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## SEXUAL VIOLENCE AND FUTURE HARM: LESSONS FROM ASYLUM LAW

Shawn E. Fields\*

### *Abstract*

*Sexual violence victims face unique and enduring safety risks following an assault. The legal system's gradual shift from solely punishing offenders for past acts to protecting survivors from future harm reflects a recognition of this fact. But so-called "sexual assault protection order" statutes impose onerous "future harm" requirements – including proof by clear and convincing evidence that another sexual assault is imminent – that belies the realities of ongoing injury for victims and creates barriers to protection similar to the criminal justice approach to rape.*

*This Article suggests a different approach, one justified by a novel analogy to the refugee protection paradigm. Asylum law prospectively protects applicants upon a showing that they have a "well-founded fear" of future persecution. Only the most severe forms of discrimination qualify as "persecution." But applicants who can prove they have suffered a single act of past persecution enjoy a rebuttable presumption of future harm. Both courts and Congress have recognized the propriety of this presumption, given the "atrociousness" of persecution and the permanent scarring it causes to "the mind of a refugee." The same logic applies to sexual violence, long considered "the most heinous crime" short of murder. By transplanting the evidentiary framework from asylum law to sexual civil protection, this Article does two things unique in scholarly literature: 1) provides the first comprehensive consideration and overhaul of the sexual violence protection order regime, and 2) reconceptualizes asylum as a form of prospective civil protection.*

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## INTRODUCTION

The violence of rape endures. The unique “humiliation, degradation, and terror” caused by sexual assault does not end with the completion of the physical act.<sup>1</sup> Mental and emotional anguish following such a traumatic intimate violation can last a lifetime. Feelings of insecurity in the immediate aftermath of an attack often short-circuit a survivor’s ability to begin the difficult process of recovery, especially if the assailant continues to have contact with the victim.<sup>2</sup> In short, the violence done to sexual assault victims pervades, encompasses, and alters entire lives.<sup>3</sup>

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<sup>1</sup> See 42 PA. CONS. STAT. § 62A02 (2015) (describing the Pennsylvania General Assembly purpose for a newly-created sexual assault civil protection order); WASH. REV. CODE ANN. § 7.90.005 (West 2019) (providing a “legislative declaration” in support of creating Washington’s Sexual Assault Protection Order); see also Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1148 (1986) (cautioning against “obscuring the unique meaning and understanding of the indignity and harm of ‘rape.’”); Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 187 (2002) (“[S]exual autonomy or sexual integrity, the violation of which represents a unique, not readily comparable, type of harm to the victim.”).

<sup>2</sup> See NICOLA GAVEY, *JUST SEX? THE CULTURAL SCAFFOLDING OF RAPE* 128–41 (2d ed. 2019) (describing the emotional toll of repeated interactions and pressures women face in having sex through example of several forms of relationship with rape perpetrators); PATRICIA EASTEAL & LOUISE MCORMOND-PLUMMER, *REAL RAPE, REAL PAIN: HELP FOR WOMEN SEXUALLY ASSAULTED BY MALE PARTNERS* 8–15 (2006) (discussing the lasting trauma of partner rape); EDNA B. FOA & BARBARA OLASOV ROTHBAUM, *TREATING THE TRAUMA OF RAPE COGNITIVE-BEHAVIORAL THERAPY FOR PTSD* 16–29 (David H. Barlow ed., 2001) (describing several forms of disorder and mental health issues suffered among rape victims, including a high incidence of PTSD); Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 695 (1999) (postulating that, in the absence of prosecution for acquaintance rape, many victims simply want their attacker to “know that what [they] did was wrong” (quoting Andrea Parrot, *Recommendations for College Policies and Procedures to Deal with Acquaintance Rape*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 369 (Andrea Parrot & Laurie Bechofer eds., 1991))); Leonore M. J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 526 (1999) (“Only by treating acquaintance sex offenses as seriously as stranger cases can these victims begin the healing process.”).

<sup>3</sup> I use the terms “rape” and “sexual assault” interchangeably. But I also use, and prefer, the term “sexual violence,” which not only encompasses both rape and sexual assault but draws attention to the violent nature of these physical violations of the person, even where force is absent. This preference is reflected in the title of the Article. I also use the terms “victim” and “survivor” interchangeably, though in general I follow the mainstream approach adopted by the sexual assault advocacy community and use the word “‘victim’ when referring to someone who has recently been affected by sexual violence,” and “‘survivor’ to refer to someone who has gone through the recovery process, or when discussing the short- and long-term consequences of sexual violence.” *Key Terms and Phrases*, RAINN, <https://www.rainn.org/articles/key-terms-and-phrases> [<https://perma.cc/TC47-6NK3>] (last visited Aug. 12, 2019).

Of course, similar statements can be made about many traumatic episodes, especially violent criminal acts. But psychologists, scholars, and legislatures all agree that rape is a unique atrocity, an affront to a victim's very personhood in a way different from any other physical violation.<sup>4</sup> Moreover, this unique future harm suffered by sexual violence victims is compounded in two important ways.

First, a substantial majority of these victims know and must continue to interact with their assailants, either at school, work, or home.<sup>5</sup> The #MeToo movement has refocused attention on this epidemic of acquaintance rape and sexual assault,<sup>6</sup> illuminating for many what survivor advocates have long known: that sexual violence is often committed by a close friend or acquaintance and not a "stranger in the bushes."<sup>7</sup> But while this movement has created a platform for survivors to come forward with painful stories years or even decades later, relatively little attention has been paid to recent survivors who face imminent and ongoing safety concerns from attackers with whom they must have future contact.

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<sup>4</sup> See *infra* notes 107, 156–159 and accompanying text. Sexual violence disproportionately affects women, and throughout the Article I refer either to women or more generally to victims/survivors. See also MICHELE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011) (suggesting that nearly one in five women have been raped at some point; for men, the figure is one in seventy-one). I am keenly aware, however, that sexual violence affects both men and women. My scholarship is informed by my experience surviving an acquaintance rape from a close college friend. Afraid of facing the "men can't be raped" trope, I never spoke up. Thankfully, survivors eventually find their voice in different ways; my scholarship is my voice.

<sup>5</sup> See ILLINOIS COALITION AGAINST SEXUAL ASSAULT, ACQUAINTANCE RAPE, <http://www.icasa.org/docs/aquaintancerape.pdf> [perma.cc/VP5R-HXNK] (last visited Aug. 12, 2019) ("More than 70% of rape victims knew their attackers . . . . In a survey of more than 6,000 students at 32 colleges and universities in the U.S., it was found that . . . 84% of the rape victims knew their attacker . . . .").

<sup>6</sup> See Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 759 (2018) (observing that "#MeToo" and related movements have begun to change "[p]ublic perception [that] tended to trivialize acquaintance rape as more private, less serious, and less scary, despite emerging data that it was 'more common' and 'just as traumatic'" as stranger rape); *History & Vision*, ME TOO, <https://metoomvmt.org/about/> [https://perma.cc/U73J-Q26M] (last visited Aug. 26, 2019) ("The 'me too' movement was founded in 2006 to help survivors of sexual violence . . . find pathways to healing. . . . In less than six months, because of the viral #metoo hashtag, a vital conversation about sexual violence has been thrust into the national dialogue.").

<sup>7</sup> Abrams, *supra* note 6, at 775 ("It is much less likely that a stranger will perpetrate sexual crimes against women on campus; strangers committed 34% of reported sexual battery incidents and 9% of rapes."); Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 WIS. L. REV. 429, 433 (2017) ("Approximately three-quarters of all sexual assaults are committed by close acquaintances of the victims . . . .").

Second, victims seeking traditional legal recourse after an attack often experience further harm and trauma instead of healing and justice.<sup>8</sup> The criminal justice system, in particular, provides cold comfort for these survivors. In a society where rape myth tropes abound, victims rarely interact with officers who “start by believing.”<sup>9</sup> In a prosecutor-centric system obsessed with conviction rates, far too few compelling cases of criminal rape and sexual assault ever see a courtroom.<sup>10</sup> And in a punitive system where the victim is reduced to a “complaining witness” with no meaningful role in the trial, virtually no one works towards a victim-centered solution aimed at prospective protection and healing.<sup>11</sup>

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<sup>8</sup> Hannah Giorgis, *Many women of color don't go to the police after sexual assault for a reason*, THE GUARDIAN (Mar. 25, 2015), <https://www.theguardian.com/commentisfree/2015/mar/25/women-of-color-police-sexual-assault-racist-criminal-justice> [<https://perma.cc/GT2M-RTVQ>] (“If we report our assaults to the police, we risk being retraumatized . . . by the violence of the criminal justice system itself, which treats rape victims like suspects.”).

<sup>9</sup> See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 33 (2017) (“The typical law enforcement investigation is guilt-presumptive (and potentially problematic for that reason). In sexual assault cases, this presumption is flipped.”); Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 62–63 (2016) (reviewing structural reasons why police investigations of rape often are not taken seriously and noting that, along with other organizations, “the Start by Believing Campaign . . . offer[s] more detailed guidance on specific approaches police can take to strengthen rape investigation and ensure officer accountability.”); Becky Farley, *A Perpetrator's Paradise: Outdated Sexual Assault Statutes Provide Minimal Protection to Survivors Who Are Victimized in Common Sexual Assault Scenarios*, 17 WYO. L. REV. 315, 316 (2017) (summarizing common victim-blaming attitudes facing sexual assault survivors in the criminal justice system); *It's Time to Start by Believing*, END VIOLENCE AGAINST WOMEN INTERNATIONAL, <https://www.evawintl.org/images/uploads/General/SBB%20Brochure%202018.pdf> [<https://perma.cc/3J72-R2XR>] (last visited Feb. 11, 2019).

<sup>10</sup> Fields, *supra* note 7, at 433–34 (“[D]istrict attorneys choose to prosecute fewer than one in five of [sexual assault] arrests . . . .”); Estrich, *supra* note 1, at 1161–62 (exposing prosecutor “screening” mechanisms for comparatively weaker rape cases, observing that “[p]rosecution and conviction rates are highest when force and resistance are greatest, when the rape is corroborated, when no prior relationship exists between victim and defendant, and when the initial contact between the two is involuntary.”); see also Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CALIF. L. REV. 1631, 1646 n.181 (2012) (examining claim that “low convictions rates” for rape lead to “vicious circles” of failure to prosecute and failure to report (citing Jennifer Temkin, “*And Always Keep A-Hold of Nurse, for Fear of Finding Something Worse*”: Challenging Rape Myths in the Courtrooms, 13 NEW CRIM. L. REV. 710, 713 (2010))).

<sup>11</sup> Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 27 n.136 (1999) (noting the minimizing effect of the criminal trial to the needs of rape victims, particularly when “[t]he victim’s role is limited to that of a ‘complaining witness’”).

An increasing number of jurisdictions, recognizing the uniquely private nature of sexual violence and the failures of the criminal justice to prosecute this “most heinous crime,”<sup>12</sup> have crafted civil restraining orders designed specifically for victims of sexual assault.<sup>13</sup> These sexual assault protection orders (“SAPOs”) are a recent addition to the legal landscape. In 2000, only California and North Dakota provided civil protection mechanisms for sexual violence survivors.<sup>14</sup> By 2015, that number had grown to twenty-eight.<sup>15</sup> The emergence of these new protection orders has been uneven, with significant variance among states in terms of scope, procedure, evidentiary burdens, and remedies.<sup>16</sup>

Some common features, however, predominate. SAPOs operate much like more well-known domestic violence restraining orders by allowing victims to seek immediate ex parte relief from their abusers, apply for permanent “stay away” relief in an expeditious and flexible evidentiary hearing, and pursue other victim-centered prospective and compensatory relief to protect their safety and healing process.<sup>17</sup>

Legal regimes addressing the future harms of sexual violence provides a helpful start. But a majority of these protection order statutes impose unnecessarily burdensome evidentiary requirements that reflect a continued ignorance of the realities of sexual assault victimization.<sup>18</sup> In particular, most SAPOs and analogous restraining order mechanisms require survivors to prove not only that a sexual assault occurred, but that the perpetrator is likely to commit another sexual assault or other act of violence in the near future.<sup>19</sup> Many states require victims to prove that

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<sup>12</sup> 740 ILL. COMP. STAT. 22/102 (2004) (“Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims.”).

<sup>13</sup> See AM. BAR ASS’N COMM’N ON DOMESTIC & SEXUAL VIOLENCE, SEXUAL ASSAULT CIVIL PROTECTION ORDERS (CPOS) BY STATE (2015), [https://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/Charts/SA%20CPO%20Final%202015.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/SA%20CPO%20Final%202015.authcheckdam.pdf) [<https://perma.cc/YAD7-WUGG>] [hereinafter ABA, DOMESTIC & SEXUAL VIOLENCE] (summarizing the twenty-eight states offering some form of civil protection relief to victims of sexual assault).

<sup>14</sup> See *infra* Appendix Table 1 (summarizing development of SAPOs by year).

<sup>15</sup> See *id.*

<sup>16</sup> See *infra* notes 98–121 and accompanying text.

<sup>17</sup> See Hayley Jodoin, *Closing the Loophole in Massachusetts Protection Order Legislation to Provide Greater Security for Victims of Sexual Assault: Has Massachusetts General Laws Chapter 258E Closed it Enough*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 102, 116–22 (2012) (analogizing the purpose and function of SAPOs to domestic violence restraining orders).

<sup>18</sup> See *infra* Appendix Table 2 (noting that nearly half of all states with statutes offering civil protection for sexual assault victims require proof that another attack is imminent by at least a preponderance of the evidence).

<sup>19</sup> See, e.g., COLO. REV. STAT. § 13-14-103 (2018) (requiring to show “that there are reasonable grounds to believe that a minor child is in danger in the reasonably foreseeable future of being the victim of an unlawful sexual offense”); FLA. STAT. § 784.046 (2019) (requiring to show that “[p]etitioner genuinely fears repeat violence by the respondent”);

their assailants are more likely than not to assault them again,<sup>20</sup> and California and Wyoming require proof by clear and convincing evidence that another sexual assault is imminent.<sup>21</sup>

In most cases of acquaintance rape, such an onerous and specific evidentiary hurdle is virtually impossible to meet and threatens to render SAPO legislation as ineffective as criminal adjudications.<sup>22</sup> More fundamentally, requiring proof of a specific type of future harm “ignores the reality faced by victims of sexual assault.”<sup>23</sup> It fails to account for the harm suffered when victims are forced to be present with their attackers.<sup>24</sup> It also ignores significant evidence indicating that perpetrators can and often do exercise control over sexual assault survivors through “non-violent” intimidation and bullying, though few perpetrators telegraph this behavior in advance.<sup>25</sup>

This Article suggests an alternative evidentiary approach better aligned with the future harms of sexual violence: a “rebuttable presumption of future harm” standard. Restraining orders provide prospective relief, and thus should be premised on some likelihood of future injury.<sup>26</sup> For sexual violence victims, however, a rebuttable presumption of future harm should exist once the victim has proven that

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MONT. CODE ANN. § 40-15-102 (2019) (stating that a person may file a petition for an order of protection if “the petitioner is in reasonable apprehension of bodily injury”). For a complete list, see *infra* Appendix Table 2.

<sup>20</sup> See *infra* Appendix Table 2.

<sup>21</sup> *Id.*

<sup>22</sup> See *Military Law – Justiciability - Eastern District of Virginia Dismisses Suit Against Government for Military Sexual Assaults*, 130 HARV. L. REV. 2243, 2247 (2017) (observing that a standard requiring a sexual assault victim “to assert facts that predict she will be assaulted in the future” creates “a nearly impossible standard” (citation omitted)).

<sup>23</sup> Fields, *supra* note 7, at 487 (“Following an assault, the mere mention or presence of the attacker can cause immeasurable harm.” (citing JESSICA E. MINDLIN & LIANI JEAN HEH REEVES, CTR. FOR LAW & PUB. POLICY ON SEXUAL VIOLENCE, RIGHTS AND REMEDIES: MEETING THE CIVIL LEGAL NEEDS OF SEXUAL VIOLENCE SURVIVORS 77 (2005), <https://law.lclark.edu/live/files/6469-rights-and-remedies-meeting-the-civil-legal-needs> [<https://perma.cc/H9TK-8XRV>])).

<sup>24</sup> See *Post Traumatic Stress Disorder in Rape Survivors*, AM. ACAD. EXPERTS IN TRAUMATIC STRESS, <http://www.aaets.org/article178.htm> [<https://perma.cc/U2TJ-QGVB>] (last visited Aug. 22, 2019) (describing rape trauma syndrome, including the ability to be triggered into a state of paralysis in the presence of one’s attacker).

<sup>25</sup> See *id.*

<sup>26</sup> See *Rynearson v. Ferguson*, 903 F.3d 920, 926 (9th Cir. 2018) (“[T]he primary purpose of [a restraining] order is to protect the petitioner, not punish the respondent.”); Brian Kuhl, *Long-Arm to Protect the Unarmed from Harm by the Armed: Why Wisconsin Needs a New Statute to Ensure Its Residents Can Obtain Restraining Orders Against Foreign Residents Who Threaten Them*, 2012 WIS. L. REV. 1041, 1054 (2012) (“The purpose of restraining order statutes is to allow the state government to protect its threatened or abused citizens by preventing future harm.”).

a past sexual assault has in fact occurred. Such an approach would accord with the very real and unique risks of re-traumatization facing rape and sexual assault survivors.

For support, this Article draws a novel but compelling parallel to a seemingly unrelated body of law: asylum law. Under United States and international law, asylum seekers must demonstrate a “well-founded fear of [future] persecution” on account of their race, religion, nationality, political opinion, or membership in a particular social group.<sup>27</sup> This standard is inherently prospective in that asylum seekers must prove some genuine fear of future harm if returned to their home country. But asylum law also provides asylum seekers with a rebuttable presumption: if the applicant did, in fact, suffer a past qualifying act of persecution, a rebuttable presumption exists that the applicant possesses a well-founded fear of future persecution.<sup>28</sup> The justification articulated for this rebuttable presumption standard—that no one who “has suffered under atrocious forms of persecution” should be forced to reengage with their attackers, given how such an experience forever changes “the mind of the refugee”—applies with equal force for survivors of the “heinous crime” of sexual violence.<sup>29</sup>

More broadly, this Article suggests a novel way to conceptualize asylum law: as a form of protection order. It is precisely asylum law’s prospective, victim-centered focus that renders the analogy so apt. Both asylum law and civil protection order statutes protect specifically defined, vulnerable groups of people. Both provide prospective protection premised on a reasonable likelihood of future harm and employ flexible procedures through which to establish this harm. And both offer remedies tailored to the healing of the victim, not the punishment of the assailant.

There are limits to the analogy. Asylum cases arise from the actions of non-party foreign governments over which immigration courts have no jurisdiction, while restraining order hearings require the appearance of the alleged assailant and carry the threat of sanction against respondents.<sup>30</sup> And asylum seekers are,

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<sup>27</sup> See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6529, 189 U.N.T.S. 137 [hereinafter UN 1951 Convention]; 8 U.S.C. § 1101(a)(42)(A) (2012).

<sup>28</sup> See *Tianhai Cui v. Whitaker*, 749 F. App’x 642, 643 (9th Cir. 2019) (“A finding of past persecution creates a rebuttable presumption of a well-founded fear of future persecution.”).

<sup>29</sup> *In re Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989) (creating rebuttable presumption standard); 8 C.F.R. § 208.13(b)(1)(ii) (2019) (codifying rebuttable presumption standard); see also *Nozadze v. Sessions*, 740 F. App’x 476, 483 (6th Cir. 2018) (“In the absence of a well-founded fear of future persecution, an applicant may nevertheless be eligible for a discretionary grant of humanitarian asylum if he or she ‘has suffered under atrocious forms of persecution.’” (citations omitted) (quoting *Ben Hamida v. Gonzales*, 478 F.3d 734, 740 (6th Cir. 2007))).

<sup>30</sup> *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (“An [asylum] applicant . . . has the burden of establishing that . . . the persecution was committed by the government, or by forces that the government was unable or unwilling to control.” (citing *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010))).



presumably, already physically separated from their perpetrators while protection order petitioners are applying for precisely that sort of separation. But while the procedural process of these two regimes may be reversed, the overall protection paradigm of each legal regime is sufficiently similar to merit examination.

Critics of this approach likely will decry the lack of protections afforded the accused. In the Title IX context, the Trump administration and a growing chorus of scholars warn of the dangers of “victim-led prosecutions” of sexual violence, calling for a heightened clear and convincing evidence standard, right of appeal for the accused but not the accuser, and other procedural hurdles.<sup>31</sup> Analogizing civil sexual violence adjudications to asylum proceedings may only further antagonize these critics; after all, a grant of asylum neither carries with it the individualized sanction nor the continuing stigma of a sexual assault protection order.<sup>32</sup>

These concerns merit discussion. But they also understate both the structural societal hurdles sexual violence victims face through “credibility discounting,”<sup>33</sup> victim shaming,<sup>34</sup> and the unique future harms accompanying sexually violent acts.

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<sup>31</sup> See DEP’T OF EDUC. ISSUES NEW INTERIM GUIDANCE ON CAMPUS SEXUAL MISCONDUCT, U.S. DEP’T OF EDUC. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/ED9D-7VTH>] [hereinafter 2017 Dear Colleague Letter] (issuing new guidance for Title IX sexual assault cases and rescinding Obama-era guidance that “created a system that lacked basic elements of due process and failed to ensure fundamental fairness”); Open Letter from Mike Adams et al., *Stop Abusive and Violent Environments, Regarding Inequitable Victim-Centered Practices* (Feb. 7, 2018), <http://www.saveservices.org/wp-content/uploads/Victim-Centered-Practices-Open-Letter-FINAL.docx.pdf> [<https://perma.cc/5NG3-UR6H>] (providing an open letter signed by 140 law professors criticizing “the use of investigative ‘victim-centered’ practices that threaten to subvert the objective collection and presentation of evidence in administrative, civil, and criminal sexual assault proceedings [through] guilt-presuming methods.”); see also Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities Are Adjudicating Sexual Assault*, 71 U. MIAMI L. REV. 377, 389–402 (2017) (surveying procedures in college sexual assault hearings and contrasting guidance provided by the Obama and Trump administrations).

<sup>32</sup> See 8 U.S.C. § 1158(c) (2012).

<sup>33</sup> See Tuerkheimer, *supra* note 9, at 3 (defining “credibility discounting” as “skepticism of rape complaints [and] . . . the dismissal of women’s reports of sexual violation,” a phenomenon that is “systemic” and “firmly lodged”).

<sup>34</sup> See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1234, 1262 (1997) (“Many rape scholars imply that leniency in acquaintance rape cases has no parallels in other criminal cases . . . [because] victim blaming defense are more often successful in acquaintance rape cases than any other criminal case.”); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1461–62 (2014) (describing advocacy efforts to counter “‘slut shaming,’ victim blaming, and a rape culture that excuses sexual violence perpetrated by non-strangers”); Andrew Beaven, *Rape girl “driven to suicide by her ordeal in court,”* DAILY MAIL (Jan. 29, 2015), <https://www.dailymail.co.uk/news/article-129105/Rape-girl-driven-suicide-ordeal-court.html> [<https://perma.cc/F8EK-GH2B>] (describing case of Lindsay Armstrong, a teenage rape victim who committed suicide after being embarrassed by defense counsel requiring her

Concerns regarding the downstream effects to respondents in SAPO hearings – including limits on school choice and housing or employment opportunities<sup>35</sup> – can be addressed by sealing court records and taking other measures to ensure the privacy of all parties. Imposing insurmountable front-end hurdles to relief for sexual violence victims is not the answer.

The Article proceeds in three parts. Part I discusses the history, purpose, and function of SAPOs, with emphasis on the unique ongoing trauma of sexual violence and the uneven statutory response to this trauma. Part II examines the existing “future harm” legal framework in SAPOs, including the requirement of proof of multiple past acts of violence and independent proof of likely “imminent” future harm, often by a heightened burden. This section explores how this existing framework misunderstands the enduring violence of sexual assault and threatens to create unjustified barriers to entry for petitioners. Part III analogizes the underlying purpose of SAPOs to the underlying purpose of asylum law and considers whether a limited “framework borrowing” of asylum’s rebuttable presumption of future harm and well-founded fear standards can point the way forward in SAPO legislation.

## I. THE EMERGENCE OF SEXUAL ASSAULT PROTECTION ORDERS

Until very recently, sexual violence victims had little legal recourse outside a broken criminal justice system. The proliferation in the last ten years of civil protection relief for these victims merits consideration. This section describes the normative and historical justifications for civil protection orders generally, how sexual assault protection fit within that context, and how individual states have approached SAPO legislation.

### A. *History and Purpose of Civil Protection Orders*

The common law civil injunction has existed as an equitable remedy since at least the fourteenth century.<sup>36</sup> Today, civil litigants invoke a version of this “quintessential equitable remedy”<sup>37</sup>—the preliminary injunction—in emergency

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to hold up in court the thong underwear she wore the night she was raped and implying she “deserved to be raped”).

<sup>35</sup> See *Courts, Not Campuses, Should Decide Sexual Assault Cases*, INTELLIGENCE SQUARED (Sep. 16, 2015), <https://www.intelligencesquaredus.org/debates/courts-not-campuses-should-decide-sexual-assault-cases> [<https://perma.cc/GD6X-P9HR>] (arguing that campus sexual assault tribunals lack fairness and result in disproportionate outcomes); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106–08 (2015) (describing “overcorrection” of sexual assault adjudications employing reduced procedural protections for the accused).

<sup>36</sup> David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 555 (1985) (“Injunctions appeared in Chancery as early as the 1390s.”).

<sup>37</sup> *Id.* at 539; see also H. Tomás Gómez-Arostegui, *Prospective Compensation in Lieu of a Final Injunction in Patent and Copyright Cases*, 78 FORDHAM L. REV. 1661, 1700 (2010)

situations to prevent an alleged “imminent irreparable harm” from an opposing party.<sup>38</sup> The alleged harms justifying this preliminary relief can be as varied as litigation itself: the destruction of an environmental habitat from a construction project,<sup>39</sup> disclosure of a trade secret,<sup>40</sup> or a ban on immigration.<sup>41</sup> Given the urgency of many situations, litigants often request a temporary injunction (or temporary restraining order) on a shortened briefing schedule while the parties conduct discovery and prepare to do battle over the prospect of an order permanently enjoining conduct.<sup>42</sup> While courts can quickly grant temporary injunctions, the elements and burden of proof required to receive them create a significant barrier to most parties facing possible irreparable harm.<sup>43</sup> And as with any traditional civil litigation, the expense needed to secure even a temporary order can be prohibitive.

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(arguing that prospective compensation acts “[m]uch like an injunction—the quintessential equitable remedy”); Eric A. White, *Examining Presidential Power Through the Rubric of Equity*, 108 MICH. L. REV. 113, 124 n.69 (2009) (“The injunction is in many ways the quintessential equitable remedy.” (citing John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33 (2007))); Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 S.M.U. L. REV. 1577, 1614 (2002) (“The injunction is the quintessential equitable remedy . . .”).

<sup>38</sup> *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (“A preliminary injunction requires showing ‘imminent’ irreparable harm . . . . Indeed, the very idea of a *preliminary* injunction is premised on the need for speedy and urgent action to protect a plaintiff’s rights before a case can be resolved on its merits.”); *Hynoski v. Columbia County Redevelopment Authority*, 485 F. App’x. 559, 563 (3d Cir. 2012) (providing that “[t]he preliminary injunction must be the only way of protecting the plaintiff from harm,” but affirming denial of injunction because “the appellants did not allege imminent irreparable harm”).

<sup>39</sup> *D’Agnillo v. U.S. Dep’t of Housing & Urban Dev.*, 965 F. Supp. 535, 539 (S.D.N.Y. 1997) (denying motion to preliminarily enjoin construction of subsidized housing project in City of New York because the plaintiff “failed to demonstrate any present likelihood of imminent irreparable harm to the environment”).

<sup>40</sup> *Gable-Leigh, Inc. v. North American Miss*, No. CV01-01019MMM (SHxa), LEXIS 25614, at \*12 (C.D. Cal. Apr. 13, 2001) (granting preliminary injunction to prevent imminent disclosure of beauty pageant company trade secrets by former employee).

<sup>41</sup> *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (reversing grant of multiple nationwide preliminary injunctions barring enforcement of a presidential proclamation banning all immigration from certain countries because “plaintiffs have not shown that they are likely to succeed on the merits of their claims”).

<sup>42</sup> *See Brocade Commc’ns. Sys., Inc. v. A10 Networks, Inc.*, No. C 10-3428 PSG., LEXIS 4834, \*17–18 (N.D. Cal. Jan. 10, 2013) (discussing the “‘emergency relief’ requested in a preliminary injunction”).

<sup>43</sup> *Id.* at \*17 (“[B]ecause of the ‘emergency relief’ of a preliminary injunction, the standard for ‘irreparable harm’ is higher in that context than in the permanent injunction setting.”).

In contrast, “protection orders” have a much narrower function: to protect an alleged victim of a violent crime from future harm at the hands of the accused.<sup>44</sup> “Before the 1970s, protection orders were sought primarily by prosecutors in connection with existing criminal cases.”<sup>45</sup> These “criminal protection orders” were traditionally granted as a matter of course in domestic violence cases, where the victim and the assailant were likely to have significant future contact.<sup>46</sup> While the aim of criminal protection orders ostensibly is to protect the victim from future harm, in practice, these orders often fail to accomplish this goal for three reasons. First, the vast majority of domestic violence assaults never reached the courtroom, as “American society viewed domestic violence as a trivial matter . . . best kept veiled within the confines of the private home.”<sup>47</sup> Second, the few cases that did merit prosecution were controlled entirely by the state, and courts granted “protection” orders without the involvement or consent of the victim, who may have had compelling reasons not to seek an order.<sup>48</sup> Third, these orders only required assailants to “stay away” and did not grant more comprehensive financial, emotional, and safety support needed by victims in crisis.<sup>49</sup>

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<sup>44</sup> *Alanis-Alvarado v. Holder*, 558 F.3d 833, 836 (9th Cir. 2009) (“[P]rotection order” means any injunction issued for the purpose of preventing violent or threatening acts . . .” (citing 8 U.S.C. § 1227(a)(2)(E)(ii) (2012))); *Studer v. Studer*, 2012-Ohio-2838, ¶ 19 (Ohio App. 3d, June 25, 2012) (“The purpose of a civil protection order . . . is to provide the petitioner or other household members with protection from . . . violence.”); *State v. Dejarlais*, 944 P.2d 1110, 1112 (Wash. Ct. App. 1997) (“The purpose of a domestic violence protection order is to reduce the abuser’s power over the victim.”).

<sup>45</sup> Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 98 (2005) (“The only place where a victim could obtain a civil order of protection was divorce court.”).

<sup>46</sup> *Id.* at 116–17.

<sup>47</sup> Melanie Kalmanson, *Filling the Gap of Domestic Violence Protection: Returning Human Rights to U.S. Victims*, 43 FLA. ST. U. L. REV. 1359, 1367 (2016) (describing the history of the “chastisement” principle, wherein a husband was allowed to “command a wife’s obedience, and subject her to corporal punishment . . . if she defied his authority” (quoting Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–23 (1996))).

<sup>48</sup> Jeannie Suk, *Criminal Law comes Home*, 116 YALE L.J. 2, 17 (2006) (“Whereas the civil protection order is sought voluntarily by the victim, the criminal protection order is sought and issued by the state in the public interest.”); 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, 1546 n.358 (2008) (describing “criminal court’s practice of entering a criminal protection order . . . regardless of the victim’s wishes” (citing Suk, *supra* note 49, at 48–50)).

<sup>49</sup> See Suk, *supra* note 48, at 8 (describing prosecutors’ use of criminal protection orders “to command defendants to stay away from their spouses and homes on pain of arrest” as a way to circumnavigate the guilt beyond a reasonable doubt standard); Christopher R. Frank, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919, 938–41 (1996) (summarizing remedies for state criminal protection orders).

Born out of “an effective challenge to [the patriarchal] regime” by “the contemporary women’s rights movement,” states began crafting civil protection orders for domestic abuse victims in the 1970s, in recognition both of the widespread epidemic of gender-based family violence in the United States and the need to provide agency to victims in a survivor-led process.<sup>50</sup> While New York’s first-in-the-nation domestic violence restraining order (“DVRO”) statute was passed in 1962, the second such DVRO statute was not passed until 1976, in Pennsylvania.<sup>51</sup> After that, however, change happened rapidly. By the time Congress passed the Violence Against Women Act in 1994, creating a federal civil legal remedy for gender-based violence and shining a national spotlight on the crisis of domestic abuse,<sup>52</sup> all fifty states and the District of Columbia had DVRO statutes.<sup>53</sup>

Many scholars have explored this history and development of DVRO legislation before,<sup>54</sup> but few have considered the broader protection order paradigm this history created. At root, DVROs were developed to 1) address a widespread humanitarian crisis,<sup>55</sup> 2) affecting a discrete and vulnerable population;<sup>56</sup> 3)

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<sup>50</sup> Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2171 (1996); *see also* Kalmanson, *supra* note 47, at 1366.

<sup>51</sup> Smith, *supra* note 45, at 99–100.

<sup>52</sup> *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, 42 U.S.C. §§ 13701–14040 (1994), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

<sup>53</sup> Smith, *supra* note 45, at 99–100 (“Pennsylvania passed its Protection from Abuse Act in 1976, which created an avenue for victims of domestic violence to obtain protection orders outside the context of criminal court or civil divorce proceedings. Other states began to follow suit. By 1994, all fifty states had adopted some form of domestic violence civil protection order legislation.”).

<sup>54</sup> *See, e.g.*, Smith, *supra* note 45, at 100–04 (summarizing excellent legal scholarship on history and development of domestic violence restraining order protections).

<sup>55</sup> Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor’s Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL’Y 1, 5 (1994) (“[A] congressional report indicated that the most dangerous place in the United States for a woman to be is in her home.”); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 891 (1992) (“[O]n an average day in the United States, nearly 11,000 women are severely assaulted by their male partners.”); Martha F. Davis & Susan J. Kraham, *Protecting Women’s Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141, 1145 (1994) (describing the impact of the domestic violence “epidemic” on “poor women” and noting “60% of women [in Washington State] on public assistance reported sexual and physical abuse as adults, usually by a spouse or boyfriend”); *In re White*, No. G036010, 2006 WL 1454769, at \*8 (Cal. Ct. App., May 26, 2006) (“Allowing a domestic violence victim to obtain a restraining order under a lower standard of proof is a rational way of combating this epidemic.”).

<sup>56</sup> *See* *People v. Bogle*, 48 Cal. Rptr. 2d 739, 7459 (Cal. Ct. App. 1995) (construing the term “cohabitant” in domestic violence restraining order legislation broadly “because ‘individuals are uniquely vulnerable in their domestic environment’” (quoting *People v. Siravo*, 21 Cal. Rptr. 2d 350, 354 (Cal. Ct. App. 1993))); *People v. Marquez*, H029431U, 2007 WL 3051722 (Cal. Ct. App., Oct. 19, 2007) (“[T]he purpose of section [California’s DVRO statute] is to protect persons in their domestic environment where they are ‘uniquely

suffering from profound physical, mental, or emotional violence; 4) that is likely to continue without intervention; and 5) that which existing legal structures have failed to prevent; by 6) affording the victim agency to direct the course of protection.<sup>57</sup> This protection order paradigm helps explain the proliferation of similar protection order legislation aimed at curbing other narrowly-defined epidemic abuses directed at vulnerable populations, including the elderly, members of immigrant communities, members of tribal communities, LGBTQIA community members, and victims of sexual violence.<sup>58</sup>

Functionally, civil protection orders statutes address the urgency of preventing grave future harm by providing flexible and immediate procedural benefits to victims not readily available in the criminal context alone. Most civil protection order statutes allow victims to obtain a temporary order ex parte, requiring the alleged assailant to stay away for up to three weeks while the court sets a hearing for a permanent protection order hearing.<sup>59</sup> That hearing employs more flexible evidentiary standards than criminal adjudications allow, in recognition of the fact that “[a] victim may not have the evidence necessary to sustain criminal charges, but may have evidence to support a finding that she is in danger, or that a past crime has

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vulnerable’ because of their relationship with the perpetrator.” (citing *Bogle*, 48 Cal. Rptr. 2d at 745)). This vulnerability is heightened when among intersectional groups. See Joshua B. Gurney, *An “SDVCJ Fix”—Paths Forward in Tribal Domestic Violence Jurisdiction*, 70 HASTINGS L.J. 887, 892 (2019) (“Colonization and historical trauma experienced by Indian communities also played a role in making Indian women uniquely vulnerable to domestic violence.”); Kae Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 BERKELEY J. GENDER L. & JUST. 198, 221–23 (2012) (describing how legal and social rules make trans women particularly vulnerable to domestic violence); Natalie Nanasi, *The U Visa’s Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 283 (2018) (“[I]mmigrant women are uniquely vulnerable to intra-family violence and are more likely to face domestic abuse than members of the general population.”).

<sup>57</sup> See Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL’Y, & L. 43, 49 n.31 (1995) (summarizing studies demonstrating the recidivist nature of spousal batterers and the failure of the criminal justice system to “significantly reduce recidivism”); see also *id.* at 44 (“The legal response to domestic violence cases has been so weak that offenders seem to walk away from a legal encounter believing that they can batter their intimate partner or ex-partner with impunity.”); Smith, *supra* note 45, at 119 (“[C]ivil protection orders empower the victim. They can have a positive effect on the emotional well-being of victims by giving them a choice of remedies.”).

<sup>58</sup> See generally *Selected State Statutes, Plain-language Legal Information for Victims of Abuse*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, <https://www.womenslaw.org/laws/statutes> [https://perma.cc/U67Z-LSGG] (last visited Aug. 12, 2019) (summarizing various protection orders by state).

<sup>59</sup> Smith, *supra* note 45, at 99–102; see also Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of “Efficacy,”* 11 S. CAL. INTERDISC. L.J. 361, 365 (2002).

occurred, under a lower burden of proof.”<sup>60</sup> These civil hearings also typically “provide protection more quickly than criminal orders of protection,” and authorize a much broader range of victim-centered relief than the limited “stay away” nature of a criminal protection order.<sup>61</sup>

More fundamentally, “civil protection orders empower the victim. . . . [T]he victim, rather than the state, has control over what happens to her.”<sup>62</sup> “Studies show that this type of empowerment affects a victim’s sense of well-being,” and allows the victim to determine when—and whether—a protection order makes sense for herself and her family.<sup>63</sup> “In this way, civil protection orders may ‘work’ more effectively than criminal orders of protection because the victim . . . chooses when to file and directs the strategy of obtaining the order, in contrast to the criminal system.”<sup>64</sup>

### *B. History and Purpose of Sexual Assault Protection Orders*

Alongside efforts to pass DVRO legislation, the women’s rights movement sought changes “in the law [regarding] gender equality in sex and sexual relations.”<sup>65</sup> These efforts focused almost entirely on “[t]he treatment of crimes specifically targeting women, [like] sexual assault,” and initially focused on “revisions in antiquated and gender-biased rape statutes.”<sup>66</sup> One of the most significant reforms to rape laws was the redefinition of “consent,” specifically the “[e]limination of force as a statutory element of rape.”<sup>67</sup> Laws defining sexual assault as “forced sexual penetration that causes injury”<sup>68</sup> ignored the thousands of nonconsensual

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<sup>60</sup> Smith, *supra* note 45, at 119.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 120–21.

<sup>63</sup> *Id.* at 121; see also Susan Keilitz et al., *U.S. Dept. of Justice, Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence*, in *DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE: THE CIVIL JUSTICE SYSTEM’S RESPONSE TO DOMESTIC VIOLENCE* 3, 49 (Patricia G. Barnes ed., 1988).

<sup>64</sup> Smith, *supra* note 45, at 122; see also Martha Minow, *Surviving Victim Talk*, 40 *UCLA L. REV.* 1411, 1420–21 (1993) (discussing the importance of empowering victims of domestic violence throughout the legal process and beyond).

<sup>65</sup> Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 *SUFFOLK U. L. REV.* 467, 467 (2005).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 484; see also STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 99–113 (1998) (cataloguing the American criminal system’s failure to punish non-physical interference with sexual autonomy).

<sup>68</sup> See, e.g., *MICH. COMP. LAWS* § 750.520b (2019) (effective Mar. 4, 2014) (defining several situations in which sexual assault can occur, such as forced or coerced sexual penetration that causes injury).

sexual encounters made possible through duress, coercion, intoxication, or unconsciousness.<sup>69</sup>

The separation of force and consent as independent elements of rape, and eliminating the need to prove force for certain categories of criminal rape and sexual assault reflected a significant shift in the move towards sexual equality. It also accorded with the realities of rape and sexual assault in the United States. Over seventy-five percent of all sexual assaults are committed by acquaintances of the victim, not by a “stranger in the bushes” leaping out to commit a violent rape.<sup>70</sup> And a majority of these acquaintance rapes are committed through non-violent coercive tactics, such as intimidation and threats, forced intoxication, or—as the #MeToo Movement has so abundantly demonstrated—exploitation of power and control.<sup>71</sup>

But despite these reforms, “society still expects rape to be a horrifically violent crime.”<sup>72</sup> In the criminal justice system, “law enforcement personnel, judges, and potential jurors . . . are ambivalent about placing criminal sanctions on ‘non-violent’ sexual assault or, for that matter, anything short of violent penetration that results in physical injuries.”<sup>73</sup> This ambivalence, of course, disproportionately affects acquaintance rape victims. “Although treated in rape law as an independent element, force often acts as a proxy for awareness of nonconsent,” with the absence of one negating the presence of the other.<sup>74</sup> These problems are as endemic to the nature of criminal prosecutions themselves as they are to societal attitudes about “non-traditional rapes.”<sup>75</sup> “Even when nonconsent is the defining criterion of rape, it will

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<sup>69</sup> See SCHULHOFER, *supra* note 67, at 100–12 (articulating need to criminalize sex procured by threats, abuse of trust, exploitation of psychological or physical incapacity, intoxication, or exploitation of psychological or economic power or authority).

<sup>70</sup> Fields, *supra* note 7, at 432–33.

<sup>71</sup> Vera Baird, *Sexual abuse is about power – and the powerful shouldn’t be protected*, THE GUARDIAN (Apr. 29, 2014), <https://www.theguardian.com/commentisfree/2014/apr/29/sexual-abuse-power-max-clifford-sexual-assault-anonymity> [<https://perma.cc/A7V8-QQ7E>] (“The key to abuse is power – of the abuser over the abused. Although sexual assault occurs across society, men of influence or standing carrying an extra sparkle of fame can be especially prey to a sense of entitlement. Their victims often do not understand that they are being groomed.”).

<sup>72</sup> Seidman & Vickers, *supra* note 65, at 484. (“[S]ocietal attitudes . . . have not kept pace with statutory reform.”); *id.* at 468.

<sup>73</sup> *Id.* at 473; see also Fields, *supra* note 7, at 443 (“When victims don’t conform to idealized versions of what a rape victim should look and act like, untrained and inexperienced officers, like most people, are highly likely to doubt them.”).

<sup>74</sup> Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 164 (1996); see also Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 275 n.49 (2002) (“Typically, the elements of nonconsent and force merge.” (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.04[B][1][a] (1987))).

<sup>75</sup> See Charlow, *supra* note 74, at 289 (describing unclear rape statutes that emphasize force to such a degree that “consent does not appear to be an element”); Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 558–59 (2000) (arguing



often be difficult to prove nonconsent beyond a reasonable doubt absence evidence of force by the perpetrator or resistance by the victim.”<sup>76</sup> As a result, “few commentators can point to any data suggesting that criminal rape reform laws have deterred the commission of rape, increased its prosecution, or increased conviction rates.”<sup>77</sup>

Victim advocates also sought an alternative to a criminal justice system that, even at its best, “was too slow and poorly equipped to protect against the immediate devastating consequences of assault,”<sup>78</sup> and did not afford victims of intimate physical abuse the agency and empowerment necessary to begin the healing process.<sup>79</sup> To address these concerns, advocates began lobbying legislatures for the creation of a civil legal remedy similar to DVROs.<sup>80</sup> Existing DVRO statutes applied only to victims of abuse in a marital or similar relationship with their assailants, thus

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that force and nonconsent are so intertwined that, in practice, it can be difficult to prove one without the other).

<sup>76</sup> Wertheimer, *supra* note 75, at 558–59; *cf.* Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1785–92 (1992) (maintaining that force and consent are separate and distinct elements).

<sup>77</sup> See Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 58 (2011); *cf.* H. FEILD & L. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 7 (1980) (“The expressions of outrage expressed over the antiquated state of rape laws in every American jurisdiction usually neglect one fact: the fact that the rape laws did not result in convicting men of rape was not a mistake or an oversight . . . . When juries refuse to convict for rape . . . the law alone is not what needs to be changed.”).

<sup>78</sup> Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1559 (2014) (quoting Seidman & Vickers, *supra* note 65, at 472).

<sup>79</sup> Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 134, 173 n.461 (2017) (summarizing studies concluding that sexual assault victims requiring reporting protocols that “consider the needs of victims themselves in terms of their healing process . . . ,” and which recognize “the trauma that often accompanies a sexual assault [victim, including] leav[ing] a victim’s memory and verbal skills impaired”); *see also* Lisa Frohmann, *Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management*, 45 SOC. PROBS. 393, 400–01 (1998) (finding that in rape cases, prosecutors reinterpret victim trauma within a legal framework, preventing empowerment); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 577 (1999) (highlighting that, in the domestic violence context, “[e]mpowerment provides a space for the battered woman to decide how to proceed in the healing process”).

<sup>80</sup> *See, e.g.*, Jodoin, *supra* note 17, at 116–19 (describing the history for sexual assault protection order in Massachusetts, which sprang from the state’s earlier history with DVROs).

preventing most rape survivors from accessing this flexible, victim-centered protection regime.<sup>81</sup>

Unlike with DVRO legislation, however, states were reluctant to create protection order avenues for individuals outside the traditional family context. Although California's Civil Harassment Restraining Order (passed in 1978)<sup>82</sup> and North Dakota's "disorderly conduct" order (passed in 1993)<sup>83</sup> technically offered protection regardless of relationship status, no state specifically recognized sexual assault as a ground for civil protection until Montana did so in 2001.<sup>84</sup> But over the next fifteen years, over two dozen states expanded their civil protection statutes to cover non-partner sexual violence.<sup>85</sup>

### C. *The Uneven Emergence of SAPO Legislation*

Unlike DVRO statutes, which have largely taken on a uniform quality across the country, no single standard form of civil protection order exists for victims of sexual assault. First, only twenty-eight states and the District of Columbia even offer civil protection for sexual assault victims.<sup>86</sup> Second, as discussed in greater detail below, only five states have protection order statutes designed solely for sexual assault.<sup>87</sup> The other twenty-three jurisdictions offering sexual violence civil protection do so only incidentally, authorizing victims to seek protection under more generalized "harassment" or "violence" statutes that also apply to stalking victims

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<sup>81</sup> Smith, *supra* note 45, at 93–94 (recounting stories of sexual and other physical abuse suffered by women who had no legal recourse "because they were not married" to their abuser: "He savagely beat her and often raped her, once using a broken broomstick . . . She wanted a civil order of protection . . . [, but] was told that she was not entitled to an order . . . against her abuser because they were not married . . ."); *see also id.* at 108 ("Many [domestic violence] statutes exclude violent crimes such as sexual assault . . . a surprising number of states do not specifically include sexual assault within their definitions of domestic violence . . .").

<sup>82</sup> CAL. CIV. PROC. CODE § 527.6 (West 2019); *Schild v. Rubin*, 232 Cal. App. 3d 755, 762 (1991) ("In 1978 the Legislature enacted Code of Civil Procedure 527.6, a special statute designed to afford protection against harassment." (citing Stats. 1978, ch. 1307, §2, p. 4294) (internal quotations omitted)).

<sup>83</sup> 1993 N.D. Laws Ch. 125 (codified at N.D. CENT. CODE § 12.1-31.2-01 (2019)).

<sup>84</sup> 2001 Mont. Laws Ch. 503 (codified at MONT. CODE ANN. § 40-15-102 (2019)).

<sup>85</sup> *See generally* ABA, DOMESTIC & SEXUAL VIOLENCE, *supra* note 13 (summarizing the twenty-eight states offering some form of civil protection relief to victims of sexual assault); *see also* BATTERED WOMEN'S JUSTICE PROJECT: NATIONAL CENTER ON PROTECTION ORDERS AND FULL FAITH & CREDIT, *Sexual Assault Protection Order Matrix* (2019), <https://www.bwjp.org/assets/documents/pdfs/ncpoffc-sexual-assault-protection-order-matrix.pdf> [<https://perma.cc/6H5X-3B26>].

<sup>86</sup> *Id.*; *see also infra* Table 1.

<sup>87</sup> *See infra* Table 1.

and noisy neighbor disputes.<sup>88</sup> These “catch-all” protection order statutes vary greatly in terms of scope (including who qualifies to petition and what acts of abuse qualify as protection), procedures employed, evidentiary requirements, and available remedies.

“Catch-all” statutes, broadly construed, govern any type of “civil harassment” from noise complaints<sup>89</sup> and easement disputes<sup>90</sup> to terroristic threats<sup>91</sup> and rape.<sup>92</sup> These statutes present problems when applied to sexual assault, because evidentiary requirements that might be advisable in a neighbor dispute—such as a “course of conduct” requirement<sup>93</sup>—make little sense in the context of sexual assault. While some of these “catch-all” statutes specifically define sexual assault as a qualifying category of “harassment,” most grant relief on the same terms and through the same processes as any other case.<sup>94</sup> These statutes tend to create confusion, as reflected in

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<sup>88</sup> See, e.g., CAL. CIV. PROC. CODE § 527.6 (West 2019) (“Civil Harassment Restraining Order” authorizing protection for “a person who has been harassed”); MASS. GEN. LAWS ANN. ch. 258E § 1 (West 2019) (Massachusetts protection order statute authorizing protection for “[three] or more acts of willful and malicious conduct aimed at a specific person”); N.D. CENT. CODE § 12.1-31.2-01 (2019) (authorizing orders for “disorderly conduct,” defined as “intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person”).

<sup>89</sup> *Grant v. Clampitt*, 65 Cal. Rptr. 2d 727, 728–29 (Cal. Ct. App. 1997) (considering whether California’s “civil harassment injunction” action is automatically stayed by federal bankruptcy law in a case involving “[a] noisy radio and a long-simmering feud between an elderly woman and her former landlord”).

<sup>90</sup> *Clement v. Ziemer*, 953 So. 2d 700, 701 (Fla. Dist. Ct. App. 2007) (reversing grant of injunction under Florida’s catch-all protection order statute involving alleged misuse of a ten-foot easement to access a neighborhood lake).

<sup>91</sup> See, e.g., MINN. STAT. § 609.748 (2019) (authorizing civil harassment restraining order for threats of violence); *Dunham v. Roer*, 708 N.W.2d 552, 565–66 (Minn. Ct. App. 2006) (finding statute constitutional because the only speech it regulates are “fighting words” and “true threats”).

<sup>92</sup> See CAL. CIV. PROC. CODE § 527.6(b)(7) (West 2019) (authorizing civil harassment restraining order to prevent “unlawful violence,” defined as “any assault or battery,” including “sexual[] assault”).

<sup>93</sup> See MASS. GEN. LAWS ANN. ch. 258E § 1 (West 2019) (requiring proof of three or more separate incidents of misconduct); CAL. CIV. PROC. CODE § 527.6 (West 2019) (requiring a petitioner to show by clear and convincing evidence that she has been harassed, which is defined as a knowing and willful course of conduct); *Grant*, 65 Cal. Rptr. 2d at 730 (defining California’s “course of conduct” requirement as “a pattern of conduct composed of a series of acts over a period of time”).

<sup>94</sup> Compare CAL. CIV. PROC. CODE § 527.6(b)(6) (West 2019) (specifically referencing “sexual assault” as a category of harassment), with *Danielle S. v. Ezra C.*, No. A108727, 2005 WL 2840340, at \*2 (Cal. Ct. App. Oct. 28, 2005) (struggling to interpret California’s civil harassment statute in a sexual assault case, finding alternatively that “[a] single episode of harassment cannot constitute a course of conduct” but that “there may well be cases in which the circumstances surrounding ‘a single act of violence may support a conclusion that

court cases expressing frustration over whether and how to treat sexual assault civil protection order petitions differently from other petitions.<sup>95</sup>

In contrast, five states—Illinois,<sup>96</sup> Nevada,<sup>97</sup> Pennsylvania,<sup>98</sup> Oregon,<sup>99</sup> and Washington<sup>100</sup>—have crafted statutes designed solely and expressly to govern the “unique” case of sexual assault. These statutes have the practical benefit of avoiding the unjustified and confusing application of heightened burdens in “catch-all” legislation. These narrowly focused statutes also allow the legislature to highlight the uniqueness of sexual assault as a grave violation and the need for a unique civil remedy to address this violation. For example, Washington state recognizes

Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. According to the FBI, a woman is raped every six minutes in the United States. Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim.<sup>101</sup>

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future harm is highly probable” (quoting *Russell v. Douvan*, 5 Cal. Rptr. 3d 137, 141 (Cal. Ct. App. 2003))).

<sup>95</sup> See, e.g., *D.R.B. by K.G.B. v. G.T.B.*, No. 17 NO 0452, 2018 WL 3414261, 2018-Ohio-2787 (Ohio Ct. app., June 25, 2018) (acknowledging the difficulty in interpreting the evidentiary difference between the requirements for a “civil stalking protection order” and a “civil sexually oriented offense protection order,” both of which are governed by the same statute); *Ezra C.*, No. A108727, 2005 WL, at \*2.

<sup>96</sup> 740 ILL. COMP. STAT. 22/103 (West 2010) (“[V]ictim of non-consensual sexual conduct or non-consensual sexual penetration . . .”).

<sup>97</sup> NEV. REV. STAT. § 200.378(1) (2017) (“[A] person who reasonably believes that the crime of sexual assault has been committed against him or her by another person . . .”).

<sup>98</sup> 23 PA. CONST. STAT. § 6102(a) (2019) (defining “abuse” under statute as “rape, involuntary deviate sexual intercourse, sexual assault, [or] statutory sexual assault”).

<sup>99</sup> OR. REV. STAT. ANN. § 163.763 (West 2019) (“A person who has been subjected to sexual abuse and who reasonably fears for the person’s physical safety . . .”).

<sup>100</sup> WASH. REV. CODE ANN. § 7.90.020 (West 2019) (requiring petition for sexual assault protection order to “allege the existence of nonconsensual sexual conduct or nonconsensual sexual penetration”).

<sup>101</sup> WASH. REV. CODE ANN. § 7.90.005 (West 2019).

Table 1 below illustrates the relatively recent emergence of SAPO legislation:

Year	“Catch-all” CPOs	SAPOs
2000	2	0
2005	6	1
2010	13	3
2015	22	5
2019	23	5

Table 1 highlights two important trends: 1) the rapid increase in civil protection remedies for sexual violence in the last ten years; and 2) states’ continued reluctance to treat sexual violence as a unique violation requiring a unique remedy. This reluctance, driven in part by a misunderstanding of the enduring harm of sexual violence, has led to the imposition of unjustified burdens for sexual assault victims and the denial of relief for petitioners even when courts acknowledge respondents have raped them.<sup>103</sup>

#### D. *The Sexual Assault Protection Order Paradigm*

Despite variation among state protection order statutes, SAPOs, like DVROs<sup>104</sup> and other protection order regimes, exist to: 1) address a widespread humanitarian crisis;<sup>105</sup> 2) affecting a discrete and vulnerable population;<sup>106</sup> 3) suffering from profound physical, mental, or emotional violence;<sup>107</sup> 4) that is likely continue absent

<sup>102</sup> Table 1 is reproduced in full in the Appendix at the end of this Article, complete with citations to each state’s legislative bill and enacted statute. The citations have been removed here for ease of reading.

<sup>103</sup> See *infra* Part III.

<sup>104</sup> See *supra* notes 45, 54–57 and accompanying text.

<sup>105</sup> See BLACK ET AL., *supra* note 4 (confirming widespread epidemic of sexual assault and disproportionate risks to women); Doe v. Hagenbeck, 870 F.3d 36, 53 n.8 (2d Cir. 2017) (Chin, J., dissenting) (discussing the “large-scale epidemic of sexual assault and harassment of women on college campuses around the country”); Fields, *supra* note 7, at 431 (“On average, a sexual assault occurs every ninety-eight seconds; a rape occurs every six minutes.”).

<sup>106</sup> Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 446 (2013) (arguing that “[w]omen, as members of a group particularly vulnerable to sexual assault,” require different protection mechanisms); Sara L. Ainsworth, *Amicus Curiae Brief: Stormans, Inc. v. Selecky*, 24 HASTINGS WOMEN’S L.J. 303, 305 (2013) (“All women are at risk, but certain groups of women are particularly vulnerable to sexual assault.”).

<sup>107</sup> Bessel A. van der Kolk, *The Body Knows the Score: Memory and the Evolving Psychobiology of Posttraumatic Stress*, 1 HARV. REV. PSYCHIATRY 253, 256 (1994), [http://franweiss.com/pdfs/sensorimotor\\_vanderkolk\\_1994.pdf](http://franweiss.com/pdfs/sensorimotor_vanderkolk_1994.pdf) [<https://perma.cc/JD6K-TWZG>] (“[T]rauma is stored in somatic memory and expressed as changes in biological

intervention; and 5) which existing legal structures have failed to prevent. (6) Finally, SAPOs afford the victim the agency to direct the course of protection.<sup>108</sup>

In furtherance of these objectives, some broadly uniform characteristics define the SAPO paradigm. Unlike DVROs and some other protection order statutes, sexual assault victims need not have any specific relationship (or any relationship at all) with their assailant in order to obtain a SAPO. Anyone who has suffered a sexual assault qualifies to petition for a SAPO, and anyone who has committed a sexual assault is subject to sanction.<sup>109</sup> What constitutes a qualifying act of “sexual assault” varies, but virtually all state statutes define rape and sexual assault with reference to their respective state criminal codes.<sup>110</sup> Thus, SAPO petitioners benefit from the expanded criminal rape definition resulting from rape reform law advocacy, even if they remain largely unable to benefit under criminal law.<sup>111</sup> However, many states do not include non-criminal “sexual harassment” as a qualifying act of abuse.<sup>112</sup>

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stress response. Intense emotions at the time of the trauma initiate the long-term conditional responses to reminders of the event, which are associated both with chronic alterations in the physiological stress response and with the amnesias and hypermnesias characteristic of posttraumatic stress disorder (PTSD). . . . Development of PTSD . . . was significantly more likely in victims with histories of sexual abuse than in victims with no such histories.”); Letter from Eileen Zurbiggen, Professor of Psychology, et al. to Daniel Hare, Chair Acad. Senate of the Univ. of Cal. Sys. (Oct. 26, 2015), <http://ucscfa.org/wp-content/uploads/2015/10/UCSC-faculty-comments-on-SVSH-policy-10.26.15.pdf> [<https://perma.cc/7L5V-WBQ6>] (“Rape, sexual assault, and sexual harassment are traumatic in part because the victim loses control over his or her own body. A clearly established principle for recovery from these traumatic experiences is to rebuild trust and to reestablish a sense of control over one’s own fate and future.”).

<sup>108</sup> LYNN LANGTON ET AL., DEP’T OF JUSTICE, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010, at 1 (2012), <https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf> [<https://perma.cc/EK8X-LP5C>] (noting that, due to structural and systemic challenges of prosecuting sexual assault in the criminal justice system, it is estimated that less than 0.6% of all perpetrators ever spend a day behind bars); Jodoin, *supra* note 17, at 111–13 (describing empowering effects of SAPO legislation and attendant increase in public safety resulting from an increased willingness to cooperate with law enforcement when the victim has been empowered to make her own decisions).

<sup>109</sup> See, e.g., *Roake v. Delman*, 408 P.3d 658, 659 (Wash. 2018) (describing the legislative intent behind Washington’s SAPO statute, and that of similar statutes nationwide, to broaden relief to those not involved in dating or marital relationships).

<sup>110</sup> See, e.g., 23 PA. CONST. STAT. § 6102(a) (2019) (defining sexual assault with reference to state’s criminal codes); ME. STAT. tit. 19, § 4005 (2018) (defining sexual assault); MD. CODE ANN., CTS. & JUD. PROC. § 3-1503 (West 2012) (defining sexual assault).

<sup>111</sup> See, e.g., Sexual Assault Protection Order Act, H.B. 2576, 2006 Wash. Sess. Laws Ch. 138 (codified at WASH. REV. CODE ANN. § 7.90.010(4) (West 2019)) (House Bill enacting Washington’s SAPO statute and defining “sexual conduct” to include “intentional or knowing touching,” “intentional or knowing display,” “any forced display,” “any coerced or forced touching,” and certain “nonphysical contact”).

<sup>112</sup> See, e.g., NEV. REV. STAT. § 200.378 (“[A] person who reasonably believes that the *crime* of sexual assault has been committed against him or her by another person may petition

SAPO procedures remain relatively uniform. A petitioner may seek an *ex parte* temporary (or emergency) protection order lasting two to three weeks, but notice of a permanent protection order hearing must be provided to the respondent as soon as possible.<sup>113</sup> Hearings are commonly held within one month of the issuance of a temporary protection order unless otherwise stipulated by the parties, and hearings are almost always resolved in a single day.<sup>114</sup>

Remedies vary by jurisdiction, but the most common types of remedies reflect a focus on prospective, victim-centered protection. Assailants must physically stay away from victims and may have no contact with the victims whatsoever.<sup>115</sup> In many jurisdictions, assailants must provide economic compensation related to the healing process, including “medical expenses, counseling expenses, temporary shelter or housing expenses, and expenses to repair or replace damaged property.”<sup>116</sup> In addition, any violation of a protection order constitutes a criminal offense.<sup>117</sup> Other remedies appear aimed, at least in part, on general societal protection and individual rehabilitation, including requiring the assailant to relinquish firearms or enter a substance abuse treatment program.<sup>118</sup> But these remedies also provide a necessary additional layer of comfort and safety to petitioners as they begin the recovery process.

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. . . for a temporary or extended [protective] order . . .”) (emphasis added); OKLA. STAT. tit. 22, § 60.2 (2019) (offering emergency protection only to victims of domestic abuse, stalking, criminal harassment, or rape); OHIO REV. CODE ANN. § 3113.31(A)(6) (defining “sexually oriented offense” authorizing issuance of a protective order by reference to the definition of “sexually oriented offense” in Ohio’s criminal code).

<sup>113</sup> See, e.g., ALASKA STAT. ANN. § 18.65.850 (West 2019) (requiring notice of permanent restraining order hearing to be given to respondent at least ten days prior to hearing).

<sup>114</sup> See *infra* Table 1 and accompanying notes 316–320.

<sup>115</sup> See, e.g., MICH. COMP. LAWS § 600.2950a (2019) (allowing court to enjoin an individual from “[a]ppearing within the sight of the petitioner” or “[approach] . . . the petitioner”); MINN. STAT. § 609.748 (2019) (allowing court to “order[] the respondent to have no contact with [petitioner]”); N.C. GEN. STAT. § 50C-5 (2018) (allowing court to issue a “no-contact order”); 740 ILL. COMP. STAT. 22/103 (West 2010) (“‘Stay away’ means to refrain from both physical presence and nonphysical contact with the petitioner directly, indirectly, or through third parties who may not know of the order. ‘Nonphysical contact’ includes, but is not limited to, telephone calls, mail, e-mail, fax, and written notes.”).

<sup>116</sup> Smith, *supra* note 45, at 104.

<sup>117</sup> See, e.g., N.C. GEN. STAT. § 50C-10 (2018) (mandating contempt of court for “knowing violation[s]”); OHIO REV. CODE ANN. § 2705.02 (West 2018) (permitting criminal prosecution and contempt of court for violations); N.D. CENT. CODE § 12.1-31.2-01 (2019) (“[V]iolation of the order is a class A misdemeanor.”).

<sup>118</sup> See, e.g., OHIO REV. CODE ANN. § 3113.31(F)(2) (West 2019) (authorizing notice for relinquishment of firearms); *cf.* TEX. CODE CRIM. PROC. ANN. art. 7A.05(a)(2)(D) (West 2019) (authorizing gun restraint “unless offender is a peace officer . . . actively engaged in employment as a sworn full-time paid employee of a state agency or political subdivision”).

The most significant divergence between various SAPO statutes concerns evidentiary requirements and standards of proof. Exactly half of the existing SAPO statutes require proof of a prior sexual assault *and* a reasonable fear of a future sexual assault from the assailant, while the other half require only proof of a prior sexual assault.<sup>119</sup> At least two states expressly require that future harm is “imminent,”<sup>120</sup> and California requires proof both of a past “course of conduct” and proof that the same type of harm (i.e., another sexual assault) is likely to occur in the future.<sup>121</sup> It also bears emphasis that twenty-two states offer no civil protection for non-partner sexual violence, leaving victims in these states to prove “imminent irreparable injury” and a likelihood of success on the merits through the much slower civil preliminary injunction remedy.<sup>122</sup>

Regarding burdens of proof, more than seventy percent of states require proof by a preponderance of the evidence or a similar standard that a sexual assault has occurred.<sup>123</sup> California and Wyoming require such proof by clear and convincing evidence.<sup>124</sup> But states requiring an additional showing of future harm employ different burdens of proof for this prong, with some states requiring only a “reasonable belief” akin to asylum’s “well-founded fear” standard, and other states requiring proof by a preponderance.<sup>125</sup> A surprising number of statutes are silent on the appropriate burden of proof entirely,<sup>126</sup> an unfortunate omission leaving significant room for debate over whether protection proceedings are inherently “civil” or “quasi-criminal” in nature.<sup>127</sup>

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<sup>119</sup> See Appendix, Table 2.

<sup>120</sup> FLA. STAT. § 784.046 (2019) (governing protective orders and temporary restraining orders); MD. CODE ANN., CTS. & JUD. PROC. § 3-1503 (West 2019) (granting relief if petitioner alleges “[a]n act that places the petitioner in fear of imminent serious bodily harm”).

<sup>121</sup> CAL. CIV. PROC. CODE § 527.6 (West 2019).

<sup>122</sup> See, e.g., CAL. CIV. PROC. CODE § 527.6 (West 2019); MASS. GEN. LAWS ANN. ch. 258E § 1 (West 2019); N.D. CENT. CODE, § 12.1-31.2-01 (2019).

<sup>123</sup> See *infra* Table 2.

<sup>124</sup> CAL. CIV. PROC. CODE § 527.6 (West 2019); WYO. STAT. ANN. § 7-3-508(b) (2019) (“If the court determines . . . that there exists a clear and present danger of further stalking, sexual assault or of serious physical adverse consequences to any person, the court may grant *ex parte* a temporary order of protection pending the hearing.”).

<sup>125</sup> See *infra* Table 2.

<sup>126</sup> *Id.*

<sup>127</sup> *Rynearson v. Ferguson*, 903 F.3d 920, 933 (9th Cir. 2018) (“The mere fact that protection order law refers to criminal statutes does not mean that protection order proceedings are quasi-criminal.”); *cf.* *Kelm v. Hyatt*, 44 F.3d 415, 423 (6th Cir. 1995) (“[A] civil protection order is quasi-criminal in nature.”); Tamara L. Kuennen, “*No-Drop*” *Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN’S L.J. 39, 44 (2007) (“The quasi-criminal nature of CPOs, as compared with traditional injunctions, may cause a judge to take a more interventionist, rather than deferential, approach.”).



These unresolved evidentiary issues in SAPO statutes constitute the most significant barriers to entry for sexual assault victims in need of immediate protection. The following section examines why onerous evidentiary burdens regarding “future harm” are unjustified in the context of SAPOs. In doing so, it highlights the growing debate over “victim-led” sexual assault adjudications on college campuses and explores how comparisons to domestic violence and other traditional protection order regimes do little to resolve the stalemate. This discussion prefaces Part III, which offers a novel comparison of sexual violence to persecution in asylum law and explores how the lesson of asylum law can provide a principled justification for a uniform set of burdens premised on a single act of abuse, a rebuttable presumption of future harm, and a preponderance of the evidence burden of proof.

## II. SEXUAL VIOLENCE AND “PROOF” OF FUTURE HARM

One of the most enduring and vexing problems of punishing sexual violence through the criminal justice system is the challenge of proving beyond a reasonable doubt that a nonconsensual sexual contact occurred. Absent forcible struggle or eyewitnesses, there often exists a lack of independently corroborating evidence.<sup>128</sup> Cases often become a credibility battle between the accused and the accuser, where denials that a sex act occurred—or more frequently, claims that the alleged victim consented—appear plausible enough to cast reasonable doubt over the prosecutor’s case.<sup>129</sup> This plausibility has created the “widespread perception that word-on-word cases . . . are not provable,” giving jurors pause to ever return a conviction absent a wealth of “CSI-style” forensic evidence.<sup>130</sup>

Prosecutors are mindful of this reality that, “with many sexual assault cases, the limited evidence [makes] proving the case beyond a reasonable doubt incredibly difficult.”<sup>131</sup> This has a downstream effect on how many rape cases come to trial, as

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<sup>128</sup> The “uniquely intimate nature of a sexual assault crime” also has a chilling effect on victim participation in the criminal justice system, where “the prosecution may seek to disclose information about the victim that he or she would not like publicized.” Erin Gardner Schenk & David L. Shakes, *Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn From the Military?*, 6 U. DENV. CRIM. L. REV. 1, 8–9 (2016).

<sup>129</sup> See, e.g., Tuerkheimer, *supra* note 9, at 35 (quoting officers who discount acquaintance rape allegations as mere expressions of regret over a consensual encounter: “I don’t have time to deal with . . . wake-up and regret. You did what you did. That’s that. It’s not a crime and don’t take up our time with it.” The regret trope is premised on a notion that consensual sex is often rued in retrospect; this lament is perceived as the impetus for fabricating rape allegations.”).

<sup>130</sup> *Id.* at 5.

<sup>131</sup> Dominic S. Angiollo, *Risky Sexual Behavior – The “Broken Windows” of Sexual Assault: A Proposal for Universities to Incorporate Targeted Intervention to Bridge the Gap Between Sexual Assault Prevention and Response*, 26 AM. U.J. GENDER SOC. POL’Y & L.

“prosecutors generally impose far more stringent standards on the decision to proceed with charges” than is required by law.<sup>132</sup> This self-imposed “convictability standard” prematurely screens out thousands of meritorious cases.<sup>133</sup>

Other, more sinister factors are at work as well. In her article *Incredible Women*, Professor Deborah Tuerkheimer offers a compelling argument about why “he said/she said” cases almost always discount the “she said” portion of the equation:

Rape allegations are, and always have been, deeply intertwined with questions of credibility. In the paradigmatic case of ‘he said/she said,’ accuser and accused offer two opposing versions of events: one party is telling the truth; the other is not. To pick between competing accounts, the decider must judge credibility.

Accusers – typically women – do not tend to fare well in these contests. Over time, skepticism of rape complaints has remained firmly lodged, migrating from formal legal rules to informal practices, toward much the same end – the dismissal of women’s reports of sexual violation. Although systemic disbelief is variegated, the staying power of what I call ‘credibility discounting’ is the dominant feature of our legal response to rape.<sup>134</sup>

This “credibility discount” follows women into court, be it in a criminal or civil context. But as one prosecutor explained, it may be abundantly clear that “the accused demonstrated troubling [or threatening] judgment preceding and during the sexual encounter” sufficient to warrant prospective protection from future threatening actions, even if the recipient of those actions cannot be adjudicated a “victim” under criminal law.<sup>135</sup> SAPOs as an alternative to traditional prosecution, with lower evidentiary burdens and prospective remedies, function well to address these problems where the criminal justice system fails.

But SAPOs and other protection order regimes present evidentiary problems of their own. As statutes offering *prospective* relief from *future* harm, one reasonably expects any such relief to be premised on a reasonable prediction of future harm based on past events. Moreover, SAPO statutes seek to grant relief to petitioners based on proof of a violent *criminal* act by the respondent, raising due process

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881, 888 (2018) (Even with rape reform laws expanding the definition of rape and eliminating force as an element, there often simply exists a lack of evidence to “prove that the accused actually committed a sexual assault, based on the legal definition and the available evidence.”).

<sup>132</sup> Tuerkheimer, *supra* note 9, at 37.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 3.

<sup>135</sup> Angiollo, *supra* note 131, at 888 (describing a case in which, “[b]ased on the accused’s aggressive actions with a new partner, it was no surprise that the encounter was rife with issues of consent”).

concerns for the accused even if the adjudication takes place in civil court.<sup>136</sup> These unique characteristics of SAPOs give rise to three distinct evidentiary issues, discussed further below, regarding future harm related to (1) establishing a pattern of past acts; (2) establishing fear of future harm; and (3) burden of proof.

1) Pattern of Past Acts: If courts are asked to predict future harm based on past acts, must petitioners show a pattern of past abuse to qualify for protection order relief? Sometimes called the “course of conduct” requirement, at least one “catch-all” statute requires petitioners to produce evidence of multiple, separate assaults to demonstrate a likelihood of future harm.<sup>137</sup>

2) Fear of Future Harm: Can petitioners demonstrate a fear of future assault solely through evidence of past assaults, or must they provide independent proof that they “reasonably fear future harm” from their attackers? Moreover, what type of future “harm” must petitioners show? Half of the nation’s SAPO statutes impose an independent “reasonable fear of future harm” requirement, with some even requiring proof of the same type of future harm.<sup>138</sup> Some courts have denied protection orders on these grounds for failure to satisfy this burden even when petitioners prove that past sexual assaults occurred.<sup>139</sup>

3) Burden of Proof: By what standard must petitioners prove a likelihood of future harm? Despite debates over burdens of proof in Title IX sexual assault cases,<sup>140</sup> all but two SAPO statutes require proof of past acts by a preponderance of the evidence.<sup>141</sup> But statutes vary considerably regarding the appropriate burden of proof for future harm.

This Part explores how various states and courts have addressed all three issues, highlighting how higher burdens of production and proof do harm both to the purpose and practical efficacy of SAPO statutes.

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<sup>136</sup> See *Crespo v. Crespo*, 972 A.2d 1169, 1175 (N.J. Super. Ct. App. Div. 2009) (considering constitutional due process challenge to New Jersey’s DVRO statute and its preponderance standard); *State v. Karas*, 32 P.3d 1016, 1020–21 (Wash. Ct. App. 2001) (rejecting due process challenge to Washington’s DVRO statute, which permitted temporary restraining orders to be granted *ex parte*).

<sup>137</sup> CAL. CIV. PROC. CODE § 527.6 (West 2019).

<sup>138</sup> See *infra* Table 2.

<sup>139</sup> See, e.g., *Morrell v. Chadick*, 965 So. 2d 1277, 1281 (Fla. Dist. Ct. App. 2007) (reversing grant of protection order despite proof of past sexual assault because there was no evidence the attack was likely to occur again in the future). Of course, sexual violence petitioners in one of the twenty-three states without SAPO legislation must not only prove future harm, but an “imminent risk of irreparable [future] injury” absent a civil injunction. See *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016).

<sup>140</sup> See 2017 Dear Colleague Letter, *supra* note 31 (criticizing Obama Administration’s recommendation of a preponderance of the evidence standard in Title IX sexual assault hearings and suggesting that a clear and convincing evidence standard can better serve the interests of due process).

<sup>141</sup> See *infra* Table 2.

*A. Pattern of Past Acts*

“The best predictor of future behavior is past behavior.”<sup>142</sup> Given the prospective nature of protection orders, courts understandably scrutinize the past behavior of respondents before determining whether to place restraints on their future conduct.<sup>143</sup> But can a single act of bad behavior accurately predict future bad behavior? Some states have answered “no” in the context of civil protection orders, and require petitioners to demonstrate a “course of conduct” through multiple acts of abusive behavior before obtaining an order, as discussed below.

Some behaviors require multiple independent actions by definition. Stalking, for example, often consists of “repeatedly following or harassing another person. . . .”<sup>144</sup> Not surprisingly, protection order statutes for stalking require proof of multiple independent acts. For example, Florida’s “protective injunctions” statute requires proof of “two incidents of . . . stalking,”<sup>145</sup> while North Carolina’s stalking statute requires proof that “[o]n more than one occasion” the respondent “follow[ed] or otherwise harass[ed]” petitioner.<sup>146</sup> Courts have also interpreted stalking protection order statutes to require a course of conduct, even in the absence of clear legislative directive.<sup>147</sup>

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<sup>142</sup> See *Coble v. Davis*, 682 F. App’x 261, 271 (5th Cir. 2017); M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, 91 MARQ. L. REV. 1119, n.284 (2008) (“The adage . . . appears to be supported by the research.”); JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 44–49 (1981) (“If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act.”).

<sup>143</sup> See *San Luis & Delta-Mendota Water Auth. v. U.S. Dept. of Interior*, 870 F. Supp. 2d 943, 964 (E.D. Ca. 2012) (granting injunction because, “[a]lthough no party can predict exactly” what people will do, “past conduct indicates a reasonable expectation that the conduct may be repeated”).

<sup>144</sup> *Stalking*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/stalking> [<https://perma.cc/4UAR-ESR4>] (last visited Oct. 25, 2019); DEL. DOMESTIC VIOLENCE COORDINATING COUNCIL, 20 YEAR REPORT 6 (2014) (“Stalking is a distinctive form of criminal activity composed of a series of actions that, if taken individually, might constitute legal behavior.”).

<sup>145</sup> FLA. STAT. § 784.046 (2019).

<sup>146</sup> N.C. GEN. STAT. § 50C-1 (2018); see also *Watts v. Hensley*, 4 P.3d 45, 46 (Okla. Civ. App. 1999) (requiring a victim of stalking to provide evidence “of a knowing and willful course or pattern of conduct”).

<sup>147</sup> See *Sullivan v. Willhoite*, 2018-Ohio-4234, at ¶ 16, \*8 (Ohio Ct. App. 2018) (affirming denial of civil stalking protection order because plaintiff failed to establish two or more incidents that would cause him to fear physical harm or mental distress); *Nwosu v. Underwood*, 2007-Ohio-1907, at ¶ 16 (Ohio Ct. App. 2007) (stating civil stalking protection orders “were not enacted for the purpose of alleviating uncomfortable situations, but to prevent the type of persistent and threatening harassment that leaves victims in constant fear

Other misconduct, though not inherently defined by a pattern of conduct, may by itself be legal or otherwise trivial enough that courts will require a continuing “course of conduct” before granting a protective order. “Catch-all” statutes like California’s Civil Harassment Restraining Order<sup>148</sup> broadly govern virtually any type of harassing or annoying behavior, including parking in a neighbor’s driveway,<sup>149</sup> playing basketball in one’s own backyard,<sup>150</sup> or arguing over a child’s school pickup time.<sup>151</sup> Given the comparatively minor harms associated with a single incident, courts considering these types of “harassment” require a “course of conduct” before granting an order.<sup>152</sup> This requirement serves both to ensure that the threshold of past misconduct is sufficiently high to constitute harassment and to accurately predict whether this type of sub-criminal harassment will continue in the future.<sup>153</sup>

Sexual assault is not stalking. It does not require a pattern of conduct to be completed. Nor is sexual assault trivial “uncomfortable” behavior.<sup>154</sup> It need not happen multiple times to cross any threshold for “harassment.” Indeed, by requiring a pattern of repeated sexual assaults to secure relief would suggest that courts cannot adequately judge a perpetrator’s sexually violent propensities without multiple past acts of violence from which to predict future behavior.

This reasoning fails for two reasons. First, it too narrowly defines “future harm.” Victims of rape need not be raped again by their assailants to experience harm from them; the attacker’s presence alone can prove devastating and traumatic.<sup>155</sup> Psychological research on the post-traumatic effects of sexual violence shows that, for many sexual assault victims, a mere encounter with the assailant can

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of physical danger” (citation omitted) (quoting *Kramer v. Kramer*, 2002-Ohio-4383, at ¶ 17 (Ohio Ct. App. 2002))).

<sup>148</sup> CAL. CIV. PROC. CODE § 527.6 (West 2019).

<sup>149</sup> *Byers v. Cathcart*, 57 Cal. Rptr. 2d 398, 402 (Cal. Ct. App. 1997) (denying injunction request because there was arguably “a legitimate purpose” for the conduct).

<sup>150</sup> *Schild v. Rubin*, 283 Cal. Rptr. 533, 537 (Cal. Ct. App. 1991) (considering whether “the noise from a ball and the verbal chatter by several people engaged in recreational basketball play in [a] residential backyard” could “constitute unlawful harassment . . .”).

<sup>151</sup> *Harris v. Stampolis*, 204 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2016) (granting injunction upon evidence showing a course of conduct indicative of a “credible threat of violence,” including “placing his hands close to [the principal,] raising his voice, pointing and gesturing, and walking back and forth toward her . . .”).

<sup>152</sup> See *Schild*, 283 Cal. Rptr. at 537; *Harris*, 204 Cal. Rptr. 3d at 10–11.

<sup>153</sup> Some state “catch-all” statutes do not require a course of conduct. See *Wetzel v. Schlenvogt*, 705 N.W.2d 836, 838 (N.D. 2005) (affirming grant of restraining order arising from customer’s actions of hitting employee because the “disorderly conduct restraining order does not require a pattern of behavior”); cf. *Ramsey v. Harman*, 661 S.E.2d 924, 927–28 (N.C. Ct. App. 2008) (vacating restraining order despite finding that a blogger had consistently and repeatedly sent petitioner aggressive messages).

<sup>154</sup> *Nwosu*, 2007-Ohio-1907 at ¶ 16.

<sup>155</sup> See *van der Kolk*, *supra* note 107, at 95–102.

be as devastating and frightening as the actual attack.<sup>156</sup> Indeed, victims “can re-experience the mental anguish of the assault whenever they re-encounter the perpetrator.”<sup>157</sup> This mental anguish is compounded with repeated encounters, such as at work or school.<sup>158</sup> This type of distress merits consideration, given that nearly three-quarters of all sexual assault victims must face ongoing contact with their assailants.<sup>159</sup>

Second, it discounts the dangerous propensities of sexual assault perpetrators. A momentary lapse in judgment leading to a spiteful blog post or aggressive driving is qualitatively different from the perpetration of a sexual assault.<sup>160</sup> Not only is this “most heinous crime” more serious by orders of magnitude, but a single act of sexual aggression has been recognized as a leading indicator of future violent behavior.<sup>161</sup> Danger and lethality assessments, created by the Centers for Disease Control and widely used to predict which victims of domestic abuse face a high risk of death from their abusers, recognize sexually aggressive behavior as a leading indicator of future violence.<sup>162</sup> While proof of six rapes would provide greater evidence of future violence, a single sexual assault more than suffices.<sup>163</sup>

Most states recognize the impropriety of requiring multiple past acts of sexual assault as a predicate for granting protective relief, even if multiple acts are required for other misconduct.<sup>164</sup> Alaska is a noteworthy example. Alaska enacted one of the

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<sup>156</sup> *Id.*

<sup>157</sup> Sarah Deer, *Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault*, 4 TRIBAL L.J. 3, 37 (2004).

<sup>158</sup> *Id.*

<sup>159</sup> Fields, *supra* note 7, at 433.

<sup>160</sup> While these types of actions can be considered harassment under certain circumstances, standing alone, they provide little evidence of a pattern of recidivist behavior.

<sup>161</sup> See generally Elizabeth D. Kolivas & Alan M. Gross, *Assessing Sexual Aggression: Addressing the Gap Between Rape Victimization and Perpetration Prevalence Rates*, 12 AGGRESSION AND VIOLENT BEHAVIOR 315 (2006), <http://www.genderbias.net/docs/resources/guideline/Assessing%20sexual%20aggression%20Addressing%20the%20gap%20between%20rape.pdf> [<https://perma.cc/NFS4-XAFX>] (highlighting the increased prevalence of violence among men who had a past history of sexual aggression).

<sup>162</sup> KATHLEEN C. BASILE ET AL., CTR. FOR DISEASE CONTROL, INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE VICTIMIZATION ASSESSMENT INSTRUMENTS FOR USE IN HEALTHCARE SETTINGS (2007), [https://www.cdc.gov/violenceprevention/pdf/ipv/ipvandsv\\_screening.pdf](https://www.cdc.gov/violenceprevention/pdf/ipv/ipvandsv_screening.pdf) [<https://perma.cc/L5CG-BYWH>]. Moreover, while only approximately 6% of men ever attempt or complete a rape, 63% of these men are repeat offenders. Fields, *supra* note 7, at 445.

<sup>163</sup> See, e.g., *Russell v. Wofford*, 816 S.E.2d 909 (N.C. Ct. App. 2018) (granting civil no contact order based on multiple separate incidents of sexually aggressive behavior, including defendant grabbing plaintiff’s breasts without her consent and repeatedly having his erectile dysfunction medication delivered to her home).

<sup>164</sup> See, e.g., MINN. STAT. § 609.748 (2019) (defining “harassment” as “a single incident of physical or sexual assault . . . or repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect”); *Hanson v. Burrige*, A16-2069, 2017 WL

earliest and most progressive SAPOs in 2006,<sup>165</sup> a credit to the state with by far the highest per capita rate of forcible rape in the country.<sup>166</sup> Alaska’s statute, which covers both “stalking and sexual assault,” only requires a showing by a “preponderance of the evidence that the respondent has committed . . . sexual assault against the petitioner, regardless of whether the respondent appears at the hearing.”<sup>167</sup> The plain language of the statute does not require any proof of reasonable fear of future harm, nor does it require proof of more than one act of sexual assault.<sup>168</sup> In addition, the statute specifically prevents a court from denying a petition “solely because of a lack of time between an act of sexual assault and the filing of the petition.”<sup>169</sup>

However, some “catch-all” statutes requiring a course of conduct for some behaviors have created confusion for petitioners seeking a streamlined protection remedy, and for courts trying to divine legislative intent.<sup>170</sup> Florida’s statute appears particularly confusing. While 2003 amendments to Florida’s “catch-all” statute suggest that one act of sexual violence will suffice where multiple acts of other types of violence or harassment are required in the same statute,<sup>171</sup> cases interpreting this statute in the sexual violence context repeatedly focus on the statute’s requirement

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3378284, at \*3, \*6 (Minn. Ct. App. Aug. 7, 2017) (affirming grant of restraining order based on single act where male dorm mate touched female dorm mate’s sexual organs while she slept).

<sup>165</sup> See S.B. 54, 2006 Alaska Sess. Laws Ch. 36 (“Amending protective order statutes for crimes involving stalking to include crimes involving sexual assault and sexual abuse . . .”) (currently codified at ALASKA STAT. ANN. § 18.65.850 (West 2019)).

<sup>166</sup> Statista Research Department, *Forcible rape rate per 100,000 inhabitants in the United States in 2017, by state*, STATISTA (last edited Aug. 9, 2019), <https://www.statista.com/statistics/232563/forcible-rape-rate-in-the-us-by-state/> [<https://perma.cc/56F5-XRMJ>] (showing that 116.7 Alaskans are raped for every 100,000 people in the state, a rate 65% percent higher than Michigan, the second highest state).

<sup>167</sup> ALASKA STAT. ANN. § 18.65.850(a)-(b) (West 2019).

<sup>168</sup> ALASKA STAT. ANN. § 18.65.850 (West 2019). While a regular petition for a protective order does not require a showing of future harm, the statute does require such a showing for “an emergency protective order” filed by a “peace officer, on behalf of and with the consent of the victim.” ALASKA STAT. ANN. § 18.65.855(b) (West 2019) (The court “shall issue an emergency protective order . . . [i]f the Court finds probable cause to believe that the petitioner is in immediate danger of . . . sexual assault based on an allegation of the recent commission of . . . sexual assault”). Emergency protective orders expire after 72 hours. *Id.*

<sup>169</sup> ALASKA STAT. ANN. § 18.65.850(e) (West 2019).

<sup>170</sup> See, e.g., *D.R.B. by K.G.B. v. G.T.B.*, No. 17 NO 0452, 2018 WL 3414261, 2018-Ohio-2787 (Ohio Ct. app., June 25, 2018) (acknowledging the difficulty in interpreting the evidentiary difference between the requirements for a “civil stalking protection order” and a “civil sexually oriented offense protection order,” both of which are governed by the same statute).

<sup>171</sup> FLA. STAT. § 784.046 (2019).

of two or more “overt acts.”<sup>172</sup> Coupled with the statute’s “imminent fear of future harm” requirement, Florida’s statute creates nearly insurmountable barriers for sexual violence victims.<sup>173</sup>

Contrasted with the progressive SAPO order of Alaska, one of the least populated states in the country, the most populated state in the country—California—has perhaps the most regressive statute.<sup>174</sup> California’s catch-all Civil Harassment Restraining Order was the first statute in the country to offer civil protection relief for anyone outside the marital relationship, including a non-partner victim of sexual violence.<sup>175</sup> But the same onerous evidentiary burdens governing stalking and neighbor disputes in 1979 continue to govern sexual assaults in 2019; California requires proof of a past “course of conduct” comprised of at least two separate incidents giving rise to a separate reasonable fear of future harm, both of which must be proven by clear and convincing evidence.<sup>176</sup>

### *B. Fear of Future Harm*

“The purpose of [a] civil protection order is not to address past abuse,” but “to protect the petitioner from future harm.”<sup>177</sup> In fact, protection order remedies do not

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<sup>172</sup> See, e.g., *Cannon v. Thomas*, 133 So. 3d 634, 638–39 (Fla. Dist. Ct. App. 2014) (denying restraining order because, “[a]lthough Appellant committed a vicious attack on Appellee’s daughter, Appellee . . . never described two distinct acts of violence”); *Corrie v. Keul*, 160 So. 3d 97, 98–99 (Fla. Dist. Ct. App. 2015) (reversing grant of injunction despite evidence that respondent had anger issues and threatened to take the complainant’s home and have him thrown in jail, screamed at him, and chased him and his dogs down the sidewalk, because no “overt act on [the neighbor]’s part indicated an ability to carry out” the attack).

<sup>173</sup> See, e.g., *Gagnard v. Sticht*, 886 So. 2d 321, 322 (Fla. Dist. Ct. App. 2004) (per curiam) (finding that although respondent threatened to kill petitioner and “F” him up,” no injunction could issue without “overt acts indicating ability to carry out the threats or justifying a belief that violence was imminent”); *Russell v. Doughty*, 28 So. 3d 169, 170 (Fla. Dist. Ct. App. 2010) (per curiam) (holding that yelling profanities and threatening petitioner, even after documented case of battery, was not sufficient for restraining order without evidence that respondent took an action creating a “well-founded fear that violence was imminent”).

<sup>174</sup> See *US States–Ranked by Population 2019*, WORLD POPULATION REVIEW <http://worldpopulationreview.com/states/> [<https://perma.cc/UQC9-GNPB>] (last visited Oct. 19, 2019) (listing California as the most populated state with nearly 40 million people, and Alaska as the forty-eighth most populated state, with 738,068 residents).

<sup>175</sup> CAL. CIV. PROC. CODE § 527.6 (West 2019).

<sup>176</sup> *Id.*

<sup>177</sup> *Wetterman v. B.C.*, 2013-Ohio-57, at ¶ 20–22 (Ohio Ct. App. 2013); see also *Rodriguez v. Sessions*, 876 F.3d 280, 285 (7th Cir. 2017) (“A protection order is any injunction issued for the purpose of preventing violent or threatening acts of domestic violence.”) (citation omitted); *Russell v. Douvan*, 5 Cal. Rptr. 3d at 401 (“[A] prohibitory injunction necessarily addresses future conduct.”).



provide any redress for past abuse in the traditional sense; “the primary purpose of the order is to protect the petitioner, not punish the respondent.”<sup>178</sup> Thus, even if a court finds that past abuse occurred, it must nonetheless consider whether a likelihood of future harm to the petitioner exists. In some contexts, such as domestic violence, courts presume a likelihood of future harm given the close nature of the relationship between petitioner and respondent.<sup>179</sup> In contrast, if an assailant is serving a life sentence in a maximum security federal prison, a court would likely find no need for a protection order.<sup>180</sup>

Where does sexual assault fall along this continuum of likely future harm? An automatic, irrebuttable presumption of future harm similar to domestic violence seems less justifiable, at least to the extent that sexual violence protection orders do not require the existence of a past or current romantic relationship. Yet there appears to be significant justification for a rebuttable presumption of future harm in the case of sexual assault. The vast majority of sexual assault victims are assaulted by close acquaintances, people with whom they live, work, socialize, or attend school.<sup>181</sup> Moreover, as discussed above, the type of devastating harm felt by sexual assault victims when forced to interact with their assailants provide compelling support for a presumption of future harm, even in the absence of a pattern of sexually aggressive behavior.<sup>182</sup>

Recognizing this reality, fourteen states do not require independent proof of future harm for a sexual assault protection order to issue; proof of past sexual violence suffices.<sup>183</sup> For example, Tennessee requires only proof of past “sexual assault by a preponderance of the evidence,”<sup>184</sup> and at least one Texas court rejected a challenge to its state SAPO statute by finding that a single conviction of past sexual violence was sufficient for a protective order in the absence of future harm.<sup>185</sup>

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<sup>178</sup> Ryneanson v. Ferguson, 903 F.3d 920, 926 (9th Cir. 2018).

<sup>179</sup> See Fields, *supra* note 7, at 466; see also Merle H. Weiner, *Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER SOC. POL’Y & L. 749, 769–72 (2002) (discussing propriety of presumption of awarding child custody to battered spouse given likelihood of future harm at the hands of the batterer).

<sup>180</sup> Fields, *supra* note 7, at 469 (“Or to the put the point more directly, a victim need not seek prospective relief protecting her from her attacker if the attacker is dead.”).

<sup>181</sup> *Id.*

<sup>182</sup> See van der Kolk, *supra* note 107, at 104; see also *supra* notes 155–159 and accompanying discussion.

<sup>183</sup> See *infra* Table 2; see also, e.g., Emery v. Bryand, No. A13-1146, 2013 WL 6839922, at \*3 (Minn. Ct. App. Dec. 30, 2013) (affirming grant of protection order based on single act of sexual assault because the plain language of Minnesota’s statute “does not require a finding or—an allegation—of ‘an immediate and present danger of harassment’”) (citation omitted).

<sup>184</sup> TENN. CODE ANN. § 36-3-605 (West 2019).

<sup>185</sup> L.S. v. Shawn, No. 13-17-00224-CV, 2018 WL 4100857, at \*4 (Tex. App. Aug. 29, 2018) (previous guilty plea to felony indecency with a child was sufficient to sustain protective order).

Likewise, in rejecting a claim that a protection order must be predicated on proof of future harm, the U.S. Court of Appeals for the D.C. Circuit explained an “important factor in issuing a CPO is whether it ‘provides a measure of peace of mind for those whose benefit it was issued.’”<sup>186</sup> Because “[t]he purpose of . . . a civil protection order . . . is to protect the moving party, rather than punish the offender,” recognition of an adjudicated sexual violence victim’s safety needs is sufficient.<sup>187</sup>

But such a rebuttable presumption does not exist in half of the twenty-eight jurisdictions providing civil protective relief for sexual violence victims, nor in *any* of the twenty-three jurisdictions authorizing civil law injunctions.<sup>188</sup> Thus, a majority of states require the petitioner to prove not only that she suffered a past act of sexual abuse, but that she also independently fears future harm from the respondent.<sup>189</sup> Some states even require proof of a reasonable likelihood that the same type of harm already inflicted will occur again in the future, absent a protective order.<sup>190</sup> In other words, these states require a sexual violence victim to somehow prove that she likely faces another sexual assault specifically again by her same attacker.

Florida’s statute requiring proof that a future attack of sexual violence is “imminent” seems particularly harmful and ill-suited to the realities of sexual assault.<sup>191</sup> Florida courts have regularly held that proof of multiple non-sexually aggressive acts—including numerous murder threats<sup>192</sup> and multiple batteries

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<sup>186</sup> *Salvattera v. Ramirez*, 111 A.3d 1032, 1038 (D.C. Cir. 2015) (quoting *Maldonado v. Maldonado*, 631 A.2d 40, 43 (D.C. 1993)).

<sup>187</sup> *Ba v. United States*, 809 A.2d 1178, 1183 (D.C. Cir. 2002) (citing *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. Cir. 1991)); *cf.* VT. STAT. ANN. tit. 15, § 1103 (2019) (providing a court order available to an adjudicated plaintiff “if the court finds that the defendant has abused the plaintiff, and . . . [t]here is a danger of further abuse”).

<sup>188</sup> *See infra* Table 2.

<sup>189</sup> *See, e.g.*, 42 PA. CONS. STAT. § 62A06 (2019) (“[T]he plaintiff must . . . assert that [she] . . . is a victim of sexual violence or intimidation; and . . . prove by a preponderance of the evidence that the plaintiff . . . is at a continued risk of harm from the defendant.”); MD. CODE ANN., CTS. & JUD. PROC. § 3-1505 (2019) (authorizing grant of a “peace order” if the judge finds “by a preponderance of the evidence that the respondent has committed, and is likely to commit in the future, an act [of sexual violence]”).

<sup>190</sup> *See, e.g.*, CONN. GEN. STAT. § 46b-16a(b) (2019) (granting a protection order for sexual assault “[i]f the court finds that there are reasonable grounds to believe that the respondent has committed acts constituting grounds for issuance . . . and will continue to commit such acts”); *Kayla M. v. Greene*, 126 A.3d 1, 3 (Conn. App. Ct. 2016) (finding that Connecticut’s civil protection order statute requiring proof that the same type of harassment encountered in the past is likely to occur in the future).

<sup>191</sup> FLA. STAT. § 784.046 (2019).

<sup>192</sup> *Tash v. Rogers*, 246 So. 3d 1304, 1305 (Fla. Dist. Ct. App. 2018) (mem.) (denying injunction despite multiple threats that respondent would “kill [petitioner] and his family” because such threats “did not constitute an assault or enumerated act of violence”); *Perez v. Siegel*, 857 So. 2d 353, 354, 355 (Fla. Dist. Ct. App. 2003) (finding trial court erred in

coupled with threats of violence<sup>193</sup>—are insufficient for a protective order absent independent evidence of an “overt act” making a future attack “imminent.”<sup>194</sup> Disturbingly, that same standard has typically been applied in cases of sexual violence.<sup>195</sup>

For example, in *Morrell v. Chadick*,<sup>196</sup> a Florida court found that an employer had intimidated an employee into having sex with her by repeatedly demanding sexual favors at work, screaming that “it was unacceptable” that she refused sex when she tried to deny him, and continued harassing her after she quit her job, in part by calling her new employer so frequently to demand sex that the new employer terminated her.<sup>197</sup> Viewing this pattern of behavior through a shockingly regressive lens, the court found that no past sexual assault had occurred, noting that the respondent “was never physically violent towards Ms. Chadick,” and that “none of the [phone] messages contained violent language or threats of violence.”<sup>198</sup> Her testimony “belied her claim . . . that she was in imminent danger of becoming a victim of an act of sexual violence.”<sup>199</sup>

The court went further, observing that:

[W]hile evidence of past alleged nonconsensual sexual encounters not involving criminal charges might under certain facts constitute grounds for an injunction for protection against sexual violence . . . it is not clear whether in this case such findings, standing alone, would have been legally sufficient to support an injunction against sexual violence without a showing that a threat of sexual violence was imminent.<sup>200</sup>

While catch-all statutes like Florida’s impose unnecessary future harm requirements better suited for less serious harassment, at least two “SAPO-only” state statutes also impose such a requirement.<sup>201</sup> Washington’s SAPO statute contains ambiguous language on the future harm requirement,<sup>202</sup> an ambiguity the

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granting injunction where tenant screamed at and threatened to kill their condominium owners because the activity “does not qualify as an assault”).

<sup>193</sup> *Cannon v. Thomas*, 133 So. 3d 634, 638 (Fla. Dist. Ct. App. 2014) (providing a ruling against the petitioner although a parent’s daughter was viciously assaulted by an assailant, because the parent did not allege two acts of violence).

<sup>194</sup> *Id.*

<sup>195</sup> *See Morrell v. Chadick*, 965 So. 2d 1277, 1281 (Fla. Dist. Ct. App. 2007).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1278–79.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1280.

<sup>200</sup> *Id.* at 1281.

<sup>201</sup> *See WASH. REV. CODE* § 7.90.020 (2019); 23 PA. CONST. STAT. § 6102(a) (2019).

<sup>202</sup> Section 7.90.090, titled “Burden of proof – Issuance of protection order – Remedies – Violations,” appears on its face to only require proof “by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct,” at which point “the

Supreme Court of Washington confronted in a case highlighting the impropriety of an independent future harm requirement for sexual violence victims.<sup>203</sup>

In May 2014, University of Washington student Megan Roake met Maxwell Delman at a college party.<sup>204</sup> After the party, both students returned to Roake's dorm, where Delman allegedly sexually assaulted her.<sup>205</sup> Roake reported the incident to the Seattle Police Department and the university.<sup>206</sup> She told friends.<sup>207</sup> And in January 2015, she filed for and received a temporary SAPO in civil court.<sup>208</sup> At the permanent protection order hearing, the trial court concluded that a sexual assault had, in fact, occurred but nonetheless denied the petition because Roake had failed to provide *independent* evidence demonstrating her fear of future harm from the man who sexually assaulted her.<sup>209</sup> The Court of Appeals reversed, noting the inconsistency in the statute "by focusing on the language of the final order statute . . . which . . . read in isolation . . . does not reference 'a reasonable fear of future dangerous acts.'"<sup>210</sup>

The Supreme Court of Washington reversed and dismissed the protection order, holding that a petitioner who has proven by a preponderance of the evidence that she was, in fact, sexually assaulted, cannot obtain an order requiring her attacker to stay away unless some independent proof exists that he is likely to sexually assault her again.<sup>211</sup> The concurring opinion observed that the legislatures specifically intended for the SAPO statute to "protect against future harms, not remedy past ones," and further noted that "the statutory requirement of future harm [was] unique among [Washington's] protection order statutes."<sup>212</sup> Because Ms. Roake "alleged no acts or statements separate from the sexual assault itself" and could not predict "what Delman might do in the future," she simply was not entitled to protective relief.<sup>213</sup>

In dissent, Justice Debra Stephens offered a compelling rebuttal to this "future harm" requirement, explaining that such a requirement "ignores the reality that experiencing a sexual assault is itself a reasonable basis for ongoing fear. . . . [T]he

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court shall issue a sexual assault protection order." WASH. REV. CODE § 7.90.020 (2019). However, Section 7.90.020 requires petitioners to allege both "the existence of nonconsensual sexual contact" and "the specific facts and circumstances from which relief is sought." *Id.*

<sup>203</sup> Roake v. Delman, 408 P.3d 658, 659 (Wash. 2018).

<sup>204</sup> *Id.* at 659.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 660.

<sup>208</sup> *Id.* at 659–60.

<sup>209</sup> *Id.* at 660.

<sup>210</sup> *Id.* at 660–61.

<sup>211</sup> *Id.* at 662–63.

<sup>212</sup> *Id.* at 666–67 (McCloud, J. concurring). Judge McCloud also observed that "it is absurd to interpret the SAPO language to require allegation of an element of future harm that need not ever be proved." *Id.* at 668.

<sup>213</sup> *Id.* at 668.

statutory text does not require a petition to restate the obvious – that the petitioner is reasonably afraid of the attacker in light of the alleged sexual assault.”<sup>214</sup> She also offered a practical justification for not requiring proof of future harm: to keep the “SAPO petition process . . . straightforward and accessible to survivors, many of whom seek judicial relief without legal assistance.”<sup>215</sup> Offering evidence regarding a single particular encounter is far more “straightforward” for the *pro per* litigant than offering evidence to predict a likelihood of future contact, abuse, and assault from an assailant.<sup>216</sup>

### C. *Burdens of Proof*

The debate over the appropriate burden of proof in civil sexual assault adjudications has grown more visible, vocal, and political.<sup>217</sup> As disturbing statistics about sexual assault on college campuses garnered national media attention in 2009 and 2010, the Obama administration’s Department of Education issued guidance in 2011 to university presidents for appropriately responding to allegations of sexual assault.<sup>218</sup> Among other things, the 2011 “Dear Colleague Letter” recommended using a “preponderance of the evidence” standard of proof in administrative hearings.<sup>219</sup> In 2017, President Trump’s Department of Education rescinded this letter, replacing it with temporary guidelines providing significantly more protections for the accused.<sup>220</sup> One such protection for the accused was the recommendation that universities use a heightened “clear and convincing evidence” standard.<sup>221</sup>

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<sup>214</sup> *Roake*, 408 P.3d at 669–71 (Stephens, J., dissenting) (“Indeed, this approach invites absurd results: if the assault itself cannot form the basis of a required showing, any petition based on a single assault by an unknown assailant would be legally insufficient, though this is exactly the type of assault the SAPO Act is meant to address.”).

<sup>215</sup> *Id.* at 669–70 (Stephens, J., dissenting) (“streamlined requirements [is] in keeping with the Legislature’s intent to make the SAPO process accessible.”).

<sup>216</sup> *Id.*

<sup>217</sup> John Villasenor & Nancy Cantalupo, *Is a Higher Standard Needed for Campus Sexual Assault Cases?*, N.Y. TIMES (Jan. 4, 2017), <https://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases> [<https://perma.cc/E73K-4QSU>] (consisting of a debate between Professor Nancy Chi Cantalupo of Barry University School of Law and Professor John Villasenor of the University of California, Los Angeles department of public policy regarding the efficacy and fairness of a preponderance versus a clear and convincing standard); see also *supra* note 25 and accompanying text.

<sup>218</sup> See DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, U.S. DEP’T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/UT67-X35C>].

<sup>219</sup> *Id.* at 10–11.

<sup>220</sup> 2017 Dear Colleague Letter, *supra* note 31.

<sup>221</sup> See *id.* at 1 (criticizing 2011 Dear Colleague Letter’s requirement that schools “adopt a minimal standard of proof—the preponderance of the evidence standard— . . . even though many schools had traditionally employed a higher clear and convincing evidence standard”);

The debate rages in the Title IX context but has largely been settled in civil court. Twenty-six of twenty-eight SAPO jurisdictions require proof of past violence or harassment by a preponderance of the evidence or similar burden.<sup>222</sup> This burden is “tailored to address the unique needs of sexual assault victims . . . reflect[ing] the relative lack of extrinsic evidence in most cases and the need to provide an attainable form of relief for victims in need.”<sup>223</sup> As one court explained in the context of domestic violence, “a clear-and-convincing standard would saddle victims . . . with a burden that would often foreclose relief in many deserving cases.”<sup>224</sup> Moreover, even a lower preponderance standard requires some probable showing that sexual assault occurred, a fact often obscured in the debate over “he said/she said” adjudications.<sup>225</sup>

But even if a preponderance standard governs proof of past sexual assault, should it govern the independent proof of future harm? Of the thirteen states requiring independent proof of future harm, six require proof by a preponderance, two require proof of “substantial fear” or “imminent fear” by a preponderance, two require proof by clear and convincing evidence, two require a “reasonable belief” of

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*see also id.* at 1–2 (“The 2011 . . . guidance document[] may have been well-intentioned, but those documents have led to the deprivation of rights for many students . . .”). The National Center for Higher Education Risk Management (NCHERM) recommended to schools in 2001 that they use the preponderance of the evidence standard in sexual misconduct hearings. BRETT A. SOKOLOW, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, COMPREHENSIVE SEXUAL MISCONDUCT JUDICIAL PROCEDURES 1, 20 (2001), [https://www.ncherm.org/pdfs/COMPREHENSIVE\\_CAMPUS\\_SEXUAL\\_MISCONDUCT\\_JUDICIAL\\_PROCEDURES.pdf](https://www.ncherm.org/pdfs/COMPREHENSIVE_CAMPUS_SEXUAL_MISCONDUCT_JUDICIAL_PROCEDURES.pdf) [<https://perma.cc/N9BX-RY3R>]. The NCHERM criticized the “clear and convincing evidence” standard for acting as a structural impediment for alleged victims. A structural impediment exists when “some aspect(s) of a college’s sexual assault policies . . . non-user friendly.” *Id.* at 5. This rationale begs the question: who is the user? Presumably both petitioner and respondent are school students, and the respondent accused of sexual misconduct likely would find a higher burden of proof very “user-friendly.”

<sup>222</sup> *See infra* Table 2. Some state statutes are silent on the burden of proof, but courts interpreting those statutes have required a preponderance standard. *See, e.g.,* Weismuller v. Polston, 2012-Ohio-1476, 6–7 (Ohio Ct. App. 2012) (“[I]f the legislature had wanted to require clear and convincing evidence, it would have specified that standard . . . .”); Marquette v. Marquette, 1984 OK 25, 686 P.2d 991, 993–94 (Okla. Civ. App. 1984) (finding that actions under Oklahoma’s civil protection order statutes are “civil, not criminal” and the proper standard is “preponderance of the evidence”).

<sup>223</sup> Fields, *supra* note 7, at 489 (contending that a higher burden of proof might be justified for orders infringing on fundamental constitutional rights, such as orders requiring the relinquishment of firearms).

<sup>224</sup> Crespo v. Crespo, 972 A.2d 1169, 1177 (rejecting “a burden of persuasion that more effectively eliminates the chance of a mistaken adjudication at the steep price of permitting countless more meritorious claims to be lost”).

<sup>225</sup> *See* Adorno v. Melvin, 876 F.3d 917, 920 (7th Cir. 2017) (“[P]reponderance of the evidence, if you look at this like a scale, all you have to do is tilt it. So the definition of preponderance of the evidence is, it’s more likely than not that the event occurred.”).

future harm, and Florida requires a genuine fear of imminent harm.<sup>226</sup> Thus, only three states tie the fear of future harm to the actual beliefs of the victim; ten states requiring objective proof that it is at least more likely than not a victim will suffer a future act of abuse.<sup>227</sup>

### III. ASYLUM LAW AND “PROOF” OF FUTURE HARM

As the foregoing Section illustrates, the ability of sexual violence victims to “prove” future harm depends on several factors: the past conduct of the assailant, the likelihood of future contact with the assailant; and the definition of “harm,” and the burden of proof employed.<sup>228</sup> Of course, no one can definitively “prove” that a particular individual will harm another individual in the future. At best, the law can make predictions of future contact based on past behavior, including past misconduct, past interactions, and evidence demonstrating a future likelihood of one or both. SAPO statutes have struck an uneven and often unjustified balance between providing attainable relief for sexual violence victims and requiring some objective predictive measure of future harm.

The few scholars addressing SAPO legislation have analogized sexual violence to domestic violence as a way to justify flexible protection procedures, noting the similarity between domestic and sexual violence as private, intimate acts of (mostly) “gender-based violence.”<sup>229</sup> But this analogy fails in the context of future harm. Courts and legislatures considering DVRO applications presume future harm to the petitioner upon a showing of past harm precisely because of the relationship status of the parties making DVRO relief available. The parties are, or at some point were partners with significant close contact, and this definitional partnership created at least a rebuttable presumption of future contact and harm. No such relationship necessarily exists in sexual violence cases, so a simple analogy to another form of gender-based violence alone cannot justify similar presumptions in the SAPO context.

But another protection order regime can more easily justify a rebuttable presumption of future harm for sexual violence victims: asylum law. This analogy seems strange at first blush. Asylum is neither a “protection order” in the traditional sense nor designed to restrain the actions of the perpetrator. Asylum protections also are not predicated on sexual or gender-based violence. But as this Section illustrates, asylum does contain the paradigmatic hallmarks of a protection order regime. More importantly, asylum protections are predicated on proof of a very restrictive form of

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<sup>226</sup> See *infra* Table 2.

<sup>227</sup> *Id.*

<sup>228</sup> As to “harm,” the distinction for SAPO legislation appears to be whether one must prove a likelihood of the same type of harm in the future (i.e., another sexual assault) or a likelihood of a more generalized harm.

<sup>229</sup> See Jodoin, *supra* note 17, at 115–16.

“atrocious discrimination” or “persecution” that both parallels with the narrowly defined heinous crime of sexual violence and justifies rebuttable presumptions of future harm.<sup>230</sup>

#### A. *The Asylum Protection Order Paradigm*

It is important to consider how asylum law can legitimately be viewed as a form of protection order, given the novelty of the claim and the lack of a respondent to be formally restrained.<sup>231</sup> Asylum laws function to grant refuge to victims of abuse from their assailants by allowing them to live in a new country free from contact with the persecuting home country.<sup>232</sup> While the procedures are flipped – immigration courts grant protective space to victims who have already fled their abusers, while civil courts grant protection orders requiring abusers to stay away from their victims – the purpose remains the same: to grant the space necessary for future healing.

Indeed, asylum law functions to (1) address a widespread humanitarian crisis; (2) protecting a discrete and vulnerable population; (3) suffering profound mental, physical, and emotional anguish; (4) that is likely to continue absent intervention; and (5) that which existing legal structures have failed to prevent; by (6) affording the victim agency to direct the course of protection.<sup>233</sup>

Refugee protections first arose in response to a widespread humanitarian crisis facing Europe in the aftermath of World War II.<sup>234</sup> Millions of people had been displaced to foreign countries as a result of specific discrimination or generalized

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<sup>230</sup> See *Saleem v. Mukasey*, 289 F. App'x 452, 454 (2d Cir. 2008).

<sup>231</sup> The persecuting foreign government cannot be hailed into United States immigration court to answer for its persecution, but it can be implicitly “restrained” from future contact with the asylum seeker, should it attempt to continue its persecution in the United States.

<sup>232</sup> Arlene Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 TEMP. L. REV. 1117, 1143 (2000) (explaining that the asylum paradigm was not created “to address past persecution of social groups, but rather to prevent future persecution”); Hannah Pearce, *An Examination of the International Understanding of Political Rape and the Significance of Labeling It Torture*, 14 INT'L. J. REFUGEE L. 534, 552 (2002) (“[A]sylum is clearly not a reward for past persecution but a mechanism to prevent future persecution . . .”).

<sup>233</sup> See *Union of Refugee Women and Others v. Director: Private Security Industry Regulatory Authority and Others*, 2006 (4) SA 395 (CC) at 59 para. 117 (S. Afr.) (“[R]efugees as a group are by definition vulnerable.”); *Hawaii v. Trump*, 871 F.3d 646, 662 (9th Cir. 2017) (recognizing refugees as a “marginalized and vulnerable” population). As to the lack of adequate remedies, refugees by definition have no adequate remedy in their country of origin because the persecution to which they are subjected is perpetrated or allowed by the government, the very entity responsible for providing legal remedies.

<sup>234</sup> Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 635 (2017) (“The drafters of the Refugee Convention, working under the specter of mass influx, treated the issue as a scary basement to which the door must remain firmly shut. In the wake of World War II, more than 850,000 displaced persons were living in camps for displaced persons in Austria, Germany, and Italy.”).



violence, and by 1951 it became clear that many of these people were unlikely ever to go home.<sup>235</sup> Contemporaneous accounts of these displaced persons suggest that the horrors of war and the atrocities of persecution had so permanently scarred these individuals that they simply could not ever feel safe in their home country again, regardless of the changing circumstances in their home country.<sup>236</sup>

In response, dozens of countries gathered in 1951 to address the crisis.<sup>237</sup> What resulted from the conference was the creation of an asylum protection regime, both “aspirational” in purpose and limited in scope.<sup>238</sup> While “reluctan[t] to commit themselves to large future obligations,”<sup>239</sup> the countries agreed to protect a discrete class of displaced persons particularly vulnerable to mistreatment because of their difference from the dominant community on account of their “race, religion, nationality, membership of a particular social group, or political opinion.”<sup>240</sup> Scholars debate whether the limited definition of refugee is merely a necessary limit-setting device on an admittedly “expansive goal”<sup>241</sup> or a betrayal of the “core purpose of the refugee definition – protection against the persecution of difference, group guilt, and the suppression of belief and expression.”<sup>242</sup> But regardless of the particularized *values* sought to be protected by the asylum protection paradigm,

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<sup>235</sup> T. ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 789 (8th ed. West 2016).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Megan Heesch, *Navigating the Doctrinal Tension in U.S. Asylum Law*, 25 MINN. J. INT’L L. 421, 457–58 (2016); *see also* Ramji-Nogales, *supra* note 234, at 636–37 (articulating a historical narrative of the Refugee Convention drafting process that cynically “stamped out any suggestion that the Refugee Convention might offer means of entry into a state”).

<sup>239</sup> ALENIKOFF ET AL., *supra* note 235, at 789. In some ways, this approach worked. The narrow definition of refugee, discussed below, excludes many of the estimated 58 million people currently seeking asylum outside their home countries or living in “refugee-like” situations as internally displaced persons in their home country. *See id.* at 790 (“Some of the largest concentrations of refugee populations (as they are popularly understood) . . . consist primarily of people who fled civil war and ethnic strife,” not targeted persecution.); *see also* Ramji-Nogales, *supra* note 234, at 637 (Emphasizing the limited individualized purpose of the Refugee Convention: “the drafters firmly closed the door to protection-based approaches to processing large groups of migrants and to enabling them safe passage for migrants fleeing harm.”).

<sup>240</sup> UN 1951 Convention, *supra* note 27; Protocol Relating to the Status of Refugees Art. 1(A)(2), Jan. 31, 1967, 19 U.S.T. 6233, 606 U.N.T.S. 267; *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (implementing the UN 1951 Convention).

<sup>241</sup> Heesch, *supra* note 238, at 457.

<sup>242</sup> Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 781, 787–88, 804 (1998) (articulating various proposed purposes of the refugee definition, including “[r]emediation of the failure of state protection . . . protection against serious harm inflicted on account of personal status . . . protection against the infliction of collective punishment . . . [and] the privileging of individual belief and expression”).

indisputably the overriding purpose of the law is the prospective protection of the *person*.

This limitation on who may qualify for protection evokes similarities to the limited purpose of SAPO legislation. Asylum laws protect only those in a discrete and particularly vulnerable class, not all people who suffer from generalized violence or insecurity. While “[n]arratives of flight from persecution or war evoke sympathetic images of refugees,” protection is usually reserved “for those who meet a specific legal definition.”<sup>243</sup> Similarly, SAPO statutes are not available to anyone who has suffered generalized harassment or even some forms of sexual harassment, but a specifically-defined form of sexual violence typically set forth in a state’s criminal code.<sup>244</sup>

The refugee definition also limits the types of *harm* qualifying one for protection to the type of profound and all-encompassing injury paradigmatic of protection orders. Not all mistreatment qualifies one for asylum protection. The 1951 United Nations Convention Relating to the Status of Refugees, and Sections 207 of the Immigration and Nationality Act provide asylum protection only to those who have a well-founded fear of “persecution.”<sup>245</sup> Neither U.S. nor international law defines persecution,<sup>246</sup> but courts have emphasized that “mere discrimination or

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<sup>243</sup> ALEINIKOFF ET AL., *supra* note 235, at 789. The United States, as with many countries around the world, only grants refugee status to those who arrive at its border or who are already inside the country and can demonstrate they meet the narrow definition adopted by Article 1(A)(2) of the UN 1951 Convention Relating to the Status of Refugees:

[T]he term “refugee” shall apply to any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.

See UN 1951 Convention, *supra* note 27; Refugee Act of 1980 § 102.

<sup>244</sup> See *supra* Section II.

<sup>245</sup> See UN 1951 Convention, *supra* note 27; Immigration and Nationality Act, 8 U.S.C. § 1157(a) (2012); *Molina v. Whitaker*, 910 F.3d 1056, 1060 (8th Cir. 2018) (affirming denial of asylum application because the applicant alleged “no well-founded fear of future persecution . . .”); *Shao v. Mukasey*, 546 F.3d 138, 148–49 (2d Cir. 2008) (upholding BIA’s denial of asylum application where applicant presented no well-founded fear of future persecution, but only adverse treatment arising from enforcement in home country “because the record did not contain persuasive evidence . . . amounting to persecution” (quoting *In re J-H-S-*, 24 I. & N. Dec. 196 (BIA 2007))).

<sup>246</sup> *Melaj v. Mukasey*, 282 F. App’x 354, 358 (6th Cir. 2008) (“The Immigration and Nationalization Act (“INA”) provides no definition of ‘persecution,’ and thus far this Court has declined to articulate one.” (citing *Mikhailevitch v. I.N.S.*, 146 F.3d 384, 389 (6th Cir. 1998))); JAMES HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 7 (1st ed. 1991) (describing the 1951 Convention’s lack of a clear definition for “persecution” and

harassment” does not qualify.<sup>247</sup> The Ninth Circuit explained in *Ghaly v. INS*<sup>248</sup> that “‘persecution’ is . . . ‘the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive,’” but that “persecution is an extreme concept that does not include every sort of treatment our society regards as offensive.”<sup>249</sup>

The core definition of “persecution” includes extreme physical violence, including physical torture and illegitimate imprisonment.<sup>250</sup> But the outer bands of the definition are narrow. Even extreme non-physical discrimination does not amount to persecution unless it “threatens the person’s very life or liberty.”<sup>251</sup> In defining the outer limits of “persecution,” the Fourth Circuit held in *Mirisawo v. Holder* that a claim of economic deprivation could amount to “persecution” only if the claimed abuses amounted to “a deliberate and severe deprivation of necessities.”<sup>252</sup> Applying this definition, the court denied a Zimbabwe national’s claims of political persecution when members of President Robert Mugabe’s government bulldozed three of the four rooms in a new home she had purchased for her brother and family, because the home was not completely destroyed and because Ms. Mirisawo had never lived or planned to personally live in the home.<sup>253</sup>

*Mirisawo* highlights the limited scope of the asylum protection paradigm. Although the destruction of Ms. Mirisawo’s home was almost surely a human rights violation,<sup>254</sup> asylum law is not designed to afford relocation to all who have suffered

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contending that the omission was deliberate to allow Western states broad latitude in defining categories of ideological dissidents over whom to grant protection).

<sup>247</sup> *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992) (contrasting discrimination or harassment with threat of death); see also *Lamaj v. Mukasey*, 275 F. App’x 522, 527 (6th Cir. 2008) (“The INA provides no definition of ‘persecution.’ This court, however, has determined that ‘persecution’ . . . requires more than a few isolated incidents of verbal harassment or intimidation . . .”).

<sup>248</sup> 58 F.3d 1425, 1431 (9th Cir. 1995) (quoting *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995); *Fisher v. INS*, 37 F.3d 1371, 1380 (9th Cir. 1994)).

<sup>249</sup> *Id.* at 1431 (internal quotation marks omitted); see also Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 337 (2013) (“When legislators debated whether to include a definition of persecution in the Refugee Act, they ultimately declined to do so under the premise that the Ninth Circuit’s description of persecution was well established.”).

<sup>250</sup> See *Lolong v. Gonzales*, 400 F.3d 1215, 1220 n. 3 (9th Cir. 2005) (It is not the case “that only killings or extreme violence constitute persecution” for the purposes of asylum applications. “Rather . . . discrimination and harassments, in combination with lower levels of violence, may also constitute persecution.”).

<sup>251</sup> *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010).

<sup>252</sup> *Id.* at 396 (emphasis added). The court emphasized that “not every economic deprivation or disadvantage makes a person a ‘refugee.’” *Id.*

<sup>253</sup> *Id.* at 402. In a stirring dissent, Judge Gregory posited a hypothetical whereby a political dissident spent \$1,000 to build a well that was immediately poisoned upon completion, and asked “would this Court hold that merely because the alien had yet to drink from the well, he was not persecuted?” *Id.* at 402 (Gregory, J., dissenting).

<sup>254</sup> *Id.*

such violations.<sup>255</sup> The development of asylum law in the United States points to an intent to protect a narrower class of persons whose life on return would be so constricted as to be virtually impossible in their home country.<sup>256</sup> This narrow qualifying definition of “persecution” is critical to the sexual violence analogy. Both persecution as narrowly defined and sexual violence as defined in criminal codes are “atrocious,” “heinous” forms of injury that create uniquely long-lasting future harms.<sup>257</sup> As discussed *infra*, it is precisely for this reason that immigration courts require neither proof of multiple past acts of persecution nor independent proof of a future likelihood of harm.

Asylum contains the other hallmarks of a protection order paradigm. It predicates relief on a “well-founded fear” of future harm absent intervention, even if a rebuttable presumption of future harm exists in certain cases.<sup>258</sup> Moreover, asylum fills the gap where existing legal structures fail. The persecution experienced by asylum seekers must have been perpetrated either by their home country’s government or by non-state actors “where it is shown that the government of the proposed country of [return] is unwilling or unable to control that group.”<sup>259</sup> Thus, any existing legal recourse in their home country would prove fruitless. And asylum provides agency to asylum seekers by allowing them to direct the course of their protection.<sup>260</sup>

Having established a framework for the SAPO/asylum law analogy, the balance of this Part turns to how asylum law assesses its “future harm” requirement and whether that assessment can inform sexual violence protection orders. The refugee definition is inherently prospective, offering relief only to those who can demonstrate a “well-founded fear” of future persecution. The same questions of proof exist in this context. How can one demonstrate a fear of future harm? Must a

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<sup>255</sup> *Id.*

<sup>256</sup> *See, e.g., id.; cf. Borca v. INS*, 77 F.3d 210, 217 (7th Cir. 1996) (reaffirming that, “[t]o establish a well-founded fear of economic persecution, [an asylum applicant] must show that she faces a probability of deliberate imposition of substantial economic disadvantage on account of her political opinion,” but overturning agency holding that required economic persecution to be “so severe as to deprive an applicant of all means of earning their living”); *cf. Koval v. Gonzales*, 418 F.3d 798, 805–06 (7th Cir. 2005) (finding economic persecution where the government of Ukraine prevented a Mormon from “continuing her education in the Ph.D. physics program, denied her permission to live in Kiev and reduced her to working in menial jobs that required no education, training or acuity”).

<sup>257</sup> *Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989); WASH. REV. CODE § 7.90.020 (2019).

<sup>258</sup> *See Jerez-Sanchez v. U.S. Att’y Gen.*, 286 F. App’x 796, 798 (3d Cir. 2008) (denying asylum application despite “subjective belief that guerillas were still active in Guatemala” because she failed to “prove a well-founded fear of future persecution” (citing *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 345 (3d Cir. 2008))).

<sup>259</sup> *McMullen v. INS*, 658 F.2d 1312, 1319 n.2 (9th Cir. 1981).

<sup>260</sup> *See Natalie Nanasi, Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, 78 OHIO ST. L.J. 733, 756 (2017).

pattern of past acts be demonstrated to predict future behavior? And by what standard must one “prove” future harm?

### B. *Single Acts of Abuse*

Unlike most SAPO statutes, asylum applicants need not prove that they have actually suffered past persecution to qualify for relief; demonstrating a “well-founded fear” of future persecution will suffice.<sup>261</sup> This approach accords with the logic of protection order regimes, which are inherently prospective and should provide relief when reasonable grounds exist to suggest a likelihood of future harm. In this sense, asylum law acts like a more rational prospective protection order statute than do most SAPO statutes. States would be well served to explicitly define “future harm” alone as a qualifying ground for a sexual violence protection order, which would align more closely with the stated goal of providing forward-looking protection for victims.

Of course, demonstrating a likelihood of future harm without any past record of abuse (even a single incident) will prove more difficult for both asylum and sexual violence victims, and no “rebuttable presumption” of future harm should exist in those situations because no likelihood of future harm can be presumed in the absence of any past harm.<sup>262</sup> No such presumption exists in asylum law, nor should one exist in SAPO statutes.

However, many asylum applicants petition on the basis of having already suffered a past act of persecution. These applicants enjoy a rebuttable presumption of future harm based on this past record of abuse, as discussed in more detail *infra*, in Section C. Importantly, these applicants need not demonstrate a “course of conduct” via multiple past acts of persecution to qualify for such a presumption or otherwise to qualify for asylum; rather, one incident suffices.

### C. *Rebuttable Presumption of Future Harm*

As noted above, no requirement exists that applicants for asylum protection prove they have already suffered past persecution.<sup>263</sup> However, many applicants have suffered such past harm. In the United States, these applicants are the

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<sup>261</sup> See ALEINIKOFF ET AL., *supra* note 235, at 821 (“[T]here is no requirement that applicants for protection under the asylum and withholding statutes have already suffered past persecution . . . .”); *Paramanathan v. U.S. Att’y Gen.*, 341 F. App’x 613, 616 (11th Cir. 2009) (“To establish asylum eligibility, an applicant must show with specific and credible evidence (1) past persecution . . . or (2) a well-founded fear [of] . . . future persecution” (quoting *Zheng v. U.S. Att’y Gen.*, 451 F.3d 1287, 1290 (11th Cir. 2006))).

<sup>262</sup> This statement recognizes that sufficiently specific threats may themselves constitute past abuse in certain circumstances.

<sup>263</sup> See *Xusheng Shi v. Bd. of Immigration Appeals*, 374 F.3d 64, 68 (2d Cir. 2004) (explaining that an applicant can demonstrate asylum status by showing either that he has suffered past persecution or has a well-founded fear of future persecution).

beneficiaries of an express rebuttable presumption that they have a well-founded fear of future persecution.<sup>264</sup> The regulations specify that applicants who establish that they were subject to persecution on one of the protected grounds in the past will be presumed to have a well-founded fear of persecution.<sup>265</sup> The government can rebut this presumption in two ways: (1) by showing that a fundamental change in circumstances has occurred that removes any well-founded fear of persecution; or (2) by showing that the asylum applicant could avoid future persecution by relocating to another part of the home country and that it would be reasonable to expect the applicant to do so.<sup>266</sup>

This rebuttable presumption standard was not the initial product of legislative action; the Board of Immigration Appeals (BIA) introduced the standard in 1989 in *Matter of Chen*.<sup>267</sup> In articulating the standard, the BIA observed that “a rebuttable presumption arises [when] an alien who has been persecuted in the past by his country’s government has reason to fear similar persecution in the future.”<sup>268</sup> In the text of the decision, the BIA hinted at its rationale behind the creation of this new standard:

It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.<sup>269</sup>

Congress adopted this “rebuttable presumption” standard seven years later in 1996, codifying a refugee-friendly doctrine in the otherwise draconian and unfortunately named Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>270</sup> Notably, no legislative history exists to explain why Congress incorporated the rebuttable presumption standard. It appears the holding and

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<sup>264</sup> *Ming Dai v. Sessions*, 884 F.3d 858, 867 (9th Cir. 2018) (“If a noncitizen establishes past persecution, a rebuttable presumption of a well-founded fear arises, and the burden shifts to the government to demonstrate that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear.” (citing *Tawadus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004))).

<sup>265</sup> 8 C.F.R. § 208.13(b)(1) (2018).

<sup>266</sup> 8 C.F.R. § 208.13(b)(1)(i)(A)-(B) (2018); *Tawadrus*, 364 F.3d at 1102–03 (9th Cir. 2004).

<sup>267</sup> *Chen*, 20 I. & N. Dec. 16.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 19.

<sup>270</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-649 (codified at 8 U.S.C. § 1324a (2012)).

rationale of *Matter of Chen* was adopted wholesale with virtually no legislative discussion.<sup>271</sup>

But the rationale articulated in *Matter of Chen* contains clues. In particular, there appears to be a reasonableness component with both objective and subjective elements. The BIA created this rebuttable presumption at least in part because it simply would not be reasonable to “expect[]” those who suffer “atrocious forms of persecution . . . to repatriate,” suggesting that at least some forms of egregious past persecution are sufficient for asylum status.<sup>272</sup> One can glean an objective reasonableness prong from the court’s observation that circumstances on the ground may not have sufficiently changed in fact to merit returning an asylum seeker to her home country. But importantly, the court suggests a rebuttable presumption ought to exist even if conditions in the home country have objectively changed, so long as the “mind of the refugee” has not changed, given her traumatic experience.<sup>273</sup>

Thus, the rebuttable presumption standard appears “principally designed to protect a victim of persecution from even the remote possibility of future persecution.”<sup>274</sup> Indeed, the BIA’s preoccupation with the asylum seeker’s subjective perception of future harm suggests a paramount “concern for the persecution victim’s state of mind and the desire that a victim of persecution not be forced to relive her persecution in the place where the persecution occurred.”<sup>275</sup> This concern with the subjective state of mind of “atrocious persecution” victims may also help explain the former Immigration and Naturalization Service’s decision to adopt implementing regulations allowing a “humanitarian grant of asylum” for victims of past persecution *even in the absence of fears of future persecution*: “[a]n applicant . . . may be granted asylum, in the exercise of the decision-maker’s discretion, if . . . the applicant has demonstrated compelling reasons for being unwilling . . . to return . . . arising out of the severity of the past persecution.”<sup>276</sup>

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<sup>271</sup> See Shelley M. Hall, *Quixotic Attempt? The Ninth Circuit, the BIA, and the Search for a Human Rights Framework to Asylum Law*, 73 WASH. L. REV. 105, 124–125 (1998) (remarking on the rebuttable presumption standard articulated in *Chen* and observing that “[t]he legislative history of [IIRIRA] provides little, if any, interpretive help . . .,” because “[t]he asylum deadlines and summary exclusion procedures in the bill received the most attention in floor debates and in commentaries because those are the most obviously onerous provisions” (citations omitted)).

<sup>272</sup> *Lal v. INS*, 255 F.3d 998, 1015 (9th Cir. 2001) (O’Scannlain, J., dissenting) (“It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate.” (quoting *Chen*, 20 I. & N. Dec. at 18–19)).

<sup>273</sup> *Id.* (“[C]hanged country conditions ‘may not always produce a complete change . . . in view of his past experiences, in the mind of the refugee.’” (quoting *Chen*, 20 I. & N. Dec. at 18–19)).

<sup>274</sup> Timothy P. McIlmail, *Toward a More Reasonably Rebutted Presumption: A Proposal to Amend the “Past Persecution” Asylum Regulation – 8 C.F.R. § 208.13(B)(1)*, 12 GEO. IMMIGR. L.J. 265, 271 (1998).

<sup>275</sup> *Id.*

<sup>276</sup> 8 C.F.R. § 208.13(b)(1)(iii)(A) (2019).

The rationale for a rebuttable presumption—that it is unreasonable to force a victim of “severe” and “atrocious” past abuse to return to the place of that abuse—applies with equal force to sexual violence. Rape and sexual assault are among the most intimate, violative, abusive, and degrading forms of physical abuse. Rape is treated as the most serious violent offense in our criminal code other than murder, making it the most serious offense for which a person could seek a protection order.<sup>277</sup> In the same way that asylum law will not force adjudicated victims of severe past persecution to face renewed trauma by returning to the location of the abuse, SAPO statutes should not force adjudicated victims of sexual violence to face renewed trauma by continued interactions with their assailants.

There is another, equally compelling way to interpret asylum law’s rebuttable presumption standard that aligns with the experience of sexual violence. Under the BIA’s rationale from *Matter of Chen*, it would be objectively unreasonable to expect, “in view of his past experience, . . . the mind of the [persecuted] refugee” to change sufficiently to deny the future harm he likely would suffer upon a forced return.<sup>278</sup> In other words, the enduring violence of severe persecution forever changes the mind and heart of the persecuted, and the law is willing to recognize this ongoing harm as an objectively reasonable basis upon which to grant prospective relief. Precisely the same argument can and should be made for sexual violence victims, who endure continued suffering long after the attack even when the likelihood of another attack seems remote.

Of course, the nature of rebuttable presumptions is that they can be rebutted. In asylum law, once past persecution has been established, the burden shifts to the government to show “by a preponderance of the evidence, either: (1) a change in the country’s conditions; or (2) that relocation within the country would avoid future persecution and that it was reasonable to expect the alien to do so.”<sup>279</sup> The corollary

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<sup>277</sup> See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529 n.13 (2005) (examining exonerations for various offenses and coding offenses based on state law punishments on “the following descending scale: murder, rape, other violent crimes, non-violent crimes”); Stuart Ford, *The Meaning of Gravity at the International Criminal Court: A Survey of Attitudes About the Seriousness of Mass Atrocities*, 24 U.C. DAVIS J. INT’L. L. & POL’Y 209, 235 (2018) (surveying participants to rate “the most grave” offenses based on a hypothetical scenario: 40% scored the scenario involving murder as the most grave, 22% said murder and rape were “equally grave,” 15% found rape to be “the most serious offense,” and “almost nobody (2%) thought that [non-rape] assault was the most serious crime”).

<sup>278</sup> *Chen*, 20 I. & N. Dec. at 19.

<sup>279</sup> See *id.* at 17–19; see also *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214 (9th Cir. 2004). The U.S. Court of Appeals for the Ninth Circuit in *Knezevic v. Ashcroft* recognized that internal relocation to a safer area within an applicant’s country can constitute a change in circumstances sufficient to overcome the presumption of future persecution. The court further stated, “the reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and



to sexual violence would require a showing by the respondent that either: (1) the assailant has changed sufficiently to warrant continued contact with his victim; or (2) that it would be reasonable to require the victim, rather than the assailant, to relocate.

As to (1), it would, of course, be incredibly difficult to demonstrate in the immediate aftermath of an attack that a perpetrator had “changed” sufficiently to negate a reasonable fear of future harm. But even if significant time had passed since the attack, and even if the assailant had rehabilitated, the mere presence of an attacker acts as a significant triggering event for sexual violence victims regardless of the motivations of the assailant.<sup>280</sup> As to (2), no law could credibly suggest a remedy requiring the victim to move away from the attacker as a form of protection, at least not one grounded in a sense of fairness and justice. Indeed, under this approach, the only types of “change[s] in . . . conditions” sufficient to rebut a presumption of future harm in the sexual violence context would appear to be the assailant’s incarceration or incapacitation.

And in fact, the presumption of future harm has proven nearly that difficult to rebut in the asylum context. For example, in *Kataria v. INS*,<sup>281</sup> the petitioner established past persecution in his native India based on his political affiliations with the All India Sikh Student Federation, a group “seeking the establishment of the independent Sikh state of Khalistan.”<sup>282</sup> Having established past persecution, Mr. Kataria enjoyed a presumption of future harm, which the government attempted to rebut with substantial country conditions evidence demonstrating that the number of documented acts of persecution against this political minority “ha[d] declined significantly.”<sup>283</sup> The Ninth Circuit did not dispute this evidence but found it “not sufficient to rebut the presumption” of future harm.<sup>284</sup>

The government also failed to rebut a past persecution presumption based on perceived changes in country conditions in *Alcius v. Holder*.<sup>285</sup> The petitioner, a Haitian national and political activist affiliated with Jean Baptiste Aristide’s Lavalas Party, was continually harassed by right-wing parliamentary groups during Aristide’s exile from 1991 to 1994.<sup>286</sup> At one point during this period, they were

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family ties.” *Id.* (citing C.F.R. § 1208.12(b)(3)). Thus, even if the conditions of various regions within an applicant’s country would justify a grant of asylum, if a particular region is deemed suitable for relocation, the presumption can still be rebutted. This unquestionably eases the burden for the government in certain situations.

<sup>280</sup> See AMNESTY INTERNATIONAL, BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN 16 (2001), <https://www.amnesty.org/download/Documents/120000/act400012001en.pdf> [<https://perma.cc/5J28-VGY4>].

<sup>281</sup> *Kataria v. INS*, 232 F.3d 1107 (9th Cir. 2000).

<sup>282</sup> *Id.* at 1109.

<sup>283</sup> *Id.* at 1115.

<sup>284</sup> *Id.*

<sup>285</sup> *Alcius v. Holder*, 374 F. App’x 583, 584 (6th Cir. 2010).

<sup>286</sup> *Id.*

detained, interrogated, and beaten at a prison for two days by these hostile groups.<sup>287</sup> Alcius subsequently left Haiti in 1995.<sup>288</sup> The immigration judge found Alcius's past persecution story credible, but found that the government had successfully rebutted the presumption of future persecution by presenting evidence that a new political party without a history of political persecution had taken control of the country.<sup>289</sup>

The Sixth Circuit reversed.<sup>290</sup> Notably, while the Sixth Circuit agreed with the government that Alcius's original persecutors were no longer in power, it focused on evidence of continued "human-rights abuses . . . in Haiti" against both "pro- and anti-Aristide partisans."<sup>291</sup> This reluctance to rebut Alcius's presumption of future harm based primarily on the existence of unspecified non-governmental violence illustrates how impenetrable the presumption has become.<sup>292</sup>

The government has also failed to rebut the presumption of future harm based solely on a petitioner's continued contacts with the country of origin. In *Prus v. Mukasey*,<sup>293</sup> a citizen of Uzbekistan, successfully demonstrated to the immigration judge that he suffered past persecution on account of his religious beliefs.<sup>294</sup> The judge nonetheless rejected Prus's asylum claim because the government successfully rebutted Prus's presumption of well-founded fear.<sup>295</sup> In particular, the government showed that Prus "returned to Uzbekistan three times without incident" following his persecution and flight from the country, including returning at least one time for a visa interview with government officials.<sup>296</sup> The Ninth Circuit reversed, observing that the government had neither provided evidence of changed circumstances in Uzbekistan or that Prus could reasonably be expected to relocate to another part of the country safely.<sup>297</sup> Moreover, the court noted that these purportedly "voluntary" trips were taken "in a manner to avoid detection," lasted

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<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 586.

<sup>290</sup> *Id.* at 591.

<sup>291</sup> *Id.* at 588.

<sup>292</sup> *Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004) ("If past persecution is shown, the BIA cannot discount it merely on a say-so. Rather, our precedent establishes that in such a case the BIA must provide an 'individualized analysis of how changed conditions will affect the specific petitioner's situation.'"); *see also* *Hanna v. Keisler*, 506 F.3d 933, 938–40 (9th Cir. 2007) (holding that evidence demonstrating "the fall of the Ba'ath party" in Iraq was not sufficient to "remove[]" any fear of future persecution" where petitioner was persecuted by the Ba'ath party for his political affiliations).

<sup>293</sup> *Prus v. Mukasey*, 289 F. App'x 973 (9th Cir. 2008).

<sup>294</sup> *Id.* at 975.

<sup>295</sup> *Id.* (citing 8 C.F.R. § 208.13(b)(1)); *Korablina v. INS*, 158 F.3d 1038, 1043 (9th Cir. 1998).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

only a short period of time, and in at least one instance was taken at great personal risk to visit his ill son in Ukraine.<sup>298</sup>

Significant future contact with the country of origin may rebut any claims of future harm, however. In *Male v. United States*, a native-born citizen of Albania sought asylum “based on his political opinion and his membership in the Albanian Army.”<sup>299</sup> But despite a finding of past persecution on these grounds, the court found that the government had sufficiently rebutted a presumption of future harm.<sup>300</sup> The court noted that conditions in Albania had changed so fundamentally that the petitioner’s family had lived openly and without harassment since the country’s Democratic Party regained control, negating any suggestion that a likelihood of future harm existed.<sup>301</sup>

These cases sketching the contours of asylum’s rebuttable presumption standard are relevant in the sexual violence context. As in *Kataria* and *Holder*, post-violence conditions on the ground may substantially change for the better. An abuser may go extended periods of time without contacting or harassing his victim, even deliberately taking steps to avoid her. But this voluntary cessation of abuse provides no more comfort to a victim of intimate sexual violence than it does to a victim of severe persecution. Only a formal order of protection, buttressed by threat of criminal sanction, can provide the sense of security necessary to rebuild one’s life in the wake of such a traumatic violation.

*Prus* and *Male* are likewise instructive. A sexual violence victim may have little choice but to interact with her assailant, either because they work in the same office, are enrolled in the same class, or otherwise have intertwined schedules. But just as it would be unreasonable to require Mr. Prus not to travel to Uzbekistan to visit his sick child,<sup>302</sup> it would be unreasonable to require sexual violence victims to leave their jobs or schools to avoid their attackers. Some outer exceptions may exist, such as voluntarily living or socializing with an assailant for twelve years, as in *Male*.<sup>303</sup> But absent these and similar circumstances suggesting a subjective intent to remain in contact voluntarily, a victim’s continued compelled interactions with her abuser to maintain employment or enrollment should not be viewed as negating fear of future harm.

Perhaps most analogous to the sexual violence experience is *Mohammed v. Gonzales*.<sup>304</sup> Khadija Ahmed Mohammed, a native and citizen of Somalia, applied for asylum at the age of seventeen based in part on the fact that she had been subjected to female genital mutilation (FGM) as a child, a type of horrific torture

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<sup>298</sup> *Id.* The Court denied that these trips demonstrated Prus had a “safe haven” in Ukraine, contrasting his case specifically with an Indonesian national who fled persecution but then returned for two extended periods to live and work without incident.

<sup>299</sup> *Male v. U.S. Att’y Gen.*, 399 F. App’x. 440, 441 (11th Cir. 2010).

<sup>300</sup> *Id.* at 442.

<sup>301</sup> *Id.*

<sup>302</sup> *Prus*, 289 F. App’x 973 at 975.

<sup>303</sup> *See Male*, 399 F. App’x. at 441–42.

<sup>304</sup> *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005).

that “rises to the level of persecution within the meaning of [] asylum law.”<sup>305</sup> Although the Ninth Circuit acknowledged she did not face any *future* risk of again being mutilated, the court found that “genital mutilation, like forced sterilization, is a ‘permanent and continuing’ act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.”<sup>306</sup> The court further found that Ms. Mohammed would qualify for a “humanitarian” grant of asylum even absent a well-founded fear of future harm, given that “female genital mutilation is a particularly severe form of past persecution.”<sup>307</sup>

Like FGM, the intimate physical invasion of one’s body caused by sexual violence serves as “a permanent and continuing act” of harm to its victims. While FGM leaves permanent scars in a way that sexual violence (often) does not, the permanent mental and emotional anguish felt by sexual violence victims deserves recognition as sufficient for future harm purposes. To be sure, many actions meeting the legal definition of “sexual assault” or “sexual harassment” constitute far less severe forms of abuse than FGM, and it would be inappropriate to suggest that a single act of groping exists on the same plane as “the cutting and removal of all or some of a girl or a woman’s external genitalia.”<sup>308</sup> But the similarities between the physical, sexual, intimate violations of FGM and sexual assault, coupled with the long-lasting psychological scarring of such an attack, render the analogy apt for the limited purpose of justifying a rebuttable presumption of future harm.

#### D. “Well-Founded Fear” of Future Persecution

The question of burdens remains. If a presumption of future harm attaches to a petitioner’s claim, the burden shifts to the respondent to rebut it. But if a presumption does not attach—either because the petitioner has not established a past act of abuse or because the statute precludes such a presumption—by what standard of proof must the petitioner prove future harm? Unlike the majority of SAPO jurisdictions which require proof of future harm by a preponderance of the evidence, an asylum applicant need not prove by any standard that he will be or is likely to be persecuted.<sup>309</sup> Instead, an applicant need only show “that a reasonable person in his shoes would fear persecution.”<sup>310</sup>

In particular, to establish a “well-founded fear of future persecution, the applicant must demonstrate that ‘(1) a reasonable person in the circumstances would

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<sup>305</sup> *Id.* at 789–95.

<sup>306</sup> *Id.* at 800.

<sup>307</sup> *Id.* at 801.

<sup>308</sup> *Id.* at 799.

<sup>309</sup> *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992) (“Nor must the applicant for asylum prove that he will be persecuted.”).

<sup>310</sup> *Id.* (“At argument we asked the government’s lawyer whether he would fear persecution by Iran if he were in Bastanipour’s religious and political shoes and he conceded that he would — and even conceded that he was a reasonable man! We accept both concessions.”).

fear persecution; and (2) that the fear has some basis in reality of the circumstances and is validated with specific, concrete facts.”<sup>311</sup> Neither the 1951 United Nations Convention Relating to the Status of Refugees nor the Immigration and Nationality Act define “well-founded fear.”<sup>312</sup> But the United States Supreme Court concluded that “so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.”<sup>313</sup> The Court explained that this interpretation is “consistent” with the United Nations “High Commissioner’s [for Refugees] analysis of the United Nations’ standard,” which allows for a finding of well-founded fear even if “an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted.”<sup>314</sup>

This approach makes sense, both in the asylum and the SAPO context. The likely occurrence of a future event is immeasurably more difficult than proving the existence of a past act. Given the seriousness of the future acts contemplated—persecution and sexual assault—victims and potential victims should not be required to prove it is more likely than not they will face this type of grave consequence, but they should only be required to demonstrate that their concern about the potential future act is grounded in objective fact. In this respect, asylum law also holds much promise for SAPO reform.

#### CONCLUSION

All victims of violence suffer mental and emotional anguish following an attack. However, sexual violence uniquely violates the sanctity, dignity, and safety of victims, whose intimate physical violation creates deep and long-lasting feelings of insecurity. Much of this insecurity stems from the “heinous” nature of the criminal act itself. But for the majority of sexual violence victims who know and are acquaintances with their attackers, genuine safety concerns exist when these victims are forced to see and interact with their attackers at school, work, or in social settings. Beyond the very real risk of a repeat assault, the mere presence of a violent sexual perpetrator can trigger a uniquely devastating feeling of insecurity.

The failure of existing criminal justice structures to provide prospective relief for these victims has led to a majority of jurisdictions adopting civil protection order statutes authorizing limited prospective relief in the form of “stay away” orders granting victims a measure of physical and emotional safety as they recover from the traumatic experience. These restraining order mechanisms are an important step in the right direction, but most such statutes treat sexual violence like any other

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<sup>311</sup> *Huaman-Cornelio v. Bd. Immigration Appeals*, 979 F.2d 995, 999 (4th Cir. 1992).

<sup>312</sup> See UN 1951 Convention, *supra* note 27; Immigration and Nationality Act, 8 U.S.C. § 1157(a) (2012).

<sup>313</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); see also *Mwesige v. Ashcroft*, 59 F. App’x. 888, 893 (“[A]n applicant for asylum can establish a well-founded fear by showing that a reasonable person in his or her circumstances would fear persecution . . .”).

<sup>314</sup> See *Bastanipour*, 980 F.2d at 1133 (“Nor must the applicant for asylum prove that he will be persecuted—only that a reasonable person in his shoes would fear persecution.”).

misconduct for which a plaintiff might seek an injunction. Given the prospective nature of the relief, most of these statutes require some proof that a future attack is likely to occur, and some states even require a showing that a similar sexual assault is imminent. While such a showing might make sense in the context of a business dispute or construction project, such a requirement in the sexual assault context would create an evidentiary hurdle effectively eliminating civil protection order relief for victims.

This Article has attempted to comprehensively catalog these “future harm” evidentiary issues with existing SAPO legislation, provide normative and empirical explanations for why these requirements fail to account for the uniqueness of sexual assault, and provide a justification for a rebuttable presumption of future harm. The parallels to asylum law—another body of law premised on “atrocious” violations of one’s personhood—are instructive. As the national conversation regarding sexual assault and acquaintance rape continues, and as states continue to grapple with effective legal remedies for at-risk victims of sexual violence, perhaps reference to the surprisingly similar asylum experience will result in the adoption of practical, attainable, and justifiable evidentiary standards opening the door to civil protection for more victims.

## APPENDIX

**Table 1. Evolution of Civil Protection Orders**

Year	“Catch-all” CPOs	SAPOs
2000 <sup>315</sup>	2	0
2005 <sup>316</sup>	6	1
2010 <sup>317</sup>	13	3
2015 <sup>318</sup>	22	5
2019 <sup>319</sup>	23	5

<sup>315</sup> In 1980, California passed the first-in-the-nation restraining order statute offering protection beyond relationship domestic abuse. *See* ch. 795 § 8, 1979 CAL. STAT. 2708. This broad “catch-all” civil harassment restraining order remains California’s only civil protection order mechanism for sexual violence victims in the state today. In 1993, North Dakota passed its “disorderly conduct” civil restraining order statute. Act of Apr. 15, 1993, ch. 125 § 2, 1993 N.D. LAWS 556.

<sup>316</sup> Between 2000 and 2005, four states passed “catch-all” restraining order statutes: Montana in 2001, Oklahoma and Florida in 2003, and North Carolina in 2004. Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, ch. 223, 2001 MONT. LAWS 1036; The Victim’s Freedom Act, ch. 2003-117, 2003 Fla. LAWS 733 (codified at FLA. STAT. § 784.046; 2003 Okla. Sess. LAWS § 407 (enacted as OKLA STAT. tit. 22 § 60 (2003))); Act to Establish Civil No-Contact Orders for the Protection of Individuals Who Are Victims of Unlawful Conduct, ch. 50C, 2004 N.C. Sess. LAWS 768 (codified at N.C. GEN. STAT. § 50C-11). Also in 2004, Illinois passed the first-in-the-nation Sexual Assault Protection Order statute. 2004 Ill. LAWS 1615 (codified at ILL. COMP. STAT. 22/101 et seq).

<sup>317</sup> Between 2006 and 2010, seven more states passed “catch-all” restraining order legislation: Alaska, Ohio and Vermont in 2006, South Dakota and Maine in 2007, and Michigan and Massachusetts in 2010. Act of Aug. 16, 2006, ch. 36, 2004 Alaska Sess. LAWS 1; Act Relating to Orders Against Stalking or Sexual Assault, No Contact Orders, and Establishing A Victims’ Rights Study Committee, ch. 178 § 1, 2006 Vt. Acts & Resolves 522; 2007 S.D. Sess. LAWS ch. 143 § 1, 209; 2006 Ohio LAWS File 99; Act To Improve the Protection from Abuse LAWS, ch. 340, 2007 Me. LAWS 860; 2010 Mich. Pub. Acts 21; 2010 Mass. Acts 71. During this time, two additional states passed SAPO legislation: Nevada in 2009, and Washington in 2010. 2009 NEV. STAT. 228; 2010 Wash. Sess. LAWS 103 (codified at WASH. REV. CODE § 7.90.020).

<sup>318</sup> Between 2011 and 2015, nine additional jurisdictions passed “catch-all” restraining order legislation: Tennessee and the District of Columbia in 2011, Texas and Colorado in 2013, Virginia and Minnesota in 2014, and Connecticut, Maryland, and Wyoming in 2015. 18-377 D.C. REG. (June 3, 2011); 2011 Tenn. Pub. Acts cmlxxxv; 2013 Colo. Sess. LAWS 995; Act Relating to the Issuance of Protective Orders for Certain Sexual, Stalking, and Trafficking Offenses, ch 520 §4, 2013 Tex. Gen. LAWS 1417; 2014 Va. Acts 346; 2014 Minn. LAWS 204; 2015 Conn. Acts 258; 2012 Md. LAWS 1; 2015 Wyo. Sess. LAWS 144; . In addition, Oregon passed a SAPO statute in 2014 (2013 c. 687 § 2 (effective Jan. 1, 2014)), followed by Pennsylvania in 2015.

<sup>319</sup> Most recently, Wisconsin passed a “catch-all” civil protection order in 2016. WIS. STAT. § 813.12 (2016).

**Table 2. Proof Requirements for Sexual Assault Protection Orders**

	Course of Conduct?	Future Harm?	Future Harm Burden	Overall Burden
Alaska <sup>320</sup>	No	No		Preponderance
California <sup>321</sup>	Yes	Yes	Clear and Convincing	Clear and Convincing
Colorado <sup>322</sup>	No	Yes	Reasonable Belief	Preponderance
Connecticut <sup>323</sup>	No	Yes	Reasonable Belief	Preponderance
D.C. <sup>324</sup>	No	No		Reasonable Grounds
Florida <sup>325</sup>	No	Yes	Genuinely Fears (and is likely imminent)	Silent
Illinois <sup>326</sup>	No	No		Preponderance
Maine <sup>327</sup>	No	Yes	Preponderance	Preponderance
Maryland <sup>328</sup>	No	Yes	Preponderance (and is likely imminent)	Preponderance

<sup>320</sup> ALASKA STAT. ANN. § 18.65.850 (West 2019) (requiring only proof that the petitioner “is a victim of . . . sexual assault”).

<sup>321</sup> CAL. CIV. PROC. CODE § 527.6 (West 2019) (defining “harassment” as a “course of conduct composed of a series of acts of a period of time . . . evidencing a continuity of purpose,” and authorizing grant of restraining order if “the judge finds by clear and convincing evidence that unlawful harassment exists” and is likely to continue).

<sup>322</sup> COLO. REV. STAT. § 13-14-103 (2018) (offering protection when “a minor child is in danger in the reasonably foreseeable future of being the victim of an unlawful sexual offense”).

<sup>323</sup> CONN. GEN. STAT. § 46b-16a(b) (2017) (“If the court finds that there are reasonable grounds to believe that the respondent has committed acts constituting [sexual assault] . . . and will continue to commit such acts,” a permanent restraining order will issue.).

<sup>324</sup> D.C. CODE § 16-1005 (2019) (enjoining respondent if there is good cause “to believe the respondent has committed or threatened to commit a criminal offense against the petitioner”).

<sup>325</sup> FLA. STAT. § 784.046 (2019) (requiring proof that “petitioner genuinely fears repeat violence by the respondent”).

<sup>326</sup> 740 ILL. COMP. STAT. 22/103 (2010) (offering protection for any “victim of non-consensual sexual conduct or non-consensual sexual penetration”).

<sup>327</sup> ME. STAT. tit. 19-a, § 4006 (2017) (requiring proof of a past sexual assault by a preponderance of the evidence).

<sup>328</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-1505 (West 2019) (“If the judge finds by a preponderance of the evidence that the respondent has committed, and is likely to commit in the future, an act [of sexual assault] . . . , the court may issue a final peace order to protect the petitioner.”).



Massachusetts <sup>329</sup>	No	No		Silent
Michigan <sup>330</sup>	No	Yes	Preponderance	Silent
Minnesota <sup>331</sup>	No	No		Preponderance
Montana <sup>332</sup>	No	No		Good Cause
Nevada <sup>333</sup>	No	No		Preponderance
North Carolina <sup>334</sup>	No	No		Preponderance
North Dakota <sup>335</sup>	No	No		Reasonable Grounds
Ohio <sup>336</sup>	No	No		Preponderance
Oklahoma <sup>337</sup>	No	No		Preponderance
Oregon <sup>338</sup>	No	Yes	Preponderance	Preponderance
Pennsylvania <sup>339</sup>	No	Yes	Preponderance	Preponderance
South Dakota <sup>340</sup>	No	No		Preponderance

<sup>329</sup> MASS. GEN. LAWS ANN. ch. 258E § 1 (West 2019) (providing relief to a victim of a single sexual assault).

<sup>330</sup> MICH. COMP. LAWS § 600.2950a (2018).

<sup>331</sup> MINN. STAT. § 609.748 (2019) (requiring only proof of “a single act of physical or sexual assault”); *Emery v. Bryand*, No. A13-1146, 2013 Minn. App. LEXIS 1172 (Minn. Ct. App. Dec. 30, 2013) (finding that the district court did not err when it granted a restraining order even though failing to find an immediate and present danger of future harassment).

<sup>332</sup> MONT. CODE ANN. § 40-15-102 (2019) (requiring petition that “the petitioner is in reasonable apprehension of bodily injury by the petitioner’s partner or family member”).

<sup>333</sup> NEV. REV. STAT. § 200.378 (2017) (requiring only proof that the “crime of sexual assault has been committed against” the petitioner).

<sup>334</sup> N.C. GEN. STAT. § 50C-5 (2018) (providing relief “[u]pon a finding that the victim has suffered unlawful conduct committed by the respondent”).

<sup>335</sup> N.D. CENT. CODE § 12.1-31.2-01 (2019) (authorizing a restraining order if “the court finds after the hearing that there are reasonable grounds to believe that the respondent has engaged in disorderly conduct,” including illegal sexual assault).

<sup>336</sup> OHIO REV. CODE ANN. § 3113.31 (West 2019) (requiring only proof that the respondent is over 18 and has “committed a sexually oriented offense”).

<sup>337</sup> OKLA. STAT. tit. 22, § 60.2 (2019) (offering relief for any adjudicated victim of domestic abuse, stalking, harassment, or rape.).

<sup>338</sup> OR. REV. STAT. ANN. § 163.763 (West 2019) (requiring petitioner to prove by a preponderance of the evidence that “the respondent subjected the petitioner to sexual abuse within the 180 days preceding the filing of the petition” and that “[t]he petitioner reasonably fears for the petitioner’s physical safety with respect to the respondent”).

<sup>339</sup> 42 PA. CONS. STAT. § 62A06 (2018) (requiring proof that “the plaintiff or another individual, as appropriate, is a victim of sexual violence or intimidation committed by the respondent,” and “prove by preponderance of the evidence that the plaintiff, or another individual, as appropriate, is at a continued risk of harm from the defendant”).

<sup>340</sup> S.D. CODIFIED LAWS § 22-19A-8 (2019) (requiring only that the petitioner is the victim of “(a) stalking or (b) physical injury as a result of an assault or (c) a crime of violence” as defined in the criminal code, including rape and sexual assault).

Tennessee <sup>341</sup>	No	No		Preponderance
Texas <sup>342</sup>	No	No		Reasonable Grounds
Vermont <sup>343</sup>	No	Yes	Preponderance	Preponderance
Virginia <sup>344</sup>	No	No		Preponderance
Washington <sup>345</sup>	No	Yes	Preponderance	Preponderance
Wisconsin <sup>346</sup>	No	Yes	Preponderance (must have “substantial fear”)	Preponderance
Wyoming <sup>347</sup>	No	Yes	Clear and Convincing	Clear and Convincing

<sup>341</sup> TENN. CODE ANN. § 36-3-601 (West 2019) (requiring only proof that the petitioner was “subjected to, threatened with, or placed in fear of” sexual assault).

<sup>342</sup> TEX. CODE CRIM. PROC. ANN. § 7A.03 (West 2019) (requiring only proof that “there are reasonable grounds to believe that the applicant is the victim of sexual assault or abuse, stalking, or trafficking” to issue a permanent restraining order); *cf.* TEX. CODE CRIM. PROC. ANN. § 7A.01 (West 2018) (requiring an application for a protective order to allege “that there is a clear and present danger of sexual assault or abuse” to enter a temporary ex parte order).

<sup>343</sup> VT. STAT. ANN. tit. 12 § 5133 (West 2019) (requiring proof “by a preponderance of the evidence that the defendant has stalked or sexually assaulted the plaintiff”).

<sup>344</sup> VA. CODE ANN. § 19.2-152.10 (2018) (authorizing relief upon a finding that the respondent has been convicted of or threatened “an act of violence, force, or threat”).

<sup>345</sup> WASH. REV. CODE § 7.90.020 (2019) (requiring proof of a non-consensual sexual conduct or non-consensual sexual penetration); *see also* Roake v. Delman, 408 P.3d 658, 659 (Wash. 2018) (finding that statute requiring allegation and proof of probable future harm).

<sup>346</sup> WIS. STAT. ANN. § 813.125 (West 2019) (authorizing relief if the court finds “reasonable grounds” to believe the respondent has engaged in harassment with intent to harass or intimidate the petitioner, but requiring proof that there is a “substantial risk” of future sexual assault to extend protective order).

<sup>347</sup> WYO. STAT. ANN. § 7-3-508(b) (2019) (“If the court determines . . . that there exists a clear and present danger of further stalking, sexual assault or of serious physical adverse consequences to any person, the court may grant ex parte a temporary order of protection pending the hearing.”).