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AN AMERICAN CONCEPT WITH DISTINCTLY CHINESE CHARACTERISTICS: THE INTRODUCTION OF THE CIVIL PROTECTION ORDER IN CHINA

ROBIN R. RUNGE*
ABSTRACT

This Article provides an analysis of the emerging legal system response to domestic violence in China, focusing on the implementation of a civil protection order for victims by comparing it with the U.S. version, using the North Dakota statute as a representative example. The first section of this Article is a brief introduction to violence against women and the development of laws to address domestic violence in the U.S. and China, including the civil protection order. The second section analyzes the implementation of the civil protection order in China and the U.S. This section provides a detailed comparison of the legal definition of domestic violence in the U.S. and China, the scope of protections available to victims in each country, evidentiary requirements, and enforcement provisions in the U.S. and China. The discussion highlights similarities and differences, exploring the societal and cultural sources of those differences, and implications of those differences for victims. The third section details challenges that Chinese judges and advocates have identified as they implement the civil protection order, highlighting lessons learned from the U.S. experience.

* Assistant Professor, University of North Dakota School of Law. This Article is based in part upon a presentation provided at North Dakota Law Review's Domestic Violence and Sexual Assault Symposium on November 11, 2012, and contains research conducted as a Fulbright Senior Research Fellow in Beijing, China from September 2012 to April 2013. The author appreciates the generosity and assistance of the Fulbright program which made it possible for her to conduct this research, the staff at the American Bar Association Rule of Law Program in China, the faculty at the Chinese Academy of Social Sciences Institute of Law, and the Chinese lawyers, judges, and anti-domestic violence scholars who entrusted her with their experiences and who continue to work toward ending domestic violence in China. She is also indebted to Margaret Drew, Jennifer Salen, Julia Ernst, and Siodhbhra Parkin for their generous feedback and assistance.

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I. INTRODUCTION

It is widely recognized that the law has a crucial role to play in ending violence against women and domestic violence, in particular.¹ Over the past forty years, the United States (U.S.) has adopted laws against domestic and sexual violence, proscribing punishment for offenders. Nonetheless, reports of domestic violence in the U.S. remain unacceptably high.² This has led to considerable critical examination of the enforcement and efficacy of statutes and policies intended to keep victims safe and hold offenders accountable, including civil protection orders.³ Often missing from these discussions in the U.S. are other countries' experiences developing legal responses to domestic violence.

1. See generally Christine Forster, *Ending Domestic Violence in Pacific Island Countries: The Critical Role of Law*, 12 ASIAN-PAC. L. & POL'Y J. 123 (2011).

2. See CATALANO *infra* note 7.

3. See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1112 (2009); Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 572-73 (2007); Leigh Goodmark, *Law Is the Answer?: Do We Know That For Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 24-27 (2004).

In the last twenty-five years, Chinese anti-domestic violence advocates and gender law scholars have advocated for Chinese laws and policies that define domestic violence as a violation of individual human rights and provide protections to domestic violence victims. Significant progress has been made. The All-China Women's Federation, the National Anti-Domestic Violence Network, and the Beijing Maple Women's Psychological Counseling Center, among others, have led calls for national anti-domestic violence legislation. In 2012, the Standing Committee of the National People's Congress included national anti-domestic violence in the legislative work plan, signaling adoption by 2015.⁴ In addition, Chinese judges in some jurisdictions have begun to issue civil protections for victims of domestic violence in family law cases.⁵ These achievements would have been unthinkable a few years ago and represent significant increased protections for victims throughout China.

Violence against women is a global epidemic. The United Nations Development Fund for Women estimates that at least one in every three women will be beaten, raped, or otherwise abused during her lifetime, and in most cases, the offender is a member of her own family.⁶ On average, more than three women are murdered each day in the U.S. by their husband or boyfriend.⁷ Nearly one in four women in the U.S. has reported experiencing violence by a current or former spouse or boyfriend in some

4. See *China Mulls Domestic Violence Law*, China Daily (Feb. 28, 2012), http://usa.chinadaily.com.cn/china/2012-02/28/content_14715048.htm (stating that national anti-domestic violence law is on the legislative agenda of the National People's Congress in 2012) (English translation on file with author); *The Introduction of Anti-Domestic Violence the Country has 28 Provinces and Municipalities in Local Regulations or Policies*, CHINA LAW (Dec. 7, 2012), <http://www.chinalawedu.com/new/201212/wangying2012120715461222987184.shtml> (describing a national anti-domestic violence forum at which it was stated that national anti-domestic violence law has been included in the legislative work program of the Standing Committee of the National People's Congress in 2012 and quoting from an All China Women's Federation survey in which 93.5% percent of those polled support national anti-domestic violence legislation) (English translations on file with author); see also All-China Women's Federation website for information about activities, <http://www.womenofchina.cn>, and the National website, www.stopdv-china.org, for information about their policy advocacy work on behalf of victims [hereinafter *Stop DV-China*].

5. There are reports that over 200 civil protection orders have been issued throughout China. See Interview with Researcher from the Institute for Applied Jurisprudence of the Supreme People's Court of China (December 2, 2012). This Researcher was involved in the development of the Bench Book in December 2012 and January 2013. *Id.*

6. UNITED NATIONS DEP'T OF PUBLIC INFORMATION, U.N. SECRETARY-GENERAL'S CAMPAIGN, UNITE TO END VIOLENCE, FACTSHEET, DPI/2498 (Feb. 2008), available at <http://www.un.org/en/women/endviolence/pdf/VAW.pdf>.

7. SHANNON CATALANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvs.pdf>.

point in her life.⁸ The prevalence of domestic violence reported in China is similar. A national survey conducted by the All China Women's Federation in 2011 found that "one in approximately every four women has experienced violence at home including verbal and physical abuse, having their freedom restricted and being forced to have sex."⁹ In the U.S. and China, the overwhelming majority of victims of domestic violence are women, although men may also be victims.¹⁰

Domestic violence consists of a combination of forms of abuse used by one intimate partner to gain power and control over the other, frequently involving a systemic pattern of abusive behaviors with this goal or intent.¹¹ It occurs in all countries regardless of political, religious, cultural, social, or economic structures.¹² It may include physical violence in combination with other forms of controlling behavior, such as mental, emotional, psychological, economic, and sexual abuse.¹³ Manifestations of domestic violence are unique to each situation and are reflective of the culture in which it occurs. For example, in the U.S., where guns are a prevalent part of the culture, they are often used as a tool to control victims by threatening to shoot them or their children, as well as using them to kill victims.¹⁴ Nonetheless, the dynamics of domestic violence, using different forms of abuse to exercise power and control over an intimate partner, and the impact on and needs of victims are analogous worldwide. As a result, it is

8. U.S. Ctrs. for Disease Control & Prevention, *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence*, 57 MORBIDITY & MORTALITY WEEKLY REPORT 113, 115 tbl. 1 (2008), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5705.pdf>.

9. See Huang Yuli & He Dan, *Call for Action on Domestic Violence*, CHINA DAILY (Nov. 26, 2012), http://usa.chinadaily.com.cn/epaper/2012-11/26/content_15958548.htm [hereinafter *Call for Action*] (describing how the All-China Women's Federation and the National Bureau of Statistics released this data in 2011 following a national survey of 105,573 people aged eighteen and over and twenty, 405 teenagers aged between ten and seventeen).

10. In the United States, women are eighty-four percent of spouse abuse victims and eighty-six percent of victims of abuse at the hands of a boyfriend or girlfriend, and approximately three-fourths of the individuals who commit family violence are men. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs02.pdf>. Ninety percent of victims of domestic violence in China are women and domestic violence occurs in approximately 29.7 to 35.7% of Chinese families. *Domestic Violence in China*, WOMEN OF CHINA (Oct. 10, 2008), http://wunrn.com/news/2008/11_08/11_10_08/111008_china.htm.

11. *Domestic Violence*, U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN (Aug. 2012), <http://www.ovw.usdoj.gov/domviolence.htm> [hereinafter *Domestic Violence*].

12. U.N. Children's Fund, *Domestic Violence Against Women and Girls*, 6 INNOCENTI DIGEST 1, 3-5 (2000), available at <http://www.unicef-irc.org/publications/pdf/digest6e.pdf>.

13. See *Domestic Violence* *supra* note 11.

14. VIOLENCE POL'Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2002 HOMICIDE DATA: FEMALES MURDERED BY MALES IN SINGLE VICTIM/SINGLE OFFENDER INCIDENTS 1 (2004), available at <http://www.vpc.org/studies/wmmw2004.pdf>. A 2001 study by the Centers for Disease Control and Prevention (CDC) on homicide found that female intimate partners are more likely to be murdered with a firearm than all other means combined. *Id.*

not surprising that countries are employing similar legal responses to combat domestic violence, even when their political, cultural, and societal structures may differ significantly. However, the implementation of similar legal constructs in countries with different governmental structures and cultures leads to unique applications designed for outcomes that are reflective of their societal values and more appropriate for the needs of victims in their communities.

A. THE LEGAL RESPONSE TO DOMESTIC VIOLENCE IN THE UNITED STATES

In the U.S. and China, civil legal protections for victims of domestic violence are relatively recent. U.S. law has prohibited physical abuse of a wife since the seventeenth century; however, enforcement of the law and punishment of perpetrators was limited until the last thirty years.¹⁵ Historically, the home was viewed as a private place, and men had the right and privilege to run their household as they saw fit.¹⁶ The lack of a separate legal identity from their husbands supported a belief that husbands had a right to control their wives, including the use of force to do so.¹⁷ Domestic violence was not considered a crime, and the police routinely failed to arrest perpetrators.¹⁸ In addition, American society placed, and continues to place, a high priority on keeping the family together. This is reflected in family laws that promote family unity by rewarding the spouse that is perceived to be more cooperative and the integration of mandatory mediation in many family courts.¹⁹

15. See KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW* 490 (4th ed. 2006); Sally Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship*, 29 *CARDOZO L. REV.* 1487, 1494-95 (2008) (summarizing research on domestic violence cases in the 1970s where police failed to arrest perpetrators of domestic violence instead occasionally walking them around the block; prosecutors failed to pursue criminal charges when they were arrested and judges encouraged parties to work things out).

16. See Goldfarb, *supra* note 15, at 1495-96 (describing the influence of the principles of marital unity and privacy on a failure of the police, attorneys, and judges to enforce laws that could punish husbands for abusing their wives).

17. *Id.*; see also ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 13 (2000).

18. See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 *J. CRIM. L. & CRIMINOLOGY* 46, 47 (1992) (police were taught that domestic violence was a private matter).

19. Mediation is mandated and/or strongly encouraged in most family cases. See Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 *S. ILL. U. L.J.* 559, 562-63 (2002) (stating that participation in mediation is mandatory in family law cases in many jurisdictions). Many states' laws have codified cooperative parenting as a favorable trait in considering the award of child custody. See generally Margaret K. Dore, *The "Friendly Parent" Concept A Flawed Factor For Child Custody*, 6 *LOY. J. PUB. INT. L.* 41 (2004) (describing the friendly parent concept as a belief that children do better when allowed or encouraged to maintain a

Over the past forty years, feminist legal scholars and others in the U.S. have effectively advocated for societal, cultural, and legal changes to improve the safety and security of women in intimate relationships. A part of these efforts included enforcement of existing civil and criminal legal remedies for victims of domestic violence, and the development of additional remedies reflective of the unique needs of victims.²⁰ Training of police, prosecutors, and judges on how to identify domestic violence and how to collect evidence and present it in court has led to improved enforcement of state and federal criminal laws.²¹ In the 1970s, U.S. states began adopting laws enabling victims of domestic violence to petition judges for civil protection orders against their abuser.²² Civil protection orders are now considered one of the most effective legal tools used to respond to and to prevent domestic violence in the U.S.²³ In addition, in 1994, Congress passed the Violence Against Women Act (VAWA), which is the first national-level, comprehensive legal response to domestic violence, including the interstate enforcement of civil protection orders.²⁴

Over the last twenty years, the legal response to domestic violence has evolved to better address the needs of victims as policy-makers have learned from the experiences of victims and advocates. For example, the

close relationship with both parents and thus custody should be awarded to the parent most likely to support a relationship with the other parent and how it has been incorporated into many states' custody statutes). Much has been written about the negative impact of friendly policies and laws on victims of domestic violence in custody disputes. See Dana Harrington Conner, *Back To The Drawing Board: Barriers To Joint Decision-Making In Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL'Y 223, 242 (2011) (explaining how taking friendly parent into consideration when making custody determinations could be used against a battered parent because she is likely to seek sole custody).

20. See SCHNEIDER, *supra* note 17, at 29-49.

21. See generally Janet E. Findlater & Dawn Van Hoek, *Prosecutors and Domestic Violence: Local Leadership Makes A Difference*, 73 MICH. B.J. 908 (1994) (describing training on how to handle domestic violence cases for police and prosecutors results in improved response and safety).

22. Goldfarb, *supra* note 15, at 1503-04 (stating since they were introduced in 1976 in Pennsylvania, all fifty states and the District of Columbia have protection orders).

23. See, e.g., Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women* 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 513 (2003) (noting protective order petitioners cite satisfaction with temporary protective orders); see Goldfarb, *supra* note 15, at 1510-11 (summarizing studies in which women who obtained protection orders overwhelmingly indicated their satisfaction with doing so, in particular noting that they felt safe from physical harm and harassment and that they thought orders were effective in preventing further abuse). In the United States, criminal protection orders may be issued in criminal proceedings with a similar goal of providing protection to victims, but they are not the focus of this paper.

24. See generally Robin R. Runge, *The Evolution of a National Response to Violence Against Women*, 24 HASTINGS WOMEN'S L. J. 425 (forthcoming 2013) (discussing the significance of the Violence Against Women Act as the first national legislation to comprehensively address violence against women including the interstate civil protection order provision and the full-faith and credit provisions).

definition of domestic violence in VAWA and in state laws has expanded to recognize that domestic violence occurs not just in marital relationships, but also in dating relationships, by formerly married partners, caregivers, and in same gender relationships.²⁵ In addition, the focus of direct services has shifted from primarily emergency response to more long-term support for victims and prevention of domestic violence.²⁶ The need for and threat of economic security have been identified as critical barriers for women attempting to leave violent relationships. This has led to efforts to increase economic resources for victims including access to employment training, housing, and other economic supports.²⁷ For example, funding was included and expanded in VAWA in 2005 for transitional housing and economic security for victims.²⁸ Importantly, when discussing the development of China's legal response to domestic violence, the U.S. has not widely acknowledged that domestic violence is a violation of human rights, and some have argued that this has limited the remedies available to victims and left victims vulnerable.²⁹

B. THE LEGAL RESPONSE TO DOMESTIC VIOLENCE IN CHINA

The modern Chinese legal system is significantly younger than the U.S., as is the integration of domestic violence. The People's Republic of China adopted laws in 1949 that were effectively abandoned during the Cultural Revolution of 1966-76, and then revived afterward.³⁰ The current Chinese Constitution was adopted in 1982, the Marriage Law in 1980, and

25. See, e.g., N.D. CENT. CODE § 14-07.1-01(4) (2009). Family or household member is defined as:

a spouse, family member, former spouse, parent, child, persons related by blood or marriage, persons who are in a dating relationship, persons who are presently residing together or who have resided together in the past, persons who have a child in common regardless of whether they are or have been married or have lived together at any time, and for the purposes of the issuance of a domestic violence protection order any other person with a sufficient relationship to the abusing person as determined by the court.

Id.

26. See Runge, *supra* note 24.

27. *Id.* (describing the inclusion of funding for transitional housing and other economic supports in the reauthorization of the Violence Against Women Act of 2005).

28. *Id.*

29. See Caroline Bettinger-Lopez, *Jessica Gonzales v. United States: An Emerging Model For Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183, 188 (2008) (describing the U.S. approach to addressing domestic violence is to punish individual batterers rather than the human rights approach of concentrating on governmental accountability in perpetuating violence against women).

30. See Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J.L. & FEMINISM 99, 107-09 (2003) (describing how legal reform stopped during the Cultural Revolution and then restarted in 1978 including the adoption of the Marriage Law which allowed divorce if a party demonstrated that "emotions or mutual affections were broken.").

the Civil Procedure Law in 1982. Traditional and modern Chinese law and culture has emphasized the interests of the group over the interests of the individual.³¹ Historically, community order and family harmony were highly valued, and the rights of the individual yielded to the interests of the collective when they conflicted.³² The focus on maintaining order and on the community over the individual has been criticized for subverting women's legal needs and interests, specifically in the area of domestic violence.³³ For example, one of the stated goals of present day courts has been to help stabilize society and maintain harmony by using mediation whenever appropriate to resolve disputes, even when domestic violence is alleged.³⁴ Domestic violence was considered—and still is in many parts of the country—private, within the family, and not a criminal act.³⁵ Moreover, it was considered a threat to family and community harmony. Recently, some Chinese attorneys and judges have articulated an understanding that domestic violence is not just a family issue—it is a crime—and if women are not provided with protection, the violence will negatively impact the community.³⁶

International human rights values have contributed to the development of a legal response to violence against women in China. Chinese anti-domestic violence advocates and scholars trace the current movement and momentum to end violence against women in China to the public discussions regarding domestic violence that took place during the U.N.

31. *Id.* (describing how loyalty to the nation and state was more important than family).

32. *Id.*; see also XIANFA art. 51 (1982) (China) (“Citizens of the People’s Republic of China, in exercising their freedoms and rights, may not infringe upon the interest of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens.”); see generally Joy L. Chia, *Piercing The Confucian Veil: Lenahan’s Implications for East Asian and Human Rights*, 21 AM. U. J. GENDER SOC. POL’Y & L. 379 (2012) (discussion of the role of Confucianism in China’s social structures valuing family relationship over individual rights and how scholars consider it in conflict with human rights).

33. See generally Woo, *supra* note 30.

34. *Id.* at 111 (describing how a divorce petition must first be mediated during which courts are to reconcile the parties); see also Dep’t of Guiding the Grass-Root Work, *Ministry of Justice in Recognition of the Polling Work “Double First,”* LEGAL INFO. (2002), http://www.legalinfo.gov.cn/moj/jcgzdzs/2005-05/17/content_133971.htm (reemphasizing the importance of mediation in serving the interests of building a “harmonious society”) (English translation on file with the author).

35. See Lija Zhang, *China’s Big Divorce Case Exposes a Hidden Epidemic of Domestic Violence*, GUARDIAN (Feb. 5, 2013) <http://www.guardian.co.uk/commentisfree/2013/feb/05/china-divorce-case-kim-lee-domestic-violence>; see also *Domestic Violence*, CHINA DAILY (Feb. 5, 2013), http://www.chinadaily.com.cn/cndy/2013-02/05/content_16200578.htm (describing how domestic violence is still considered a private matter).

36. Statements made by Chinese judges, lawyers, and law professors presenting at the National Anti-Domestic Violence/Fanbao Conference (Jan. 29-30, 2013) (agenda and notes on file with the author) [hereinafter Fanbao Conference].

Conference on Women, held in Beijing in 1995.³⁷ For example, a group of domestic violence experts, gender scholars, and other interested individuals in Beijing began meeting informally after the U.N. conference on Women in 1995, and in 2001 founded the Anti-Domestic Violence Network of the China Law Society (the Network).³⁸ As the first and only multi-disciplinary, national coalition that focuses exclusively on domestic violence, the Network includes seventy-two group members from twenty-eight municipalities, provinces, and autonomous regions in China as of 2010.³⁹ The Network conducts public awareness and education on the prevention and elimination of domestic violence, develops training materials, and conducts trainings for service providers, journalists, medical personnel, judges, and police on domestic violence, and drafts proposed laws and legal and policy recommendations on domestic violence and other forms of gender-based violence.⁴⁰ The Network has most recently been instrumental in advocating for implementation of the civil protection order and for adoption of national anti-domestic violence legislation.⁴¹

National Chinese law specifically addresses domestic violence as a violation of human rights. Battering is considered a violation of women's rights of the person according to the General Principles of Civil Law of the People's Republic of China from 1987.⁴² In addition, in April 2001, the amendments to the Chinese Marriage Law included establishment of domestic violence as a permissible basis for divorce if mediation fails.⁴³ This was the first time that the term "domestic violence" was included in

37. See Law of the People's Republic of China on the Prevention and Punishment of Domestic Violence: A Draft Proposed by Anti-Domestic Violence Experts, (Proposed Draft, 2010), (China), [hereinafter 2010 Draft Proposal] (describing how the issue of domestic violence has gained more attention since the Fourth World Conference on Women in 1995) (on file with author); see also Fanbao Conference, *supra* note 36.

38. See *Stop DV-China*, *supra* note 4. In March 2011, the Anti-Domestic Violence Network became the Beijing Fan Bao Cultural Development Co., Ltd. *Id.* The mission of the Network is to eliminate gender-based violence and create a gender-equal society by advocating for reform of policies and systems, improvement of multi-organizational collaboration of intervention, improving women's rights, and interests through research, training and advocacy. See Fanbao Conference, *supra* note 36.

39. *Id.*

40. *Id.*

41. *Id.*

42. General Principles of the Civil Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), 2 P.R.C. LAWS 255-49 (China).

43. Marriage Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981, amended Apr. 28, 2001) art. 32(B), <http://www.nyconsulate.prchina.org/eng/lsgz/laws/t42222.htm> [hereinafter Marriage Law of the People's Republic of China].

national Chinese legislation.⁴⁴ The Marriage Law also stated that family violence should be prohibited, and a victim of family violence may seek assistance from local committees and public security to seek mediation and to stop the violence.⁴⁵ The Marriage Law also states that individuals who commit family violence that is sufficiently severe as to constitute a crime under the Criminal Law shall be held criminally liable.⁴⁶ Finally, it detailed that if a spouse is able to prove domestic violence is the basis for divorce; she is entitled to claim damages for the domestic violence.⁴⁷ Although this language is clear, the law did not provide a definition of family violence or domestic violence for these purposes, leading to confusion and a lack of enforcement of these provisions. In March 2004, the Constitution of the People's Republic of China was amended to include language that the state respects and protects human rights,⁴⁸ and in 2005, the Law on the Protection of Women's Rights and Interests was amended to include a prohibition on the use of violence against women.⁴⁹ These laws also do not provide definitions of these terms nor enforcement mechanisms for these protections, leaving violations to be dealt with under the existing criminal law.⁵⁰

Addressing the need for clarity regarding the definition of family violence in the Marriage Law, China's Supreme People's Court issued the "Judicial Interpretation for Issues Regarding the Marriage Law of the People's Republic of China" in December 2001.⁵¹ This document provided the first national-level guidance on how judges should handle marital cases involving allegations of domestic violence, including a definition of family

44. See Yuhong Zhao, *Domestic Violence in China: In Search of Legal and Social Responses*, 18 UCLA PAC. BASIN L.J. 211, 212 (2001).

45. See Marriage Law of the People's Republic of China, *supra* note 43, arts. 3, 43.

46. *Id.* at art. 45.

47. *Id.* at art. 46(c); see Zhao, *supra* note 44, at 211.

48. See XIANFA art. 33 (1982) (China).

49. See Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (China) art. 46, <http://www.wcwwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf>; *Human Rights in China, Caught Between Tradition and The State: Violations Of The Human Rights Of Chinese Woman*, 17 WOMEN'S RTS. L. REP. 285, 287 (1996) (describing passage of the Law on the Protection of Women's Rights and Interests).

50. See Criminal Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1980, amended Mar. 14, 1997) art. 98, <http://www.cecc.gov/pages/newLaws/criminalLawENG.php> [hereinafter PRC Criminal Law]; see also *id.*, arts. 232, 234, 236, 260 (including the crimes of intentional murder, intentional injury, rape and abuse).

51. See Rangita de Silva de Alwis, *Opportunities and Challenges For Gender-Based Legal Reform In China*, 5 E. ASIA L. REV. 197, 271-72 (2010).

violence.⁵² Then in March 2008, the Institute for Applied Jurisprudence of the Supreme People's Court of China issued "The Bench Book on Marriage Cases Involving Domestic Violence" (涉及家庭暴力婚姻案件审理指南 roughly translated as "Bench Book")⁵³ for judges hearing marital cases. The Bench Book contained a description of how judges may issue civil protection orders (*renshen anquan baohu ling* or 人身安全保护令) to provide protection to victims of domestic violence.⁵⁴ The purpose and structure of the civil protection order in the Bench Book bears a resemblance to U.S. civil protection order statutes and is based in part on those statutes.⁵⁵ In September 2008, the All China Women's Federation, the Ministry of the Chinese People's Congress, the Ministry of Public Security, the Ministry of Civil Affairs, the Ministry of Justice, and the Ministry of Health jointly issued an official statement "Several Opinions on Prevention and Prohibition from Domestic Violence."⁵⁶ This was the first national policy paper on domestic violence, describing the responsibility of the government in addressing domestic violence and the need for collaboration between and among government agencies to provide support and protection

52. Interpretation No. 1 of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China, art. 1 (Dec. 27, 2001) [hereinafter Interpretation No. 1 of Marriage Law], <http://www.cnbjlawyers.com/article/en/Family/195.htm>. (defining family violence in Articles 3, 32, 45 and 46 of the Marriage Law as "a behavior whereby a person causes certain physical or mental injuries to his family member(s) by beating, binding, forced restriction of personal freedom or by other means."). Note that a definition of domestic violence is not included in the judicial interpretation, and it is not clear if the intention is that domestic violence and family violence are the same.

53. It is important to note that because of significant differences in the structures of the legal system in China and the U.S., there is no direct translation into English for this document. There is nothing in the Chinese legal system called a bench book, however, the author of this document and I have determined that the closest proximate translation based upon its issuance, its role and its usage is Bench Book.

54. The author has conducted numerous, lengthy interviews with a researcher from the Institute for Applied Jurisprudence of the Supreme People's Court of China involved in the development of the Bench Book in December 2012 and January 2013. See Interview with Researcher from the Institute for Applied Jurisprudence, *supra* note 5. An unofficial English translation of the Bench Book is on file with the author. These conversations and this document form the basis of the interpretations and analysis of the Bench Book contained in this Article. The Bench Book is the first document of its kind in China according to this researcher.

55. Interview with Researcher from the Institute for Applied Jurisprudence, *supra* note 5. During these conversations she confirmed that she used these materials and researched the U.S. civil protection order when developing the Chinese domestic violence bench book. *Id.*

56. See Anti-Domestic Violence Network of China Law Society, LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON THE PREVENTION AND PUNISHMENT OF DOMESTIC VIOLENCE (A Draft Proposal by Anti-Domestic Violence Network Experts) 46 (2010) (copy in English and Chinese on file with the author); Li Ying, *New Development in Prevention and Prohibition of Domestic Violence in China*, in WELLESLEY CTR. FOR WOMEN, NEW AND EMERGING DEVELOPMENTS IN GENDER AND LAW IN CHINA 51, 56 (2009) [hereinafter *New Development*]; *The Suggestions Public Policy Should Improve the Policy and Legal Framework for Anti-Domestic Violence*, CHINA WOMEN'S NEWS (Nov. 11, 2008), http://www.china-woman.com/tp/main?fid=open&fun=show_news&from=view&nid=88903&ctype=3 (English translation on file with the author).

to victims of domestic violence, and describes the responsibility of each participant institution in ending domestic violence.⁵⁷ This document is remarkable for its focus on governmental responsibility for protecting victims, incorporating a human rights perspective.

The first legislation to specifically address domestic violence in China was on the local level in the city of Changsha in Hunan Province in 1996.⁵⁸ This was followed by the first provincial level regulation on domestic violence entitled, “A Resolution Concerning the Prevention and Resolution of Domestic Violence,” issued in 2000 by the People’s Congress Standing Committee of Hunan Province.⁵⁹ By September 2008, twenty provinces, municipalities, and autonomous regions in China had adopted legal mechanisms against domestic violence.⁶⁰ In addition, by October 2008, twenty-three provinces, municipalities, and autonomous regions had passed enforcement plans for the national Law on the Protection of Women’s Rights and Interests specifically addressing domestic violence.⁶¹ Today, all but six or seven provinces have adopted official policy statements against domestic violence.⁶²

These regulations and policies identify domestic violence as a violation of a woman’s human rights and affirmatively state that preventing and responding to domestic violence is a means of ensuring harmonious families and social stability.⁶³ All of these regulations encourage promotion and education of laws on the prevention of domestic violence, to raise citizens’ legal awareness. Unfortunately, the majority of these policies and legislative initiatives do not contain specific rights or protections for victims of domestic violence, and thus, attorneys and scholars in China report that these policies have not resulted in increased protections for victims or punishment for perpetrators. However, all of these laws reflect

57. See New Development, *supra* note 56 at 56-57; see also Anti-Domestic Violence Network of China, REPORT ON ANTI-DOMESTIC VIOLENCE ACTION IN CHINA 8 (2011) (English copy on file with the author).

58. See Anti-Domestic Violence Network of China, REPORT ON ANTI-DOMESTIC VIOLENCE ACTION IN CHINA 6 (2011) (translated as the “Decision on How to Prevent and Stop Domestic Violence.”).

59. See Zhao, *supra* note 44, at 229.

60. See Anti-Domestic Violence Network of China, REPORT ON ANTI-DOMESTIC VIOLENCE ACTION IN CHINA 7-8 (2011) (in chronological order of adoption, the provinces included Hunan, Sichuan, Ningxia, Jiangxi, Shaanxi, Heilongjiang, Hubei, Shanxi, Anhui, Shandong, Hebei, Liaoning, Guangxi, Guizhou, Hainan, Qinghai, Henan, Inner Mongolia, Chongqing, and Jilin).

61. *Id.* at 8 (in chronological order Xinjiang, Hunan, Heilongjiang, Jiangxi, Shaanxi, Guizhou, Shanghai, Anhui, Ningxia, Guangdong, Tianjin, Zhejiang, Hubei, Gansu, Sichuan, Jilin, Xanxi, Jiangsu, Yunnan, Hebei, Chongqing, Henan and Fujian).

62. Board Member, Remarks at the National Anti-Domestic Violence Network Conference (Jan. 29-30, 2013) China (stating that 28 provinces now have anti-domestic violence legislation leaving only six or seven without such legislation) (on file with the author).

63. *Id.*

recognition that government has a responsibility to prevent and to protect victims of domestic violence and provide a good framework to develop coordinated responses to domestic violence. Implementation and enforcement of these laws is still evolving and domestic violence persists at high levels.⁶⁴ The Bench Book issued in 2008 by the Institute for Applied Jurisprudence of the Supreme People's Court provides the first detailed guidance on issuance and enforcement of civil protection orders and possibly the best opportunity for the creation of a specific set of legal protections to provide safety and protection for victims of domestic violence thus far.

II. CIVIL PROTECTION ORDERS IN CHINA AND THE UNITED STATES

Civil protection orders have been described as the most commonly used legal remedy for domestic violence in the U.S.⁶⁵ The first comprehensive domestic violence civil protection order statute was introduced in Pennsylvania in 1976.⁶⁶ As of the 1990s, all fifty states and the District of Columbia had adopted civil protection order statutes for victims.⁶⁷ The civil protection order is a unique, quasi civil-criminal legal construct that was informed by the experiences of victims of domestic violence. When interviewed, victims stated that they want the abuse to stop, but they do not necessarily want the offender to go to jail, and they do not want to be forced to leave their home and go to a shelter in order to be safe.⁶⁸ Victims provided many reasons for not wanting the perpetrator to be criminally prosecuted, including that they still love the abuser, they want

64. See, e.g., *Law on Domestic Violence*, CHINA DAILY (May 8, 2012), http://www.china-daily.com.cn/opinion/2012-05/08/content_15231819.htm. According to the All-China Women's Federation statistics from 2011, approximately one in four women have experience domestic violence. See *More Than Half Chinese Suffer Domestic Violence Survey*, CRIEnglish (May 19, 2012), <http://english.cri.cn/6909/2012/05/14/2982s699572.htm>. According to an online survey released by the Maple Women's Psychological Counseling Center in May 2012, of 1858 respondents (male and female), 54.6% reported experiencing some form of domestic violence including "vocal or sexual abuse, restraints on freedom, beating and even scalding and knife attacks." *Id.*

65. See Goldfarb, *supra* note 15, at 1489.

66. See Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 205 (1999) (finding that while two states had protection order legislation prior to Pennsylvania's 1976 Protection from Abuse Act, this Act was a landmark in terms of scope of protection). Note that civil protection orders are known by different names in different United States jurisdictions including restraining order, protection order, peace order, etc.

67. EVE S. BUSAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 234 (3d ed. 2003).

68. See Goldfarb, *supra* note 15, at 1488-89 (stating the many women in abusive relationships do not want to separate from the abuser, that they want the abuse to stop but the relationship to continue).

their children to have a father, the perpetrator is often the family breadwinner, and they fear losing income and becoming homeless due to lack of financial resources.⁶⁹

Civil protection orders are currently available in every state in the U.S. and are afforded full-faith and credit. Orders issued in one state are enforceable in other states if the victim moves or flees to another jurisdiction, thereby providing her with continuous protection.⁷⁰ Statutes differ substantively and procedurally from state to state including the requisite relationship between the victim and the perpetrator, the types of evidence necessary and available remedies.⁷¹ In general, the relationship requirements include those who are married, have a child in common, were or are currently living together, or are in a dating relationship.⁷² In recent years, civil protection order statutes have been amended to specifically enable teens, victims of elder abuse, and victims in same gender relationships obtain civil protection orders.⁷³ Additional remedies under civil protection order statutes include visitation, spousal support, firearms possession prohibitions, counseling for the victim and perpetrator, and economic remedies deemed appropriate.⁷⁴ The proof required to obtain an order also varies from state to state. In general, proof of criminal behavior committed by the respondent against the petitioner and continued threat of such criminal behavior is required.⁷⁵ Some states allow a combination of behaviors to establish the requisite acts, including noncriminal behavior such as harassment, emotional, economic, and mental abuse.⁷⁶ Remedies available include ordering the perpetrator of the domestic violence to refrain from physically harming the victim, contacting or harassing the victim, staying a specific distance away from the victim, and vacating a shared home.⁷⁷ Although civil protection orders have been shown to provide safety and protection to some victims, they have not been without criticism.

69. *Id.*

70. 18 U.S.C. § 2265 (2006).

71. *See generally* Catherine F. Klein & Leslye E. Orloff, *Promising Legal Protections for Battered Women An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (providing a comprehensive survey of civil protection order statutes in all fifty jurisdictions, the District of Columbia, and Puerto Rico).

72. *Id.* at 814-41.

73. *Id.*

74. *Id.* at 910-48.

75. *See* Johnson, *supra* note 3, at 1112 (stating two-thirds of states limit CPO remedies to those who are subjected to physical violence or other criminal acts under state law).

76. *See* DEL. CODE ANN. tit. 10, § 1045 (defining domestic violence to include “[e]ngaging in a course of alarming or distressing conduct in a manner which is likely to cause fear or emotional distress or to provoke a violent or disorderly response.”).

77. *See* Klein & Orloff, *supra* note 71 (describing remedies available to petitioners in civil protection orders).

Some scholars have interpreted these statutes as requiring that the victim leave the shared home and end the relationship in exchange for protection.⁷⁸ Civil protection orders are often referenced as “just a piece of paper,” alluding to the fact that their efficacy depends on the victim’s willingness to report violations to the police, which is often directly related to their trust in the police to promptly respond to the complaint, effective prosecution of the violations, and appropriate judicial consideration of those violations.⁷⁹ It has widely been acknowledged that a coordinated community response is necessary to ensure the safety of victims and accountability of batterers, and the enforcement of the civil protection order by the police, prosecutors, and judges is a concrete example of this.⁸⁰

The Bench Book issued by the Institute for Applied Jurisprudence of the Supreme People’s Court of China for judges handling marital cases in 2008 provided the first mention of a civil protection order in China. The purpose of the Bench Book is to provide assistance to judges handling marriage cases involving allegations of domestic violence.⁸¹ It includes a definition of domestic violence, and it incorporates reference to the national Civil Procedure Law as the authority for judges to issue civil protection orders.⁸² In conjunction with issuance of the Bench Book, nine pilot courts were authorized to use the Bench Book to issue civil protection orders on behalf of victims of domestic violence in marital cases.⁸³ Over the last few years, the number of provinces and courts involved in the pilot project has

78. See generally Goldfarb, *supra* note 15, at 1488-89.

79. See Leigh Goodmark, *Law Is the Answer? Do We Know For Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004).

80. *Id.*

81. *Foreword to INST. FOR APPLIED JURISPRUDENCE OF THE SUPREME PEOPLE’S COURT OF CHINA, BENCH BOOK FOR HANDLING MARRIAGE CASES INVOLVING DOMESTIC VIOLENCE (forthcoming) [hereinafter CHINA-BENCH BOOK].* All references to the Bench Book are from an unofficial translation on file with the author. Because the translation is unofficial, there may be some misunderstandings due to the translation and all errors are mine. In 2007, the author traveled to China at the request of the American Bar Association Rule of Law program in China to meet with judges from the Supreme People’s Court and judges from across the country to present information regarding how evidence of domestic violence is collected and considered in United States courts and how mediation is used in marital cases where allegations of domestic violence are present. As a part of these discussions, the author presented a copy of Washington State’s judicial bench book on domestic violence as an example of how guidance is provided to judges in the United States on how to consider these issues.

82. Civil Procedure Law of the People’s Republic of China (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective Apr. 9, 1991) (LawInfoChina), art. 154.

83. Interview with Researcher from the Institute for Applied Jurisprudence, *supra* note 5.

expanded to include at least seventy-four.⁸⁴ Beijing was included in the pilot project in August 2012.⁸⁵

The Bench Book is not law, and it is not binding on Chinese judges. However, several high provincial courts have issued opinions including language from the Bench Book regarding issuance of civil protection orders in marital cases; these opinions are considered law and binding in those jurisdictions.⁸⁶ Moreover, attorneys have referred to the Bench Book when representing victims of domestic violence seeking civil protection orders in marital cases.⁸⁷ Chong'an District Peoples' Court in Wuzi City, Jiangsu Province, issued the first civil protection order on August 6, 2008.⁸⁸ Then, on September 24, 2008, a court in Yuelu District Peoples' Court in Changsha City, Hunan Province issued a civil protection order.⁸⁹ In Changsha, a copy of the order was sent to the police, and the ruling required the police to inform the court if the husband violated the order. On June 1, 2010, the Yuelu District Court of Changsha issued the first civil protection order for a male victim of domestic violence against a woman.⁹⁰

Between March 2008, when the Bench Book was issued, and October 2010, it was reported that one hundred protection orders were issued. It is estimated that over two hundred have been issued as of April 2013.⁹¹ For example, Shaanxi became a part of the pilot protection order project in 2010, and they have issued thirty-five protection orders for victims as of

84. See *Call for Action on Domestic Violence*, *supra* note 9 (stating that seventy-two courts were enrolled in the pilot protection order project as of the end of 2010).

85. Judge C, Addressing the National Anti-Domestic Violence Network Conference (Jan. 29-30, 2013) (on file with the author).

86. See, e.g., *Procedures and Provisions for Protection Order Rulings in Domestic Violence Cases in Chongqing Municipality Higher People's Court*, CHINA.FINDLAW, <http://china.findlaw.cn/lawyers/article/d105170.html> (last visited Apr. 12, 2013) (English translation on file with the author).

87. Conversation with Guo Jianmen, Dir. of Beijing Zhongze Women's Legal Counseling and Serv. Ctr., Beijing, China (Nov. 30, 2012). She described how she used the Guidance in a case representing a victim of domestic violence seeking a divorce including providing the judge and opposing counsel with a copy. *Id.*; see also WOMEN OF CHINA, *supra* note 10 (describing how judges are using the guidance in decision making in marital cases).

88. *See id.*

89. *Id.*

90. See *Yuelu District Court of Changsha Issued 1st Protective Order to Male Domestic Violence Victim*, PEOPLE'S DAILY (June 4, 2010), <http://society.people.com.cn/GB/42735/11788415.html> (describing how a man filed for divorce and sought a protection order from his wife in May 2010, alleging she had beaten him) (English translation on file with author).

91. See *Over One Hundred Orders Were Issued Nationwide—Most of the Husbands Acknowledged His Fault and Most of the Wife Withdrew The Divorce Proceedings*, LEGAL DAILY (Oct. 19, 2010), http://news.xinhuanet.com/legal/2010-10/19/c_12673716.htm (English translation on file with author); see also Interview with Researcher from the Institute for Applied Jurisprudence, *supra* note 5.

January 2013.⁹² Given the total population of China of over one billion people, this number is remarkably low. Judges, attorneys, and domestic violence victim advocates speculate that the low number is due to the lack of public awareness of the civil protection order, the inability of victims to provide sufficient evidence to obtain a protection order, the limiting of access to marital cases, and concern about the lack of enforcement.⁹³

In February 2013, one of the first civil protection orders issued in Beijing was on behalf of an American woman against her wealthy Chinese husband in a high profile divorce case. In addition to issuing Mrs. Lee a three month protection order against Li Yang, founder of the very successful “Crazy English” language program, the court acknowledged that domestic violence was a legitimate basis for divorce and ordered him to pay her 50,000 renminbi in compensation for the violence.⁹⁴ Mrs. Lee’s case has garnered national attention since she posted photos of her abuse on Weibo, the Chinese version of Twitter, in 2011, and has contributed significantly to raising awareness of domestic violence and the challenges victims face in seeking protection in China.⁹⁵ Moreover, application of the provisions of the civil protection order in Mrs. Lee’s case provides important precedent that other judges may learn from.

A. DEFINITION OF DOMESTIC VIOLENCE

China and the U.S. differ in how domestic violence is defined, who is eligible to petition for a protection order, when it is available, the remedies available, and how evidence of domestic violence is accessed and considered by judges in civil protection order proceedings. However, there are also similarities in approaches to development of effective enforcement mechanisms for orders to ensure victims’ safety. The definition of domestic violence for the purposes of obtaining a civil protection order in

92. Judge A from Shaanxi High People’s Court, Remarks at the National Anti-Domestic Violence Network Conference (Jan. 29-30, 2013 in Beijing China) (on file with the author).

93. Fanbao Conference, *supra* note 36. See *infra* Part II.B. for discussion.

94. See Didi Kirsten Tatlow, *In China’s Most-Watched Divorce Case, 3 Victories, 1 Defeat*, INT’L HERALD TRIB. (Feb. 4, 2013), <http://rendezvous.blogs.nytimes.com/2013/02/04/in-chinas-most-watched-divorce-case-3-victories-1-defeat/?smid=tw-share>.

95. See, e.g., *Domestic Violence: Beaten But Unbowed*, ECONOMIST (Aug. 18, 2012), <http://www.economist.com/node/21560616> (describing the domestic violence Mrs. Lee experienced starting in 2006 at the hands of her husband); Kathleen E. McLaughlin, *China’s Domestic Violence Problem*, SALON (Sept. 15, 2011), http://www.salon.com/2011/09/14/china_domesticviolence/ (describing Ms. Lee’s experiences and the photos that she posted on Weibo of her injuries and how it raised awareness about domestic violence, the advocacy for the national anti-domestic violence law, and the historical culture of accepting abuse as normal, related to gender inequality); Gillian Wong, *Kim Lee Becomes Hero For Battered Wives in China*, HUFFINGTON POST (Feb. 9, 2012), http://www.huffingtonpost.com/2012/04/21/kim-lee-domestic-violence_n_1442559.html.

China is distinguishable from North Dakota's because of its integration of international human rights law and principles.

The Bench Book begins its discussion of the definition of domestic violence by referencing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and a United Nations report on violence against women defining domestic violence as a gender-based crime.⁹⁶ Domestic violence is considered a violation of CEDAW and China has signed and ratified CEDAW.⁹⁷ The Bench Book then incorporates the definition of family violence from the Judicial Interpretation of the Chinese Marriage Law from December 2001: "Behavior whereby a person causes certain physical or mental injuries to his family member(s) by beating, binding, forced restriction of personal freedom or by other means."⁹⁸

The term "domestic violence" as used in the Chinese Marriage Law is not defined.⁹⁹ The Bench Book defines domestic violence for the purposes of determining when it is appropriate to issue civil protection orders in marital cases, thereby addressing confusion caused by the lack of clarity in the Marriage Law. The definition of domestic violence is broader than the definition of family violence: "Behavior, among family members, especially between husband and wife whereby one party violates the other party's physical, sexual, emotional and other personal rights through coercion, violence, abuse, economic control and other means in order to attain the purpose of controlling the other party."¹⁰⁰ It then references international conventions, laws, and research as the basis for further describing the four manifestations of domestic violence: physical violence, sexual violence, emotional violence, and economic control.¹⁰¹ These forms of domestic violence are framed as violations of individual rights, consistent with international human rights principles. The inclusion of emotional, mental, economic, and sexual harm as forms of domestic violence in the Bench Book demonstrates a clear understanding of dynamics of domestic violence, that it is a pattern of physical and other

96. CHINA-BENCH BOOK, *supra* note 81, at ch.1, art. 2. China became a signatory to CEDAW in 1980. Domestic violence is considered a violation of CEDAW.

97. See Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8 NW. U. J. INT'L HUM. RTS. 190, 193 (2010) (describing how violence against women was incorporated into CEDAW by adopting General Recommendation 19 in 1992).

98. CHINA-BENCH BOOK, *supra* note 81, at ch.1, art. 2.

99. See de Alwis, *supra* note 51, at 269-70 (stating that the term family is not defined and it is unclear if it includes grandparents, ex-spouses, or if it only covers women who were married at the time of a domestic violence incident).

100. CHINA-BENCH BOOK, *supra* note 81, at ch.1, art. 2.

101. *Id.* at ch. 1, art. 3.

abusive behaviors and tactics designed to assert power and control over the victim.

In these ways, the definition of domestic violence in China for protection orders is broader and more inclusive than the definition in most U.S. civil protection order statutes. The definition of domestic violence in North Dakota is representative of many states' definitions in that it does not include any reference to international human rights. It defines domestic violence as physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm.¹⁰² The definition provided in the North Dakota statute is also similar to many other states in the U.S. in that it is gender neutral, limited to criminal acts, omitting other abusive behavior often used by offenders in conjunction with criminal acts to exert power and control over the victim.¹⁰³ This is in spite of the fact that victims have articulated, and the general understanding among domestic violence victim advocates is, that psychological abuse is as harmful as physical abuse.¹⁰⁴

American scholars have argued the need for civil and criminal law to go beyond discreet acts of physical violence to reflect the whole experience of domestic violence as power and control tactics.¹⁰⁵ To address these concerns, the North Dakota Judicial Bench Book provides additional guidance to judges, identifying domestic violence as "a pattern of behavior where one person in an intimate relationship coerces, dominates, and isolates another person in an intimate relationship in order to maintain power and control over that person and over the relationship."¹⁰⁶ It goes on to state:

Power and control is the central dynamic of a relationship in which domestic violence occurs and patterns of abuse often escalate over time. Abusive partners use myriad tactics and strategies to exert and maintain control over their partners, including physical abuse, verbal abuse, sexual abuse, psychological/emotional abuse, economic abuse, isolation, intimidation, and use of privilege such as immigration status, or threats to disclose the sexual identity or sexual orientation of the victim.¹⁰⁷

102. N.D. CENT. CODE § 14-07.1-01(2) (2009).

103. *See generally* Heine v. Heine, 2010 ND 5, 777 N.W.2d 590 ("[C]alling one's wife a 'bitch' and threatening her does not constitute domestic violence.").

104. *See* SCHNEIDER, *supra* note 17, at 66 (stating that women describe threats and verbal abuse as more painful than physical abuse).

105. *See* Johnson, *supra* note 3, at 1112.

106. *See* N.D. COURT SYSTEM, NORTH DAKOTA JUDICIAL BENCH BOOK 4 (2012) (on file with the author).

107. *Id.*

In this way, the North Dakota Bench Book and the Chinese Bench Book are similar: neither is binding on judges, however both are intended to provide judges with guidance to identify the context in which the criminal acts occur and educate them about the aspects of domestic violence that separate it from other crimes.

Only individuals who are married to the person whom has allegedly committed domestic violence, or those who are recently divorced from the individual whom has allegedly committed the domestic violence, are permitted to petition the court for a civil protection order in China.¹⁰⁸ As stated in the Bench Book, an individual may only file for a civil protection order immediately preceding, or for a limited time after, filing for divorce.¹⁰⁹ A victim must file for divorce within fifteen days of when the court has issued the civil protection order or the civil protection order will be deemed expired.¹¹⁰ The victim may also apply for a civil protection order for six months after the divorce proceedings are completed.¹¹¹ In this way, the Bench Book requires that the civil protection order be issued in conjunction with divorce proceedings.¹¹²

In contrast, in North Dakota, a victim of domestic violence may petition the court for a civil protection order against a “family or household member” which is defined as those married to one another, those in a dating relationship, people who are living together but not married, those who have previously lived together, people who may have never lived together or been married and have a child in common, “and, for the purposes of the issuance of a domestic violence protection order, any other person with a sufficient relationship to the abusing person as determined by the court.”¹¹³ This definition recognizes that domestic violence may occur in marital relationships but also in dating relationships, or in relationships between individuals who were once married or who are currently living together but

108. See http://www.legaldaily.com.cn/bm/content/201103/26/content_2544886.htm?node=20733. Part of the Pilot Courts Try to Apply for a Separate Filing, March 26, 2011, Chinese Legal Daily, (English translation on file with the author).

109. CHINA-BENCH BOOK, *supra* note 81, at ch. 3, art. 31.

110. *Id.*

111. *Id.*

112. *Id.*

113. N.D. CENT. CODE § 14-07.1-01(4) (2009) Family or household member is defined as: a spouse, family member, former spouse, parent, child, persons related by blood or marriage, persons who are in a dating relationship, persons who are presently residing together or who have resided together in the past, persons who have a child in common regardless of whether they are or have been married or have lived together at any time, and for the purposes of the issuance of a domestic violence protection order any other person with a sufficient relationship to the abusing person as determined by the court.

Id.

have never been married. In the U.S., more than fifty-percent of victims are abused by a current or former boyfriend or girlfriend¹¹⁴ and the highest rates of victimization are against girls and women between the ages of sixteen and twenty-four.¹¹⁵ The broader definition of domestic violence also reflects the reality in the U.S. that there are many different forms of families and intimate relationships, which may include same gender relationships. Domestic violence may occur in all of those relationships, and all victims must have equal access to legal protections. In North Dakota, civil protection orders may be sought in conjunction with other civil and criminal proceedings such as divorce or they may be sought independently.¹¹⁶ In the U.S., the fora for obtaining a protection order are broad since the purpose of the civil protection order statute is to prevent further harm to all victims of domestic violence regardless of marital status.¹¹⁷

It would be dangerous, and inaccurate, to interpret the limited access to civil protection orders in China as a reflection of a wider held belief that domestic violence only occurs in marital relationships or at the time of separation. The definition of domestic violence included in recent proposals put forward by scholars and advocates for a national anti-domestic violence law contain definitions that include dating relationships.¹¹⁸ Moreover, it was recently reported that Changchun City adopted a Domestic Violence Ordinance that included a definition of family that includes unmarried individuals, single parents, same-sex partners, and other circumstances.¹¹⁹ Additionally, at least one Chinese judge has issued a civil protection order in a case involving a woman who was not married to her abuser.¹²⁰ Conversations with national leaders in the anti-domestic violence movement in China confirm a sophisticated understanding of domestic violence, that it occurs in all forms of intimate relationships in

114. U.S. BUREAU OF JUSTICE STATISTICS, NCJ 187635, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM 1993-1999, at 7, tbl. 4 (2001).

115. *Id.*

116. N.D. CENT. CODE § 14-07.1-07 (2009).

117. *See* *Wolt v. Wolt*, 2010 ND 30, ¶9, 778 N.W.2d 802, 807 (citing *Gaab v. Ochsner*, 2001 ND 195, ¶5, 636 N.W.2d 669, 671).

118. *See* Anti-Domestic Violence Network of China Law Society, LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON THE PREVENTION AND PUNISHMENT OF DOMESTIC VIOLENCE (A Draft Proposal by Anti-Domestic Violence Network Experts) 46 (2010) (urging a definition of domestic violence that includes "persons who are in a dating and cohabitation relationship or who have formerly been in a spousal relationship.").

119. *See* CHINA WOMEN'S NEWS, *supra* note 56.

120. Interview with Researcher from the Institute for Applied Jurisprudence, *supra* note 5.

China regardless of duration or whether the individuals were ever married, lived together, or had a child in common.¹²¹

The limiting of access to civil protection orders to spouses or former spouses and family members in Bench Book issued in China is similar to the early versions of civil protection order statutes in the U.S. However, over the past forty years, experience and research has demonstrated that domestic violence is committed in all forms of intimate partner relationships. U.S. state law definitions of domestic violence have been amended to expand protections to victims in more of these intimate relationships.¹²²

In practice, the response of judges to women seeking civil protection orders in the U.S. is very similar to the response of judges and attorneys in China, and has not been without criticism. As previously stated, victims in the U.S. have repeatedly stated that they wish the abusive behavior to stop but they do not necessarily want to sever the relationship with the abuser. Since its inception, implementation of the civil protection order reflected the belief of judges that a woman seeking protection from the courts should leave her abuser if she was living with him. Chinese judges and lawyers have articulated that taking the step of seeking a civil protection order often indicates that the abuse is such that family harmony has been broken, and thus, divorce is necessary. Accordingly, it may only be sought when a victim believes the abuse is so bad that she is also willing to seek a divorce. Some have reported cases in which obtaining the civil protection order has ended the abuse and then the divorce is not necessary. Information about civil protection order proceedings is limited, however, because most court proceedings are not open to the public and there have been very few orders issued. Regardless, these statements make it clear that the judges understand the goal of the civil protection order is to stop the abuse, not necessarily end the relationship.

Historically, insufficient consideration is given to the sacrifice required of victims who courageously come before the legal system seeking protection from perpetrators. For many victims in the U.S., their first interaction with the legal system relating to the domestic violence is when they seek a civil protection order. This may be the first time that they have articulated the abuse they experienced and they are doing so to a judge, often a total stranger. In doing so, they face a system that either assumes

121. See Conversations with Staff and Board of the Anti-Domestic Violence Network in (Dec. 2012, Jan. 2013) (on file with the author); see also Presentations provided by Speakers at the National Anti-Domestic Network Conference (Jan. 29-30, 2013) (on file with the author).

122. See Klein & Orloff, *supra* note 71, at 811-42 (describing how the majority of state protection orders covered spouses and former spouses, family members, children, parents of a child in common, unmarried persons of different genders living as spouses, all were eligible to seek protection orders).

that they will leave their home if it is shared with the perpetrator or requires them to do so in exchange for access to the protections provided by the legal system. For example, a victim may petition the court to have the abuser stop harming her, and to stop contacting her. If they continue to live together, some would argue that the order is a legal fiction because it is unenforceable. Moreover, if the victim waives in response to questions about when she is moving out, her credibility is questioned and she may become subject to a silent higher standard of proof regarding the domestic violence alleged.

The standard response is “Why does she stay?” In the past, judges who were not trained on domestic violence struggled to understand why a victim would consider continuing to live with her husband or boyfriend if he actually committed the violence she alleged in order to obtain the civil protection order. Training of judges and lawyers has improved their response to victims coming forward to seek assistance. In addition, the focus of the anti-domestic violence advocacy community has broadened from attempting to ensure that there are sufficient emergency and transitional housing options for victims when they leave, to supporting victims who may choose to stay in their home and with the abuser after obtaining a civil protection order. Civil protection order statutes have been amended to include a “kick out order” as a possible remedy, requiring the abuser to vacate the shared home instead of the victim. Like the amendments to the statutes broadening the categories of individuals eligible to seek a civil protection order, these are reflective of an evolution in thinking about domestic violence in the U.S. and about the role of law in ending it.

Instead, the limitation of the accessibility of civil protection orders in China thus far is a product of the framework in which it has been inserted. As described above, the Bench Book is not binding and was issued in 2008, in the context of the 2001 amendment to the Marriage Law that mentioned both domestic violence and family violence, and established that domestic violence may be a basis for divorce, but failed to provide a definition for either term. A judicial interpretation of the Marriage Law that same year provided a definition of family law, but not one for domestic violence, leaving judges handling marital cases in which domestic violence was raised as a basis for divorce without guidance for how to consider evidence of domestic violence or how to assess economic remedies as permitted by the law and the guidance. The Bench Book was issued after the 2001 amendment and judicial guidance interpreting the Marriage Law in order to address the need for a definition of domestic violence. Thus it could be inferred that the civil protection order in the Bench Book had to stay within the marital framework.

B. CONSIDERATION OF EVIDENCE AND BURDEN OF PROOF

How evidence is obtained and considered in civil protection order proceedings in China and the U.S. is considerably different, starting with how the victim's statement should be valued. In China, the Bench Book asserts that a judge should treat the statement of the victim as more credible than that of the offender.¹²³ In support of this recommendation, the Bench Book states that the victim would not take the risk of coming to court and sharing this information unless it was the truth.¹²⁴ These two statements are remarkable and reflect an effort to address any gender bias that may exist when a judge hears a domestic violence case and the reality of the difficulties victims must overcome to seek protection from the courts. Moreover, Chinese judges and lawyers have repeatedly stated that the words of the victim are not considered evidence without additional witness statements or forms of evidence, making this recommendation even more important.¹²⁵

The Bench Book also provides examples of evidence that may prove that a petitioner has suffered domestic violence or is facing the threat of domestic violence in order to meet the evidence requirements of a civil protection order. Pictures of injuries, police records, a statement from a witness, documentation from a social service organization, and documentation of the abuse, including text messages containing threats from the respondent, are all examples of evidence that the victim may bring forward or the judge may seek in support of a victim's statement.¹²⁶ In one case, a judge reported that the husband not only beat his wife at home, but he came to her workplace and beat her as well.¹²⁷ The fact that the husband came to the workplace, a public place, was taken very seriously by the judge. The judge went to the workplace and interviewed the wife's coworkers who stated they witnessed the abuse. There was also a video camera at the workplace that recorded the episode and this evidence was also admitted in support of her allegations.¹²⁸

The Bench Book states that the standard of proof that the judge should use to consider this evidence is preponderance of the evidence and the judge is to make the decision "based on logic reasoning and the rule of experience

123. CHINA-BENCH BOOK, *supra* note 81, at art. 41.

124. *Id.*

125. Interviews with Chinese Judges and Lawyers, *supra* note 118.

126. CHINA-BENCH BOOK, *supra* note 81, at art. 32.

127. Judge B, Remarks at the National Anti-Domestic Violence Network Conference (Jan. 29-30, 2012).

128. *Id.*

and avoid the evidence standards of criminal procedures.”¹²⁹ This is significant because it reminds the judge that this is a civil court proceeding, and the preponderance of the evidence standard should be applied. Once the victim presents evidence of the injury and that the respondent committed the act that caused the injury, the burden of proof shifts to the respondent.¹³⁰ If the defendant denies causing the harm but is unable to provide evidence in support of his denial, then the Bench Book instructs the judge to find domestic violence has occurred and grant the order.¹³¹

This level of detail regarding the burden of proof in a civil protection order for judges is extremely helpful because it contains examples of the kind of evidence that the judge may seek and how it should be considered. In China, in contrast to the U.S., judges may and often do conduct a factual investigation in cases before them. Once a petition for a civil protection order is filed with the court, a judge may contact the victim directly to ask additional questions, including asking for specific pieces of evidence to support her statement in the petition. Similarly, the judge may contact public security (the police), the village committee where the petitioner and respondent live, and neighbors to determine if there are any witnesses or documentation supporting the petitioner’s claims of domestic violence.¹³² This is in part because there is no discovery in Chinese courts, and thus the judge is permitted to conduct an investigation to gather information that would be provided by the parties via a discovery process in the U.S.¹³³ However, some judges do not conduct investigations, and it has been noted that judges who have not received training on domestic violence or gender awareness may not seek or interpret evidence of domestic violence appropriately.

In North Dakota, the preponderance of the evidence standard is also used in civil procedure proceedings, and the judge should issue a civil protection order if he or she believes the petitioner has demonstrated by a preponderance of the evidence actual or imminent domestic violence by the respondent.¹³⁴ In contrast to China, the judge considers the sworn statement

129. CHINA-BENCH BOOK, *supra* note 81, at art. 40.

130. *Id.*

131. *Id.*

132. Chinese Judges A and B, Remarks at the National Anti-Domestic Violence Network Conference (Jan. 29-30, 2013) (on file with the author). These judges have heard Civil Protection Order Cases. *Id.*

133. See Gary Seib, et al., Eye-On-China Webinar Series: When Litigating in China is Force upon You: the Mechanics and Peculiarities of Chinese Litigation (Dec. 2, 2010), *available at* http://www.bakermckenzie.com/files/Publication/024c2d7c-a887-4477-8199-17b2cf409937/Presentation/PublicationAttachment/4234f435-8867-48a8-bada-1bf97e032db5/pn_china_eyeon_chinawebinarseries_finalsession_dec10.pdf (stating that there is no discovery in Chinese courts).

134. See *Ficklin v. Ficklin*, 2006 ND 40, ¶12, 710 N.W.2d 387, 390.

of the victim as evidence of domestic violence. Also, *ex parte* communications are prohibited in the U.S., and judges rely on the parties or their attorneys to conduct the necessary investigation and bring forward relevant evidence upon which to base their decisions.¹³⁵ This places a significant burden on a *pro se* petitioner for a protection order who is frequently experiencing trauma related to the violence and often is unfamiliar with the court process or what information is most important to present to the judge. In the U.S., forms have been created to facilitate this process for victims, the majority of whom come to the court unrepresented.¹³⁶ Moreover, in many jurisdictions, domestic violence victim advocates who have developed an expertise in the process of petitioning for a protection order are permitted, and even encouraged, to accompany victims to court to provide them with support and guidance.¹³⁷

C. REMEDIES

The emphasis placed on obtaining economic remedies in the Chinese civil protection order also distinguishes it from the U.S. The Bench Book permits judges in China to issue a civil protection order that includes a similar range of injunctive relief as in the U.S.: requiring the respondent to stay a certain distance from the victim, her home, work, or other places she frequents, prohibiting the respondent from harassing, stalking, beating, threatening, or having any other unwelcome contact with the claimant.¹³⁸ In addition, the judge may also order the respondent from beating and threatening the family and friends of the claimant.¹³⁹ The judge may also order that the respondent temporarily move out of the residence shared by the parties.¹⁴⁰

Because the civil protection order may only be sought along with a divorce, there are also several remedies available that are specifically related to the divorce proceedings. For example, the judge may order that while the protection order is in effect, “either party shall not make decisions

135. See MODEL CODE OF JUDICIAL CONDUCT R. 3B(7) (2008) (prohibits judges from initiating, permitting or considering *ex parte* communication about a pending or impending proceedings with five exceptions); MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (2008) (prohibits lawyers from communicating *ex parte* with judges and other court officials during a proceeding, except as permitted by law or court order).

136. See, e.g., *Petition for Protective Relief under the Domestic Violence Chapter of the North Dakota Century Code*, ND COURTS (Jan. 28, 2010), http://www.ndcourts.gov/court/forms/Petition_for_Protective_Relief/petition_for_protective_relief_1-28-2010.pdf.

137. See, e.g., N.D. ADMIN. 34 (2010) (a certified domestic violence advocate may accompany the petitioner to the hearing and sit with the petitioner for the protection order during the hearing and at the judge's discretion, make written or oral statements to the court).

138. CHINA-BENCH BOOK, *supra* note 81, at ch. 3, art. 27(1), (2), (5).

139. *Id.* at art. 27(4).

140. *Id.*

on joint property of great value.”¹⁴¹ In this way, the linking of the civil protection order to the divorce proceedings is helpful in preserving assets. The law in China recognizes the economic impact of domestic violence and the need for victims to have access to remedies and resources after divorce. One judge who has issued civil protection orders in Hubei province has articulated that they prioritize these cases, specifically considering ways to avoid having victims be penalized economically for filing for divorce and reporting domestic violence.¹⁴² If the victim alleges “light injuries,” one judge stated that they will reprimand the perpetrator, if the violence continues and becomes more severe, they will fine the perpetrator thousands of remimbi as a part of the divorce proceedings to provide economic support for the victim and recognize domestic violence as the basis for the divorce.¹⁴³ The Bench Book specifically recognizes that financial considerations may play a role in her decision to seek safety. It states that when a judge finds it necessary, he or she may order the respondent to pay for living expenses for the victim and expenses related to raising any minor children in the custody of the victim while the order is in effect.¹⁴⁴ Moreover, the judge may order the batterer to pay for any medical expenses, fees for therapy, or “necessary fees of the claimant for receiving medical care due to the violent behaviors of the respondent.”¹⁴⁵ These specific remedies related to divorce proceedings and financial support for victims acknowledge the risk that women take coming forward to seek a divorce in China and the significant financial barriers that she will face including obtaining housing after the separation. In these ways, the Chinese civil protection order offers victims significant economic supports for victims that exceed those available in some jurisdictions in the U.S.

The Bench Book also recognizes that the victim wants the abuse to stop, and the batterer may need professional assistance in order to change behavior, so the judge may order that the respondent receive therapy at his own expense.¹⁴⁶ However, in both the U.S. and China, limited availability of appropriate batterers’ treatment services makes this a false option in many instances. Finally, the Bench Book includes a “catchall” provision that enables the judge to order “[o]ther measures to protect the personal safety of the claimant and their specific family members.”¹⁴⁷

141. *Id.* at art. 27(3).

142. Judge B, Addressing the National Anti-Domestic Violence Network Conference (Jan. 29-30, 2013) (on file with the author).

143. *Id.*

144. *Id.* at art. 28(1).

145. *Id.* at art. 28(2).

146. CHINA-BENCH BOOK, *supra* note 81, at art. 27(6).

147. *Id.* at art. 27(7).

In North Dakota, as a part of a civil protection order, a judge may issue relief that includes restraining the respondent from staying away from the petitioner, excluding the respondent from the home shared with the petitioner, an award of temporary custody and/or visitation of children and payment of child support.¹⁴⁸ A civil protection order may also restrain any party from “threatening, molesting, injuring, harassing, or having contact with any other person.”¹⁴⁹ The judge may also recommend or require as a part of the order that either or both parties receive counseling at a domestic violence program or similar agencies and may request a report from the agency designated. In contrast to the recommendations of the Bench Book, the North Dakota statute does not specifically mention economic remedies that the victim may seek. However, many state civil protection order statutes do include language that a victim may use to petition the court for financial support for her and any children.¹⁵⁰

D. ENFORCEMENT

Enforcement of the American and Chinese civil protection orders is challenging; however, the challenges reflect differences in governmental structures and the role of judges and police in society, as well as the linking of the protection order to divorce in China. According to the Bench Book, if the respondent violates a civil protection order in China by harassing, beating, or threatening the victim or her family members, including specifically forcing the victim to drop the charges or give up “legitimate rights and interests” the court should impose fines or take the respondent into custody.¹⁵¹ If the respondent’s behavior is both a violation of the ruling, and a crime, he should be “transferred to the public security agency” or “inform the victim that he or she may file criminal private prosecutions.”¹⁵²

Based on the experiences of judges and attorneys who deal with protection orders in China, in practicality the primary enforcement mechanisms of a civil protection order are civil: fines and an assessment of damages in any divorce proceeding.¹⁵³ If the actions taken by the perpetrator are also sufficient to establish a criminal act, the victim may file for a private criminal prosecution against him. If the criminal acts are

148. N.D. CENT. CODE §§ 14-07.1-02(4)(a)-(g) (2009).

149. *Id.* § 14-07.1-02(4)(a).

150. See Klein & Orloff, *supra* note 71.

151. CHINA-BENCH BOOK, *supra* note 81, at ch. 3, art. 36.

152. *Id.*

153. According to the Chinese Marriage Law, if a spouse establishes domestic violence as a basis for divorce, she is entitled to damages on that basis. Marriage Law of the People’s Republic of China ch. V.

severe enough to constitute a violation of criminal law, the public prosecutor is to enforce the criminal law. It has been reported that only one of the orders of protection has been violated, and this has been viewed by many as evidence of their effectiveness.¹⁵⁴

In contrast, in the U.S., enforcement of protection orders is primarily criminal. In North Dakota, an officer shall arrest the perpetrator with or without a warrant if the person has committed a violation of a protection order, whether or not it occurred in the presence of the officer.¹⁵⁵ A violation of a civil protection order that has been served upon the respondent is a Class A misdemeanor and contempt of court.¹⁵⁶ A second or subsequent offense is a Class C felony.¹⁵⁷ In North Dakota, a law enforcement officer shall arrest an individual, if the officer has probable cause to believe that the person has committed a crime of domestic violence, regardless of whether it occurred in the officer's presence.¹⁵⁸

The Chinese Bench Book also addresses the possibility that the victim may return to the court seeking that the civil protection order be dismissed.¹⁵⁹ Within three days of receiving the order, the claimant or the respondent can request a hearing on dismissing the order.¹⁶⁰ If the judge believes that a hearing is necessary, she may decide to hold a private hearing excluding all but the parties and family members.¹⁶¹ If the claimant refuses to attend the hearing, the order will be dismissed, unless it is proven the reason the victim did not attend is because the respondent threatened the victim.¹⁶² If the respondent refuses to attend the hearing on dismissal of the order, the hearing will proceed *ex parte*.¹⁶³

III. CHALLENGES

Given the population of China, the number of protection orders issued since they became available in 2008 is remarkably low. In 2010, the All-China Women's Federation received 51,171 complaints from women about domestic violence by their husbands, and yet, very few apparently sought civil protection orders.¹⁶⁴ There are several reasons why there have

154. Judge B from Shaanxi High People's Court, *supra* note 92.

155. N.D. CENT. CODE § 14-07.1-11 (2009).

156. *Id.* § 14-07.1-06.

157. *Id.*

158. *Id.* § 14-07.1-10(1).

159. CHINA-BENCH BOOK, *supra* note 81, at art. 38.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See China Mulls Domestic Violence Law, supra* note 4.

been so few orders issued, including lack of knowledge judges have of domestic violence, the lack of the general public's awareness of the availability of civil protection orders, questions and concerns about enforcement of the orders, and the limited access to civil protection orders. Solutions to these challenges include expanded training for judges, lawyers, and police on domestic violence, and gender awareness and adoption of a national anti-domestic violence law that includes the civil protection order and clear enforcement structures.

Judges who lack training on domestic violence and gender awareness often fail to identify or understand domestic violence in their divorce cases, and as such, do not issue as many civil protection orders as they could or should. As a result, they are mediating some divorce cases with allegations of domestic violence that may lead victims into feeling pressured and batterers to feel supported in their actions. Of the twenty-one courts in the pilot civil protection order project in Shaanxi province, six courts have issued thirty-five orders of protection and twenty of them were issued by one court, highlighting the different levels of understanding of domestic violence among judges.¹⁶⁵ A judge in another province stated that approximately two-thirds of the civil matters they hear are marriage cases, totaling approximately 35,000 cases each year. In thirty to fifty percent of those cases, domestic violence is alleged, but very few protection orders are sought or issued.¹⁶⁶ A judge in a third province stated that of 30,000 divorce cases they handle each year, five to six hundred include allegations of domestic violence.¹⁶⁷ The judge believes that since domestic violence is incorporated into divorce cases, and they are not a separate cause of action, very few cases are being identified as domestic violence cases.¹⁶⁸ He also stated that in divorce cases in which domestic violence is alleged, thirty percent request economic remedies.¹⁶⁹ Another judge observed that the reason that more civil protection orders are not issued is because many victims do not provide sufficient evidence of the domestic violence and thus they cannot protect them, even if they believe her and believe that she is a victim of domestic violence.¹⁷⁰ The Bench Book has attempted to address

165. Remarks by judge addressing the National Anti-Domestic Violence Network conference held on January 29-30, 2013 in Beijing, China at the Tibet Hotel. Notes on file with the author.

166. Remarks by Judge A addressing the National Anti-Domestic Violence Network conference held on January 29-30, 2013 in Beijing, China, at the Tibet Hotel. Notes on file with the author.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*; see also Huang Yuli & He Dan, *Domestic Violence Casts an Ugly Shadow*, CHINA DAILY (Nov. 17, 2011), http://www.chinadaily.com.cn/cndy/2011-11/17/content_14108816.htm

these issues by providing specific examples of evidence that may be persuasive, and by reiterating that the standard of proof is preponderance of the evidence instead of beyond a reasonable doubt; however, there is concern that some judges are not conducting investigations, and when they are, they lack understanding of the evidence they collect.¹⁷¹

Trainings of judges on domestic violence and gender awareness have been conducted by the Anti-Domestic Violence Network, the Supreme People's Court, law schools, local bar associations, and other groups in cooperation with the United Nations, the American Bar Association Rule of Law Initiative, and other international organizations. Since 2010, judges and attorneys in several of the pilot court jurisdictions in particular have received training on domestic violence and how to consider evidence in marital cases involving domestic violence.¹⁷² Judges, advocates, lawyers, and law professors report that these trainings have had a profoundly positive impact, and that these trainings need to continue and be expanded. Training for judges, lawyers and police on domestic violence has proven to be highly effective in the U.S. as well, but it was not prioritized until the passage VAWA in 1994, many years after the initial state civil protection orders were adopted in the U.S.

Challenges that have been experienced in the U.S. that may arise in China and could also be addressed by trainings include that the process of obtaining civil protection orders is difficult, confusing, and time consuming. Few lawyers, judges, and court personnel initially understood them or how they worked. As a result, standardize forms for petitioning for protection orders began to be developed and included in trainings for judges, lawyers, police, and court personnel. Some of the pilot courts in China have also developed forms for victims to complete when seeking a protection order. A part of encouraging access to protection orders might include training on these forms of the staff of advocacy organizations, such as the All China Women's Federation, and integration of one standard form throughout the court system.

Another reason for the low number of protection orders being issued is the lack of awareness of the option of protection orders among the general population, including victims. Judges, attorneys, and others have observed that the Chinese general public is still evolving in their understanding of what domestic violence is, the role of government in providing protections

(stating that experts indicated most victims of domestic violence could not prove the abuse in court during divorce hearings because evidence is difficult to produce).

171. *Id.*

172. The author developed curricula and led trainings for Chinese judges and attorneys on domestic violence in Beijing, Chongqing, and Xi'an in 2010 and 2011.

and what protections are available.¹⁷³ There have been several successful public awareness campaigns describing domestic violence, including posters, post-cards, and protests, including ten activities who wore bridal gowns splashed with fake blood and make up on their faces that looks like bruises, all of which have increased awareness of what domestic violence is and that it is wrong.¹⁷⁴ Nonetheless, women are still reticent to report domestic violence. Some do not believe that domestic violence is wrong and others believe it to be a normal part of relationships.¹⁷⁵

In part, the limited issuance of orders may be related to the fact that civil protection orders are relatively new, are limited to victims who are married or recently divorced, and are not yet available throughout the country. As described in Part II.B. of this paper, access to civil protection orders is limited to victims who are married or are recently divorced from their offenders and must be filed in conjunction with a divorce in China as described in the Bench Book. Moreover, jurisdictions where the courts are participating in the SPC pilot project with the Bench Book are issuing some but not all of the protection orders, and even in those jurisdictions, some judges refuse to issue them stating that the Bench Book is not law. Separately, several high courts and mid-level courts have issued opinions that have the force and effect of law in which they have incorporated the text of the Bench Book describing the civil protection order. Not all of these opinions have been issued in provinces or courts involved in the pilot protection order project. Limited information collected regarding which jurisdictions have issued these opinions, continued expansion of the number of courts participating in the pilot project, and courts involved uneven issuance of civil protection orders, makes it hard to imagine how a victim could know what her rights are in a particular jurisdiction or how to obtain a protection order. Improved collection of data and information about the number of protection orders that have been sought, the number that have been issued, and documentation of enforcement efforts would improve understanding and awareness of this vital remedy.

National anti-domestic violence legislation that incorporates the civil protection order would provide continuous protections for victims through-

173. Judges A and B, Addressing the National Anti-Domestic Violence Network Conference (Jan. 29-30, 2013) (on file with the author).

173. *Id.*

174. See Wong, *supra* note 95 (describing wedding dress protest). The Anti-Domestic Violence Network has launched several public awareness campaigns including the distribution of post cards targeting young women. See also *Stop DV-China*, *supra* note 4.

175. See Leta Hong Fincher, *Wives Caught in China's "Web of Abuse,"* MSMAGAZINE, (Apr. 14, 2012), <http://msmagazine.com/blog/2012/04/14/wives-caught-in-chinas-web-of-abuse/> (describing how many women do not admit that they are victims but admit that their husband has hit them).

out China and facilitate a national awareness campaign regarding its availability. Advocates have persuasively argued that national anti-domestic violence legislation should include an expansive definition of domestic violence so that it includes dating violence, elder abuse, abuse against people with disabilities and children. Moreover, civil protection orders should be issued in standalone proceedings, as well as in conjunction with a petition for divorce, so that a victim should not be required to seek a divorce when she seeks protection if the offender is her husband.

As described above, enforcement of civil protection orders is an area where there is much confusion and concern and may also be contributing to a limited number of orders being issued in China. Who should enforce civil protection orders and how they should be enforced is still evolving in China. This is related to the nascent development of police response to domestic violence in general in China. Victims have reported that when they call the police because of domestic violence, they have failed to protect them, instead trying to mediate, or refusing to respond to calls, stating that they do not want to get involved in family matters.¹⁷⁶ In the area of police response and enforcement of protection orders, the police in Hunan province provide an example of what is possible with consistent police training on domestic violence and how to properly respond to domestic violence and take police reports, recording and computer tracking of police response to domestic violence, and coordination with the courts and women's federation. In Hunan, domestic violence training is incorporated into the police academy training that candidates receive. This training includes a discussion of the context of domestic violence, gender awareness, and best practices in police response to domestic violence, emphasizing that it is a crime and not a private family matter, and thus it is their responsibility to respond. In addition, the police work closely with the staff of the Hunan Women's Federation to ensure that victims receive information about legal and other services available to them. As a result, the police report that victims are coming to them seeking assistance instead of going to the court because the police respond to their needs and protect them. These efforts provide a model for the rest of China and are very similar to coordinated community responses in the U.S. that have become institutionalized in part because of the support and funding of VAWA.

176. See *Domestic Violence Casts an Ugly Shadow*, CHINA DAILY, November 17, 2011 http://www.chinadaily.com.cn/cndy/2011-11/17/content_14108816.htm (describing how a victim in China called the police 10 times and the officer who responded tried to make peace between the couple, and then refused to come when she called again, stating that it was "inconvenient" for them to get involved in "family disputes.").

Enforcement of protection orders continues to be a challenge in the U.S. A violation of an order often triggers mandatory arrest.¹⁷⁷ However, enforcement is inconsistent at best, and mandatory arrest laws have been criticized for placing victims in greater danger.¹⁷⁸ The case of Jessica Gonzalez highlights the continued challenges regarding enforcement of civil protection orders in the U.S. and may prove instructive for other countries. Jessica had a civil protection order against her abusive ex-husband that provided her custody of her three children in addition to custody of their children. One afternoon, he took their children from her yard in violation of the order.¹⁷⁹ The Colorado statute stated that the police *shall* arrest the respondent if he violates the order.¹⁸⁰ The police refused to attempt to find him and her children, or to arrest him in spite of her numerous calls to them pleading with them to do so. In the early hours of the next morning, he was shot and killed by the police.¹⁸¹ Their daughters were found dead in the cab of his truck.

Jessica sued the town of Castle Rock for violating her civil rights in failing to protect her, and her case was appealed to the U.S. Supreme Court where the Court held that there was no violation of Ms. Gonzales' federal Due Process rights.¹⁸² This case concerned anti-violence against women advocates across the country that fought so hard to ensure the adoption of laws that required the police to enforce protection orders. There is no way the language in the law could have been clearer in Colorado, and yet, the police failed to enforce the order and faced no punishment for doing so. This indicates that even the clearest statutory language regarding enforcement may be insufficient to ensure that the government takes on its responsibility for ensuring the safety of victims. It may be that China's incorporation of a human rights approach to anti-domestic violence advocacy may prove more effective.

177. See, e.g., COLO. REV. STAT. § 18-6-803.5(3)(b) (1999) (“[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person . . .”).

178. See Arthur L. Rizer III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1, 17 (2005) (discussing the negative consequences of mandatory arrest including increasing risk to victims and failing to deter perpetrators); see also Tadhya Iyengar, *The Protection Battered Spouses Don't Need*, THE NEW YORK TIMES, August 7, 2007, available at <http://www.nytimes.com/2007/08/07/opinion/07iyengar.html?r=0>.

179. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 753 (2005).

180. COLO. REV. STAT. § 18-6-803.5(3)(b).

181. *Castle Rock*, 545 U.S. at 754.

182. *Id.* at 786.

IV. CONCLUSION

Chinese anti-domestic violence advocates often discuss the need to change minds and attitudes in order to ensure safety for victims. Law plays a critical role in changing society attitudes, but law alone cannot achieve this goal. Respect for the law, and enforcement of the law because a society believes in the rule of law, and the rights that it protects, is essential. By training judges, lawyers and police on the dynamics of domestic violence and gender awareness before the passage of a national anti-domestic violence law will likely facilitate the necessary shift in understanding domestic violence is a violation of human rights and that they have a key role to play in holding batterers accountable.