal contempt. After their refusal to prosecution, the judge didn't, himself, initiate any contempt proceedings. Mrs. Cunningham filed for civil contempt.[31] At the hearing on the civil contempt motion, the judge asked Mrs. Cunningham if she had seen her children for visitation since they had last been in court.[32] Through counsel, she informed the court that she had had Sunday visitations since she had filed the motion for criminal contempt.[33] The judge then told the parties that the motion was denied given that Mr. Cunningham was currently complying.[34] Mrs. Cunningham was baffled and dismayed. She asked for increased visitation moving forward to compensate her for the hours she had lost during the months

[25] Id. at 9.
[26] Id.
[27] Id. at 10.
[28] Id.
[29] Motion for Criminal Contempt filed in Watford-Cunningham v. Cunningham, 2011 CPO 809, Superior Court of the District of Columbia, filed 9/28/11.
[30] Official Transcript of Watford-Cunningham v. Cunningham, 2011 CPO 809, Superior Court of the District of Columbia 12/3/11, p. 3.
[31] Motion for Civil Contempt filed in Watford-Cunningham v. Cunningham, 2011 CPO 809, Superior Court of the District of Columbia, filed 12/5/11.
[32] Official Transcript of Watford-Cunningham v. Cunningham, 2011 CPO 809, Superior Court of the District of Columbia 12/3/11, p. 17.
[33] Id.
[34] Id. at 19.

Mr. Cunningham had refused to deliver the children for visitation.[35] The judge asserted that the remedy she sought was inappropriate given that the purpose of civil contempt is to compel current compliance. The judge explained that now that Mr. Cunningham was in compliance, he was not "empowered to do anything in terms of the Civil Contempt Motion."[36] He refused to provide any compensatory visitation.[37]

According to court records, Mr. Cunningham continued to violate the court order after that hearing. Mrs. Cunningham filed again for civil contempt, alleging that Mr. Cunningham violated the joint legal custody provisions of the protection order by unilaterally enrolling the children in schools, by failing to provide her with documentation related to the schools.[38] She also alleged he violated the legal custody provision by unilaterally obtaining medical treatment for the children and changing medical insurance and denying her any documentation.[39] Finally, she alleged he violated a provision of the order requiring him to facilitate phone calls between her and the children on more than a dozen occasions in a one month period.[40] This motion again went nowhere. The court did not take it up. Ultimately, with no resolution in D.C. of the violations of the order, the parties fought for custody in a different jurisdiction in which the judge granted Mrs. Cunningham sole legal and physical custody.

Mrs. Cunningham's story captures elements of the court experiences of a sizeable number of women coming seeking protection for themselves and their children.

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[35] Id. at 17.
[36] Id. at 18.
[37] Id. at 19.
[38] Motion to for Civil Contempt filed in Watford-Cunningham v. Cunningham, 2011 CPO 809, Superior Court of the District of Columbia, filed 1/17/12.
[39] Id.
[40] Id.

Protection orders are subject to frequent violations, [41] and taking children unlawfully from women subject to domestic violence is a well-documented tactic of abuse and control exercised by abusive partners.[42] Infringing custody and visitation provisions granted in a protection order represents a robust and successful tactic of abusive partners in controlling and harassing the other parent.

II. *Three Avenues to Enforce Protection Orders.*

To enforce a civil protection order, a protected party can pursue statutory or equitable remedies. The equitable remedies of criminal and civil contempt are available to aggrieved parties and authorized specifically by statute as well. The Supreme Court first distinguished the two forms of contempt in 1904, stating that criminal contempt cases were "prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders."[43] A civil contempt action, on the other hand, was developed to protect "and enforce the rights and administer the remedies" that courts have set forth."[44] A criminal contempt remedy punishes a contemnor for having violated a court order.[45] If a father, for example, violated a civil protection order custody provision by enrolling a child in a new school when the mother had been granted legal custody, the mother could file for criminal contempt to punish the father for having

[41] *See, e.g.* T.K. Logan et al., THE KENTUCKY CIVIL PROTECTION ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTION ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COSTS 97 (2009) (concluding that research has consistently shown that 50% of protection orders are violated by respondents); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship*, 29 CARDOZO L. REV. 1487, 1512 (2008) (citing studies that conclude that petitioners reported violations in 60% of cases in one study and 49% in the other study within a year of issuance).

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[43] Bessette v. W.B. Conkey Co., 194 U.S. 324, 328 (1904) (quoting In re Nevitt, 117 F.448, 458 (8th Cir. 1902)).

[44] *Id.*

[45] *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); U.S. v. Schine, 260 F.2d 552 (1958) (purpose of criminal contempt proceeding is to vindicate the authority of the court).

violated the court order.[46] A criminal contempt action vindicates the court's authority. The realistic threat of criminal contempt also deters future violations.[47] To prevail in a criminal contempt action, the prosecutor must prove beyond a reasonable doubt that the contemnor willfully violated a court order.[48] If proven, the contemnor may face jail time and/or a fine.[49] The distinction between criminal and civil contempt hinges on the remedy sought and the purpose of the suit.[50]

Civil contempt remedies seek to bring the contemnor into compliance rather than to punish for past violations.[51] Jail time, if ordered, can be imposed only if the contemnor has the ability to come into compliance and even then, only until he or she has complied with the breached order. Though this remedy may well serve the interest of plaintiffs seeking specific performance of an outstanding court order, it fails to send a firm message to the contemnor about the importance of complying with the order. As such, the civil contempt remedy, by nature, is likely to be less successful in assuring future compliance than criminal contempt.

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[46] In this Article, I will generally refer to those who receive protection orders by the feminine pronoun and the respondents by a masculine pronoun. This practice is not to suggest that all recipients of protection orders – or recipients of sole legal custody – are women and that all respondents or those who breach court orders granting custody and visitation are men. These gender pronouns merely align with the statistics regarding protection orders and allow for more consistency in describing scenarios.

[47] *See supra* T.K. Logan, note x at 156 (stating that based on a broad study of CPO enforcement that the effectiveness of the order depends on the respondent's fear of enforcement.").

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[50] *See generally*, In re Stewart, 571 F.2d 958 (1978) (holding the purpose of relief is determinative of the nature of contempt proceeding as criminal or civil); In re Marini, 28 B.R. 262 (Bankr. E.D.N.Y. 1983) (distinguishing the two types of contempt by whether they seek to effectuate collection or uphold the dignity of the court).

[51] *See* Morgan v. Barry, 595 F. Supp. 897 (D.C. 1984) (holding that civil contempt exists as a remedial sanction intended to coerce compliance with a court order or to compensate for damages sustained a result of noncompliance.").

Finally, many jurisdictions have created a separate statutory crime for the violation of a protection order.[52] In Mississippi, for example, a statutory provision enables the government to bring a misdemeanor prosecution for the violation of the order.[53] Therefore, if a party violates a protection order, the government has the discretion to prosecute the party in breach for a misdemeanor. Like any ordinary criminal case, the victim has a limited role in the prosecution and no right to bring the action or to influence whether it is pursued or not.

When a party violates the custody or visitation provisions of a protection order, the court's authority has been flouted, the rights of the party to whom the remedy was granted have been denied, and the children who are the subject of the order have not been the beneficiaries of the custody arrangement the court determined or ratified was the most appropriate to achieve their best interests. For the order to have value in this circumstance, it must be enforced against the breaching party.[54] Without repercussions, the breaching party is likely to violate the order again, rendering the court order irrelevant. The following sections consider, given the affronts to the court, the protected party, and to the children at issue, who holds the power to enforce the order and the limitations on that power.

## III. *Where does the Power Reside to Enforce Relief through Criminal Contempt?*

[52] *See e.g.* ALA. CODE § 13A-6-142(a) (stating that violating a protection order can be a Class A misdemeanor); A.C.A. § 9-15-207(b)(1) (stating that violating a protection order can be a Class A misdemeanor);10 DEL. C. § 1046 (h)-(i) (stating that violating a protection order can be a Class A misdemeanor); MN CODE § 518B.01(14)(b) (stating that violating a protection order can be prosecuted as a misdemeanor); Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1667 (asserting that as of 2002, all fifty and D.C. had enacted statutes creating a separate statutory crime of violating a protection order.)

[53] MS CODE § 93-21-21(1).

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The criminal contempt remedy punishes breaching parties for their violations and implicitly seeks to deter future violations. But the locus of the power to deploy the criminal contempt remedy is elusive. Recent Supreme Court precedent complicates the protected parties' role in the criminal enforcement of protection orders. In this section, the Article looks to the various entities and individuals potentially involved in a criminal contempt prosecution for the breach of the family law remedies of a protection order and analyzes their access to enforcement power.

a. *Courts hold the power but rarely exercise it.*

Courts hold an inherent authority to enforce their orders,[55] which encompasses initiation of contempt proceedings.[56] As the Supreme Court stated in *Young v. U.S.*, the power to initiate contempt proceedings is "essential to the administration of justice."[57] Similarly, state courts have recognized their inherent authority as well[58] - to both initiate and punish contempt.[59]

Further, by federal law, Article III courts have also been granted this power explicitly under 18 USCS § 401 which states that "[a] court of the United States shall have the power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as…(3) disobedience or resistance to its lawful writ, process, order, rule, decree or command."[60] This statute codifies the inherent power

[55] Young v. United States ex rel. Vuitton et Fils, 481 U.S. 787, 796 (1987) ("it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders."); Bessette v. W.B. Conkey Co., 194 U.S. 324 (1904); In re Debs, 158 U.S. 564 (1895); Martha M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. PITT. L. REV. 835, 854 (2007).
[56] Young v. United States ex rel. Vuitton et Fils, 481 U.S. 787, 793 (1987).
[57] *Id.* at 795, citing *Michaelson v. United States ex rel. Chicago, St. P.M. & O.R. Co*, 266 U.S. 42, 65-66 (1924)
[58] *See* State v. Murray, 225 Conn. 355, 360 (1993) (noting that separate and apart from statutory authority, courts have the inherent power to punish disobedience of a court order outside of the presence of the judge."
[59] *Id.* at 363, n. 16.
[60] 18 USCS § 401.

of the court to enforce its orders, even if the violation takes place outside of the view of the court, guaranteeing that both the "trial court and the grand jury have power to bring contempt proceedings."[61] Some states have also codified this right as well,[62] and courts have explicitly held that that power encompasses the power to initiate contempt proceedings *sua sponte*.[63]

The power to initiate has been deemed critical to the administration of justice. As the Supreme Court acknowledged, courts must hold this power because they "cannot be at the mercy of another branch in deciding whether such proceedings should be initiated."[64]

But this power is not without complications. The power to initiate contempt proceedings vests the court with the authority to charge and define the crime and then to judge the alleged violation of its own order. "Contempt law exacerbates the conflict by committing to the conflicted adjudicator the authority not merely to find the facts but to define the offense, initiate the enforcement proceeding, to determine the form and severity of the sanction, and, by the former choice, to fix what procedural protections the defendant will receive."[65] A Florida court elucidated that in a criminal contempt action "the judge also determines who should be prosecuted, and then tries, convicts, and punishes." [66] Or, as Justice Scalia noted in his concurrence in Young, "[i]n light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those

[61] U.S. v. Mohsen, 587 F.3d 1028 (2009).
[62] *See e.g.* MAINE R. CIVIL PROC. § 66(c) (only the court can initiate criminal contempt proceedings); FLORIDA STAT. 741.31(3) (state should initiate contempt proceedings if the state fails to act).
[63] *See* In re Price, 645 A.2d 488 (Rhode Island, 1994) ("this court is of the opinion that these statutes confer . . . [upon the court] broad powers to initiate contempt proceedings…").
[64] Young, 796.
[65] Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025 (1993).
[66] Walker v. Bentley, 600 So. 2d 313, 325 (Fla. 2d DCA 1995).

to whom they apply, the notion of judges' in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth. . . the prospect of 'the most tyrannical licentiousness."[67]

Perhaps it is this complicated posture that at least partially explains the judicial reluctance to initiate contempt proceedings for nonsummary contempts. In the District of Columbia, for example, judges exercise their authority in protection order cases to initiate contempt proceedings for technical violations – failure to complete a counseling program, for example – of protection orders.[68] So, for example, if a respondent fails to enroll in a court-ordered program such as domestic violence intervention, the court will issue a show cause order to force the respondent to answer to the violation and remedy it. This informal practice is not codified in the statute or the court rules that set forth the procedures for contempt cases, which fail to mention any right of the court to initiate its own contempt proceedings.[69] In Kansas, the court is authorized to issue a show cause order and conduct a hearing him or herself.[70] However, advocates in Kansas reported to Amicus in the Robertson case that they have never seen Kansas courts deploy this power.[71]

The dearth of court-initiated prosecutions for contempt may also be the result of a further complication. The power to initiate contempt proceedings may not be enough to allow for the prosecution of the case. After a court issues an order to show cause why a party should not be held in contempt of court[72] for a non-summary offense, the case must

[67] 481 U.S. at 822 (Scalia, J., concurring in judgment) (quoting *Anderson*, 19 U.S. (6 Wheat.) at 228)
[68] *See e.g.* In re Jackson, 51 A.3d 529. 532 (D.C. 2012) (noting that the judge issued a show cause order to defendant in a case in which he had not enrolled in a counseling programs required by a protection order).
[69] DV Statute and rules.
[70] KAN. STAT. ANN. § 20-1204a (2009).
[71] Amicus Brief at 13.
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be prosecuted before the court. In some jurisdictions, it appears that the court can proceed with the prosecution, even in the absence of a prosecutor.[73] However, other jurisdictions require that a prosecutor handle the prosecution and prohibit the judge from moving forward sua sponte in the absence of prosecution.[74]

However, courts generally hold a further right to enforce their orders if the prosecution fails to pursue the case – the court may appoint a private prosecutor. As the Court stated in *Young*, "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises."[75] At the same time, a court has restrictions on the exercise of that power – namely as set forth in *Young*, it must exercise that power using the "least possible power adequate to the end proposed,"[76] by appointing a prosecutor who is disinterested. Further, a private prosecutor must be willing to prosecute the case without compensation or the jurisdiction must have funds for private prosecution.[77]

In practice, courts seem to deploy this power infrequently. Looking again to contempt prosecutions in the District of Columbia Domestic Violence Unit, in the aftermath of *Robertson*, a private right of action no longer exists in prosecuting criminal contempt cases. The local prosecution unit, the Office of the Attorney General or the United States Attorney's Office for the District of Columbia, which also prosecutes local

[73] In these states, the hearing proceeds in an inquisitorial fashion. For example, in Florida, in a criminal contempt proceeding, a judge may move forward even in the absence of a prosecutor or any other "assistance." FLA. R. CRIM. P. 3.840(a) (2015).
[74] *See e.g.* In re Jackson, 51 A.3d 529. 538 (D.C. 2012) (holding that "trial judges may initiate and preside over, but may not prosecute, a CPO indirect criminal contempt proceeding in cases involving intrafamily offenses."). *See also* International Union, United Mine Works of Am. v. Bagwell, 512 U.S. 821, 832-33 (1994) ("summary adjudication of indirect contempts is prohibited"). *See generally infra* text accompanying footnote x.
[75] Young, 800-01.
[76] United States v. Wilson, 421 U.S. 309, 219 (1975)
[77] State courts have noted that there is no such funding available. *See* State ex re. O'Brien v. Moreland, 778 S.W.2d 400, 407 (Mo. Ct. App. 1989) ("No such funds are appropriated to state courts."); Musidor, B.V. v. Great American Screen, 658 F.2d 60, 65 (2d Cir. 1981) (same).

crimes, must review all motions for criminal contempt. [78] Each prosecution unit can exercise its discretion to pursue the case. If both decline, the court may appoint a special prosecutor.[79] According to estimates within the prosecutors' offices, together the units pursue about x percent of the motions for criminal contempt.[80] In the x years that this procedure has been in place, court personnel estimate that four special prosecutors have been appointed.[81] Other jurisdictions.[82]

While the power to initiate and to facilitate the prosecution of criminal contempt cases reside in the judiciary, the deployment of that power is both opaque and rare.

b. *The protected party often lacks the power.*

Across the country, the law governing whether the beneficiary of an order can him or herself initiate and prosecute a case for criminal contempt against a defendant who has allegedly violated that order varies dramatically.[83] In 2011, the Supreme Court considered the issue directly in the case of *In re Robertson*, by analyzing the constitutionality of an Article III court permitting a private party to prosecute criminal contempt in a civil protection order case. The case concerned a case litigated in the District of Columbia, which had permitted private prosecution by beneficiaries for many years under appellate case law approving of the practice.[84] Reasoning that "[o]ur entire criminal justice system is premised on the notion that a criminal prosecution pits the

[78] Robertson II.
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[82] RA task pending.
[83] A seminal Supreme Court to directly address the propriety of the private right of action in criminal contempt and of a disinterested prosecutor was Young v. United States ex rel. Vuitton Et Fils S. A., 481 U.S. 787 (U.S. 1987).
[84] Green v. Green, 642 A.2d 1275, 1280-81 (D.C. 1994) (holding that it is constitutionally permissible for an interested private party to prosecution a criminal contempt action).

government against the governed, not one private citizen against another,"[85] the Court invalidated the private right of action. It held, instead, that any action for criminal contempt in a protection order case might be brought in the name of the sovereign,[86] and on remand, D.C. Court of Appeals held that a criminal contempt must "be brought in the name and pursuant to the sovereign power of the United States."[87]

The repercussions of *Robertson* are yet unknown since the case fails to have direct precedential value in state courts. However, today, some jurisdictions still explicitly permit a private beneficiary of a protection order to prosecute a defendant for criminal contempt of that order, either by statute or common law.[88] In other states, courts have indicated that private, interested parties can prosecute crimes in some circumstances, but no case law has addressed the prosecution of criminal contempt cases by beneficiaries of court orders.[89] In still other jurisdictions, courts that have addressed

85 Robertson at 2188.
86

87 Robertson, court of appeals 755-56.
88 *See e.g.,* ALASKA CIVIL RULE 90(b)(year) (permitting a private party to prosecute criminal contempt); N.Y. CLS FAM. CT. ACT 848 (2015); Rollins v. State, 748 P.2d 767, 769 (Alaska Ct. App. 1988) (upholding a criminal contempt prosecution by an interested party); Olmstead v. Olmstead, 284 S.W.3d 27, 28 (Ark. 2008) (upholding the right in Arkansas of private party to prosecute by distinguishing from *Young*); Eichhorn v. Kelley 111 P.3d 544, 548 (Colo. Ct. App. 2004) (declining to adopt a rule that would prohibit a beneficiary of an order from prosecuting for contempt); Gay v. Gay 485 S.E.2d 187 (Ga. 1997) (noting the private prosecution of criminal contempt is valid in Georgia); Marcisz v. Marciz, 357 N.E. 2d 477, 480 (Ill. 1976) (holding the criminal contempt may be prosecuted by counsel for the beneficiary of the order); Long v. Hutchins, 926 So.2d 556, 567 (La. 2006) (noting and approving of the procedure of private parties "traditionally and naturally" prosecuting for criminal contempt); Katz v. Commonwealth, 399 N.E.2d 1055, 1060 (Mass. 1979) (holding in a landlord-tenant case that a private party in civil litigation may press both the civil and criminal aspects of a case); DeGeorge v. Warheit, 741 N.W.2d 384, 392-93 (Ct. App. Mich. 2007) (permitting criminal contempt cases to be pursued by private parties); State ex re. O'Brien v. Moreland, 778 S.W.2d 400, 405-07(Mo Ct. App. 1989) (upholding a private prosecution for criminal contempt); Wilson v. Wilson, 984 S.W.2d 898, 903-04 (Tenn. 1998) (noting that due process does not require the disqualification of a private party as prosecutor of a criminal contempt case).
89 *See e.g.,* Whitfield v. Gilchrist, 497 S.E.2d 412, 415-16 (N.C. 1998) (stating that North Carolina permits private prosecutors to pursue crimes); State v. Ray, 143 N.E.2dd 484, 485 (Ohio Ct. App. 1967) (stating that private prosecutors representing interested parties can prosecute crimes); State v. Crouch, 445 S.E.2d 213, 218-19 (W. Va. 1994) (holding that private prosecution should be allowed to permit a victim's family to assure itself that a case is vigorously pursued).

this issue either explicitly prohibit the private prosecution of criminal contempt cases,[90] or generally prohibit private parties from prosecute criminal cases.[91]

c. *The prosecutor holds the power and selectively deploys it.*

Unequivocally, prosecutors hold the power to enforce all provisions of a protection order.[92] Upon the breach of a protection order, the prosecutor's office, in its discretion can pursue a criminal contempt action against a party who has violated a protection order. In no jurisdiction, however, is a prosecutor obligated to seek such a remedy.[93]

d. *Implications of the prosecutorial power monopoly.*

The *Robertson* case suggests that individuals whose protection orders are violated will have increasingly limited recourse through the criminal justice system. Although the case has direct precedential value only in Article III courts, its repercussions are likely to be widespread in state courts across the country.[94] Victims have never had influence over the *misdemeanor or felony prosecution* for the violation of protection order and many states even prior to *Robertson* denied aggrieved parties a private right of action for

[90] *See e.g.*, 15 VSA § 1108 (e) (codifying that state's attorney must prosecute criminal contempt cases); People v. Eubanks, 927 P.2d. 310, 315 (Cal. 1996) (holding that all criminal prosecutions must be prosecuted in the name of the people of California or by their authority); DSS ex rel. Montero v. Montero, 758 P.2d 690 (Haw. Ct. App. 1988) (holding private, interested prosecutors may not prosecute criminal contempt actions); State ex. Rel. La Mere v. Young, 192 N.W.2d 186, 187 (Minn. 1971) (holding that a petitioner's attorney may not act as a special prosecutor in a contempt action); Trecost v. Trecost, 502 S.E.2d 445, 449 (W. Va. 1988) (holding that it is unconstitutional for a private, interested party to prosecute a criminal contempt case); DiSabitino v. Salicete, 671 A.2d 1344, 1353 (Del. 1996) (following *Young* and holding an attorney for the beneficiary of an order in a civil proceeding may not represent the party in a subsequent criminal contempt prosecution); Rogowicz v. O'Connell, 786 A.2d 841, 844 (N.H. 2001) (holding that interested parties may not prosecute criminal contempt cases); State v. Valentine, 864 A.2d 433, 435-36 (N.J. Super 2005) (setting certification requirements for private prosecutors that disqualify interested parties from prosecuting criminal contempt); In re Interest of Mowery, 169 P.2d 835, 843 (Wash. Ct. App. 2007) (holding that Washington state law requires disinterested prosecutors); Robertson, DC.

[91] *See e.g.*, Rogers v. State, 348 S.E.2d 888, 889 (Ga. Ct. App. 1986) (holding private parties are prohibited from acting as private prosecutors in criminal cases); State v. Warford, 389 N.W. 575, 582 (Neb. 1986) (stating that private prosecutors are not permitted).

[92]

[93] RA – prosecutorial discretion.

[94]

contempt.[95] This means that in many jurisdictions criminal enforcement of protection orders is completely dependent on the government's discretion.[96]

Prosecution units throughout the country have limited resources and therefore must exercise prosecutorial discretion. In exercising prosecutorial discretion, prosecutors are historically reluctant to prosecute violations of protection orders[97] and particularly likely to decline cases involving the breach of family law remedies.[98] With limited resources, they ordinarily pursue violations involving violence, threats, or unwanted contact.[99] These violations are more discrete, insistent, and most likely easier to prove. As one prosecutor in New Mexico stated, "[v]iolation of an Order of Protection is a

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[95] Supra.

[96] *See* Kenneth L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CALIF. L. REV. 727, 740 (1992) (noting that because prosecutors are underresourced and over worked, "they typically devote their scarce resources to more serious crimes and more readily ignore charges perceived as less serious).

[97] *See* U.S. v. Vuitton, 529 F. Supp. 734, 744 (S.D.N.Y. 1984) ("Realistically…aggrieved plaintiffs…cannot depend on the United States Attorney's office to enforce the court's mandates."); David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal contempt Sanctions to Enforce Protection Orders*, 56 OHIO ST. L.J. 1153, 1209-10 (1995) ("Despite the wishes of . . .advocates, domestic violence does not behave like an 'ordinary' crime and prosecutors and police have legitimate grievances about being forced to treat it as such."); In re: Kevin Jackson, No. 11-FM-1123, Brief and Appendix of Amicus Curiae Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) in Support of Neither Party 6 (2012) ("[T]he enforcement of a *civil* order is simply not viewed by prosecutors – or anyone – as a 'crime' worthy of prosecution like other crimes. Such violations are understandably viewed by law enforcement as minor 'law violations' rather than 'real crimes' requiring a criminal justice response.") (emphasis in original).

[98] *See* Cecelia Guzaldo Gamrath, *Visitation Abuse v. Unlawful Visitation Interference – Is there Comfort for Noncustodial Parents?*, 91 ILL. B.J. 450, 467 (2003) ("Some police and prosecutors still believe enforcement of visitation belongs in family court and are reluctant to enforce the criminal statute."); Gordon v. State, 960 So.2d 31, 39 (2007) ("Although an indirect criminal contempt proceeding in a family law case is vitally important to the parties, such a case often has little interest to a professional prosecutor."); In re: Kevin Jackson, No. 11-FM-1123, Brief and Appendix of Amicus Curiae Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) in Support of Neither Party 7 (2012) (referring to a telephone conversations with an advocate and a judge which confirmed that public prosecutors' offices are not primarily concerned with enforcement of civil orders – particularly those that do not involve violence.).

[99] *See* generally, Green v. Green, 642 A.2d 1275, 1280, n.7 (D.C. 1994) (reporting at the time that the prosecuting authority in D.C. "prosecute[d] less than 10 percent of the criminal contempt motions brought for violations of protection orders."); Wilson v. Wilson, 984 S.W.2d 898, 903 (Tenn. 1998) (discussing the burden on prosecutors' offices to merely enforce criminal laws); Wainstein at 737 ("Public prosecutors, however, often fail to prosecute these contempt cases because of their already overwhelming caseloads."); J. Wilson CRIME AND PUBLIC Policy 170 (1993) (citing studies to same effect).

criminal statute so [breaches] are prosecuted criminally. In my years spent prosecuting I never prosecuted an offender for violating custody/visitation provisions of an [Order of Protection]."[100] However, enforcement of custody or visitation provisions may be more critical to a parent whose rights are being violated than enforcement of a no assault or threats order. In the context of a violation of a safety provision, a petitioner has other options for enforcement. He could seek enforcement from the criminal justice system as simple assaults or threats under the criminal code. Further, a past assault is in the past. But a past violation of a custody or visitation provision is likely to be on-going with enduring harm.

Seeking enforcement that is unlikely to be pursued could have a neutral effect at best, and a very damaging effect at worst. If a petitioner files a motion to adjudicate criminal contempt that is later dismissed for want of prosecution, the parent who has violated the order not only escapes prosecution. He may reasonably take away the message that the legal system fails to take seriously either the violation or the order. In the end, pursuing such a remedy may result in empowering the parent in breach rather than deterring or punishing him.[101] The government's exercise of discretion not to pursue a contempt charge can leave a victim open to continuing victimization.[102]

IV. *Where Does the Power to Enforce Civil Contempt Reside?*

A court can hold a party who has breached a protection order in civil contempt. Traditionally, a civil contempt action seeks to coerce a contemnor into compliance rather

**100** Email from Lisa Weisenfeld to Furqan Shukr, June 21, 2014. On file with author.
101 *See generally* T.K. Logan, *supra* note x at 156 (stating that based on a broad study of CPO enforcement that the effectiveness of the order depends on the respondent's fear of enforcement.").
102 One commentator suggested that a judge's decision to appoint a private prosecutor should be determined based on twhehter the "government's decision not to file a justifiable criminal charge leaves the victim vulnerable to revictimization." Wainstein, at 732.

than to punish him or her for having violated a court order.[103] The repercussions for civil contempt differ from those for criminal contempt. A contemnor, once convicted, can be sentenced to jail time, just like a criminal contempt contemnor.[104] However, in a civil contempt case, the contemnor may be detained in jail only until he comes into compliance – as courts have explained, "he carries the keys to his prison in his own pocket."[105] Given the limitations on the deployment of power to enforce criminal contempt, civil contempt is a vital tool in terms of giving a protection order meaning. The power to enforce custody and visitation remedies through civil contempt is less opaque than it is through criminal contempt. However, though locating the power to enforce civil contempt is straightforward, the enforcement itself is complicated by the law surrounding defenses and relief. Those complications threaten to render the power to enforce through civil contempt meaningless. This section will consider who has the power to enforce custody and visitation provisions of protection orders through civil contempt and then interrogate the underlying law and the relief offered through this cause of action. [106]

a. *The court and prosecution.*

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[103] *See* In re Marini, 28 B.R. 262, 265 (Bankr. E.D.N.Y. ?)(citing the common law distinction between types of contempt actions that seek to impose a fine to uphold the court's authority and those that see to effectuate the judgment); Jolly v. Wright, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) *overruled on other grounds by* McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993); Tyll v. Berry, 758 S.E.2d 411 (N.C. Ct. App.) *review denied*, 762 S.E.2d 207 (N.C. 2014) and *appeal dismissed*, 762 S.E.2d 207 (N.C. 2014) (agreeing with *Jolly* that civil contempt's purpose is to coerce, not punish).

[104] *See generally* Rawlings v. Rawlings, 362 Md. 535 (2001) (holding that a contemnor may be incarcerated for civil contempt to coerce compliance, but only if he has the present ability to purge.)

[105] Gompers v. Bucks Stove & Range Company, 21 U.S. 418, 442 (1911) (citing In re Nevitt, 117 Fed. Rep. 451 (1902).

[106] Most appellate case law dealing with the enforcement of custody and visitation orders deal with long-term orders entered in the domestic relations context. Largely due to the dearth of counsel and to available remedies, appellate case law does not include civil contempt cases related to the enforcement of custody and visitation provisions within a protection order. As such, this Article will analyze the enforcement of domestic relations orders though civil contempt as a close analogy since the same rationale would apply to considering enforcement.

Fill in. In inherent authority of court – refer to above section. Prosecution is not empowered to bring civil contempt.

b. *Aggrieved party may enforce through civil contempt*

Since *Robertson*, civil contempt has remained an available enforcement mechanism for protection order petitioners nationwide. Civil contempt cases are private rights of action that protected parties themselves can file and pursue. With low burdens of proof such as clear and convincing evidence and no constitutional right to counsel for the defendant, civil contempt cases can be filed by private attorneys or even pro se litigants without overwhelming procedural barriers.[107] Legal barriers, however, render civil contempt of questionable assistance to a party who wishes to be compensated for breached parenting time or custody orders and to deter continuing violations. Remedies at common law for civil contempt vary wildly across jurisdictions revealing a patchwork of case law that illustrates a complicated and unreliable relief scheme. In some jurisdictions, the legislature has created a more reliable system that sets forth by statute specifically the remedies that can be imposed generally in a civil contempt suit but not specifically in a protection order case.[108] No protection order statute sets forth enumerated remedies to be granted in a civil contempt suit for the breach of a protection order. Without that statutory guidance, courts have taken a variety of approaches that render enforcement through civil contempt unreliable and potentially lacking in effectiveness. This subpart will consider these barriers.

1. Contempt remedies, which cannot be punitive, do not sufficiently vindicate the court's authority.

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[108] *See infra*….

Civil contempt remedies seek to bring the contemnor into compliance rather than to punish for past violations.[109] Jail time, if ordered, can be imposed only if the contemnor has the ability to come into compliance and even then, only until he or she has complied with the breached order.[110] Though this remedy may well serve the interest of plaintiffs seeking specific performance of an outstanding court order, it fails to send a firm message to the contemnor about having violated the court's authority.[111] As such, the civil contempt remedy alone is likely to be less successful in assuring future compliance than criminal contempt. It fails to convey the importance of compliance with an order of the court.[112]

2. Relief may be limited to coercion rather than compensation.

Federal and state level case law in a wide array of jurisdictions holds that the purpose of civil contempt is to both enforce compliance with a court order and compensate for losses related to the noncompliance.[113] However, some jurisdictions hold that if the contemnor has come into compliance, then the court may not impose further

[109] *See generally* Goetz v. Goetz, 181 Kan. 128, 137-39 (1957) (discussing the difference between criminal and civil contempt).

[110]

[111] A Florida appeals court considered this issue when reasoning that a civil contempt remedy may send the message that a contemnor is exempt from punishment for on-going noncompliance with a court order. The court stated that "the trial court should have initiated a proceeding for indirect criminal contempt" in order to punish the contemnor for her "substantial infraction." De Mauro v. State, 632 So.2d 727, 730 (1994).

[112] Jeffrey A. Parness & Daniel J. Sennott, *Expanded Recognition of Written Laws of Ancillary Federal Court Powers: Supplementing the Supplemental Jurisdiction Statute*, 64 U. PITT. L. REV. 303, 322 (2003) ("The chief purpose of coercive civil contempt is to resolve issues in an individual case, not to aid the court as an institution."). Any empirical data on this?

[113] *See e.g.*, Bibbage, 175 BR 708 (1994); In re TS, 829 A.2d 937, 940 (D.C. 2003); United Mine Workers; Hicks v. Feiock, 485 U.S. 624, 635 (noting that sanctions can be purely remedial); Fuller v. Fuller, 987 A.2d 1040 (2010); 531 F.2d 617, 622 ("Judicial sanctions in civil contempt proceedings are proper either to coerce compliance with the court's order for the complainant's benefit, or to compensate the complainant for losses sustained."); 977 A.2d 901, 915 (D.C. 2009) ("civil contempt is a sanction designed to . . .compensate the aggrieved party for any loss or damage sustained as a result of the contemnor's noncompliance.").

remedies to compensate the complainant.[114] For example, in *Bruzzi v. Bruzzi*, a father who had failed to return the children after visitation was the subject of a civil contempt suit. The court held that because the children had been returned by the time of the hearing, the court was not empowered to impose any civil contempt remedies because "[the father] could not be coerced into returning the children; he had already done so."[115] In the Cunningham case discussed above, fore example, the court refused to compensate a mother for the father's failure to produce the children for visitation. The mother sought compensatory visitation time for the months of missed visitation. Instead, the court ruled: "The purpose of civil contempt is not to punish for past behavior. It's to compel current behavior."[116] The court refused to provide compensation of the many hours of visitation of which mother had been deprived. Similarly, in a North Carolina civil contempt suit against a father who had failed to pay child support, the court held that "[a] trial court, however, does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt."[117]

When considering a one-time payment or the performance of a particular action, coercion into compliance may be sufficient to compensate a complainant for his or her losses.[118] In a child support case, for example, though the contemnor has violated a court order in the past, his payment of arrears has made the other party whole and he has been

[114] *C.f.* Fields v. Fields, 240 Ga. 173, 175-76 (1977) (stating that in visitation cases, civil contempt may be inadequate means of enforcement and that criminal contempt might be the more appropriate action to achieve vindication of the court's authority).
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[116] Cunningham v. Cunningham, T.R. 17-18.
[117] Reynolds v. Reynolds, 147 N.C. App. 566, 573 (2001).
[118] *See generally* Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. PITT. L. REV. 835, 867 (discussing the shortcomings of traditional civil contempt remedies when dealing with a recurring violation that cannot be fully addressed by merely coercing one-time compliance).

coerced into compliance. As such, the goals of civil contempt have been reified. But in the context of an on-going breach of a custody or visitation order, coercion into compliance can only satisfy short-term future performance. Such coercion cannot compensate past breaches that have hurt the complainant.

3. Compensatory sanctions are traditionally monetary.

In custody cases, coercive sanctions are far more common than remedial relief.[119] However, even when judges do award remedial sanctions in civil contempt cases, those sanctions are usually monetary in nature.[120] The court will seek to impose a monetary remedy to compensate the aggrieved party for the noncompliance.[121] For example, a monetary remedy might compensate a litigant for the litigation costs or out of pocket expenses.[122] Or the court might award monetary damages to compensate for inconvenience or frustration resulting from the breach in the long-term custody context.[123] Several state statutes explicitly authorize the court to award compensatory monetary remedies in civil contempt cases related to custody enforcement.[124] But protection orders statutes remain silent on relief.

Though a monetary remedy to compensate for the aggravation of having to bring a suit to realize one's rights might be provide some relief to a parent after the breach of a

[119] Mahoney at 866.
[120] Mahoney at 866; Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy when a Defendant Violates an Injunction*, 1980 U. ILL. L. FORUM 971, 971 (add paren).
[121] 749 N.E. 2d 626; 671 N.E. 2d 1172.
[122] Id.; Zillmer v. Latkins, 544 N.E.2d 550, 552-53 (1989) (holding that it was a proper use of a civil contempt sanction to order reimbursement of costs for locating and obtaining physical custody of children that contemnor was withholding from other parent).
[123] Maede v. Levett, 671 N.E. 2d 1172, 1181 (Ind. Ct. App. 1996) (holding there was sufficient evidence to grant monetary damages to compensate the complaining party for inconvenience and frustration).
[124] *See e.g.* MO. REV. STAT. § 452.400(6)(3) (2014); WASH REV. CODE § 2609.160(2)(b)(i) (2015).

custody provision of a protection order,[125] it rarely will address the actual loss. Consider, for example, Mrs. Cunningham. First, how would one quantify the monetary value of six months of visitation with her children? Second, even if the court were to have awarded her money to compensate her for this loss, how could it have addressed the actual loss she had sustained?

Monetary remedies are insufficient on several levels to compensate an aggrieved party in cases of breached custody provisions of protection orders.[126] First, money can cannot compensate a parent for a long term loss of access to his or her children. Nor can it compensate for a unilateral decision to change a child's school or religion. In those cases, compensation in the form of make-up visitation or physical custody or a mandate to reverse the unilateral parenting decision or to engage in mediation to reconsider the decision would far more effectively compensate the aggrieved party. Such a remedy would not punish the contemnor because he or she would have enjoyed the benefit of the breach. The remedial action would, instead, merely equitably redistribute the "good" to compensate for the breach.

Second, monetary damages are ineffective in cases in which the contemnor is judgment-proof or when the contemnor determines, by cost benefit analysis, that the violation is worth the penalty.[127] When a contemnor cannot pay the damages, then monetary damages are particularly futile to an aggrieved party. Asserting that he or she cannot meet the payment, the defendant may not be fined and the relief neither

[125] *See e.g.*, MacIntosh v. MacIntosh, 749 N.E.2d 626 (Ind. Ct. App. 2001) (awarding compensatory payment for the monetary loss related to one parent not producing the children for a scheduled trip with the other parent.)
[126] *See generally* Mahoney at 872 (noting that remedies scholars generally have addressed the difficulty of awarding monetary relief for the breach of an equitable coercive court order.).
[127] The calculus is equally valid in the context of family law and other civil injunctions. For an example in the context of trademark infringement see Wainstein, at 733.

compensates the aggrieved party nor fines the perpetrator.[128] Nor does the relief deter the contemnor from future noncompliance. Ironically, such contemnors, while they could not meet a monetary obligation, could satisfy compensatory relief that is not monetary in nature – such as providing make-up visitation.

In a minority of jurisdictions, the courts will award make-up parenting time to compensate a party whom has been denied his or her access to a child. Those awards are usually made based on explicit statutory authorization in the context of a long term domestic relations matter to grant make-up visits[129] or on a court order that sets forth specific penalties to include make-up time for a breach of the order. For example, a Texas statute permits the imposition of make-up time to compensate a parent for lost visitation.[130] The Court of Appeals then enforced that statutory provision, and in fact held that awarding only seven days of make-up visitation time to compensate for ninety seven days of denied visitation was unfair and urged the lower court to reconsider and award more time.[131] In a Florida case, the appeals court affirmed that a court may enforce a court order that specified that a party being denied visitation could be compensated with additional child access hours.[132]

Make-up visitation may well be an optimal remedy in some civil contempt cases for breaches of visitation or custody agreements in that it both coerces the contemnor into

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[129] *See e.g.* MCLS § 552.642 (2015) (statutory directive noting that all circuits shall establish a make-up parenting time policy for cases which a parent has wrongfully been denied parenting time); Florida Code § 61.13(4)(c)(1) (setting forth authority to award make-up visitation to a parent denied his or her visitation); In re Marriage of Herrera, 772 P.2d 676 (1989) (affirming a lower court judgment granting make-up visitation to a father who had been denied his visitation time under a court order in a state that has a statute explicitly authorizing make-up visitation as a remedy for parenting time interference).

[130] TEXAS FAM. CODE § 157.168(a).

[131] Romero v. Zapien, 2010 WL 2543897 (2010) (unreported).

[132] Lombard v. Lombard, 997 So.2d 1188, 1191 (2008). *C.f. also* Rush v. Rush, 1999 WL 1044482 (Ct. App. Ohio 1999) (unpublished) (noting that in a prior case, the court had found the mother in contempt for interfering with the father's visitation rights, sentencing her to thirty days in jail but allowing her to purge by permitting the father to make-up for lost visitation).

compliance and compensates a parent who had been denied parenting time. However, any award of make-up parenting time would need to be assessed by the additional standard of the best interest of the child. For example, if a custodial parent had denied a nonresidential parent a number of visitation days – for example, fourteen – the court would be advised to consider the best interests of the child before granting the aggrieved parent two straight weeks of parenting time. It might not be in the best interests of the child for the nonresidential parent to care for the child on overnights or for extended periods. Any adjudication of relief that includes a major readjustment of a child's living situation or parenting should be considered in the larger context of best interests of the child.

4. Often courts deny monetary remedies as impermissibly punitive.

When an aggrieved party cannot quantify her losses, courts in some jurisdictions refuse to grant even monetary relief, considering it instead a punitive fine. For example, a Missouri court found in a custody case that there was no evidence to support a fine that was related to actual damages and held that "[g]enerally, an outright fine, unrelated to actual damages, is not appropriate for civil contempt because it is not designed to cure but is intended to punish."[133] Other courts have ruled similarly in the custody context, finding monetary damages to be unlawful when awarded to either coerce compliance or compensate for unquantifiable losses.[134]

In other jurisdictions, courts have affirmed monetary awards for nonmonetary losses in civil contempt cases in the custody context. For example, a Florida court

[133] Levis v. Markee, 711 S.W. 2d 928, 932 (Mo. Ct. App. 1993).
[134] Wilson v. Sullivan, 922 S.W. 2d 835, 839 (Mo. Ct. App. 1996); Macintosh v. Macintosh, 749 N.E. 2d 626, 631 (Ind. Ct. App. 2001); 771 S.W. 2d 928. *See also* Nelson v. Nelson, 194 A.D.2d 828, 831 (1993) (finding that a monetary fine for respondent's failure to deliver the children to two scheduled visitation dates would to be unduly harsh).

imposed on a mother $100 payment to compensate the father for the mother's failure to return the child to his custody for 61 days.[135] In another case, the Florida court noted that compensatory damages for unliquidated injuries are usually generally unavailable in commercial matters.[136] But, it held that it should be within the court's discretion to award compensatory monetary awards if the court has a "reasonable basis for concluding that a compensable injury may have been suffered as a result of a willful violation of an…order."[137] Because these cases are hard to find and sprinkled across a few different jurisdictions,[138] they cannot provide certainty for a party seeking to rely on a custody order. However, they do suggest that courts may not be so adverse to the idea of compensating nonmonetary losses that judges would seek to circumvent a statutory directive.

5. Purge clauses fail to compensate for recurrent violations.

Purge clauses, which provide a condition that the defendant may satisfy to purge the contempt, are included in the typical civil contempt sentence.[139] They are an excellent way to coerce one-time payments or a one-time surrender of medical records or school reports. However, a purge remedy may not be responsive to an aggrieved parent's

[135] Laroche v. Briggs, 720 So.2d 321 (Fla. Dist. Ct. App. 1998).
[136] Habie v. Habie, 654 So.2d 1293 (Fla. Dist. Ct. App. 1995).
[137] *Id.* at 1295.
[138] *See e.g.,* Luminella v. Marocci, 814 A.2d 711, 719 (Pa. Super. Ct. 2002) (affirming a $500 fine imposed on a mother for breaching the custody order); Meade v. Levett, 671 N.E.2d 1172, 1181 (Ind. Ct. App. 1996) (stating that the court can consider compensating inconvenience and frustration with monetary relief).
[139] *See e.g.* Bryant v. Howard Cnty. Dep't of Soc. Servs. ex rel. Costley, 874 A.2d 457 (2005) ("[i]f [a contempt penalty] is to be coercive rather than punitive, it must provide for purging, e.e., it must permit the contemnor to avoid the penalty by some specific conduct that is within his ability to perform."Hudson v. Hudson, 494 So.2d 664 (1986) (affirming a civil contempt sentence against a mother that suspended the jail time allowing the mother to purge the contempt by coming into compliance with the divorce decree); MacIntosh v. MacIntosh, 749 N.E.2d 626, 631 (2001) (invalidating a fine imposed in a civil contempt sentence since it was imposed without any opportunity to purge); De Mauro v. State, 1632 So.2d 727, 729 (1994) (noting that the order for civil contempt specified that the contemnor could purge her contempt by returning the children to the other parent).

need for future compliance or past compensation, leading courts to query whether civil contempt can be a proper remedy for the violation of a custody or visitation order.[140]

In *Boggs v. Boggs*, for example, the court drew a distinction between civil and criminal contempt by holding that ordinarily, civil contempt findings must allow for the contemnor to purge the violation.[141] Without an opportunity to purge, the court reasoned, the contemnor was properly subject to criminal contempt remedies.[142] In that case, the court held the father in contempt for failure to pay child and spousal support and provided that his jail sentence would be suspended on the condition of consistent payment.[143] The court, however, also held the father in contempt for having exposed the children to his "paramour" in contravention of their custody order. For that violation, the court sentenced the father to 10 days jail, since that violation could not be discharged by performance.[144] On appeal, the court held that the jail sentence was a punitive crime since there was no opportunity to purge the violation.

In the end, a civil contempt suit, intended to coerce compliance and to compensate the aggrieved party, is an unreliable instrument to achieve either goal in this context. A party with a protection order granting her custody and visitation provisions who can no longer rely on enforcement through the criminal justice system may quickly find that the civil system offers little assistance as well. The civil contempt system offers limited relief for nonmonetary losses and for recurrent violations. As such, a

[140] *See* Wilson v. Freeman, 402 So.2d 1004, 1007 (1981) (citing a treatise for the proposition that there is a serious question about whether civil contempt is appropriate to respond to noncompliance with a visitation order); De Mauro v. State, 1632 So.2d at 730 (noting that an appropriate sanction for having concealed the children for three months from the other parent would most likely have come from a criminal rather than a civil contempt action).
[141] Boggs. v. Boggs, 118 Ohio App. 3d 293, 299 (1997);
[142] *Id.*
[143] *Id.*
[144] *Id.*

protected party and a contemnor can reasonably conclude that the custody and visitation provisions of a protection order are worth less than the paper on which the protection order is printed.

V. *What is distinctive about the enforceability of these provisions?*

Why should we be concerned with the specific enforcement problems of domestic relations provisions in protection orders? Aren't all civil orders challenged by the practice and law surrounding criminal and civil contempt? Indeed they are. Court orders granting relief in a wide range of civil cases such as contract disputes,[145] patent infringement,[146] and bankruptcy[147] are flouted by defendants and the same principles of criminal and civil contempt apply equally to such orders. Enforcement of these orders should also be reconsidered so that court orders maintain their integrity and so that protected parties can rely on court-granted relief.

However, this Article focuses on this specific enforcement challenge because the power to enforce these provisions resides with those who do not deploy that power and because the available avenues of enforcement are particularly unresponsive to the problems underlying the violation. In this section, the Article will consider how the enforcement of custody and visitation provisions differs in relevant ways from the enforcement of other civil and family law orders.

a. Criminal enforcement is more likely to occur upon a breach of other types of injunctions.

b. Criminal enforcement can be a counterproductive response to custody and visitation breaches.

[145] *See, e.g.*, DeGeorge v. Warheit, 741 N.W.2d 384 (Mich. App. 2007) (concerning a criminal contempt matter enforcing a court order arising from a contract dispute).

[146]

[147]

As discussed above, enforcement by criminal contempt can be a fruitless endeavor for petitioners in jurisdictions that do not provide a private right of action of criminal contempt. Because judges and prosecutors rarely deploy their own power to initiate and/or prosecute a criminal contempt case for the violation of the custody and visitation provisions of a protection order, petitioners cannot rely on breaching parties to be punished for having violated orders that deny them their full parental rights.

However, in the context of two parents seeking to care for their children, vindication of that right through the incarceration of a parent may not be an appropriate remedy regardless of the state's interest in pursuing the case. Consider the case of Mrs. Cunningham. The parties in that case had agreed to joint physical and legal custody and together had a responsibility to provide for their children. Had the state agreed to prosecute Mr. Cunningham for his scores of violations of the visitation provisions of the protection order, he would have faced a criminal conviction including either a fine or jail time. The collateral consequences of such a conviction[148] may well have burdened the family in such a way to interfere dramatically with the best interests of the children. A conviction – part of his permanent record – could have burdened his ability to seek employment and provide for the children. Though Mrs. Cunningham sought make-up visitation, she was unable to care for the children overnight. Where would the children have gone while Mr. Cunningham served his jail sentence? What effect would such turbulence have on the children? And a fine – that would not be payable to Mrs. Cunningham, but to the state – would merely have burdened the family's already tight finances.

[148] Cite to my Cardozo piece.

Though a criminal prosecution and a jail sentence might have effectively deterred Mr. Cunningham from future violations, the best interests of the children would not have been served. In a case involving the care of children and two parents who are the parties, the best interests of the children, though not an explicit consideration in a criminal prosecution, should be addressed. This additional consideration, so integral to the violation in the first place, renders criminal contempt and prosecution of the misdemeanor violation of a protection order both far more complex than a criminal contempt prosecution for the violation of another kind of court order.

To the extent that protection order provisions may be enforceable against both parties to the order,[149] an incarceration remedy is particularly problematic. Punishing a parent with primary residential custody with jail time is likely to be detrimental to the children involved – at least upsetting their routine if not inducing more severe psychological stress.

Further, a criminal contempt action may not achieve a goal well-calibrated with the wishes of the aggrieved party after the violation of a custody or parenting time order within a protection order. Again, though punishment may achieve future compliance, parents whom have been denied parental rights or parenting time most often wish to have that loss redressed, remedied, and compensated.[150] In this way, prosecution for criminal contempt or a misdemeanor may represent an overly-criminalized[151] enforcement response in cases involving co-parenting.

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149

150 cite from janese?

151 *See generally* Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 562(2010) (noting the disturbing recent trends in the criminal justice system including overcriminalization generally); Erik Luna, *Overcriminalization: The Politics of Crime: The Overcriminalization* Phenomenon, 54 AM. U. L. REV. 703, 714 (2005)(discussing the phenomenon of overcriminalization and arguing that the "criminal sanction should be reserved for

c. Civil contempt remedies are better calibrated to coerce compliance and compensate in other contexts.

As discussed above, civil contempt remedies are intended to coerce the contemnor into compliance and to, in some jurisdictions, compensate the aggrieved party for direct losses. Such contempt remedies are well calibrated to enforce civil orders dictating one-time performances – such as surrendering property, ceasing to infringe a patent or trademark, or paying off debt or a monetary obligation. A contempt action can coerce performance by imposing a jail sentence but providing a purge clause to satisfy compliance. If the performance is merely a solitary obligation, then the aggrieved party doesn't need to worry if the contempt action sufficiently vindicates the court's authority, because the obligation has been extinguished.

Because of the limitations on relief discussed in section x, however, ordinary civil contempt remedies, without further statutory guidance are often insufficient either to coerce long-term compliance of a custody and visitation provision of a protection order or to compensate for recurrent breaches. An aggrieved party cannot rely on what is possible her only cause of action to enforce an order in a way that is likely to deter future breaches and to compensate her for past breaches. As such, custody and visitation provisions within protection orders present a particularly complex enforcement scheme.

d. The enforcement of other types of civil orders is governed by statutes that supplement and specify relief.

The enforcement of civil protection orders is governed by thin statutory guidance around the country and by equitable principles of civil and criminal contempt doctrine.

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specific behaviors and mental states that are so wrongful and harmful to their direct victims or of the general public as to justify the official condemnation and denial of freedom that flows from a guilty verdict.").

With statutes that merely note the availability of contempt as an enforcement action,[152] even the jurisdictions with specific mention of contempt as an enforcement tool provide no specific guidance to judges about relief, which, as discussed above often cannot redress the violation.

In contrast, the enforcement of some other civil orders are governed by specific statutes that elucidate the range of punitive, coercive, and compensatory relief available.[153] For example, in some jurisdictions, legislatures have enacted domestic relations statutes that specify various forms of relief available in a custody or visitation order is violated. OTHER EXAMPLES?[154]

Although these statutes do not provide reliable remedies for all aggrieved parties, they do give petitioners and defendants alike notice of the range of enforcement remedies likely to be considered. They also give the judge specific statutory authority to provide compensatory relief in civil cases – which may well be the most useful remedy for recurrent violations. The absence of any such statutes for enforcement of custody and visitation provisions of protection orders further highlights the complexity of this enforcement action and the necessity of reform in this area.

e. The population at issue in protection order cases is largely pro se even compared with the general civil and domestic relations litigant population, thereby posing even further enforcement challenges.

f. Law enforcement and even the judiciary are particularly reluctant to become involved in family matters. (cite to Gonzalez, etc).

## VI. Realizing the Promise of Custody and Visitation Provisions.

[152]

[153] See infra….section on DR statutes.

[154] RA task.

[Note to AALS Mid-Year Conference Readers: This section is currently being redrafted and reorganized to focus on the deployment of power by each system actor and by the protected party.]

Custody provisions in a civil protection order are remedies that are vital to the stability of children and to the peace of mind of protected parties. Their inclusion as relief in protection orders across the nation signals national unanimity that the resolution of custody and visitation matters, even in a temporary order, is relevant to the successful resolution of domestic violence issues and the safety of all involved. But the law threatens to render those protections meaningless. If they are unenforceable, victims and families cannot rely on them, and abusive respondents act rationally when ignoring or circumventing them.

The existing mechanisms of enforcement in their current form – misdemeanor prosecution and criminal and civil contempt – are unlikely to render custody and visitation provisions in protection orders reliable. The *Robertson* case strongly suggests that individual protected parties will be increasingly precluded from prosecuting their own criminal contempt cases. With bloated dockets and slim staffing, prosecutors' offices are unlikely to prioritize criminal contempt cases involving custody and visitation over those involving violent crimes. Civil contempt doctrine poses countless barriers to effective enforcement of custody and visitation provisions in protection orders. In order to deliver on the promise of these provisions, mechanisms must be developed to allow all potential holders of the power to enforce orders to do so in a way that upholds the integrity of the order, instills faith in the system, and is responsive to the needs of the family. This section analyzes possible reforms to achieve this result.

1. Criminal enforcement.

Despite the shortcomings discussed above involved in criminal enforcement in the context of pursuing violations of custody and visitation provisions in protection orders, at times, criminal enforcement may be the most appropriate response to recurrent violations. If sentencing is informed by the context of the family at issue, and if the violation is such that the contemnor is unlikely to comply without a severe penalty – either imposed or suspended – then prosecution might be the only effective enforcement method. As such, this next part sets forth ways in the power to enforce orders criminally could be more effectively deployed.

a. Render show cause orders a more available and more universally utilized enforcement mechanism.

Several states currently empower parties protected under protection order statutes to seek criminal enforcement directly by the court. Under these statutes, victims need not convince a prosecutor to pursue a case. The court itself can issue a "show cause order" against the alleged contemnor to show why he or she has not violated the order as alleged.[155] Other states specifically authorize parties to file criminal enforcement actions.[156] Procedures that negate the operation of prosecutorial discretion would be far preferable given the priorities of prosecutors' offices.

b. Increase public funds for private prosecution.

c. Provide statutory guidance in sentencing that takes into consideration to the best interests of the child.

d. More criminal statutes allowing for prosecution for interference with custody – like Tex. Penal Code § 25.03.

[155] ALASKA R. CIV. PRO. 90 (b) (2014) (allowing a party to file an affidavit alleging a violation that could result in the court issuing a show cause order that can be prosecuted by the state or by the "aggrieved party"); New York statute. *See generally* Harv. ? 1504 . Research.

[156] I don't understand this. Is this what we have in DC? You can file, but the pros. Has to take it up? Texas, PA; GA, TN.

e. Prosecutorial and judicial education on importance of enforcement and the balancing of the best interest of the child.

2. General civil enforcement for breach of custody and visitation orders.

Some jurisdictions have sought to provide parties with specific statutory enforcement actions short of contempt for the violation of custody and visitation provisions. These statutory provisions, often included in the general custody statute, provide explicit enforcement mechanisms for aggrieved parties so that they can move on their own to effectively address breaches of custody and visitation provisions without turning to contempt remedies.[157] These statutes provide aggrieved parties with a specific right of action that they can pursue without government action and that is not hampered by the ordinary civil contempt doctrines that might limit relief.

For example, a Delaware statute provides that if a court, after a hearing, has determined that a party has "violated, interfered with, impaired or impeded the rights of a party or a child with the exercise of"[158] visitation or custody or other contact with the child, then it may impose specific sanctions or grant enumerated remedies. The sanctions include a fine or a surcharge assessed against the interfering parent based on his or her child support obligation.[159] Under the statute, the aggrieved parent is entitled to extra visitation to make-up for lost visits or a temporary transfer of custody for up to thirty days and/or relief granted at the judge's discretion.[160] A Colorado statute provides an even more extensive array of relief, including an order requiring parental education

[157] *See* COLO. REV. STAT. 14-10-129.5 (2014), 13 Del. C 723 (2014); NJ STAT. ANN 2A:34-23.3, WYO. STAT. 20-2-204 (2014). *See generally* Mahoney at 855 (discussing the recent advent of remedies embedded in custody statutes addressing relief for violations of custody and visitation orders).
[158] 13 Del. C. 28 (b)(2014).
[159] Id. at (b)(3) & (4).
[160] Id. at (b)(1), (2), & (5).

program attendance,[161] family counseling,[162] custody modification,[163] and the imposition of a civil fine.[164]

If such statutes were more prevalent they could be effective in enforcing the custody and parenting time provisions of protection orders. Instead of grappling with the unreliable law of civil contempt, petitioners could be assured a private right of action with specific remedies by pursuing a suit for the breach of a domestic relations order.

3. Civil contempt enforcement.

Since the equitable doctrine of civil contempt is far from unambiguously effective in enforcing protection order provisions, some jurisdictions have enacted specific statutes that set forth specific relief in contempt cases for the violation of custody and visitation orders.[165] These statutes enumerate expanded remedies available through civil contempt actions.[166] In Louisiana, for example, the statute sets forth community service, replacement visitation days, parent education attendance, counseling, and attorneys' fees as alternatives or additions to jail time when the court holds a contemnor in civil contempt for breaching a custody or visitation order.[167] Michigan supplements those forms of relief with the suspension of occupational or driver's licenses and placing the parent under supervision for the completion of substance abuse counseling programs, the engagement in job seeking efforts, and facilitating make-up parenting time.[168]

[161] C.R.S.A. 14-10-129.5 (b.3) (2014).
[162] C.R.S.A. 14-10-129.5 (b.7) (2014).
[163] C.R.S.A. 14-10-129.5 (b) (2014).
[164] C.R.S.A. 14-10-129.5 (e.5) (2014).
[165] See generally Mahoney, at 855 (discussing statutes that set forth remedies for civil contempt for violating a custody or visitation order).
[166] BURNS IND. CODE ANN. § 31-17-4-8 (2014), IOWA CODE § 598.23 (2014), LA. R.S. § 13:4611; 19-A M.R.S. § 1653 (2013); MICH. COMP. LAWS ANN. 552.644 (West 2015); § 452.400 R.S. Mo. (2014); NEV. REV. STAT. ANN. § 125C.030 (2014); ORC ANN. 2705.031 (2013); 43 OKL. ST. § 111.1 (2014); 15 V.S.A. § 603(2015); WASH. REV. CODE ANN. § 26.09.160.
[167] La. R.S. §13:4611 (d) & (e) (2014).
[168] MI St. § 552.644 (2)(2015).

Their rationale is sound as they give the judge specific authorization to grant appropriate relief that will coerce past and encourage future compliance and compensate the aggrieved parent. As one Florida court held in regard to awarding compensatory relief for the denial of visitation in violation of a court order:

> The sanction of changing custody does not coerce compliance; rather it may, in the absence of a finding that such a change is in the best interests of the children, penalize the children for the parent's contumacious conduct. In comparison, an award of make-up visitation may serve both to redress the wrong to the parent and to effectuate compliance with the court's authority.[169]

Any effort to sharpen enforcement of domestic relations provisions of protection orders must also be attentive to collateral consequences for the beneficiaries of those orders. Sometimes a parent will withhold parenting time from the other parent not to harass or challenge the order's effectiveness, but to protect a child or the party him or herself.[170] Enforcement mechanisms must take into account defenses for parents who exercise good faith efforts to protect their children.[171] In addition, fortifying enforcement mechanisms also runs the risk of providing abusive parents with an additional avenue by which to harass the other parent. As one commentator notes "[t]hreatened or actual litigation regarding custody or visitation can become a critical avenue for the batterer to maintain control after separation."[172] Further, experts on fathers who abuse the mothers of their children note the prevalence of custody litigation in the context of domestic violence.[173] They also note their frequent success[174] at strategically manipulating the

[169] LaLoggia-VonHegel v. VonHegel, 732 So.2d 1121, 1133 (Fla. Dist. Ct. App. 1999).
[170]
[171]
[172] Tarr at 38 citing Bancroft and Silverman, Batterer as Parent (check cite).
[173] Bancroft and Silverman, Batterer as Parent, p. 98 and 113.
[174] *See* Bancroft at 98 (noting abusive fathers are more likely than non-battering fathers to seek custody and that they have an advantage over battered women in winning in a contested custody case).

system to use custody litigation to their advantage.[175] Any initiatives making private rights of action to enforce custody and visitation provisions in protection orders should include safeguards to protect parties from harassing litigation.

## CONCLUSION

[175] Bancroft and Silverman, p. 122-128.