

**BATTERED NON-WIVES AND UNEQUAL
PROTECTION ORDER COVERAGE: A CALL FOR
REFORM**

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ABSTRACT

Civil protection orders are effective, yet under-used weapons in the battle against domestic violence. In New York and in other states as well, civil orders of protection provide unique benefits and remedies to domestic violence victims that are in addition to, or that are in place of, the benefits the criminal system offers.

They are under used in part because they are not available to all victims. In every state, the availability of civil protection orders is limited to those victims who are in certain defined relationships. While many states have expanded their definitions of the types of relationships that qualify for protection, too many states still deny protection to victims in dating relationships, cohabitation relationships, same-sex relationships, and other domestic relationships.

New York limits access to its civil orders of protection to fewer types of victims than any other state. It finds the need for civil protection only where the definitions of “family offense,” a restricted list of crimes, and “family or household member,” a restricted list of persons, intersect. A historical explanation exists for this state of the law. The system was created in the 1960s by a legislature that was attempting to provide “practical help” to traditional families by taking cases out of criminal court and placing them in the exclusive jurisdiction of the family court. Its goal, above all, was to keep traditional families together. Civil orders of protection were invoked to serve that goal. Over time, though, a social shift in the perception of domestic violence occurred. As the focus moved from the goal of family cohesion to the goal of ending violence, the courts and the legislature attempted to strike a balance between the two competing interests. Ultimately, the legislature and the courts created, in what could perhaps be characterized as a historical accident, the dual inquiry, or “bifurcated” system that exists today.

The role of protection orders also shifted from serving the goal of family cohesion to serving the goal of violence cessation. This shift in role, coupled with the parallel shift in the state’s interests, renders the historical rationales for maintaining this system meaningless. New York, as all other states, must reform its civil protection order statutes to capture all victims of domestic violence, and to include all crimes as bases for protection. To the extent the legislature can provide current rationales to maintain its differential treatment of domestic violence victims, it must at least provide rational reasons that bear some relation to the goals the civil order of protection statutes serve. It is not at all clear that the legislature can satisfy that burden here.

INTRODUCTION

In 1988, Linda White was working in a supermarket to support herself and her family, including her disabled brother. It was there that she met John Strouble. The two quickly fell in love, and John moved in with Linda a month after they had met. But, before long, John began to abuse Linda. He would tie her up when he left their home. He savagely beat her, and often raped her, once using a broken broomstick. On several occasions, once after threatening to throw her from the roof of their apartment building, he would fire his gun in the air, then hold it to her temple and pull the trigger on an empty chamber, forcing her into a game of Russian roulette.

In 1989, Linda looked to the Family Court in Brooklyn New York for help. She wanted a civil order of protection. The first clerk she talked to told her that she was not entitled to an order of protection against her abuser because they were not married, nor did they have a child together. She went to the next window and told a lie she thought would save her life: "I had to lie and say I was married with kids so that I could get my order of protection, even with a black eye."¹ After telling this lie to the clerk she was finally given her order of protection. One month later, claiming self-defense, Linda White shot John Strouble. At trial, the district attorney used against her the lie that she told to the Brooklyn clerk. The jury convicted Linda of murder in the second degree and she was sentenced to seventeen years to life in prison.²

Mario Escalante, Susan Orellana's stepfather, raped Susan when she was eleven years old. He was tried and convicted of rape. Susan's mother divorced her daughter's rapist. Eventually, he was released from jail and started to stalk Susan who was now twenty-one. New York did not yet have anti-stalking legislation,³ so criminal court was not an option. Instead, she

¹ Marcela Rojas, *Escape From Abuse: Clemency Seen as Milestone for Victims*, JOURNAL NEWS, May 19, 2003 at 1A.

² *In Re Linda White*, Petition for Executive Clemency, (On file with the Author). Notably, after serving 13 years, Linda White was granted clemency on Christmas Eve, 2002 by Governor Pataki. The order of protection was cited by the governor as evidence of the abuse that Linda suffered. *Press Release, Office of Governor Pataki, Governor Pataki Grants Clemency to Four Inmates*, (Dec. 24, 2002) (on file with author).

³ For a discussion of the history of stalking laws in New York, see Demetra Pappas, *Stopping New Yorkers' stalkers: an anti-stalking law for the millennium*, 27 FORDHAM URB. L. J. 945 (2000).

went to Family Court to obtain a civil protection order against him. Ultimately, the court told her that it the only way it could grant a civil order of protection order against her stalker and former rapist was if her mother had stayed married to him.⁴

Despite two decades of change, domestic violence remains a threat to women's safety.⁵ Even the most conservative numbers indicate that, each year, women victimized by their intimate partners number in the millions.⁶ The statistics do not analyze the data based on whether a victim is married to her abuser or not. Instead, they reflect the reality that women in all forms of intimate relationships can be victims of abuse by their partners.⁷ The National Institute of Justice estimates that approximately 1.5 million women each year are assaulted or raped by an intimate partner, while approximately 500,000 women are stalked.⁸ In 2000, 1,247 women were killed by their intimate partner, or about 33% of all women killed were killed by their intimate partners; in 2001, intimate partner violence made up 20% of all violent crime against women.⁹ Domestic violence is still the

⁴ *Orellana v. Escalante*, 653 N.Y.S.2d 992, 993 (N.Y. App. Div. 1997).

⁵ Other than in arguing that protective order legislation should be expanded to cover all intimate relationships, including members of same-sex relationships, this article focuses on the threat of domestic violence as it applies to women. This focus does not mean to deny that men also fall victim to domestic violence, but it recognizes the reality that the majority of domestic violence victims are females. See, e.g., Callie Marie Rennison, Sara Welchans, *U.S. Dep't of Justice, Intimate Partner Violence 1* (2000) available at <http://www.ojp.gov/bjs/pub/pdf/ipv.pdf>. (Concluding that in 2000, 85% of domestic violence was committed against women).

⁶ Michele Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 52 (2000);

⁷ The statistics cited here are based on the prevalence of "intimate partner" violence, which includes violence committed by current or former spouses, boyfriends or girlfriends. See, e.g., Rennison, *supra* note 5 at 2. ("as defined in this report, intimate relationships involve current or former spouses, boyfriends or girlfriends. These individuals may be of the same gender.").

⁸ See Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence 9* (2000), available at <http://nij.ncjrs.org/publications>. The study surveyed 8,000 women by telephone. The study also concluded that because many women are re-victimized, an estimated that 4.8 million rapes and assaults are perpetrated against women each year.

⁹ Callie Marie Rennison *U.S. Dep't of Justice, Intimate Partner Violence 1993-2001, 1* (2003) available at <http://www.ojp.usdoj.gov>.

leading cause of injury to women between ages 15 and 44 in the United States—more than car accidents, muggings, and rapes combined.¹⁰

Because of its prevalence, the response to domestic violence has been drastic and widespread, especially in the last ten years. There are more shelters, more training programs, and more legislation. Police are more willing to arrest abusers, and the public is more educated about the effects of domestic violence on victims. But, while it is less likely that a woman today would be forced to resort to homicide to protect herself as Linda was over a decade ago, a woman today who finds herself in a relationship like Linda's would still have to lie to obtain a civil order of protection in New York. Similarly, while Susan would now have the option to seek protection in New York's criminal court from her rapist and stalker, it would be her only option. She would still be unable to obtain a civil order of protection from him.

Domestic violence civil protection orders¹¹ are effective, yet under-used weapons against domestic violence. They provide remedies and benefits to victims that are unavailable in criminal court.¹² Studies suggest that protection orders are effective in preventing and de-escalating some forms of domestic violence.¹³ They also “work”¹⁴ in other ways by giving a

¹⁰ Indiana University Protection Order Project, <http://www.law.indiana.edu/pop> (last visited Sept. 3rd, 2003). But, on a positive note, Dr. Rennison's study estimates that between the years of 1993 and 2001, the number of nonfatal violent crimes (defined as rape, sexual assault, robbery, aggravated assault and simple assault) committed by intimate partners against females declined by 49%. Rennison, *supra* note 9 at 1.

¹¹ The term “domestic violence civil protection order” is used here to differentiate them from other types of civil protection orders. Every state now has statutory schemes in place that are meant to address the problem of domestic violence. They can provide for protection, funding, services for victims, and reduced filing-fee provisions. *See e.g.*, Mass. Ann. Laws ch. 208, § 34D, ch. 209, § 32, ch. 209A, § 5A, 7, ch. 209C, § 15 (Law. Co-op 2001). Domestic violence civil protection orders fall under these schemes. Some states do provide for civil orders of protection outside the domestic violence context. *Compare*, Ariz. Rev. Stat. § 12-1809 (2003) (allowing “any person” to obtain an injunction against another for acts of harassment) *with* Ariz. Rev. Stat. § 13-3601-2 (2003) (“A person may file . . . for an order of protection for the purpose of restraining a person from committing an act included in domestic violence).

¹² This article does not attempt to suggest that criminal courts should be divested of jurisdiction over acts that are crimes; instead, this article argues that victims of domestic violence should be able to use the civil courts to protect themselves in addition to their use of the criminal courts.

¹³ Victoria Holt, M.A. Kernic, M.E. Wolf, F.P. Rivara, *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?* 24 AM. J. OF PREVENTATIVE MED.

victim a sense of control over her life.¹⁵ They are under used in part because they are not available to all victims. In every state, the availability of domestic violence civil protection orders is limited to those victims who are in certain defined relationships. While many states have expanded their definitions of the types of relationships that qualify for protection, too many states still deny protection to victims in dating relationships, cohabitation relationships, same-sex relationships, and other domestic relationships.

New York in particular has the most restrictive domestic violence civil protection order coverage in the union. It only grants civil orders of protection to victims if they satisfy two criteria. First, they must be a member of the abuser's "family or household." This definition is unduly restrictive. "Members of the same family or household means only the following: (a) persons related by consanguinity¹⁶ or affinity;¹⁷ (b) persons

16-21 (2003).

¹⁴ This term is put in quotes as borrowed from Professors Cahn and Meier. In their article addressing the intersection of domestic violence and clinical education they stated that "while there is a great deal of sensational publicity about murders of women who had obtained protection orders, in the experience of the authors, protection orders frequently do "work"; they often deter further violence and empower the victims to make further changes for their own safety. Success stories of this kind do not appear in the press because the absence of violence is not considered a newsworthy event.", Naomi Cahn, Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L. J. 339, 347 (1995).

¹⁵ In this way, civil protection orders may "work" more effectively than criminal orders of protection because the victim, not the government, is the petitioner. The victim chooses when to file and directs the strategy of obtaining the order, all in contrast to the criminal system. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 808 (1993). For instance, in Colorado, a protection order is issued automatically in all criminal and juvenile cases involving victims. The orders are entered at the time of arraignment and are in effect until final case disposition, which includes the time of any probation or parole. The order restrains the defendant "from harassing, molesting, intimidating, retaliating against or tampering with any witness to or victim of the acts. In juvenile cases, the juvenile's parents or legal guardian is also restrained under the order. Colo. Rev. Stat. §§ 18-1-1001, 19-2-707 (2003). The court has the discretion to add or delete conditions as the situation warrants. *Id.*

¹⁶ "Consanguinity" is the "relationship by blood." Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 204 (2nd ed.)

¹⁷ "A relation of affinity is based upon marriage and divorce destroys the foundation of that relation." *Escalante*, 653 N.Y.S.2d at 993 citing BLACK'S LAW DICTIONARY 59 (6th ed. 1990).

legally married to one another; (c) persons formerly married to one another; and (d) persons who have a child in common regardless whether such persons have lived together at any time.”¹⁸

Second, a victim must also establish that the abuser committed a “family offense” against her. This list is also unduly restrictive and does not contemplate treating a large amount of violent crimes as crimes of domestic violence. Instead, it includes only the specific following crimes, each of which is in turn defined by New York’s Penal Law: disorderly conduct, harassment in the first and second degree, aggravated harassment in the second degree, menacing in the second and third degree, reckless endangerment, assault in the second and third degree, attempted assault, stalking in the first, second, third, and fourth degree. As a result of this dual inquiry, a large number of victims are denied civil protection orders entirely either because they do not share the requisite relationship with their abusers, or because they were not victims of the “correct” type of domestic violence.

This dual inquiry exists not only in New York’s civil system, but also in its criminal system. As a consequence, in connection with ongoing criminal cases, New York provides for two types of criminal orders of protection: “family offense” orders of protection and standard orders of protection. “Family offense” orders of protection provide more remedies and protections than standard orders. Where an abuser is arrested and charged with a crime, the criminal court will issue a “family offense” order only to those same victims who are permitted to seek protection in family court. Namely, they must also be members of the same “family or household” as their abusers, as well as victims of a “family offense.”

New York’s system suffers from the vestiges of a scheme that its legislature set up in the 1960’s, a time when domestic violence was thought to be a private matter to be dealt with only in family court. This resulted in a dual inquiry, or “bifurcated” system that left both family and non-family members unequally protected. Nevertheless, the legislature has refused to fix its system and to provide adequate protection to all victims from all crimes of domestic violence. The reasons the legislature historically gave to deny coverage no longer exist, and there are few, if any, contemporary rationales that exist to maintain the differential treatment of victims.

Using New York as a model, this article will ultimately argue that domestic violence civil protection order statutes in all states should be amended to capture the remaining victims of domestic violence, and all acts

¹⁸ N.Y. Crim. P. Law § 530.11; N.Y. Fam. Ct. Act § 812(1)(a)-(d).

that constitute domestic violence. It will argue that all victims of domestic violence, regardless of their marital status, should be permitted to seek the benefits of civil protection orders.

Part I of this article will give some background information about civil protection order legislation as it has developed in New York and other states. Part II will generally describe the current relationship requirements. It will conclude that New York has the most restrictive relationship requirements in the country. Part III will briefly explain the structure and limitations of New York's "bifurcated" system for granting orders of protection in civil and criminal court. Part IV will demonstrate that civil orders of protection are effective in the battle against domestic violence. Part V will provide a historical explanation for New York's existing differential treatment of domestic violence victims. Finally, Part VI will argue that the historical explanations for New York's differential treatment of victims no longer exist and that its system is in need of reform to allow all victims of domestic violence the ability to obtain civil orders of protection.

I. BACKGROUND OF CIVIL PROTECTION ORDERS

Before the 1970s, orders of protection were sought primarily by prosecutors in connection with existing criminal cases.¹⁹ The only way a person could obtain a civil order of protection was in divorce court.²⁰ The courts' civil powers to issue orders of protection were considered secondary to their substantive powers, and most chose not to exercise them outside a divorce proceeding context.²¹

In New York in 1962, the legislature was under increasing pressure to deal with the "emerging" problem of domestic violence.²² It was

¹⁹ Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 227, 230-31 (Eve Buzawa & Carl Buzawa eds. 1992).

²⁰ *Id.*

²¹ EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE, 235 (3d ed. 2003).

²² The use of the word "emerging" here is not meant to suggest that domestic violence did not exist prior to 1962. The opposite is certainly true. Several commentators have suggested that until the turn of the century, crimes that took place in the home were considered private rather than public, and therefore evaded governmental intervention or review. *See, e.g.,* ELIZABETH PLECK, DOMESTIC TYRANNY, 72 (New York, 1987). *See*

generally accepted that treatment rather than criminal prosecution was the best solution for problems in the family.²³ The legislature had the desire not to punish, but to provide “practical help.”²⁴ As a result, chapter 686, the Family Court Act, which also created the procedure to obtain a civil order of protection, was enacted.²⁵ It gave Family Court “exclusive, original jurisdiction over any proceeding concerning acts which constitute disorderly conduct or an assault between spouses or between parent and child or between members of the same family or household.”²⁶ The exclusive jurisdiction provisions were eliminated in 1996, and the Criminal Court now enjoys concurrent jurisdiction over the cases that can also be heard in Family Court.²⁷

By the late 1970s, the problem of domestic violence and the failings of government to respond adequately were gaining recognition across the country.²⁸ The clear push by victim advocates and feminists was to

also MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA*, 6, 11 (1985). The fact that legislators were slow to respond most likely reflects the enduring point of view that domestic violence is a private matter to be dealt with within the confines of the home, and, in fact, the Family Court Act reflects this position. For a detailed discussion of the public/private distinction and its intersection with domestic violence from a historical perspective, *See* Linda Gordon, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*, 14 (New York, 1988). But, the pervasive idea that domestic violence was a “private” matter until it was brought into “public” view is largely ahistorical. Instead, wife-beating was protected as an affirmative, statutory, and therefore, “public” right until the mid-nineteenth century. Professor Reva Segal argues that as feminists began to reform chastisement laws during the Reconstruction Era, judges began to assert that the legal system should not interfere in cases of wife beating “in order to protect the privacy of the marriage relationship and to promote domestic harmony.” Reva Siegel, *The Rule of Love: Wife Beating As Prerogative and Privacy*, 105 *YALE L. J.* 2117, 2119 (1996).

²³ *See* Douglas J. Besharov, *Practice Commentary*, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, JUDICIARY, FAMILY COURT ACT (Book 29A), § 812, at 171.

²⁴ *Id.*; The Family Court Act, Report of Joint Legislative Committee on Court Reorganization, 1962 McKinney Session Laws (Vol. 2) 3428, 3444 (1962).

²⁵ N.Y. Fam. Ct. Act. § 812 (McKinney 1975) (repealed).

²⁶ N.Y. Fam. Ct. Act. § 812 (McKinney 1975) (repealed).

²⁷ The ultimate election requirement's elimination did not eliminate the district attorney's discretion to decide not to pursue criminal charges against a defendant in criminal court. N.Y. Crim. P. L. 530.12(14) (McKinney 2003).

²⁸ *See, e.g., See, e.g.*, D. MARTIN, *BATTERED WIVES* (1976); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990* 83 *J. CRIM. L. & CRIMINOLOGY* 240-

strengthen governmental responses to domestic violence, especially in the criminal justice system.²⁹

Until 1976, only one state other than New York had civil domestic violence protection order legislation.³⁰ Across the country, police, prosecutors, and criminal courts were slow to respond to the problem, so advocates of battered women began to push for legislation that would allow victims relief in civil court.³¹ Pennsylvania passed its Protection from Abuse Act of 1976, which created an avenue for victims of domestic violence to obtain protection orders outside the context of criminal court or civil divorce proceedings.³² Other states began following suit. By 1994, all fifty states had adopted some form of domestic violence civil protection order legislation.³³ States are repeatedly revisiting their protection order legislation to expand protection, to reduce the cost of obtaining them, to streamline the process of obtaining them, and to create state and national registries for the protection orders.³⁴

279 (1992).

²⁹ Id; *See e.g.*, Jeffrey Fagan, U.S. Department of Justice, *The Criminalization of Domestic Violence: Promises and Limits*, 6-15 (1996) available at: <http://www.ncjrs.org/textfiles/crimdom.txt>. The theory at the time was to criminalize domestic violence in order to increase awareness and public response by establishing it as a public criminal act rather than a private family matter. *See e.g.*, Gordon, *supra* note 22 at 22-25.

³⁰ Clare Dalton, Elizabeth Schneider, BATTERED WOMEN AND THE LAW, 499 (Foundation Press 2001); Janice Grau, Jeffery Fagan, & Sandra Wexler, *Restraining Orders for Battered Women: Issues of Access and Efficacy*, in CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF A LEGALLY MANDATED CHANGE 13, 14 (1985).

³¹ Buzawa Eve S. Buzawa & Carl G. Buzawa, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 234 (3d ed. 1996); Andrew Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, 211 in DO ARREST AND RESTRAINING ORDERS WORK (Eve S. Buzawa & Carl G. Buzawa eds. 1996).

³² Janice Grau et al. *supra* note 30 at 14.

³³ Mathew J. Carlson, et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. Fam. Violence 205, 206 (1999); Eve S. Buzawa & Carl G. Buzawa, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 123 (2d ed. 1996).

³⁴ *See, e.g.*, U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, *Enforcement of Protective Orders*, <http://www.ojp.usdoj.gov/ovc/publications/bulletins> (Jan. 2002); Mass. Ann. Laws ch. 208, § 34D, ch. 209, § 32, ch. 209A, § 5A, 7, ch. 209C, § 15 (Law. Co-op 2001). In 1992, Massachusetts was the first state to create a computerized database of all domestic violence

The options for relief that civil protection orders provide are granted by statute and are often more comprehensive than those available in criminal and other non-domestic violence orders of protection.³⁵ Civil protection orders can require the abuser to stay away from the victim, to refrain from contacting, threatening, harassing, stalking the victim, or committing acts of violence against her.³⁶ Also, in some states, a judge issuing a civil protection order can include orders relating to child custody and visitation.³⁷ They can also require a person restrained to seek counseling³⁸ and drug or alcohol treatment,³⁹ they can grant the petitioner possession of the residence or other property,⁴⁰ child support, or other economic relief,⁴¹ and can keep the petitioner from having access to the petitioner's personal information.⁴²

The process for obtaining a civil protection order varies by jurisdiction. In most jurisdictions a temporary or emergency protection order, valid for a short time, can be obtained immediately without a full hearing.⁴³ Often these are granted *ex-parte*, or without the abuser's

restraining orders issued within the state. Under Massachusetts law, criminal and civil record searches are required for each protection order application. *Id.* Several states have followed Massachusetts' lead by improving protection order verification procedures. *See, e.g.,* Ala. Code § 18.65.540 (2001); Ariz. Rev. Stat. § 13-3608 (2000); Cal. Fam. Code. § 6380 (Deering 2001); Cal. Penal Code § 13701 (Deering 2001); Colo. Rev. Stat. § 18-6-803.7 (2000); Fla. Stat. § 741.30 (2000); La. Rev. Stat. § 46:2136.2 (2000); N.D. Cent. Code § 12-60-23 (2000); W. Va. Code § 48-24-12(2000); Kan. Stat. Ann. 22-2307 (2000); Ky. Rev. Stat. § 403.783 (2001); S.D. Codified Laws Ann. § 23-3-39.8 (2000).

³⁵ See discussion *infra* ftnt --- and text.

³⁶ *See e.g.,* N.M. Stat. Ann. § 40-13-5 (Michie 2003); Colo. Rev. Stat. § 13-14-102 (2001); Cal. Fam. Code § 6300 (2002).

³⁷ *See, e.g.,* Colo. Rev. Stat. § 13-14-102 (2001); Cal. Fam. Code § 6300 (2002); Ka. Stat. Ann. § 403.740-750 (2003).

³⁸ *See, e.g.,* Kan. Stat. Ann. § 403.740-750 (2003).

³⁹ *See, e.g.,* Colo. Rev. Stat. § 13.14-102 (2001); Cal. Fam. Code § 6300 (2002).

⁴⁰ *See, e.g.,* N.M. Stat. Ann. § 40-13-5(A)(1) (Michie 2003); Ohio Rev. Code Ann. § 3113.31(E)(1)(b) Anderson 2003); Kan. Stat. Ann. § 403.740-750 (2003).

⁴¹ *See, e.g.,* Kan. Stat. Ann. § 403.740-750 (2003).

⁴² *See, e.g.,* Mich. Comp. Laws Ann. § 600.2950 (West 2003).

⁴³ *See e.g.,* Kan. Stat. Ann. § 403.740; Waul, *supra* note 6 at 52.

presence.⁴⁴ But, to alleviate due process challenges, courts require that an evidentiary hearing follow the issuance of the temporary order, and the restrained party must be given notice of the hearing.⁴⁵ After a hearing, the court can render the order “permanent,” but this usually means the order will remain in effect for a distinct amount of time, typically one to two years.⁴⁶ Civil rules of procedure apply, including a standard of proof that is lower than in criminal cases.⁴⁷ A judge need only determine that the facts alleged in the petition occurred and that the behavior is likely to continue by a preponderance of the evidence.⁴⁸

The punishment for violating a civil protection order varies from state to state. In most states, violations of protection orders are punishable at least as misdemeanors.⁴⁹ Most also provide that a violation of a civil

⁴⁴ Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 227, 230-31 (Eve Buzawa & Carl Buzawa eds. 1992).

⁴⁵ Id; Carolyn N. Ko, Note *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L. J. 361, 365 (2002).

⁴⁶ Waul, *supra* note 6 at 52. Some states have extended the protection to three years, *see e.g.*, Kan. Rev. Stat. § 403.750(2) (2003), while others have extended the time to five years. *See, e.g.*, Iowa Code § 708.12 (2001). Other states, in the context of criminal protection orders, have made protection orders permanent. *See e.g.*, N.J. Rev. Stat. § 2C:12-10.1 (2001) (making protection orders issued in stalking cases permanent unless sought to be dissolved by the victim); Conn. Gen. Stat. § 53a-40e (2001) (granting discretion to judges to issue standing criminal restraining orders where they believe such an order will best serve the interests of the victim and the public.)

⁴⁷ In criminal cases, an order of protection can only remain in effect if the fact finder determines that the defendant committed the underlying acts or crimes beyond a reasonable doubt. *See, e.g.*, N.Y. Crim. P. Law § 530.12(5) (McKinney 2003).

⁴⁸ Waul, *supra* note 6 at 52.

⁴⁹ Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163 (1993). In New York, for instance, violation of a civil protective order does not constitute a substantive crime, but can constitute either civil or criminal contempt depending on the circumstances of the violation. *See, e.g.*, N.Y. Penal Law § 215.52 (violation of a “duly served” order of protection constitutes a class D felony if “he or she intentionally or recklessly causes physical injury or serious physical injury to a person for whose protection such order was issued”); *see also*, N.Y. Fam. Ct. Act. § 846-a (family court has power to commit respondent to not more than six months jail for willful violation of a civil protection order).

protection order is grounds for charges of civil or criminal contempt.⁵⁰ In some states, a repeat violator of protection orders can be charged with a felony,⁵¹ and both fines and jail time can be imposed.⁵² Only a very few have required a minimum term of confinement for protection order violations.⁵³ Almost every state has enacted warrantless arrest policies for those suspected of violating a valid protection order.⁵⁴

II. THE RELATIONSHIP REQUIREMENT

To qualify for a domestic violence civil protection order, the person petitioning must show he or she has a relationship with the respondent.⁵⁵ As of 1995, the relationship requirement in a majority of states was more restrictive than it is today. By that year, thirty-three states mandated that

⁵⁰ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3,12 (1999) (discussing the legislature's response to domestic violence); Kit Kinports & Karla Fischer, *supra* note 49; Peter Finn & Sarah Colson, U.S. Dep't of Justice, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, (1990). The U.S. Supreme Court has held that a criminal prosecution for conduct that also resulted in a criminal contempt conviction for violating a protection order did not violate the Constitution's Double Jeopardy Clause. *United States v. Dixon*, 113 S. Ct. 2849 (1993); *People v. Wood*, 95 N.Y.2d 509, (2000) (Interpreting N.Y. Crim. Pro. § 40.20 (McKinney 2001)). However, some state courts have disagreed and have determined that a defendant cannot be prosecuted both for criminal contempt and criminal charges of protection order violations. *See, e.g., State v. Lessary*, 865 P.2d 150, 155 (Haw. 1994) ("we conclude that the interpretation given to the double jeopardy clause by the United States Supreme Court in *Dixon* does not adequately protect individuals from being 'subject for the same offense to be twice put in jeopardy'").

⁵¹ *See, e.g.,* 720 Ill. Comp. Stat. § 720-5/12-30 9 (2001); Tex. Penal Code Ann. § 25.07 (Vernon 2000); Wash. Rev. Code § 26.50.110 (2001).

⁵² Klein & Orloff, *supra* note 15 at 1095-99.

⁵³ Haw. Rev. Stat. §§ 586-11 (2003) (imposing minimum forty-eight hours jail for first offense, and minimum of thirty days for the second); Iowa Code § 236.14 (2001); 720 Ill. Comp. Stat. § 5/12-30 (2001).

⁵⁴ Linda G. Mills, Commentaries, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 558 (1999). However, in New York, warrantless arrest provisions do not apply to criminal protection orders, and they only apply to domestic violence orders of protection if the abuser either violates a "stay away" provision, or commits a new crime. N.Y. Crim. P. Law § 140.10 (McKinney 2003).

⁵⁵ For a discussion of the relationship requirement as it relates to teens, *see* Stacy L. Brustin, *Legal Responses to Teen Dating Violence*, 29 FAM. L. Q. 331, 339 (1995).

only individuals who were married, related by blood, had a child in common with the respondent, or were living together with the respondent, qualified for civil protection orders.⁵⁶ Since then, the tide has changed. Several states have amended their statutes to become more inclusive. In all fifty states, victims related to their abusers by blood or marriage are permitted to seek domestic violence orders of protection. The remaining breakdown of the relationships and the number of states that cover them are detailed below.⁵⁷

A. *Parents of a Common Child*

As of 1993, only forty-one states provided for protection of parents of a child in common.⁵⁸ Today, forty-eight states provide protection to

⁵⁶ *Id.*; See Ala. Code § 30-5-2(4) (1975); Ariz. Rev. Stat. Ann. § 13- 3601(A) (1994); Ark. Code Ann. § 9-15-103(b) (Michie 1993); Conn. Gen. Stat. Ann. § 46b-38a(2) (West 1994); Del. Code Ann. tit. 10, § 1041(2) (1994); Fla. Stat. Ann. § 741.28(2) (West 1995); Ga. Code Ann. § 19-13-1 (1994); Haw. Rev. Stat. § 586-1(2) (1993); Idaho Code § 39-6303(2) (1993); Iowa Code § 236.2 (1993); Kan. Stat. Ann. § 60-3102 (1993); Ky. Rev. Stat. Ann. § 403.720 (Michie/Bobbs-Merrill 1994); La. Rev. Stat. Ann. § 46:2132(4) (West 1995); Me. Rev. Stat. Ann. tit. 19, § 762(4) (West 1994); Md. Code Ann., Family Law § 4-501 (1994); Mich. Comp. Laws Ann. § 600.2950a (West 1994); Minn. Stat. Ann. 518B.01(2)(b) (West 1995); Miss. Code Ann. § 93-21- 3(d) (1994); Mo. Rev. Stat. § 455.200 (1994); Neb. Rev. Stat. § 42-903(4) (1993); Nev. Rev. Stat. Ann. § 33.018 (Michie 1992); N.Y. Fam. Ct. Act § 812(1) (McKinney 1995); N.C. Gen. Stat. § 50B-1(a) (1994); Ohio Rev. Code Ann. § 3113.31(A)(3) (Anderson 1993); Okla. Stat. Ann. tit. 22, § 60.1(4) (West 1995); S.C. Code Ann. § 20-4-20(b) (Law.Co-op.1976); S.D. Codified Laws Ann. § 25-10-1(2) (1994); Tenn. Code Ann. § 36-3-601(4) (1994); Tex. Fam. Code Ann. § 71.01(b) (West 1995); Utah Code Ann. § 30-6-1 (1990); Vt. Stat. Ann. tit. 15, § 1101(2) (1994); Va. Code Ann. § 16.1- 279.1 (Michie 1994); Wyo. Stat. § 35-21-102(a)(iv) (1994).

⁵⁷ A table reflecting the breakdown of states' treatment of each type of relationship is attached as Appendix A.

⁵⁸ See Klein & Orloff, *supra* note 15 at 825. Alaska Stat. § 25.35.200 (Supp. 1993); Ariz. Rev. Stat. Ann. § 13-3601 (Supp. 1993); Cal. Fam. Code S 70 (West 1993); Colo. Rev. Stat. Ann. § 14-4-101 (West Supp. 1993); Conn. Gen. Stat. Ann. § 46b-15 (West Supp. 1993); Del. Code Ann. tit. 10, § 945 (1993); D.C. Code Ann. § 16- 1004 (1989); Ga. Code Ann. § 19-13-1 (Supp. 1993); Haw. Rev. Stat. § 586- 1 (Supp. 1992); Idaho Code § 39-6303 (1993); 750 ILCS 60/103 (Smith-Hurd Supp. 1993); Ind. Code Ann. § 34-4-5.1-1 (West 1993); Iowa Code Ann. § 236.2 (West Supp. 1993); Ky. Rev. Stat. Ann. § 403.720 (Michie/Bobbs-Merill 1992); Me. Rev. Stat. Ann. tit. 19, § 762 (West Supp. 1992); Md. Code Ann., Fam. Law § 4-501 (Supp. 1992); Mass. Gen. L. Ann. ch. 209A, § 1 (West 1986); Minn. Stat. Ann. § 518B.01 (West Supp. 1993); Miss. Code Ann. § 93-21-3 (Supp. 1993); Mo. Rev. Stat. § 455-010 (Vernon Supp. 1993); Neb. Rev. Stat. § 42-903 (Supp. 1992); Nev. Rev. Stat. Ann. § 33-018 (Michie 1986); N.H. Rev. Stat. Ann. § 173-B:1 (Supp. 1992); N.J. Stat. Ann. § 2C:25-20 (West 1992); N.M. Stat. Ann. § 40-13-2 (Michie Supp. 1992); N.Y. Fam. Ct. Act §§ 846, 812 (McKinney Supp. 1994); N.D. Cent. Code §

parents of an existing common child.⁵⁹ This number includes the states that do not specifically provide for co-parents, but provide coverage for members in a dating relationship.⁶⁰ The two remaining states, Louisiana and Missouri, do not explicitly include co-parents or members of dating relationships as persons who may obtain domestic violence protection orders, but they do include cohabitants.⁶¹ Louisiana limits its protection to

14- 07.1-01 (Supp. 1993); Ohio Rev. Code Ann. § 3113.31 (Anderson 1992); Okla. Stat. Ann. tit. 22, § 60.1 (West 1992); Or. Rev. Stat. § 107.705 (1991); 23 Pa. Cons. Stat. Ann. § 6102 (1992); P.R. Laws Ann. tit. 8, § 602 (Supp. 1990); R.I. Gen. Laws § 15-15-1 (1988); S.C. Code Ann. § 20-4- 40 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-10-1 (1986); Tenn. Code Ann. § 36-3-60 (1991); Tex. Fam. Code Ann. § 71-01 (West 1992); Utah Code Ann. § 30-6-1 (Supp. 1993); Va. Code Ann. § 16.1-253.1 (Supp. 1993); Wash. Rev. Code Ann. § 26.50.120 (West Supp. 1993); W. Va. Code § 48-2A-2 (Supp. 1992); Wis. Stat. Ann. § 813.122 (West Supp. 1993); Wyo. Stat. § 35-21-102 (Supp. 1993).

⁵⁹ Ala. Code § 30-5-2 (1975); Alaska Stat. § 25.35.200 (1994); Ariz. Rev. Stat. Ann. § 13- 3601 (2003); Ark. Code Ann. § 9-15-103 (Michie 2003); Cal. Fam. Code § 6211 (Deering 2003); Colo. Rev. Stat. § 14-4-101 (West 2003); Conn. Gen. Stat. Ann. § 46b-38a (West 2003); D.C. Law 10- 237 (2003); Del. Code Ann. tit. 10, § 1041 (2003); Fla. Stat. Ann. § 741.28 (West 2003); Ga. Code Ann. § 19-13-1 (2003); Haw. Rev. Stat. § 586-1 (2003); Idaho Code § 39- 6303 (2003); Ill. Ann. Stat. ch. 750, para. 60/103 (Smith-Hurd 2003); Ind. Code § 35-41-1-10.6 (2003); Iowa Code § 236.2 (2003); Kan. Stat. Ann. § 60-3102 (2003); Ky. Rev. Stat. Ann. § 403.720 (Michie/Bobbs-Merrill 2003); La. Rev. Stat. Ann. § 46:2132 (West 2003); Me. Rev. Stat. Ann. tit. 19A § 4002 (West 2003); Md. Code Ann., Family Law § 4-501 (2003); Mass. Gen. Laws ch. 209A, § 1(e) (West 2003); Mich. Comp. Laws Ann. § 600.2950 (West 2003); Minn. Stat. Ann. § 518B.01 (West 2003); Miss. Code Ann. § 93-21- 3 (2003); Mo. Rev. Stat. § 455.200 (2003); Mont. Code Ann. § 40-4- 121 (2003); Neb. Rev. Stat. § 42-903 (2003); Nev. Rev. Stat. Ann. § 33.018 (Michie 2003); N.H. Rev. Stat. Ann. § 173-B:1 (2003); N.J. Stat. Ann. § 2C:25-19 (Lexis 2003); N.M. Stat. Ann. § 40-13- 2 (Michie 2003); N.Y. Fam. Ct. Act § 812 (McKinney 2003); N.C. Gen. Stat. § 50B-1 (2003); N.D. Cent. Code § 14-07.1-01 (2003); Ohio Rev. Code Ann. § 3113.31 (Anderson 2003); Okla. Stat. Ann. tit. 22, § 60.1 (2003); Or. Rev. Stat. § 107.705 (2003); Pa. Stat. Ann. tit. 23, § 6102(a) (2003); R.I. Gen. Laws § 15-15-1 (2003); S.C. Code Ann. § 20-4-20 (Law. Co-op. 2003); S.D. Codified Laws Ann. § 25-10-1 (2003); Tenn. Code Ann. § 36-3-601 (2003); Tex. Fam. Code Ann §§ 71.003-006, .0021 (Vernon 2003); Utah Code Ann. § 30-6-1 (2003); Vt. Stat. Ann. tit. 15, § 1101 (2003); Va. Code Ann. § 16.1-228 (Michie 2003); Wash. Rev. Code. Ann. § 26.50.010 (West 2003); W. Va. Code § 48-27-204 (2003); Wis. Stat. § 813.12(1) (2003); Wyo. Stat. § 35-21-102 (2003).

⁶⁰ There are only two states that fit this category: Vermont and Mississippi. Vermont does not specifically include parents of a common child, but it does include members of a dating relationship regardless of gender. Vt. Stat. Ann. tit. 15, § 1101 (2003). Also, while Mississippi does not explicitly include parents of a common child, an executive order declares that “although not falling into the definition of “family or household member”, if the individuals have a biological or legally adopted child between them, the relationship is also protected.” Op. Atty. Gen. No. 2000-0588, Carrubba, (Oct. 6, 2000).

⁶¹ La. Rev. Stat. Ann. § 46:2132(4) (West 2003); Mo. Rev. Stat. § 455.200 (2003).

cohabitants of the opposite sex.⁶²

B. Cohabitation

Today, including the number of states that do not explicitly provide protection for cohabitants, but do include other romantic relationships,⁶³ all states but one, New York, provide domestic violence protection orders for cohabitants.⁶⁴ All but two states, Delaware and Maryland, provide protection for both present and former cohabitants.⁶⁵ Delaware, Louisiana,

However, the fact that both Louisiana and Missouri do not provide protection to all parents who share a child regardless of their cohabitancy status creates a dangerous gap in the law. See, Klein & Orloff, *supra* note 15 at 824-825.

⁶² La. Rev. Stat. Ann. § 46:2132(4) (West 2003).

⁶³ Indiana, Montana, and West Virginia do not specifically include cohabitants but they do provide protection to members of a dating relationship. Ind. Code § 35 41-1-10.6 (2003); Mont. Code Ann. § 45-5-206 (2003); W. Va. Code § 48-27-204 (2003). Of these, only Montana limits protection to members of the opposite sex. Alabama includes “present or former household member,” which the courts have interpreted to mean current or former cohabitants (*Haraway v. Phillips*, 2002 WL 1728619 (Ala. Civ. Ct. App.2002) (interpreting Ala. Code § 30-5-2 (2003))

⁶⁴ Ala. Code § 30-5-2 (2003); Alaska Stat. § 18.66.990 (2003); Ariz. Rev. Stat. Ann. § 13- 3601 (2003); Ark. Code Ann. § 9-15-103 (Michie 2003); Cal. Fam. Code § 6211 (Deering 2003); Colo. Rev. Stat. § 144- 101 (West 2003); Conn. Gen. Stat. Ann. § 46b-38a (West 2003); D.C. Law 16-1001 (2003); Del. Code Ann. tit. 10, § 1041 (2003); Fla. Stat. Ann. § 741.28 (West 2003); Ga. Code Ann. § 19-13-1 (2003); Haw. Rev. Stat. § 586-1 (2003); Idaho Code § 39- 6303 (2003); Ill. Ann. Stat. ch. 750, para. 60/103 (Smith-Hurd 2003); Ind. Code § 35-41-1-10.6 (2003); Iowa Code § 236.2 (2003); Kan. Stat. Ann. § 60-3102 (2003); Ky. Rev. Stat. Ann. § 403.720 (Michie/Bobbs-Merrill 2003); La. Rev. Stat. Ann. § 46:2132 (West 2003); Me. Rev. Stat. Ann. tit. 19A § 4002 (West 2003); Md. Code Ann., Family Law § 4-501 (2003); Mass. Gen. Laws ch. 209A, § 1(e) (West 2003); Mich. Comp. Laws Ann. § 600.2950 (West 2003); Minn. Stat. Ann. § 518B.01 (West 2003); Miss. Code Ann. § 93-21- 3 (2003); Mo. Rev. Stat. § 455.200 (2003); Mont. Code Ann. §§ 40-4-121, 45-5-206 (2003); Neb. Rev. Stat. § 42-903 (2003); Nev. Rev. Stat. Ann. § 33.018 (Michie 2003); N.H. Rev. Stat. Ann. § 173-B:1 (2003); N.J. Stat. Ann. § 2C:25-19 (Lexis 2003); N.M. Stat. Ann. § 40-13- 2 (Michie 2003); N.C. Gen. Stat. § 50B-1 (2003); N.D. Cent. Code § 14-07.1-01 (2003); Ohio Rev. Code Ann. § 3113.31 (Anderson 2003); Okla. Stat. Ann. tit. 22, § 60.1 (2003); Or. Rev. Stat. § 107.705 (2003); Pa. Stat. Ann. tit. 23, § 6102(a) (2003); R.I. Gen Laws § 8-8.1-1 (2003); S.C. Code Ann. § 20-4-20 (Law. Co-op. 2003); S.D. Codified Laws Ann. § 25-10-1 (2003); Tenn. Code Ann. § 36-3-601 (2003); Tex. Fam. Code Ann §§ 71.003-006, .0021 (Vernon 2003); Utah Code Ann. § 30-6-1 (2003); Vt. Stat. Ann. tit. 15, § 1101 (2003); Va. Code Ann. § 16.1-228 (Michie 2003); Wash Rev. Code. Ann. § 26.50.010 (West 2003); W. Va. Code § 48 27-204 (2003); Wis. Stat. § 813.12(1) (2003); Wyo. Stat. § 35-21-102 (2003)

⁶⁵ Del. Code Ann. tit. 10, § 1041 (2003); Md. Code Ann., Family Law § 4-501 (2003). Other states such as Rhode Island limit protection to those who were cohabitants within a

Montana, North Carolina, and South Carolina, limit protection to cohabitants of the opposite sex.⁶⁶

C. Dating, Sexual and/or Intimate Relationships

By 1995, only fifteen states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, authorized individuals in dating relationships to obtain domestic violence civil protection orders.⁶⁷ Today, a total of thirty-five states provide protection to members of some form of dating relationship.⁶⁸ Some states require that the relationship be sexual in order

certain time. *See*, R.I. § 8-8.1-1 (2003) (“Cohabitants” means emancipated minors or persons eighteen (18) years of age or older, not related by blood or marriage, who together are not the legal parents of one or more children, and who have resided together within the preceding three (3) years or who are residing in the same living quarters.”)

⁶⁶ Del. Code Ann. tit. 10, § 1041(2)(b) (2003); La. Rev. Stat. Ann. § 46:2132 (West 2003); N.C. Gen. Stat. § 50B-1 (2003); S.C. Code Ann. § 20-4-20 (Law. Co-op. 2003). Montana does not specifically provide for the protection of cohabitants, but does provide protection for members of the opposite sex in a “dating or ongoing romantic relationship.” Mont. Code Ann. §§ 40-4-121, 45-5-206 (2003).

⁶⁷ Brustin, *supra* note 55 at 340; Alaska Stat. § 25.35.200(4) (1994); Cal. Fam. Code § 6211(c) (Deering 1994); Colo. Rev. Stat. § 14-4-101 (West 1994); D.C. Law 10- 237 (1995); Ill. Ann. Stat. ch. 750, para. 60/103(6) (Smith-Hurd 1994); Mass. Gen. Laws ch. 209A, § 1(e) (West 1994); Mont. Code Ann. § 40-4- 121(13)(c) (1993); N.H. Rev. Stat. Ann. § 173-B:1(IV) (1994); N.J. Stat. Ann. § 2C:25-19(d) (Lexis 1994); N.M. Stat. Ann. § 40-13- 2(D) (Michie 1993); N.D. Cent. Code § 14-07.1-01(4) (1993); Or. Rev. Stat. § 107.705(2)(e) (1993); Pa. Stat. Ann. tit. 23, § 6102(a) (1991); P.R. Laws Ann. tit. 8, §§ 602(i), (k) (1990); R.I. Gen Laws § 15-15-1(5) (1994); V.I.Code Ann. 16, § 91(c) (1994); Wash Rev. Code. Ann. § 26.50.010(2) (West 1994); W.Va. Code § 48-2A-2(b) (1994).

⁶⁸ Alaska Stat. § 18.66.990 (2003); Cal. Fam. Code § 6211(c) (Deering 2003); Colo. Rev. Stat. § 14-4-101 (West 2003); Conn. Gen. Stat. Ann. § 46b-38a(2) (2003) (“dating relationship”); D.C. Law 16-1001 (2003); Haw. Rev. Stat. § 586-1(2) (2003) (“dating relationship” means a “romantic, courtship, or engagement relationship, often but not necessarily characterized by actions of an intimate or sexual nature”); Idaho Code § 39-6303(2) (2003) (“dating relationship”); Ill. Ann. Stat. ch. 750, para. 60/103 (Smith-Hurd 2003); Iowa Code § 236.2(e) (includes those who are or were in an “intimate relationship” and have had contact within the past year; court is to consider a nonexclusive list of factors, including expectation by either party of sexual or romantic involvement); Ind. Code § 35-41-1-10.6(2)-(3) (2003); Kan. Stat. Ann. § 60-3102 (2003); Me. Rev. Stat. Ann. tit. 19A § 4002(4) (West 2003); (“family or household members,” which includes individuals who are or were sexual partners.”); Mass. Gen. Laws ch. 209A, § 1(e) (West 2003); Mich. Comp. Laws Ann. § 600.2950(30)(a) (West 2003) (“dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional involvement.”); Minn. Stat. Ann. § 518B.01(2)(b) (“significant romantic or sexual relationship”: “In determining whether persons are or have been involved in a significant romantic or sexual relationship . . . the court shall consider the length of time of the

for the participants to receive protection,⁶⁹ but most merely require something more than a platonic relationship.⁷⁰ Also, most states that offer the protection to members of dating relationships offer it without regard to the age of the relationship members.⁷¹ However, some limit the protection

relationship; type of relationship; frequency of interaction between the parties; and, if the relationship has terminated, length of time since the termination); Miss. Code Ann. § 93-21-3(d) (2003) (includes family or household members who reside together or who formerly resided together or between individuals who have a “current dating relationship,” which is defined to mean a “social relationship of a romantic or intimate nature”); Mo. Rev. Stat. § 455.010 (2003) (“or has been in a continuing social relationship of a romantic or intimate nature with the victim”); Mont. Code Ann. §§ 40-4-121, 45-5-206 (2003); Nev. Rev. Stat. Ann. § 33.018 (““dating relationship” means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement.”); N.H. Rev. Stat. Ann. § 173-B:1 (2003); N.J. Stat. Ann. § 2C:25-19 (Lexis 2003); N.M. Stat. Ann. § 40-13-2 (Michie 2003); N.C. Gen. Stat. § 50B-1(a) (persons of the opposite sex who are in a “dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship.”); N.D. Cent. Code § 14-07.1-01 (2003); Okla. Stat. Ann. tit. 22, § 60.1(4) (2003) (“dating relationship”); Or. Rev. Stat. § 107.705 (2003); Pa. Stat. Ann. tit. 23, § 6102(a) (2003); R.I. Gen Laws §§ 15-15-1, 8-8.1-1 (2003); Tenn. Code Ann. § 36-3-601(4) (dating and sexual relationships); Tex. Fam. Code Ann § 71.0021(b) (Vernon 2003) (“dating relationship.”); Vt. Stat. Ann. tit. 15, § 1101(2) (2003) (sexual and dating relationships. ““Dating” means a social relationship of a romantic nature. Factors that the court may consider when determining whether a dating relationship exists or existed include: (A) the nature of the relationship; (B) the length of time the relationship has existed; (C) the frequency of interaction between the parties; (D) the length of time since the relationship was terminated, if applicable.”); Wash Rev. Code. Ann. § 26.50.010 (West 2003); W. Va. Code § 48-27-204(3), (4) (2003) (sexual or intimate partners or dating); Wis. Stat. § 813.12(1); Wyo. Stat. § 35-21-102(a)(iv) (2003) (are or were in “dating relationship”).

⁶⁹ See, e.g., Me. Rev. Stat. Ann. tit. 19A § 4002 (West 2003) (“are or were “Sexual partners”); Or. Rev. Stat. § 107.705 (2003) (“Persons who have been involved in a sexually intimate relationship with each other within two years immediately preceding the filing”).

⁷⁰ See, e.g., Haw. Rev. Stat. § 586-1(2) (2003) (““dating relationship”” does not include a casual acquaintanceship or ordinary fraternization between persons in a business or social context.”); Nev. Rev. Stat. Ann. § 33.018 (““dating relationship” . . . does not include a casual relationship or an ordinary association between persons in a business or social context”); N.C. Gen. Stat. § 50B-1(a) (“A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship”).

⁷¹ See, e.g., Colo. Rev. Stat. § 14-4-101 (West 2003); Kan. Stat. Ann. § 60-3102 (2003) (includes “intimate partners and household members,” which includes those in a “dating relationship” to be determined by a list of factors); Ind. Code § 35-41-1-10.6(2)-(3) (2003) (is dating or has dated the other person; is or was engaged in a sexual relationship with the other person);

to adult members only.⁷² Others specifically offer protection to both minors and adults.⁷³ Of these states, two limit protection to members of a current relationship.⁷⁴ Two others require that the relationship occurred within a certain amount of time.⁷⁵

D. Pregnancy

Three states, Arizona, Minnesota, and Utah, specifically allow victims who are pregnant with the respondent's child to obtain domestic violence civil protection orders.⁷⁶ Most victims would be entitled to protection under the dating relationship protection offered in Minnesota and thirty three other states.⁷⁷ However, in states like New York where the jurisdiction of the

⁷² See, e.g., Wis. Stat. § 813.12(1) ("Dating relationship" means a romantic or intimate social relationship between two adult individuals); Wash Rev. Code. Ann. § 26.50.010 (West 2003) ("persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship").

⁷³ See, e.g., R.I. Gen. Laws § 15-15-1 (2003) ("persons who are or have been in a substantive dating or engagement relationship within the past one year in which at least one of the persons is a minor") and R.I. Gen. Laws § 8-8.1-1 (2003) ("persons who are or have been in a substantive dating or engagement relationship within the past one year").

⁷⁴ Mississippi and North Dakota limit protection to members of a current dating relationship. Miss. Code Ann. § 93-21-3 (2003) ("individuals who have a current dating relationship"); N.D. Cent. Code § 14-07.1-01 (2003) ("persons who are in a dating relationship"). But, North Dakota includes in its statute a catch-all provision, which provides domestic violence protection orders to "any other person with a sufficient relationship to the abusing person as determined by the court." *Id.*

⁷⁵ Rhode Island requires that the relationship occurred within one year, and Oregon limits coverage to relationships within the last two years. R.I. Gen Laws §§ 15-15-1, 8-8.1-1 (2003); Or. Rev. Stat. § 107.705 (2003).

⁷⁶ See, e.g., Ariz. Rev. Stat. Ann. § 13-3601(A) (2003); Minn. Stat. Ann. § 518B.01(2)(b) (2003) (Minnesota also amended its statute to allow victims in dating relationships to obtain civil orders of protection); Utah Code Ann. § 30-6-1 (2003). For a discussion of pregnancy and domestic violence See Evan Stark & Anne Flitcraft, WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH (1996); Hortensa Amaro et al., *Violence During Pregnancy and Substance Abuse*, 80 AM. J. PUB. HEALTH, 575-79 (1990); and Judith McFarlane et al., *Assessing Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care*, 267 JAMA 3176-78 (1992).

⁷⁷ However, many states do not provide protection for pregnant victims, which creates another dangerous gap in the law. Klein and Orloff have suggested that "the most effective way to address these dangerous oversights in the statutes and extend civil protection order coverage to abuse victims, whether they have a child in common with the respondent, claim to have a child in common, or are presently pregnant with the respondent's child, is

courts to provide civil protection orders is limited, women who are pregnant with their abusers' children are denied protection.⁷⁸

E. Same Sex Relationships

As of 1993, ten states, Alabama, Arizona, Delaware, Florida, Mississippi, Missouri, Montana, North Carolina, Pennsylvania, South Carolina, specifically denied protection to couples in same sex relationships.⁷⁹ Several other states had statutes open to interpretation.⁸⁰

Today, that number has been cut in half. Five states specifically limit

to . . . cover dating relationships and all intimate partners. Such statutory changes will result in the ability to more fully reach those relationships in which violence occurs, and will prevent victims of abuse from falling dangerously through statutory cracks." Klein and Orloff *supra* note 15 at 828-29. But, it may be better yet to omit the relationship requirement and extend the availability of civil protection orders to anyone in reasonable fear of another.

⁷⁸ See, e.g., *Gina C v. Stephen F.*, 576 N.Y.S.2d 776, 776 (N.Y. Fam. Ct. 1991) (Unborn child was not "child" within meaning of statute conferring jurisdiction for family offense proceedings on family court if parties have child in common; thus, family court had no jurisdiction over mother's petition for protection order against father who was not living with her). *Robert F.Z. v. Michelle McG.*, 513 N.Y.S.2d 628 (N.Y. Fam. Ct.) (family court lacked jurisdiction in case of putative father who denied paternity of unborn child and pregnant mother). In *Gina*, the court recommended the definition be changed to include pregnant mothers: "The legislature unfortunately has not extended Article 8 protection to situations where the sole connection between two unmarried, non-cohabitating individuals is an unborn child. Petitioner's only remedy in this matter is to apply to the criminal courts for protection and redress. The Court calls upon the legislature to remedy this gap in Article 8 and confer upon the Family Court jurisdiction to provide protection from domestic violence to pregnant women who find themselves in this situation." See e.g., *Gina C. v. Stephen F.*, 576 N.Y.S.2d 776, 777 (N.Y. Fam. Ct. 1991); but see, *Gloria C. v. William C.*, 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1989) (granting protection order on behalf of fetus against abuse by mother's husband).

⁷⁹ Ala. Code § 30-5-2(4) (1989); Ariz. Rev. Stat. Ann. § 13-3601B (1992); Del. Code Ann. tit. 10, §§ 901(9), 1041 (Supp. 1992); Fl. Rev. Stat. § 741.30 (West Supp. 1993); Miss. Code Ann. § 93-21-3 (Supp. 1992); Mo. Rev. Stat. § 455.010 (1992); Mont. Code Ann. § 45-5-206 (1991); N.C. Gen. Stat. § 50B-1 (1989); Pa. Stat. Ann. tit. 23, § 6102(a) (1991); S.C. Code Ann. § 20-4-20(b) (Law. Co-op. 1985); see also, Hon. Mac D. Hunter, *Homosexuals as a New Class of Domestic Violence Subjects under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 U. LOUIS. J. FAM. L. 557, 573 (1992/1993).

⁸⁰ See e.g., Ky. Rev. Stat. Ann. § 403.720 (Michie/Bobbs-Merrill 1992) ("member of an unmarried couple); La. Rev. Stat. Ann. § 46:2132(4) (West 1993) (living as spouses); Mich. Comp. Laws Ann. § 600.2950a (West 1992); R.I. Gen Laws § 15-15-1 (1988 & Supp. 1992) (same).

protection to persons in relationships with someone of the opposite sex in some way.⁸¹ Delaware and North Carolina specifically limit protection of co-parents and cohabitants to heterosexual couples.⁸² Louisiana and South Carolina limit coverage of cohabitants to opposite-sex couples.⁸³ But, South Carolina does not specifically exclude members of same-sex relationships if they share a child; Louisiana does not have a co-parent provision.⁸⁴ Like South Carolina, Montana limits coverage to members of opposite-sex dating relationships, but does not place the same restriction on co-parents; however, Montana does not specifically provide protection to cohabitants, regardless of their respective gender.⁸⁵

Until 2000, many states still did not provide coverage to couples in dating relationships, provided coverage to cohabitating couples living “as spouses,”⁸⁶ or had other statutory ambiguities that brought their coverage of same sex couples into question.⁸⁷ Since then, with the exception of five, all such states have either added coverage to dating couples regardless of their

⁸¹ Del. Code Ann. tit. 10, § 1041 (2003); La. Rev. Stat. Ann. § 46:2132 (West 2003); Mont. Code Ann. § 45-5-206 (2003); N.C. Gen. Stat. § 50B-1(b)(2),(6) (2003); S.C. Code Ann. § 20-4-20 (Law. Co-op. 2003).

⁸² Del. Code Ann. tit. 10, § 1041 (2003) (“domestic violence” is limited to “a man and a woman co-habitating together with or without a child of either or both, or a man and a woman living separate and apart with a child in common”); N.C. Gen. Stat. § 50B-1(b)(2),(6) (2003) (“personal relationship” includes “persons of opposite sex who live together or have lived together” and “are persons of the opposite sex who are in a dating relationship or have been in a dating relationship”).

⁸³ La. Rev. Stat. Ann. § 46:2132 (West 2003) (““Household members” means any person of the opposite sex presently or formerly living in the same residence with the defendant as a spouse, whether married or not”); S.C. Code Ann. § 20-4-20 (Law. Co-op. 2003) (“Household member” means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly have cohabited”).

⁸⁴ *Id.*

⁸⁵ Mont. Code Ann. § 45-5-206 (2003) (“Partners” means spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex”).

⁸⁶ *See, e.g.*, Ohio Rev. Code Ann. § 3113.31(A)(3) (Anderson 1993) (“Family or household member” only includes “a spouse, a person living as a spouse, or a former spouse of the respondent”).

⁸⁷ *See e.g., supra* note 80.

respective genders, or their courts have interpreted the statute as applying to same-sex couples.⁸⁸

F. No Relationship Requirement

A few states have also removed a relationship requirement altogether. They allow anyone to obtain the same type of protection that domestic violence protection orders provide without regard to relationship. Typically, they only require that the petitioner show she is in reasonable fear of imminent harm by the respondent.⁸⁹

G. Summary

In ten years, the coverage of domestic violence civil protection orders has increased dramatically. States offering protection to members of dating relationships has more than tripled.⁹⁰ Only thirteen states still restrict coverage of domestic violence civil protection orders to those who are or were married or related to their abuser, share a child with him, or who are or were living with him.⁹¹ Two more states, Arizona, and Utah have amended

⁸⁸ *State v. Yaden*, 692 N.E.2d 1097 (Ohio Ct. App. 1997) (holding gay man was "a person living as a spouse" with his partner and was a "family or household member" for purposes of the domestic violence statute); *Ireland v. Davis*, 957 S.W.2d 310, 312 (Ky. Ct. App. 1997) (holding homosexual couple fit definition of "couple" for purposes of a domestic violence protection order).

⁸⁹ *See, e.g.*, Colo. Rev. Stat. § 13-14-102(4)(a); Ariz. Rev. Stat. § 12-1809 (allowing "any person" to obtain an injunction against another for acts of harassment); Cal. Code Civ. P. § 527.6 (allowing any "person" to obtain an injunction against another for "harassment," which is defined as unlawful violence, a credible threat of violence . . . that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. "Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose").

⁹⁰ In 1993, only ten states offered protection to members of dating relationships. Alaska Stat. § 25.35.200 (Supp. 1993); Cal. Fam. Code § 70 (West Supp. 1992); Mass. Gen. L. Ann. ch. 209A, § 1 (West 1992); N.H. Rev. Stat. Ann. § 173-B:1 (Supp. 1992); N.M. Stat. Ann. § 40-13-2 (Michie Supp. 1993); N.D. Cent. Code § 14.07.1-01 (Supp. 1993); 23 Pa. Cons. Stat. Ann. § 6102 (1992); R.I. Gen. Laws § 8-8.1-1 (Supp. 1992) ('persons who shared an intimate sexual relationship within the past six (6) months'); Wash. Rev. Code Ann. § 26.50.010(2)-(3) (West Supp. 1993); W. Va. Code § 48-2A-2 (Supp. 1993); *See Klein & Orloff supra* note 15 at 836.

⁹¹ Ala. Code § 30-5-2(4) (2003); Ariz. Rev. Stat. Ann. § 13-3601(A) (2003); Ark. Code Ann. § 9-15-103(b) (Michie 2003); Del. Code Ann. tit. 10, § 1041(2) (2003); Fla. Stat. Ann. § 741.28(2) (West 2003); Ga. Code Ann. § 19-13-1 (2003); Ky. Rev. Stat. Ann. § 403.720 (Michie/Bobbs-Merrill 2003); Md. Code Ann., Family Law § 4-501 (2003);

their statutes to allow victims who are pregnant with the respondent's child to petition for protection orders.⁹² The remaining states, save one, also permit victims who are dating their abuser to obtain civil protection orders.⁹³

In those states where the parties fall outside the states' relationship definitions, victims are unable to obtain a domestic violence civil protection order. In these situations, an individual must rely on criminal courts, or they must rely on the creativity of the courts to obtain protection.⁹⁴ This can be a difficult and expensive procedure and the remedies available under civil protection order statutes may not be available in another context. Also, reliance on the criminal system may be insufficient; evidence to sustain proof beyond a reasonable doubt may be lacking, or the government may simply be unwilling to proceed with a case.

III. ALTERNATE PATHS: CRIMINAL AND CIVIL ORDERS OF PROTECTION IN NEW YORK

Unless she is obtaining a divorce, the only two places a victim of domestic violence can get protective relief in New York State are in family court and criminal court.⁹⁵ So, the only place a victim can obtain a civil

Neb. Rev. Stat. § 42-903(4) (2003); Ohio Rev. Code Ann. § 3113.31(A)(3) (2003); S.C. Code Ann. § 20-4-20(b) (Law.Co-op. 2003); S.D. Codified Laws Ann. § 25-10-1(2) (2003); Utah Code Ann. § 30-6-1 (2003).

⁹² See, e.g., Ariz. Rev. Stat. Ann. § 13-3601(A) (2003); Minn. Stat. Ann. § 518B.01(2)(b) (2003) (Minnesota also amended its statute to allow victims in dating relationships to obtain civil orders of protection); Utah Code Ann. § 30-6-1 (2003). For a discussion of pregnancy and domestic violence See Evan Stark & Anne Flitcraft, WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH (1996); Hortensa Amaro et al., *Violence During Pregnancy and Substance Abuse*, 80 AM. J. PUB. HEALTH, 575-79 (1990); and Judith McFarlane et al., *Assessing Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care*, 267 JAMA 3176-78 (1992).

⁹³ See *supra* note 68 and accompanying text.

⁹⁴ Brustin, *supra* note 55 at 338; Courts have used creative means to protect victims of domestic violence where they do not satisfy statutory definitions. For example, before the statute was amended to cover dating relationships, a court in Wisconsin used a state harassment statute to protect a member of dating relationship. *Banks v. Pelot*, 460 N.W.2d 446 (Wis. Ct. App.1990).

⁹⁵ N.Y. Crim. P. Law § 530.11-13; N.Y. Family Ct. Act § 842; N.Y. Dom. Rel. Law §§ 240(3); 252 (McKinney 2003). New York does not provide for a person to obtain *any* civil protection order in a general civil court. While beyond the scope of this article, it is notable that all other crime victims have no civil remedy to obtain an order of protection. The only way for such a victim in New York to obtain protection from harm is to file a

order of protection is to seek relief in family court. But, a person can obtain a civil order in family court only if she falls within the intersection of two separate inquiries: was she a victim of a “family offense,” and was that offense committed by a member of her “family or household.” If she fails to meet *either* of these inquiries, she is barred entirely from obtaining civil protection.

The intersection of these two inquiries exists in New York’s criminal system as well. In New York, all victims of crime are entitled to a criminal order of protection, which can be obtained from criminal court once a defendant is arrested and charged with a crime. But, there are two different types of criminal orders: “family offense” criminal orders of protection, and standard criminal orders of protection. The family offense orders offer additional unique benefits that the standard orders do not. Like the inquiries in family court, to obtain a family offense criminal order, the criminal court inquires whether the victim is *both* a victim of a “family offense,” *and* a member of the defendant’s “family or household” as defined in the Family Court Act.

As a result, New York has a “bifurcated” system, and one of the most difficult systems to navigate in the country. It treats victims differently based on their relationships with the abusers and based on the crimes the abusers committed against them. This article focuses on the problems with this bifurcated system. It takes issue both with its definition of “family offense” and with its definition of “family or household member.” Such a system does not provide sufficient protection because it denies civil protection entirely to one group, and only provides partial protection to the other.

The next section briefly examines the procedures and remedies

complaint in Criminal Court. While the court has the discretion to issue an order of protection based on a victim’s complaint that the defendant committed a crime as defined by New York’s penal law, the discretion ultimately lies with the prosecutor as to whether or not to pursue the criminal charges, and a criminal order of protection will only remain in place if the defendant is convicted of the crime beyond a reasonable doubt. N.Y. Crim. P. L. 530.12(14) (McKinney 2003). This seems particularly troubling for victims of certain crimes such as sex assault, stalking, and other violent crime. This may be especially true for crimes where proof may not be strong enough to sustain a criminal case, but would pass a lower burden. Some states have made efforts to provide civil orders of protections specific to sex assault victims, while others provide protection to any persons so long as imminent danger exists, or where a person is in reasonable fear of another. *See infra*, note 182; Colo. Rev. Stat. § 13-14-102 (2003) (permitting any municipal court, county court, or district court to issue civil orders of protection to a person whose health or safety is in “imminent danger” from another, but a lapse of time between an act of abuse or threat and filing of the petition is not dispositive).

available to two separate sets of victims: those who are entitled to jurisdiction in family court because they were a victim of a “family offense” by a member of the same family or household, and those who are not entitled to jurisdiction in family court because they do not satisfy one or both of those definitions. It will examine the procedures and benefits of the civil order of protection as well as the “family offense” and standard criminal orders of protection.

A. Victims entitled to jurisdiction in family court

Only a victim who can show she was a victim of a “family offense” at the hands of a member of the same “family or household” is entitled to jurisdiction in family court. These victims are entitled both to civil orders of protection in family court and, if criminal charges are pending, to “family offense” orders of protection in criminal court. “Family offenses” include the following crimes, which are in turn defined by New York Penal law⁹⁶: disorderly conduct,⁹⁷ harassment in the first⁹⁸ and second degree,⁹⁹ aggravated harassment in the second degree¹⁰⁰, menacing in the second¹⁰¹ and third degree,¹⁰² reckless endangerment,¹⁰³ assault in the second¹⁰⁴ and third degree¹⁰⁵, attempted assault,¹⁰⁶ stalking in the first,¹⁰⁷ second,¹⁰⁸

⁹⁶ N.Y. Fam. Ct. Act § 812; N.Y. Crim. P. Law § 511.11 (McKinney 2003).

⁹⁷ However, disorderly conduct is not limited to public conduct, but also includes disorderly conduct not in a public place. *Id.* Disorderly conduct is defined in N.Y. Penal Law § 240.20 (McKinney 2001).

⁹⁸ N.Y. Penal Law § 240.25 (McKinney 2001).

⁹⁹ N.Y. Penal Law § 240.26 (McKinney 2001).

¹⁰⁰ N.Y. Penal Law § 240.30 (McKinney 2001).

¹⁰¹ N.Y. Penal Law § 120.14 (McKinney 2001).

¹⁰² N.Y. Penal Law § 120.15 (McKinney 2001).

¹⁰³ N.Y. Penal Law § 120.20-.25 (McKinney 2001).

¹⁰⁴ N.Y. Penal Law § 120.05 (McKinney 2001).

¹⁰⁵ N.Y. Penal Law § 120.00 (McKinney 2001).

¹⁰⁶ N.Y. Penal Law § 120.15 (McKinney 2001).

¹⁰⁷ N.Y. Penal Law § 120.60 (McKinney 2001).

third,¹⁰⁹ and fourth¹¹⁰ degree. “Members of the same family or household” include “persons related by consanguinity or affinity; persons legally married to one another; persons formerly married to one another; and persons who have a child in common regardless whether such persons have been married or have lived together at any time.”¹¹¹

1. Civil Orders of Protection in Family Court

A victim must file a petition in family court to obtain a civil order of protection. She must show that the respondent engaged in conduct that constituted one of the delineated offenses, and must show that she is a member of the same family or household by showing she is a spouse, former spouse, parent, child, or that she shares a child with the respondent.¹¹²

If the abuser commits a crime other than one of the delineated “family offenses,” such as a sex crime, first degree assault, kidnapping, criminal mischief, etc., she can seek neither a civil order of protection, nor a “family offense” criminal order of protection even if she is married to the abuser, has children with him, or is otherwise a “family or household” member of the abuser’s. Her only remedy in such a situation is to proceed in criminal court, and to obtain a “non family offense” criminal order of protection.¹¹³

A victim may obtain a temporary order of protection, which, after a final hearing, can be made “permanent.”¹¹⁴ The court can require the abuser to do the following: stay away from the home, school, business, or place of

¹⁰⁸ N.Y. Penal Law § 120.55 (McKinney 2001).

¹⁰⁹ N.Y. Penal Law § 120.50 (McKinney 2001).

¹¹⁰ N.Y. Penal Law § 120.45 (McKinney 2001).

¹¹¹ N.Y. Fam. Ct. Act § 812; N.Y. Crim. P. Law § 530.11 (McKinney 2003).

¹¹² N.Y. Fam. Ct. Act § 821 (McKinney 2001).

¹¹³ *See infra* section C.2.

¹¹⁴ Once issued, a “permanent” order remains in place for two years unless aggravating circumstances are present. If such circumstances are present, an order will remain in place for five years. N.Y. Fam. Ct. Act. § 842 (McKinney 2001). Aggravating circumstances include the following: physical injury; the use of a dangerous instrument; a history of repeated violations; prior convictions for crimes against the petitioner; or “like incidents.” N.Y. Fam. Ct. Act. § 828(3) (McKinney 2001).

employment of any other party; permit a parent entitled to visitation by an existing order to visit the child; to permit a party to enter the residence to remove personal belongings; to refrain from committing a family offense, or any criminal offense against the child or against the other parent or against any person to whom custody is awarded, or from harassing, intimidating or threatening such persons;¹¹⁵ to refrain from acts creating an unreasonable risk to health, safety or welfare of a child;¹¹⁶ to pay counsel and other fees in connection with the petition; to require the abuser to participate in a batterer's education program, which may include drug and alcohol counseling; to provide medical care or pay for expenses; and to observe "other conditions as are necessary to further the purposes of protection."¹¹⁷ The order can also include provisions for child support, custody and visitation, and provisions revoking any existing license to possess a gun.¹¹⁸

If the abuser violates the order, the victim has a few choices. First, she could call the police. A police officer is required to arrest where an officer has probable cause to believe that an abuser has committed a felony against a "family or household member, regardless of whether an order of protection is in place."¹¹⁹ An officer is also required to arrest if there is

¹¹⁵ While the Family Court Act usually allows for additional provisions not delineated in the statute relating to orders of protection in criminal court, the parallel provision in criminal court reads: "to refrain from committing a family offense . . . or any criminal offense against the child or against the *family or household member*, or against any person to who custody of the child is awarded, or from harassing, intimidating or threatening such persons. N.Y. Crim. P. Law. § 530.12(c) (McKinney 2003). This seems to provide an additional protection to victims in criminal court that is not explicitly available in family court. As a result, while married or formerly married victims who do not share a child with the abuser are entitled to protection in criminal court from *any crime* as well as acts of harassment, intimidation or threats, in family court, they are entitled only to protection from future family offenses.

¹¹⁶ This provision is similar to the last. The parallel provision in criminal court reads: "to refrain from acts of commission or omission that create an unreasonable risk to the health, safety and welfare of a child, *family or household member's* life or health." N.Y. Crim. P. Law § 530.12(1)(a)(d) (McKinney). Once again, this seems to provide an additional protection to victims in criminal court that is not explicitly available in family court.

¹¹⁷ N.Y. Fam. Ct. Act § 842(1) (McKinney 2003).

¹¹⁸ N.Y. Fam. Ct. Act § 828(4), § 842-a (McKinney 2001).

¹¹⁹ N.Y. Crim. P. 140.10(4)(a) (McKinney 2003). Also outside the context of protection orders, an officer has discretion to arrest an abuser if he has reasonable cause to

probable cause to believe that an abuser has violated the provisions of a valid order of a family offense order of protection.¹²⁰ A police officer must also arrest if a duly served order of protection includes a “stay away” provision that the abuser violated, or where the abuser commits another “family offense” against the family or household member.¹²¹ The provisions relating to an officer’s ability to arrest without a warrant where an abuser violates the provisions of an order of protection apply only to “family offense” orders of protection issued in family or criminal court. They do not apply to orders of protection issued in criminal court to victims of crime who are not members of the abusers “family or household.”¹²²

But, immediate arrest is not a victim’s only option. She can also return to family court to file a civil “violation of court order” petition, or contempt petition.¹²³ If the violation also constituted a “family offense,” she can initiate an entirely new family offense proceeding in family

believe the abuser has committed a misdemeanor “family offense” against a family or household member, but the officer is directed to determine the primary aggressor, and is to avoid dual arrests. Also, if an abuser commits a misdemeanor family offense against a family or household member, and the officer elects not to arrest, the officer is required to make a report of investigation on a standardized form that the police department must keep on file for four years following the incident that lead to the investigation. *Id.* This procedure is not required if the victim is not one of a “family offense,” and is not a “family or household member” of the abusers. *Id.* For a discussion of the wisdom of mandatory arrest policies, compare Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999) (arguing that mandatory intervention inflicts its own form of violence on victims, that it ignores a victim’s perspective, and works to rob a victim of even more power); Erin L. Han, note *Mandatory Arrest and No Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L. J. 159, 179-181 (2003) (arguing that mandatory arrest policies can be parallel with the goal of empowering victims).

¹²⁰ N.Y. Fam. Ct. Act § 168(1) (McKinney 2003).

¹²¹ N.Y. Crim. P. § 140.10(4)(b) (McKinney 2003).

¹²² N.Y. Crim. P. Law § 140.10(4)(b) (McKinney 2003).

¹²³ N.Y. Fam. Ct. Act. § 846-a (McKinney 2001). At a contempt hearing in family court, the court need only be “satisfied by competent proof” that the abuser violated the order’s terms. N.Y. Fam. Ct. Act § 846-a (McKinney 2003). Upon a finding that the abuser willfully failed to obey a court order, the family court may modify the order, issue a new order, order the forfeiture of bail, order payment of reasonable counsel fees, require the respondent surrender any guns, and commit respondent to jail for up to six months for each violation. N.Y. Fam. Ct. Act § 847 (McKinney 2003).

court.¹²⁴ Or, if she chooses, she can ask the district attorney to file a complaint in criminal court instead of, or as well as, filing a complaint in family court.¹²⁵ Finally, she can also ask the district attorney to file a complaint for criminal contempt,¹²⁶ or ask the court to invoke its own powers to punish for contempt.¹²⁷ Essentially, the victim has the option of treating the violation as a new criminal offense, a civil contempt proceeding, a criminal contempt proceeding, or all three.¹²⁸

2. Criminal Orders of Protection: “Protection for victims of Family offenses”

New York has two separate criminal protection order statutes: one entitled the “protection for victims of “family offenses,”¹²⁹ and one entitled “offenses other than family offenses,”¹³⁰

A victim of a “family offense” at the hands of a member of her “family or household” has the right to proceed “directly and without court referral in either a criminal or family court, or both.”¹³¹ Simultaneous or subsequent cases may proceed in both places. To obtain a “family offense” order of protection in criminal court, a victim must show she is a victim of

¹²⁴ N.Y. Fam. Ct. Act § 847 (McKinney 2003).

¹²⁵ N.Y. Fam. Ct. Act § 847

¹²⁶ See N.Y. Penal Law §§ 215.50 – 215.51 (McKinney 2003). Repeat violations of family offense orders of protection results in increased penalties for criminal contempt. Where a defendant has been convicted of contempt within the previous five years and violates a “family offense” order of protection issued either by family or criminal court, the misdemeanor contempt crime is elevated to a class “E” felony. N.Y. Penal Law § 215.51 (McKinney 2003). This same provision does not apply to non family orders of protection.

¹²⁷ N.Y. Jud. Law § 750, 751 (McKinney 2003). These powers are separate from criminal contempt charges. The court has the power to impose prison for up to three months, and can impose a fine for one thousand dollars; these contempt penalties should not reduce any sentence for any original offense of which the defendant is also found guilty. N.Y. Crim. P. Law § 512(10) (McKinney 2003).

¹²⁸ N.Y. Fam. Ct. Act § 847 (McKinney 2003). However, there may be concerns of double jeopardy where identical contempt proceedings are pursued in both family and criminal court. *U.S. v. Dixon*, 113 S. Ct. 2849 (1993).

¹²⁹ N.Y. Crim. P. Law § 530.12 (McKinney 2003).

¹³⁰ N.Y. Crim. P. Law § 530.13 (McKinney 2003).

¹³¹ N.Y. Crim. P. Law § 530.11(2)(i) (McKinney 2003).

one of the delineated family offenses at the hands of someone from her same family or household.

Like civil orders of protection, if an abuser commits a crime that is not included in the relatively short list of “family offenses,” her remedy is to seek a “non family offense” order of protection in criminal court. Such orders do not provide the same levels of protection or provisions as family offense orders of protection.

If she is a victim of crime by a family or household member, she may file a complaint with the criminal court, with the police, or with the prosecutor’s office alleging that a defendant has committed a “family offense.”¹³² But, the victim is not in charge of this proceeding. Instead, it is only the police or prosecutor’s office that may investigate, file charges and arrest the abuser.¹³³ The prosecutor may decide not to proceed with the case and has discretion to dismiss the case.¹³⁴

In connection with the criminal case, the prosecutor may request that the court may issue an order of protection.¹³⁵ The order will be in effect while the prosecution is pending, and for the period during which a case is adjourned pending dismissal.¹³⁶

¹³² See, e.g., N.Y. Crim. P. Law § 100.15 (McKinney 2003). This statute allows any person having knowledge of the commission of the offense charged to file an information with the court. However, only district attorneys “retain the ultimate nondelegable responsibility for prosecuting all crimes and offenses.” *People v. Soddano*, 665 N.E.2d 161 (N.Y. 1995) *But see, People v. Van Sickle*, 192 N.E.2d 9 (N.Y. 1963) (upholding conviction led by a lay complainant). To constitute a complaint sufficient for arrest, a complaint must establish reasonable cause to believe that a crime has been committed. To constitute a sufficient information, it must also contain non-hearsay evidentiary allegations to establish every element of the offense alleged. See N.Y. Crim. P. Law § 100.40. While this procedure is available for victims, it is rarely used. Instead, the victim typically files a complaint with the police. Interview with Andrew Seewald, Assistant District Attorney, Manhattan District Attorney’s Office (Oct. 6, 2003).

¹³³ N.Y. Crim. P. Law § 120.10-.90 (McKinney 2003).

¹³⁴ The decision is always the government’s as to whether and how to proceed with a criminal action. See, e.g., N.Y. Crim. P. Law. § 530.12(14) (“The people shall make reasonable efforts to notify the complainant alleging a crime constituting a family offense when the people have decided to decline prosecution of such crime, to dismiss the criminal charges against the defendant or to enter into a plea agreement.”)

¹³⁵ N.Y. Crim. P. Law § 530.12 (McKinney 2003).

¹³⁶ Unlike other offenses, the time for adjournment of “family offenses” contemplating dismissal is one year instead of the standard six months for other types of offenses. N.Y.

The terms of the order can include any or all of the following: orders for the defendant to stay away from the victim; orders enforcing an existing child visitation order; orders restraining the defendant from committing any family offense, any crime against a family or household member, or any harassing, intimidating or threatening acts against such persons;¹³⁷ orders restraining the defendant from committing acts creating an unreasonable risk to the health safety or welfare of a child or family or household member; orders to allow a party to enter the shared residence to obtain belongings;¹³⁸ and orders that the defendant surrender licenses to carry or possess guns, and the guns themselves.¹³⁹

In contrast to family court civil orders of protection, the criminal court does not have jurisdiction to enter new orders regarding child custody, support, or visitation, and there are no specific provisions for restitution, payment of counsel and other fees, probation before conviction, medical care expenses, batterer intervention programs, or drug and alcohol counseling.¹⁴⁰

Unlike proceedings in family court, which require only proof by a preponderance of the evidence, to remain in place, a “permanent” criminal order of protection can only be issued if the underlying crime is proved beyond a reasonable doubt.¹⁴¹

If a defendant violates a “family offense” criminal order of

Crim. P. Law § 170.55(2) (McKinney 2003).

¹³⁷ N.Y. Crim. P. Law. § 530.11

¹³⁸ N.Y. Crim. P. Law § 530.12(1)(a-e). The court may also issue a temporary protection order ex parte upon the filing of a criminal complaint and for good cause shown. § 530.12(3).

¹³⁹ N.Y. Crim. P. Law § 530.14 (McKinney 2003).

¹⁴⁰ Compare N.Y. Crim. P. Law § 530.12(1)(a-e) with N.Y. Fam. Ct. Act § 842(1)(a-i) (McKinney 2003).

¹⁴¹ N.Y. Crim. P. Law § 530.12(5). However, to enter the order, the court must state on the record the reasons for issuing or not issuing an order of protection. *Id.* Upon conviction, if the court decides to keep the protection order in place, it must fix the order’s time of duration. In felony actions, the order can remain in effect for up to five years from the date of conviction, or three years from the date of the expiration of the maximum term of an indeterminate sentence or the term of a determinate sentence of imprisonment actually imposed. *Id.* For misdemeanor actions, the duration cannot exceed three years from the date of conviction. *Id.* In other offenses, the duration of the order cannot exceed one year from the conviction’s date. *Id.*

protection, the victim here also has several options. First, she can call the police. Like violations of civil orders of protection, police officers have the authority to arrest for violations of family offense criminal orders of protection without a warrant, and in some circumstances are required to do so.¹⁴²

Second, if an abuser commits another family offense in violation of the criminal order of protection, the victim has the option of proceeding in family court, criminal court, or both. She may file a new family offense proceeding in family court and obtain a new civil order of protection. Or, just like in violations of civil orders of protection, she may file civil contempt proceedings in family court.¹⁴³ She may also request that the prosecutor file criminal contempt charges, that the court invoke its criminal contempt penalty powers,¹⁴⁴ or that the court to exercise its powers under the criminal order of protection statute.

B. Procedures for all other victims: the standard criminal order of protection

A victim of a crime other than a “family offense” is barred from protection in civil court, and is barred from seeking a family offense order of protection in criminal court. The only remedy such victims have is to obtain a standard criminal protection order in criminal court.¹⁴⁵ Unlike family offense victims, victims entitled to protection for other offenses are not limited by the nature of the crime that the defendant committed; they can receive an order of protection for any “pending” criminal action.¹⁴⁶ Other than the entitlement definitions, the procedure for obtaining a standard order of protection is identical to the family offense criminal orders. A victim may file a complaint alleging that a defendant has committed a crime.¹⁴⁷ But, again, the victim is not in charge of this proceeding. The prosecutor may decide not to proceed with the case and has discretion to dismiss the case.

¹⁴² N.Y. Crim. P. Law § 140.10 (McKinney 2003).

¹⁴³ See *supra* note 123 and accompanying text.

¹⁴⁴ See *supra* note 126 and accompanying text.

¹⁴⁵ N.Y. Crim. P. Law. § 530.13. (McKinney 2003).

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., N.Y. Crim. P. Law § 100.15 (McKinney 2003).

Like family offense protection orders, the court can issue a temporary order of protection *ex parte* without waiting for the abuser's arrest and, upon a showing of good cause, the court can issue the order as soon as the accusatory instrument is filed.¹⁴⁸ Temporary orders can also be issued at other times throughout the proceeding, including when the matter is adjourned in contemplation of dismissal.¹⁴⁹ The order will be in effect while the prosecution is pending, and for the period during which a case is adjourned pending dismissal.¹⁵⁰

The terms of a standard criminal order of protection are even more limited than "family offense" criminal orders of protection. The only remedies specifically sanctioned by statute are "stay away" orders, and orders restraining the defendant from "harassing, intimidating, threatening or otherwise interfering with the victim or victims of the offense and such members of the family or household of such victim."¹⁵¹ The court can also include orders restraining the defendant from buying or owning guns.¹⁵² But, there are no provisions for restitution, payment of medical expenses, provisions requiring a party access to personal belongings, provisions providing for probation before conviction, batterer intervention programs, or drug and alcohol counseling.¹⁵³

Even more problematic, however, a victim of a crime other than a "family offense" may share a child with the defendant. The standard order of protection does not specifically allow for orders enforcing existing visitation orders or for restraining the defendant from committing acts creating an unreasonable risk to the health safety or welfare of a child.¹⁵⁴

¹⁴⁸ N.Y. Crim. P. Law § 530.13(2) (McKinney 2003).

¹⁴⁹ N.Y. Crim. P. Law §§ 170.55(3)-(4), 530.12(1) (McKinney 2003).

¹⁵⁰ But, unlike a "family offense" case where the time for adjournment contemplating dismissal is one year, the time for all other crimes is six months. N.Y. Crim. P. Law § 170.55(2) (McKinney 2003).

¹⁵¹ N.Y. Crim. P. Law. § 530.13.

¹⁵² N.Y. Crim. P. Law § 530.14.

¹⁵³ Compare N.Y. Crim. P. Law § 530.12(1)(a-e) and N.Y. Fam. Ct. Act. § 842 (McKinney 2003).

¹⁵⁴ Compare N.Y. Crim. P. Law § 530.12(1)(b), (d). The court may also issue a temporary protection order *ex parte* upon the filing of a criminal complaint and for good cause shown. § 530.12(3).

While the court has authority to issue “other conditions,” it is usually unwilling to depart too far from the delineated provisions. Also, it does not have jurisdiction to issue orders regarding child custody or visitation. Additionally, the court uses pre-printed forms and may not take the time to become adequately informed about the circumstances of the parties because it does not involve a “family offense.”¹⁵⁵

For a standard order to remain “permanent,” and assuming the defendant does not plead guilty, a defendant must be convicted of the underlying charge by proof proved beyond a reasonable doubt.¹⁵⁶ But, unlike a victim of a “family offense,” who has the option of proceeding also in family court, a victim of any other crime has no alternative or additional means of protection.¹⁵⁷

Where a defendant violates a standard criminal order of protection, the victim can call the police. But, unlike family offense order violations that mandate arrest and arrest without a warrant, whether police can arrest without a warrant a defendant who violates a standard order is unclear.¹⁵⁸ The victim may also request that the prosecutor file criminal contempt

¹⁵⁵ N.Y. Fam. Ct. Act. § 812(4) (McKinney 2003)(requiring the chief administrator of the courts to “prescribe an appropriate form to implement” the provisions of the law.); *See*, Criminal Court Non-Family Offense Order of Protection Form, available at: <http://forms.lp.findlaw.com/form/courtforms/state/ny/ny000013.pdf> (2003). The pre-printed form has only one line for “other conditions” as the court specifies. Also, in New York, family offense and non-family offenses cases are treated differently in criminal court, which will be discussed in more detail below.

¹⁵⁶ N.Y. Crim. P. Law § 530.13(4) (McKinney 2003).

¹⁵⁷ Upon a defendant’s conviction, if the court decides to keep the protection order in place, it fixes the order’s time of duration. The terms of duration are identical to the “family offense” provisions: in felony actions, five years from conviction, or three from the date the sentence ends; in misdemeanor actions, three years from the date of conviction; and for other offenses, one year from the conviction’s date. N.Y. Crim. P. Law § 530(5) (McKinney 2003).

¹⁵⁸ The non family offense statute provides that “the presentation of a copy of [an] order . . . to any police officer . . . shall constitute authority for him to arrest a person who has violated the terms of such order.” N.Y. Crim. P. Law § 530.13(6) (McKinney 2003). However, the statute delineating when officers may arrest without a warrant specifically states that only violators of orders issued in family court and those issued pursuant to the “family offense” provisions in criminal court are eligible for warrantless arrests. N.Y. Crim. P. 140.10(4)(b) (McKinney 2003). In any case, it is certainly clear that there are no mandatory arrest provisions that apply to violators of standard orders.

charges¹⁵⁹ or that the court invoke its criminal contempt penalty powers.¹⁶⁰ But, under any of these remedies, it is the government, not the victim, who is in control of the proceedings.¹⁶¹

Finally, upon a violation, like violations of family offense criminal orders, the court may revoke a defendant's firearms license, order him ineligible for such licenses, and order the defendant to surrender firearms if there is a substantial risk that he may use or threaten to use them against the victim.¹⁶² The court is required to take action regarding firearms where the defendant's willful failure to obey the order resulted in a serious physical injury, the use or threatened use of a deadly weapon, or behavior constituting any violent offense.¹⁶³

IV. THE BENEFITS OF CIVIL PROTECTION ORDERS

In New York and in other states as well, civil orders of protection provide unique benefits and remedies to domestic violence victims that are in addition to, or that are in place of, the benefits the criminal system offers. First, in other states generally, and in New York in particular, civil orders provide procedural benefits that the criminal system does not. They may be a preferable option for victims who may not have evidence strong enough to sustain a criminal case. Second, civil orders provide emotional or other intangible benefits unavailable in criminal court. They help empower a victim by giving her a choice of remedy, and they may be preferable to those who do not want the abuser to face criminal consequences, but simply want the violence to end. Third, at least some evidence suggests that they

¹⁵⁹ N.Y. Crim. P. Law § 530.13(8) (McKinney 2003). If a defendant violates a standard order of protection, a victim may ask the prosecutor to file misdemeanor criminal contempt charges, or if injury or property damage was involved, she may request the prosecutor file felony criminal contempt charges. But, unlike "family offense" orders of protection, repeat violators of a standard criminal order of protection will not incur any greater penalty. N.Y. Penal Law § 215.51. Instead, unlike repeat violations of family offense orders, which are at least class E felonies, each new violation of a standard criminal order is simply a class A misdemeanor. N.Y. Penal Law § 215.50 (McKinney 2003).

¹⁶⁰ N.Y. Jud. Law § 751 (McKinney 2003).

¹⁶¹ But, unlike in family offense orders where the government must make "reasonable efforts to notify" the victim of any of their decisions regarding the case, there is no comparable provision requiring the government to consult with or notify other victims of similar decisions. *See, e.g.*, N.Y. Crim. P. Law. § 530.12(14) (McKinney 2003).

¹⁶² N.Y. Crim. P. Law § 530.14(3)(b) (McKinney 2003).

¹⁶³ N.Y. Crim. P. Law § 530.14(3)(b) (McKinney 2003).

do work to reduce or at least deter future acts of violence. Finally, civil orders and their procedures work to prevent future violence from escalating further. While most studies and criticisms about civil orders of protection have measured and discussed whether orders of protection “work” by only focusing on whether they prevent future acts of violence, civil orders of protection work in several other ways, as well, and these benefits are often either discounted or ignored.¹⁶⁴ All domestic violence victims should have equal access to the unique benefits that civil orders of protection provide.

A. *Procedural and Other Benefits Generally*

Civil protection orders provide unique procedural and other benefits apart from simply forestalling future violence. First, they are easier to obtain than a criminal conviction and criminal orders of protection. A lower standard of proof applies, and in most states, a victim need only sustain proof by a preponderance of the evidence rather than proof beyond a reasonable doubt. A victim may not have the evidence necessary to sustain criminal charges, but does have evidence to support a finding that she is in future danger under a lower burden of proof. Also, civil orders can provide protection more quickly than those granted in the criminal system. In civil court, a temporary order can be issued upon the victim’s sworn statement,¹⁶⁵ or a hearing can be held in a short time. In contrast, while a temporary order can be granted in criminal cases in relatively short order, a conviction and “permanent” order can take months, or even years.¹⁶⁶

Second, civil protection orders empower the victim. They can have a positive effect on the emotional well-being of victims who obtain them by giving them choices of remedy. This serves to give victims control over both their cases and, more importantly, their lives.¹⁶⁷ It also gives control

¹⁶⁴ See Cahn & Meier, *supra* note 14 at 347.

¹⁶⁵ Kit Kinports & Karla Fischer, *supra* note 49 at 165.

¹⁶⁶ Even in courts committed to handling domestic violence cases aggressively, the average period of delay between filing to disposition in criminal court stretches from six to eight months. Buzawa E. & Hotaling G., Klein A., & Byrne, J. *Response to Domestic Violence in a Pro-Active Court Setting: Final Report*, Washington, D.C., National Institute of Justice (June 1999).

¹⁶⁷ See, Susan Keilitz, Paula L. Hannaford, & Hillery S. Efke, U.S. Dep’t of Justice, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (1998), in DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE: THE CIVIL JUSTICE SYSTEM’S RESPONSE TO DOMESTIC VIOLENCE, 3, 49 (Paul Finkelsman ed., 1998). For a discussion on the importance of empowering victims of domestic violence, see, Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411,

back to a victim who may otherwise be in a powerless situation.¹⁶⁸ In criminal cases, the decision is always the government's as to whether and how to proceed.¹⁶⁹ But, in a civil action, the victim can choose when and where to file, and she can seek remedies specific to her situation. Further, once the order is in place, where an abuser violates the order's terms, a victim has the choice whether or not to enforce the order by either calling the police,¹⁷⁰ or, in many jurisdictions, to file a contempt petition.¹⁷¹ In a contempt proceeding, a victim can often request a warrant for the abuser's arrest.¹⁷² If the court finds that the abuser violated the order, a victim can usually request additional relief, and she can even request that the abuser serve time in jail for his contumacious conduct.¹⁷³

In this way, the victim, rather than the state, is in control over what happens to her. Studies show that this type of empowerment affects a victim's sense of well-being. In one, 72% of women who obtained protection orders reported life improvements. After six months, that number goes up to 85%, and more than 90% reported an increase in

1420-21 (1993).

¹⁶⁸ One of Lenore Walker's groundbreaking works about domestic violence discusses that the dynamic of battering relationships includes dominance, power, and control. *Lenore Walker, THE BATTERED WOMAN SYNDROME*, (1984).

¹⁶⁹ *See, e.g.*, N.Y. Crim. P. Law. § 530.12(14) ("The people shall make reasonable efforts to notify the complainant alleging a crime constituting a family offense when the people have decided to decline prosecution of such crime, to dismiss the criminal charges against the defendant or to enter into a plea agreement.")

¹⁷⁰ Police are more likely to respond where a victim has an order of protection; this should serve to empower the victim even further. *See, infra* note 201 and accompanying text.

¹⁷¹ Many states also allow pro se contempt proceedings. *See, e.g.*, N.C. Gen. Stat. § 50B-4 (2003) ("A party may file a motion for contempt for violation of any order This party may file and proceed with that motion pro se, using forms provided by the clerk of superior court or a magistrate"). For a discussion of the benefits of criminal contempt proceedings for victims of domestic violence see David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L. J. 1153 (1995).

¹⁷² *See, e.g.*, W. Va. Code § 48 27-902 (2003); Miss. Code Ann. § 518B.01(14)(b) (2003).

¹⁷³ *See, e.g.*, W. Va. Code § 48 27-902 (2003); Miss. Code Ann. § 518B.01(14)(b) (2003); Miss. Code Ann. § 93-21-21 (2003).

emotional well-being and security.¹⁷⁴ Other studies have resulted in similar findings.¹⁷⁵

Further, civil orders of protection are far more complete than the remedies available in criminal court. Civil orders can provide relief in the form of child custody, child visitation, and other child-care economic orders.¹⁷⁶ They can also require that an abuser enter drug, alcohol, anger-management or batterer's education counseling, and that the abuser surrender firearms. They can order possession and use of shared residences, automobiles, or other personal effects or that the abuser vacate a shared residence or the residence of another party.¹⁷⁷ They can also require that the abuser pay the mortgage or rent on the victim's residence, and pay for victim's counsel.¹⁷⁸ They can order that the abuser pay for expenses related to the violence such as medical expenses, counseling expenses, temporary shelter or housing expenses, and expenses to repair or replace damaged property.¹⁷⁹ Also, most states have a catch-all provision that allows courts discretion to fashion additional remedies specific to each victim.¹⁸⁰ In contrast, statutes governing orders of protection issued in criminal court are usually limited in their remedies, or at least they do not delineate with the

¹⁷⁴ Keilitz, Hannaford & Efke, *supra* note 167 at 55.

¹⁷⁵ Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 417 (1995); Horton, et al., *supra* note 192 at 274; Pennsylvania Coalition Against Domestic Violence, *Protection From Abuse Orders*, 2 (February, 1998) (citing a 1994 National Center for State Courts study reporting that 80% of the women who received civil orders of protection felt safer.) (available at <http://www.pcadv.org/publications/FactSheets/PFAs.pdf>).

¹⁷⁶ *See, e.g.*, Colo. Rev. Stat. § 13-14-102(15)(e)(I – III) (2003) (Allows court to award temporary care and control of any minor children of either party involved for a period of not more than one hundred twenty days); Ind. Code § 34-26-5-9(5) (2003); Md. Code Ann., Family § 4-506(7)-(8) (2003).

¹⁷⁷ *See, e.g.*, Colo. Rev. Stat. § 13-14-102(15)(a), (d) (2003); Ind. Code § 34-26-5-9(2) (2003); Md. Code Ann., Family § 4-506(3), (12) (2003).

¹⁷⁸ *See, e.g.*, Ind. Code § 34-26-5-9(2) (2003)

¹⁷⁹ *Id.*; Md. Code Ann., Family § 4-506(4) (2003)

¹⁸⁰ *See, e.g.*, Alaska Stat. § 18.66.100(c)(16) (Michie 2003) providing that a protection order may “order other relief the court determines necessary to protect the petitioner or any household member”; Colo. Rev. Stat. § 13-14-102 (2003) (stating that a court may issue an order of protection with “such other relief as the court deems appropriate.”)

amount of detail the relief that the court is entitled to provide. Also, the forms courts use to issue orders of protection are usually pre-printed, and only have small sections available to allow a court to add provisions.¹⁸¹ Some states simply do not provide criminal orders of protection to those who do not fall within the state's definition of domestic violence victims.¹⁸²

Civil protection orders can serve to align more closely the interests of the state with those of the victim. This can serve several goals. First, it may increase a victim's participation in the case. In many cases, victims do not wish their abusers to face criminal charges for a multitude of reasons. She may need the abusers continued financial support, she may simply want the violence to end, but not the relationship, or she may fear retaliation stemming from criminal charges.¹⁸³ She may seek the broader remedies that civil court offers, and can choose to avoid the punitive sanctions imposed in a criminal proceeding. In this way, a civil order of protection can allow a victim to use, and ultimately trust the court system to protect and follow her interests to help end the violence.

Second, when provided with an additional public remedy such as a civil order of protection, a victim's interests are aligned with the state's. States criminalized domestic violence in part to bring it into the "public" forum and to send a message to abusers that domestic violence is unacceptable. Also, because the state prosecutes criminal sanctions, more force is brought to bear on the message. Civil remedies can send these same messages. A victim's choice to obtain an order of protection in a

¹⁸¹ See, e.g. Criminal Court Non-Family Offense Order of Protection Form, available at: <http://forms.lp.findlaw.com/form/courtforms/state/ny/ny000013.pdf> (2003). The pre-printed form has only one line for "other conditions" as the court specifies.

¹⁸² Illinois, for instance, does not have a specific statute allowing the court to issue criminal orders of protection in connection with an ongoing criminal case. See, e.g., 720 Il. Comp. Stat. § 5/12-30 (2003). A prosecutor may seek a protection order in criminal court under the bail statute. 725 Il. Comp. Stat. § 5/110-10. However, Illinois' definition of family and household members for purposes of the domestic violence civil orders of protection is one of the most expansive, and includes both cohabitants and members of dating relationships. But, a former stepchild does not meet the definition, nor does a victim of stranger sex assault. Illinois recently passed a separate civil statute, effective in January of 2004, which will allow victims of sexual assault to seek a civil order of protection regardless of their former relationship with the assailant. 740 Il. Comp. Stat. § 22/213 (2003).

¹⁸³ Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L. Q. 43, 44-45 (1989) (discussing reasons why a victim may not want her abuser to face criminal charges).

public court, and the court's issuance of that order, sends the message that the violence is unacceptable. Additionally, a victim seeking sanctions because of an order's violation, and the police or court's issuance of those sanctions, can send a stronger public social message that domestic violence is intolerable.¹⁸⁴

Civil orders of protection may also be cheaper than criminal remedies, both for victims and the courts.¹⁸⁵ Unlike a criminal case where a defendant may be arrested and jailed, civil orders allow a victim to obtain protection while allowing the abuser to keep his job and continue providing economic support.¹⁸⁶ A civil protection order hearing will often be less time consuming for the victim, and less expensive for the state than criminal proceedings.¹⁸⁷ A temporary civil order of protection is typically granted after a victim files a sworn statement, and a permanent order is granted after the court holds a short factual hearing. In contrast, criminal trials can be lengthy, expensive, and slow.

C. Procedural Benefits Particular to New York

New York's civil orders of protection offer many unique benefits that its criminal system cannot. First, permanent orders of protection are obtainable under a lower burden of proof than permanent civil orders.¹⁸⁸ In obtaining a disposition in family court, the victim is permitted to introduce hearsay and other "material and relevant" evidence that would not be permissible in criminal court.¹⁸⁹

Second, the remedies available in a civil order are far more complete than the remedies available in a criminal one. Criminal courts in New York cannot issue orders relating to child custody, support, or visitation. The

¹⁸⁴ For a discussion of the distinction between the "public" and "private" spheres, and its affect on victims of domestic violence, see, Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991). Professor Schneider argues that masculine concepts of privacy permit and encourage violence against women. She suggest that one way to break down the barriers between the public and private realm is to allow victims "public" civil remedies for their "private" abuses. *Id.*

¹⁸⁵ Buzawa & Buzawa, *supra* note 21 at 237.

¹⁸⁶ Kit Kinports & Karla Fischer, *supra* note 49 at 165.

¹⁸⁷ Buzawa & Buzawa, *supra* note 21 at 237.

¹⁸⁸ N.Y. Fam. Ct. Act § 832 (McKinney 2003).

¹⁸⁹ N.Y. Fam. Ct. Act. § 834 (McKinney 2003).

protection order statutes in criminal court, particularly as to “non family offense” orders, limit the remedy available to stay away orders and orders that restrain the defendant from committing acts of harassment, threats or intimidation.¹⁹⁰ They do not include provisions for payment of medical fees, restitution, attorney fees, batterer education programs, or drug and alcohol counseling.

Third, a victim has remedies at her disposal that are unavailable in criminal court if an abuser violates a civil order of protection. In addition to, or instead of seeking criminal charges of contempt in criminal court, she may seek sanctions against the abuser for civil contempt in family court. Here again, lower standards of proof apply, and the victim is not limited to evidence that satisfies the rules of admission in criminal court. If she wishes to send a strong message to the abuser even though the family court, she may still seek to have him arrested and even jailed for violation of the civil order without invoking the punitive measures of criminal court.¹⁹¹

Fourth, if an abuser violates a civil order more than once, he is subject to prosecution for felony criminal contempt, a remedy unavailable where an abuser repeatedly violates a non family offense criminal order. Also, unlike criminal cases, in the family court, the victim, not the government, is in charge. She determines whether, when, and how to proceed in her claim. She also determines whether, when, and how to proceed if the order is violated. In this way, the system returns to a victim at least some of her lost power. Finally, civil orders of protection in New York provide the other additional benefits such as emotional empowerment, prevention of re-abuse, and prevention of abuse escalation.

D. Prevention of Re-Abuse

There is evidence suggesting that the risk of a victim’s re-abuse declines where she obtains a civil protection order. While three early studies all reported that a protection order did not reduce the likelihood of subsequent violence,¹⁹² more recent studies have reported that filing for a

¹⁹⁰ N.Y. Crim. P. § 530.13(a) (McKinney 2003).

¹⁹¹ N.Y. Fam. Ct. Act § 846(b)(ii)(A-C) (McKinney 2003).

¹⁹² Waul, *supra* note 6 at 54; Berk, et. al., *Mutual Combat and Other Family Violence Myths*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH (Finkelhor, et al, eds. 1983); Janice Grau, Jeffery Fagen & Sandra Wexler, *Restraining Orders for Battered Women: Issues of Access and Efficacy*, in CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 13 (Claudine Schweber & Clarice Fineman eds. 1985); Anne Horton, Kyriacos, M. Simonidis, & Lucy

protection order resulted in a significant reduction in future abuse. In one, the researchers studied thirty women who had obtained protection orders in Massachusetts.¹⁹³ They concluded that among victims who obtained temporary protection orders, almost two-thirds were not re-abused within the two-month time period following the order's issuance.¹⁹⁴

In another study conducted in 1999, the researchers concluded that victims who filed for protection orders experienced a 66% decrease in abuse.¹⁹⁵ The same study concluded that permanent protection orders resulted in a 68% decrease in violence, while temporary protection orders resulted in a 52% decrease.¹⁹⁶ Most recently, in 2003, another study revealed that victims who obtain and maintained civil protection orders were safer than those without them in the five-month period after they were initially threatened.¹⁹⁷ In the four months following that period, the effect

Simonidis, *Legal Remedies for Spousal Abuse: Victim Characteristics, Expectations and Satisfaction*. 2 J. FAM. VIOL. 265-79 (1987). However, the Grau study did conclude that victims who had fewer injuries before seeking a protection order experienced a slightly larger decrease in re-abuse than victims with similar histories who did not obtain protection orders. Grau, at 24 (54 % of victims without protection orders experienced re-abuse, while 44% with a protection order experienced re-abuse). But, all victims with serious abuse histories were at about the same risk for re-abuse regardless of whether they sought a protection order. *Id.* (68% without protection orders were re-abused, 67% with protection orders were re-abused). The problem with most of these studies is their lack of control groups. As a result, is impossible to know whether the number of victims who were re-victimised is significantly different from victims who have suffered abuse, but have not gotten an order of protection. Also, while most these studies show that approximately half of the victims suffered additional abuse, it is impossible to know whether the half who did not suffer re-abuse would have still escaped further abuse had she not received an order of protection.

¹⁹³ Chaudhuri & Daly, *supra* note 19 at 230-32.

¹⁹⁴ *Id.* But, the study also concluded that all of the abusers with prior criminal records violated the protection orders.

¹⁹⁵ Michael Carlson, Susan D. Harris & George Holden, *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOL. 205-226 (1999) (the study looked at 210 couples who filed protection orders between 1990 and 1992, and who also had police records two years before and after the restraining orders).

¹⁹⁶ *Id.*

¹⁹⁷ Victoria Holt, M.A. Kernic, M.E. Wolf, F.P. Rivara, *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?* 24 AM. J. OF PREVENTATIVE MED. 16-21 (2003) (the researchers conducted an interview study of 448 women over a period of nine months).

of the protection order had grown, and women who maintained their orders were less likely to have been sexually abused or injured, or to have received medical care for their abuse.¹⁹⁸ While this research is not exhaustive, it indicates that protection orders do have an effect on the likelihood that a restrained party will re-abuse a petitioner.¹⁹⁹

But, while re-abuse is largely the focus of studies on the “effectiveness” of civil orders of protection from the perspective of whether they prevent future violence, as established above, there are several additional arguments for why civil protection orders work in other ways, and why they should be available to all victims in addition to criminal charges and criminal protection orders. Few studies address these other benefits.

D. Prevention of Abuse Escalation

Unlike criminal charges, civil protection orders are forward-looking. By focusing on the prevention of future acts of violence, they provide an opportunity for the victim, the courts, and the police to prevent violence not only from reoccurring, but also from escalating. Once an order is in place, its violation usually constitutes its own criminal offense, or subjects the violator to penalties for criminal contempt.

Also, it should be easier for a victim to overcome the problems of ambivalence from prosecutors and police where a protection order is in place.²⁰⁰ Most states provide for the warrantless arrest of abusers who violate a civil order. As a result, the police are more likely to arrest,²⁰¹ and

¹⁹⁸ *Id.*

¹⁹⁹ For a discussion of the problems with existing methodology of protection order efficacy studies, see, Ko, *supra* note 45 at e.g., Naomi Cahn, Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. Pub. Int. L. J. 339 (1995) (“protection orders frequently do “work”; they often deter further violence and empower the victims to make further changes for their own safety. Success stories of this kind do not appear in the press because the absence of violence is not considered a newsworthy event.”).

²⁰⁰ Buzawa et al., *supra* note 21 at 235.

²⁰¹ Pennsylvania Coalition Against Domestic Violence, *Protection From Abuse Orders*, 2 (February, 1998) (citing a National Institute of Justice study from 1991 “reporting that police officers are more likely to arrest a perpetrator who violates a protection order than other batterers who commit crimes against family members”) (available at <http://www.pcadv.org/publications/FactSheets/PFAs.pdf>); Chaudhuri & Daly, *supra* note 19 at 235-37 (women who obtained protection orders reported that before protection orders were in place, police would not come to their aid nor respond to their

prosecutors can prosecute the abuser despite the nature of the violation.²⁰² At least one study has shown that arrests for protection order violations reduce the severity of future violence.²⁰³

An abuser need not commit an act that would constitute a crime to be in violation of a protection order. Rather, he may fail to vacate a shared home or he may contact the victim in violation of a “no-contact” provision. In this way, it may be easier to deter an abuser from escalating violent conduct. Further, unlike criminal orders of protection, civil orders can provide additional terms unavailable in criminal court, and these may also form the bases of violation proceedings. For instance, the abuser may refuse to pay child support or medical benefits in violation of civil order in an attempt to intimidate the victim. Since child support or medical expense benefits may be unavailable in a criminal order of protection, the abuser’s conduct may result in a new, different type of violation chargeable in criminal court as a new crime or as an act of contempt.

Proof of these types of protection order violations may be easier to come by than proof that the abuser committed a new, separate crime.²⁰⁴ It may be easier for a prosecutor to prove that an abuser contacted a victim or failed to vacate a shared residence in violation of an order than it would be

calls for help, but once in place, police were prompt and supportive when called); Eve and Carl Buzawa have also suggested that police may be more apt to intervene due to the possible civil liability that may result if they do not. Buzawa et al. 21 at 236. *But see, DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989) (Denying § 1983 claim for governmental failure to protect stemming from domestic violence.).

²⁰² This is especially aided by the growth of protection order registries in many states. As of 2001, 46 states had protection order registries. *See*, Lorrie Montgomery, *Internet Database for Courts Work to Keep Domestic Violence Victims Safe*, (June 25, 2001) (available at: http://www.ctc7.net/about_CTC7/media/domestic_violence.htm); *See, e.g.*, Cal. Fam. Code § 6380(b) (West 2003) (establishing a Domestic Violence Restraining Order Registry); 23 Pa. Cons. Stat. Ann. § 6105(d) (creating a statewide registry of orders of protection). These help ensure that police officers responding to a scene can determine whether an order of protection is in effect and against whom, what the terms of the order are, and can allow them more certainty in arresting abusers who violate the terms of an existing order.

²⁰³ Adele Harrell, Barbara Smith, *Effects of Restraining Orders on Domestic Violence Victims* 234 in *DO ARRESTS AND RESTRAINING ORDERS WORK?* (Buzawa & Buzawa eds. 1996) (interview study showing that the odds of severe violence in cases in which an arrest had been made were less than half that of cases in which no arrest had been made in the year following the arrest; however, arrests did not reduce the likelihood of other types of less severe abuse from recurring).

²⁰⁴ *Id.*

to prove an underlying crime of assault or harassment. Additionally, in several states, repeat violations of civil orders of protection result in increased penalties and mandatory jail time.²⁰⁵ Also, several states increase penalties for crimes that also violate an existing protection order.²⁰⁶ Obviously, to take advantage of these increased penalties for its violation, a civil order of protection must first be in place. Where studies indicate that serious acts of violence are preceded by a history of less serious offenses,²⁰⁷ the threat and use of the penalties associated with protection order violations can serve as an additional deterrence to violence escalation, and can allow the protective powers of the state to aid a victim before she is subject to more serious assaults.

E. Conclusion

Civil orders of protection provide benefits to domestic violence victims that are apart from and in addition to the remedies and protections available in criminal court. The civil system in both New York and in other states offer procedural advantages, such as lower burdens of proof, remedies specific to the circumstances of domestic violence victims, and increased or additional criminal or civil penalties for abusers who violate them. Also, civil orders can be effective in reducing and deterring future abuse and future escalation. Finally, civil orders provide intangible benefits that are

²⁰⁵ See, e.g., 720 Ill. Comp. Stat. § 5/12-30.9 (2001) (makes repeated violations of civil protection orders a class four felony); Tex. Penal Code Ann. § 25.07 (Vernon 2000) (a conviction for protection order violation the third time is a class three felony, as is a violation of a protection order by assault or stalking); Wash. Rev. Code § 26.50.110 (2003) (makes violation of protection order the third time a class C felony regardless of whether the previous convictions involved the same victim); Haw. Rev. Stat. §§ 586-11 (2003) (imposing minimum forty-eight hours jail for first offense, and minimum of thirty days for the second); Iowa Code § 236.14 (2001); 720 Ill. Comp. Stat. § 5/12-30 (2001).

²⁰⁶ See, e.g., N.C. Gen. Stat. § 50B-4.1(d) (“Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order . . . shall be guilty of a felony one class higher than the principal felony described in the charging document.”).

²⁰⁷ Male domestic violence offenders who were involved in two or more domestic violence incidents with the same victim during the study period were more than eight times more likely than others to re-offend in the next eleven months. Buzawa, E. & Hotaling G., *An Examination of Assaults Within the Jurisdiction of Orange District Court: Final Report*, Washington, D.C., National Institute of Justice (June 2001); see also, Adele Harrell, Barbara Smith, *Effects of Restraining Orders on Domestic Violence Victims*, 239 in *DO ARRESTS AND RESTRAINING ORDERS WORK?* (Buzawa & Buzawa eds. 1996) (study showing that history of past abuse was predictive of severity of future abuse).

difficult to measure objectively. They serve to empower a victim who may otherwise feel powerless, they help the state send a message that domestic violence is intolerable, and they provide a cheaper and alternative method of protection outside of criminal court. Because of these unique benefits, orders of protection should be available to all domestic violence victims.

The next section provides a historical explanation for New York's existing system in particular, and advocates its change.

V. NEW YORK'S BIFURCATED SYSTEMS: A HISTORICAL EXPLANATION

A. Introduction

New York's system has become outdated, unresponsive, and inadequate to protect all domestic violence victims. As discussed, New York's family court and criminal court systems treat victims differently depending on whether they fall within the intersection between "family and household" member and "family offenses."

Protection in the form of a civil order does not exist for victims who fall outside this intersection. The heightened protection in the form of a "family offense" criminal order also does not exist for such victims. Her only remedy is a standard criminal order of protection. First, New York's definition of "family or household" is problematic because it completely denies civil orders of protection to victims who do not satisfy it. The definition includes only related persons, married or formerly married couples, and persons who share a child.²⁰⁸ This definition is too restrictive. It excludes a whole host of domestic violence victims including those who are or were living with their abuser, those who are or were in same-sex relationships with their abuser, and those who are or were dating their abuser. It also excludes relationships that were once formed by marriage, but were terminated upon divorce or legal action such as former stepchildren or former foster children.²⁰⁹ Such victims can only rely on the criminal system for their protection. But, the remedies and benefits there are not as extensive as those in civil court. Also, because the same victim cannot satisfy the definition of "family or household member" for purposes of family court, she is also denied heightened protection in criminal court. Such victims cannot obtain "family offense" orders of protection; they are limited to standard criminal protection orders, which do not provide as much protection or as many benefits.

²⁰⁸ N.Y. Crim. P. Law § 530.11; N.Y. Fam. Ct. Act § 812 (McKinney 2003).

²⁰⁹ See, e.g., *Orellana*, 653 N.Y.S.2d at 993.

Second, New York's definition of "family offense" is problematic because it is highly specific, and a large number of acts that can constitute domestic violence are excluded. While some of the excluded crimes are less violent, most of the excluded crimes are much more violent. For instance, all sex crimes are excluded from the list of "family offenses." As a result, even though she may be a member of the abuser's "family or household," a victim of rape will be denied entirely the supplemental protections that civil orders of protection provide. Her sole protection is from criminal court. Even there, however, the identical dilemma applies. Since rape is a crime that is not a "family offense," the only protection to which she is entitled is a standard criminal order of protection.

This "bifurcated" system exists as it does today because it is the remnants of an outdated one. This system was created in the 1960s when "family offenses" were given exclusive jurisdiction in the Family Courts. It was a time when domestic violence was thought to be "private," and that family court could handle the problems of domestic violence within the private confines of the family. The goal was to keep families together.

However, the shift has now rightly focused on ending violence. But currently, only a portion of victims is entitled to relief. Since the focus is on ending domestic violence, New York should amend its laws to allow members of all intimate relationships, and all types of domestic violence crimes, the additional benefits civil orders of protection provide.

B. Building a Bifurcated System: The exclusive jurisdiction provisions

Article Eight of the Family Court Act, which is entitled "Family Offense Proceedings" was created in 1962.²¹⁰ As explained above, the legislature's intent in doing this was to decriminalize domestic violence and to put its issues in a court that, it thought, was well-suited and uniquely qualified to solve what was at the time considered to be a private,²¹¹ family matter.²¹² Section 811 of article eight stated that the section's purpose was

²¹⁰ N.Y. Fam. Ct. Act. § 812 (McKinney 1975) (Repealed).

²¹¹ Besharov, *supra* note 23 at 173.

²¹² The drafter's report of original chapter 686, the Family Court Act, also expressed the legislature's intent:

Most family offense cases currently involve assault and disorderly conduct charges by wives against husbands. The wife's purpose in bringing the charge is rarely to secure a criminal conviction. Each case is somewhat different, but three patterns tend to emerge:

help “preserve the family” and provide “practical help”:²¹³

In the past, wives and other members of the family who suffered from disorderly conduct or assaults by other members of the family or Household were compelled to bring a ‘criminal charge’ to invoke the jurisdiction of a court. Their purpose, with few exceptions, was not to secure a criminal conviction and punishment, but practical help.

The purpose of this article is to create a civil proceeding for dealing with such instances of disorderly conduct and assaults. It authorizes the family court to enter orders of protection and support and contemplates conciliation procedures. If the family court concludes that these processes are inappropriate in a particular case, it is authorized to transfer the proceeding to an appropriate criminal court.²¹⁴

The original version of the statute gave *exclusive* jurisdiction to the family court “over any proceeding concerning acts which would constitute

Some wives despair of salvaging their marriage. They seek to use the threat of criminal prosecution to compel the husband to leave home. Their main purpose is to secure protection, support, and custody of children--matters that are beyond the formal powers of criminal courts.

Others (normally married less than five years) treat the assault or disorderly conduct as a sign of trouble in their marriage. They turn to the court to obtain assistance in resolving the underlying difficulty. Hence, their main purpose is a form of conciliation. The criminal charge in these cases is thus essentially a means for invoking the court's jurisdiction, though it is said that the possibility of criminal prosecution deters husbands from continuing to beat their wives while the conciliation procedures are used.

In the third group are those who have been married for more than five years and who are prepared to settle for considerably less than an ideal existence. The husband works and supports the family. But, he drinks on weekends and beats or verbally abuses the wife. The wife's purpose here is to use the court proceeding to persuade her husband to stop beating her and, perhaps, to stop heavy drinking. Home Term in New York City, which has jurisdiction over such matters, uses Psychiatric and Alcoholism Clinics in an effort to help.

Without expecting miracles, the Committee believes that the civil proceeding provided in the new Family Court Act is better adapted for dealing with the underlying family difficulties than the penal method it would replace.

Report of Joint Legislative Committee on Court Reorganization, *supra* note 24.

²¹³ N.Y. Fam. Ct. Act. § 811 (McKinney 1981) (repealed)

²¹⁴ *Id.*

disorderly conduct or assault between spouses or between parent and child or between members of the same family or household.”²¹⁵ Two years later, in 1964, in addition to disorderly conduct or assault, the legislature added harassment, menacing, reckless endangerment, and attempted assault to the crimes over which the family court had exclusive jurisdiction.²¹⁶

In passing the Family Court Act, the legislature intended that these delineated acts would no longer be crimes if they were committed against a family or household member. Instead, they were entitled “family offenses.” The criminal court could only hear “family offenses” if the family court transferred the case.²¹⁷ This procedure was successful in decriminalizing family offenses. The family court’s discretionary transfer power was used in only two percent of the 18,511 petitions that were filed in 1971-72, and the 17,277 petitions filed in 1972-73.²¹⁸ It was this act that created the only avenue in the civil law (apart from divorce proceedings) where a victim of domestic violence could obtain a “family offense” civil order of protection.

In the original version of the statute, “members of the same family or household,” was not defined.²¹⁹ As a result, the courts were free to interpret the term, and often included non-married couples in the definition. The problem, of course, was that it was the abusers who advocated this more expansive definition of family or household to avoid the sanctions of criminal court.

For instance, in *People v. Dugar*²²⁰, a man who had been living with a woman and her several children for four years argued that the criminal court did not have jurisdiction over his misdemeanor assault charge. He argued that because he supported the woman and her children economically, and had eaten, slept, and generally subsided with them as a single domestic

²¹⁵ N.Y. Fam. Ct. Act § 812 (McKinney 1962) (repealed).

²¹⁶ N.Y. Fam. Ct. Act § 812 (McKinney 1964)(repealed).

²¹⁷ Marjory Fields, *Trial of Family Offenses: A Practice Guide for Lawyers*, 82 P.L.I. N.Y. 353, (2000).

²¹⁸ Annual Report of the Judicial Conference of the State of New York, 1972-73, p. 350; Fields, *supra*, note 217 at 359. See also, Wessel, *Jurisdiction Over Family Offenses In New York: A Reconsideration of the Provisions For Choice of Forum*, 31 SYR. L. REV. 601, 610 (1981).

²¹⁹ N.Y. Fam. Ct. Act. § 812 (McKinney 1975) (Repealed).

²²⁰ 235 N.Y.S.2d 152, 153 (N.Y. Dist. Ct. 1962).

unit, they were of the same “household.”²²¹ Because they were of the same household, he argued, jurisdiction vested exclusively in family court and could only be transferred to the criminal court from family court.²²² The court agreed and dismissed the case. In so holding, the court first admitted that “it would seem strange at first blush that a court whose purpose, in large part, is restoration and preservation of marriages, should concern itself with crimes between persons who are living in a meretricious relationship.”²²³ But, the court went on to observe the following:

The legislature must be presumed to have been aware of a fact that is common knowledge to every law enforcement and social agency and to every court in this state, namely: there are countless households where man and woman reside with their offspring in a domestic relationship on a permanent basis without being legally married. Such households are responsible for many of the most difficult social problems concerning such agencies on a daily, routine basis. They present behaviour problems, support problems, mental and emotional problems. They concern the health, welfare and safety of children. They result in filiation proceedings, support proceedings and juvenile proceedings. In short, from a social point of view, this is a situation where the unique and flexible procedures and services available in the Family Court may possibly find a remedy. In some instances it may even be possible to arrange a legitimate marriage or at least furnish adequate counseling and protection.²²⁴

It seems the court in *Dugar* was well-meaning by recognizing that, in reality, this collection of people operated like a marital family, and that family court was well-suited to its problems. But, at the time, this was a double-edged sword. *Dugar* was the first case to decide the issue of whether cohabitants were covered by the family court statute. The court seemed willing to consider cohabitant relationships as functionally and actually the same as marital ones, and seemed comfortable with the decriminalization purposes of family court. However, more and more abusers who were committing more violent acts against their cohabitants were asking the criminal court to dismiss their cases on jurisdictional grounds.²²⁵

²²¹ *Id.* at 154.

²²² *Id.* at 154.

²²³ *Id.* at 153.

²²⁴ *Id.* at 653-54. Of course, this type of reasoning did not take into account what would later become the ultimate goal of orders of protection: to end the violence inflicted by one party against another.

²²⁵ See, e.g., *People v. Johnson*, 265 N.Y.S.2d 260 (N.Y. Dist. Ct. 1965) (indictment of second degree assault transferred to family court where victim and defendant had held

Other courts rejected *Dugar's* reasoning. They discussed the Family Court Act's interests in preserving the family unit, its public policy concerns of giving "practical help," and the protection it would be providing to undeserving members of "immoral" unions.²²⁶ These courts largely disregarded the dual roles that family court was playing even then. While there were "conciliatory" procedures in place, one of the provisions of the Family Court Act was the civil order of protection provision. One court recognized the importance of this provision, especially in non-marital abusive relationships:

[T]he Family court is authorized, among other things . . . to issue a temporary order of protection, which may . . . set forth reasonable conditions of behavior Thus, the order of protection, as distinguished from a reconciliation, may require the respondent (defendant) to refrain from visiting the home or it may direct him to abstain from offensive conduct against any member of the household unit and may direct him to refrain from acts of commission or omission that may tend to make the home an improper place for a child. That such an order may be even more necessary against one who is not a spouse, or a member of the family, but merely a member of the 'household' is too self-evident to require elucidation.²²⁷

Here, the court recognized the important role that civil orders of protection play in ending violence especially in cohabitation relationships. From its statement that the need for protection in non-marital relationships is "too self-evident to require elucidation," the court infers that members of non-marital relationships are more willing to assault their partners. While

themselves out as husband and wife).

²²⁶ See, e.g., *People v. Ostrander*, 295 N.Y.S. 2d 293 (N.Y. Cty. Ct. 1968). There, the court refused to dismiss indictment for first degree assault where defendant, a woman who was married to someone else, stabbed her live-in boyfriend in the chest. The court held that because the defendant committed the crime of adultery, to transfer the case to family court would be protecting an "immoral relationship" that was in violation of the Penal Law. *Id.* at 387. In rejecting *Dugar's* reasoning, the court explained that "if a literal interpretation of the word 'household' were adopted, . . . Article 8 if the Family Court Act would be available to homosexuals living together as husband and wife, and polygamists." *Id.* at 297, fnt. 1. Also, in *Best v. Macklin*, 260 N.Y.S.2d 219 (N.Y. Fam. Ct. 1965) the family court refused jurisdiction and transferred the case to criminal court where the victim, together with her two children, lived with the assailant. The court held that "it is the public policy of the State not to place children in a situation which would impair their morals." *Id.* at 221.

²²⁷ *People v. James*, 287 N.Y.S.2d 188 (N.Y. Sup. Ct. 1968) (dismissing assault in the first degree and possession of dangerous weapons charges for transfer to the family court where victim and defendant lived together and held themselves out as husband and wife).

difficult to gauge, some studies suggests this is, in fact, still the case.²²⁸

Ultimately, the question whether family court had jurisdiction over cohabitants was resolved by New York's Court of Appeals in *People v. Allen*.²²⁹ There, the court held that only members of a solemnized marriage or a "recognized"²³⁰ common-law union were "family or household" members for purposes of civil protection order jurisdiction. Specifically, the court held that the purposes contemplated by the Family Court Act, namely family cohesion, were inapplicable to non-marital relationships,²³¹ and the state had no interest in maintaining such relationships.²³²

More interesting, even, than the specific grounds on which the court ruled were the specific cases that it refused to dismiss. Like *Dugar*, the *Allen* court was dealing with several defendants who were attempting to have their criminal cases dismissed. But, unlike *Dugar*, which dealt with a misdemeanor assault, the *Allen* court was careful to outline the facts of the higher-level offenses with which it was dealing. All three defendants had *already* been convicted and sentenced to time for their felonies. One was convicted of sodomy, while the other two were convicted of second degree assault and possession of dangerous weapons charges. One of the defendants "broke into an apartment and stabbed his former girlfriend with an ice pick."²³³ He had been sentenced to four years prison. It is not a stretch to think that perhaps the court was also concerned that the defendants who were convicted and sentenced for these crimes would escape any criminal scrutiny.

Later courts also excluded other more violent crimes from the

²²⁸ See, Klein and Orloff, *supra* note 15 at 837 citing studies suggesting that the amount of violence in non-marital relationships is at least equal to, or may surpass, the rate of violence between married couples.

²²⁹ 27 N.Y.2d 108, 113 (N.Y. 1970).

²³⁰ The court specifically refused to "recognize" the relationship. "Certainly, making available conciliation procedures, as contemplated by the Family Court Act, to such informal and illicit relationships as those before us, would clearly be contrary to public policy by conferring the privileges of Family Court services to a relationship which the Legislature has chosen not to recognize." *Id.* at 112-13.

²³¹ *Id.* at 112.

²³² *Id.*

²³³ *Id.*

exclusive jurisdiction of the family court by limiting the list of “family offenses” through creative statutory interpretation. In *Whiting v. Shepard*,²³⁴ a defendant who was accused of murdering his four-month-old daughter argued that his case should be transferred to the family court under the exclusive jurisdictional provisions. The court denied the request holding that even though a basic element of the crimes of murder and manslaughter is assault did not bring those more violent offenses within the list of family offenses even though they may be committed by one family member against another.²³⁵ In so holding, the court heavily relied on the conciliatory intent of the statute and explained that because “the victims of the crimes of manslaughter and murder are obviously in no position to invoke the jurisdiction of the Family Court for practical help in the nature of protection or conciliation [sic] the Legislature certainly did not intend that these crimes should come within the jurisdiction of the Family Court.”²³⁶ Instead, the court explained, “the Legislature has thus differentiated between serious and minor offenses on reasonable and logical grounds, and we can only conclude that the Family Court has no jurisdiction over offenses of manslaughter or murder since, by the very nature of these offenses, no future benefit or protection may be afforded to the victim.”²³⁷

However, the court used this reasoning to exclude additional serious crimes from family court’s jurisdiction even though the victim was left alive and could therefore arguably benefit from the “practical help” the family court could provide. In *People v. Bronson*²³⁸ a husband threatened to kill his wife,²³⁹ stated he was going to kill her that night; he then attempted to run over her with his truck. The grand jury indicted the defendant with attempted murder, and, during trial, the prosecutor asked for the lesser included offense of first degree assault. The defendant was convicted of the assault charge. The defendant sought the dismissal of the case on jurisdictional grounds. In deciding the case, the court relied on *Whiting* to

²³⁴ 312 N.Y.S.2d 412 (N.Y. Sup. Ct. 1970).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ 337 N.Y.S.2d 215 (1972).

²³⁹ The court noted that the victim was the defendant’s “alleged” wife, but because of its holding refused to consider “the validity of the ceremonial marriage.” *Id.* at 216.

hold that like murder, even though assault was a basic element of attempted murder, it did not bring it within the list of family offenses “even though such offenses may be committed between spouses.”²⁴⁰ The court held that because the defendant was originally charged with attempted murder, the fact that the court later added first degree assault was inapposite.²⁴¹ Nevertheless, the court ignored the policy grounds on which the *Whiting* court based its decision, and instead stretched the interpretation of the statute to keep a more violent crime in criminal court.

The court similarly used a creative reading of the statute to keep jurisdiction over sex assaults even though they involved family or household members. Again, it seemed concerned with keeping more violent crimes in criminal court. In *People ex rel. Doty v. Krueger*,²⁴² the defendant was indicted for first degree sodomy, and first degree sexual assault for engaging in forcible sexual contact with his nine-year old cousin. He argued that because he was related to his cousin, and because they lived in the same household, the exclusive family court jurisdiction provisions applied. The court disagreed holding that the intent of the statute was to allow the family court to handle “domestic quarrels”²⁴³ and that the interpretation of “the serious and heinous acts and conduct implicit in the charges of sodomy and sexual abuse and contact with a nine-year old child as 'domestic quarrels' . . . is repugnant and plainly untenable.”²⁴⁴

But, the truth was that the legislature had not intended to limit the family court’s jurisdiction to less violent “domestic quarrels.” As explained by the court in *People v. Johnson*, the court upon which *Krueger* relied, the legislature had considered and rejected language that would have given family court jurisdiction over only non-felonious assaults:

It is evident that careful thought was given by the Legislature to the question of the Family Court's jurisdiction over family assaults before the decision was made to include all such assaults and not simply those

²⁴⁰ *Id.*

²⁴¹ In reaching this conclusion, the court relied on *Matter of Whiting v. Shepard*, 312 N.Y.S.2d 412 (N.Y. Sup. Ct. 1970). There, the court held that because victims of murder and manslaughter could not invoke the “practical help” that the family court was intended to provide.

²⁴² 295 N.Y.S.2d 581 (N.Y. Sup. Ct. 1968).

²⁴³ *Id.*

²⁴⁴ *Id.*

which were trivial. Although the Judicial Conference had recommended, several years before the creation of the Family Court, that the proposed “Family Court should have jurisdiction over . . . Crimes and offenses, *Except felonies*, by or against children or between spouses”, neither the Judiciary Article of the Constitution nor the Family Court Act so limited the court's jurisdiction; the exclusionary words, “except felonies”, were significantly omitted. And, as a matter of fact, the Judicial Conference unequivocally declared in 1963 that “The jurisdiction of the Family Court is not limited to any particular degree of assault.”²⁴⁵

However, the realities of a system's failings that separated some “serious” from “non-serious” crimes became more apparent as time went on. Despite the promises of the conciliatory procedures and the “practical help” that the Family Court Act was meant to give to domestic violence victims, the procedures put in place simply were not protecting women from further violence and even death.²⁴⁶ As reform efforts began to ascend in the late 1970s, a new consensus developed that the process of decriminalizing had gone too far. The emphasis on family cohesion rather than ending violence against women all “had the net effect of giving abused spouses a practical license to continue assaults.”²⁴⁷

Change was slow and piecemeal, which has resulted in today's system. Responding to pressures from women's groups and victim advocates, the legislature held hearings in 1977 to determine whether the exclusive jurisdictional system was serving the stated goal of family cohesion, or whether it was legitimizing domestic violence.²⁴⁸ That year in what ultimately proved an awkward change, the statute was amended to

²⁴⁵ 282 N.Y.S.2d 481, 484-85 (N.Y. 1967). In *Johnson*, a husband assaulted his wife with a knife and was indicted for second degree assault. He sought to transfer the case to Family Court. The Court ultimately agreed to do so and rejected the prosecutor's argument that the Family Court Act was meant only to encompass non-felonious assaults based on legislative intent.

²⁴⁶ Besharov, *supra* note 23 at 173, In *Bruno v. Codd*, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977), the court denied summary judgment in favor of family court and allowed a tort claim to proceed against the family court, the police and probation officers where “Family Court petition clerks have, upon several occasions, denied petitioning wives timely access to the sitting Judge, and have abused their discretion in determining whether the wives' complaints are sufficient to warrant preparation of a petition.”

²⁴⁷ *People v. Daniel T.*, 408 N.Y.S. 214, 215 (N.Y. Crim. Ct. 1978); Besharov, *supra* note 23 at 174.

²⁴⁸ *Id.*

allow concurrent jurisdiction in the family and criminal courts, but only until victims chose whether to file in criminal or family court. Once they chose their forum, they could not file in the other.²⁴⁹ Also, still one of the stated purposes of the difference in treatment was that “an adjudication in family court is for the purpose of attempting to keep the family unit intact.”²⁵⁰

Also in 1977, the Family Court Act’s provisions relating to the definition of “family or household member,” also underwent change. To legislate what the court in *Allen* had held, the legislature amended the statutory definition of “family and household member” to include only “persons legally married to one another” and “persons related by consanguinity or affinity.”²⁵¹ However, women’s advocates complained that this definition was too narrow.²⁵² The main complaints were that the definition excluded formerly married spouses and informal or meretricious relationships, and even excluded such relationships that had produced children.²⁵³

To further facilitate the process of allowing victims to proceed in criminal court, the legislature passed a statute to deal with victims of “family offenses” in criminal court. In 1977 it passed section 530.11²⁵⁴, entitled “Protection for victims of family offenses,” which incorporated the same definitions of “family or household member.” It provided a system by which the criminal court could issue protection orders. A corollary statute, entitled “protection of victims of crimes, other than family offenses” was passed in 1981. It provided for the criminal court to issue less comprehensive “non family offense” criminal orders of protection to victims who were not crimes of the a delineated family offense, or who

²⁴⁹ The specific language of the statute read “a choice of forum by a complainant or petitioner bars any subsequent proceeding in an alternative court for the same offense.” N.Y. Fam. Ct. Act. § 812(b) (McKinney 1977) (repealed). New York was the only state that required a victim to elect one jurisdiction at the exclusion of the other. Other states allowed victims the option of civil, criminal, or both remedies. Besharov, *supra* note 23 at 181.

²⁵⁰ N.Y. Fam. Ct. Act. § 812(d) (McKinney 1978) (repealed).

²⁵¹ N.Y. Fam. Ct. Act. § 812 (McKinney 1978) (repealed).

²⁵² See Besharov, *supra* note 23 at 184-85.

²⁵³ *Id.*

²⁵⁴ This was later renumbered to section 530.12 as it is today.

were not a “family or household member” of the abuser. These two different statutes to handle different varieties of crimes and victims are still in effect today.

In 1980, in response to the push to criminalize domestic violence, the legislature further amended the list of family offenses. The list was amended to exclude assault in the first degree, which was assault using a deadly weapon.²⁵⁵ The legislature explained that it was amending the law to send a message that “serious” acts of violence in the home would not be tolerated:

This exclusion, like the present exclusion of attempted murder, is a public policy statement that serious acts of violence between family members will not be tolerated. Violence in the home is as serious a breach of public order and safety as violence in the streets. . . . Strengthening of legal sanctions against violence in the home is a step toward stopping it in individual cases, and toward educating the public that violence in the homes is as much a criminal act as violence in a public place.²⁵⁶

This was the first public statement from the legislature since 1962 that domestic violence was intolerable. Of course, this sent more than one message. Aside from sending the message that “serious” acts of violence would not be tolerated in the home, it also said less “serious” acts would be. It also sent the message that the same acts committed against members of the same family or household were still not crimes, merely “family offenses.” But, if the same act were committed against a non-family member, the abuser was chargeable in criminal court.

Also, in 1981, § 811 of the Family Court Act, which stated the Act’s intent about “practical help” and the importance of family cohesion was repealed.²⁵⁷ Presumably, this was meant to reflect a shift toward a focus on ending violence. Section 812(d) was amended to state that family court proceedings were no longer to keep the “family unit intact,” but were to “stop the violence, end the family disruption, and obtain protection.”²⁵⁸ The legislature stated “that its first priority is protecting family members by ending the violence. After that is accomplished, counseling and reconciliation can be undertaken in an atmosphere of security for all

²⁵⁵ Besharov, *supra* note 23 at 181.

²⁵⁶ Governor’s Bill Memorandum, McKinney’s Session Laws of 1980, chaps. 530, 531, 532, pp. 1877-78; Besharov, *supra* note 23 at 182.

²⁵⁷ C. 416, L. 1980 McKinney’s Sessions Laws 1980, at A-329; Fields, *supra* note 217.

²⁵⁸ N.Y. Fam. Ct. Act. §812(b) (McKinney 1981).

members of the family.”²⁵⁹ But, the problem was still the jurisdictional provisions. Once a victim chose family court, the criminal courts lost jurisdiction.²⁶⁰ The legislature was dealing with the tension between treating “serious” domestic violence like crime and “less serious crime” like a “family offense.”

As a result, the legislature began adding and omitting more offenses to the list of family offenses. It was careful to keep more violent crimes excluded. The family offense provisions underwent several changes and other more specific crimes were added. The legislature was careful to use the same language as the Penal Law so that the delineated offenses were tied to those definitions. As of 1994, the statute listed the following crimes: disorderly conduct, harassment in the first and second degree, aggravated harassment in the second (but not the first) degree, menacing in the second and third degree (but not the first), assault in the second and third degree (but not the first), or attempted assault between spouses.

In 1994, the Family Court Act statute was amended once again with an attempt to swing the pendulum back toward the criminalization of domestic violence. Under the amendment, the victim was still required to choose a forum, but the election did not become irrevocable until 72 hours after she filed a petition.²⁶¹

In making this change, the legislature restated its commitment to ending violence, and minimized any focus on family cohesion. Instead, the goal was to put an end to the violence. In support of this position, the legislature cited the fact that domestic violence “is a crime which destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members.”²⁶² It also noted that domestic violence “results in tremendous costs to our social services, legal, medical and criminal justice systems, as they are all confronted with its tragic aftermath,” and that is “the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.”²⁶³ Despite the evolution of the law in New York, the legislature explained,

²⁵⁹ Fields, *supra* note 217; Besharov, *supra* note 23 at 174.

²⁶⁰ See *supra* note 249 and accompanying text.

²⁶¹ N.Y. Fam. Ct. Act § 821(3)(b) (McKinney Supp. 1994)

²⁶² L. 1994, c. 222, §1.

²⁶³ L. 1994, c. 222, §1.

“death and serious physical injury by and between family members continues unabated. The victims of family offenses must be entitled to the fullest protections of our civil and criminal laws.” The intent was not to normalize domestic violence, but to condemn its more serious forms in public:²⁶⁴

Therefore, the legislature finds and determines that it is necessary to strengthen materially New York’s statutes by providing for immediate deterrent actions by law enforcement officials and members of the judiciary, by increasing penalties for acts of violence within the household, and by integrating the purposes of the family and criminal laws to assure clear and certain standards *of protection* for New York’s families consistent with the interests of fairness and substantial justice.²⁶⁵

Nevertheless, the exclusive jurisdictional provisions functionally remained in effect because the choice of forum was still irrevocable after 72 hours. As a result, some acts were crimes, while others were still mere “family offenses.”

Also in 1994, the legislature amended the criminal contempt statutes in an attempt to strengthen the domestic violence statutes. At that time, several of the criminal statutes used to deal with domestic violence were only punishable as misdemeanors, including violations of civil and criminal family offense orders of protection. As a result, the legislature amended the crime of criminal contempt in the second degree, which was normally a class A misdemeanor, such that if a defendant violated a “family offense” order of protection issued either in family or criminal court and was convicted on criminal contempt in the second degree within the preceding five years, he was guilty of criminal contempt in the first degree, a class “E” felony.²⁶⁶

²⁶⁴ Specifically, the legislature stated the following:

A great deal of progress has been achieved in the effort to heighten public awareness about domestic violence and to provide services for affective family members . . . These efforts have also played a key role in bringing this issue into the open In recent years, for example, what was once largely considered a private matter has come to be more correctly regarded as criminal behavior.

New York Family Protection and Domestic Violence Intervention Act, § 1 (1994).

²⁶⁵ L. 1994, c. 222, §1 (emphasis added).

²⁶⁶ N.Y. Penal Law § 215.51 (McKinney 1999). The language of section 215.51 was amended in 2003, effective November 1, to incorporate previous convictions of first degree criminal contempt. N.Y. Penal Law § 215.51 (McKinney 2003). This provision does not

The choice of forum was not eliminated until 1996,²⁶⁷ and the criminal court was given concurrent jurisdiction over all “family offenses.” In 1999, the year the stalking offenses were created, the legislature added to the list of “family offenses” first, second, third and fourth degree stalking.²⁶⁸ Because there was no longer a danger that the criminal court would be divested of jurisdiction from crimes added to the list of family offenses, the legislature was free to add all four degrees of the new offense. This stands in stark contrast to the other offenses that are still omitted from the list of “family offenses,” such as first degree assault.

As for the definition of “family or household” member, in response to part of the concerns of women’s groups about unmarried and formerly married people with children, the definition of “family or household” was expanded in 1984 to include formerly married persons, and persons who shared a common child.²⁶⁹ In 1987, New York’s legislature determined that there was a need to develop and fund programs to assist domestic violence victims. As a result, it passed article 6-A of the New York State Social

apply to a defendant who violates a non family offense criminal order of protection. However, there are provisions that enhance criminal contempt crimes upon violation of any order of protection regardless of whether the order is a “family offense” order of protection. The crime of criminal contempt in the second degree can also constitute a class E felony if, in violation of any order of protection, a defendant intentionally places the victim in reasonable fear of injury by displaying a weapon, by engaging in a repeated course of conduct, by communicating with the victim, by coming in physical contact with the victim with intent to harass, annoy threaten or alarm, or by physical menace. *See also, Legislative Memorandum for Senate Bill 7930*, “The remedy proposed [by this amendment] is simple and straightforward: whenever defendants violate orders of protection by committing acts constituting independent crimes, such as menacing in the second degree, menacing in the third degree or aggravated harassment in the second degree, they can be prosecuted for committing the class E felony of criminal contempt in the second degree. Thus, a felony offense will be committed when a defendant violates an order of protection and in doing so brandishes a weapon at, threatens, stalks, menaces or harasses a person for whose protection the order was issued.” *Id.* Also, an abuser is guilty of first degree criminal contempt if in violation of any order he damages the victim’s property in an amount in excess of two hundred fifty dollars. N.Y. Penal Law § 215.51 (McKinney 2003). Finally, an abuser may commit aggravated criminal contempt, a class D felony, if in violation of any order of protection, he intentionally or recklessly causes physical injury. N.Y. Penal Law § 215.52 (McKinney 2003).

²⁶⁷ The ultimate election requirement’s elimination did not eliminate the district attorney’s discretion to decide not to pursue criminal charges against a defendant in criminal court. N.Y. Crim. P. L. 530.12(14) (McKinney 2003).

²⁶⁸ N.Y. Fam. Ct. Act. § 812 (McKinney 1999 and Supp. 2003).

²⁶⁹ *Id.*

Services Law, the Domestic Violence Prevention Act.²⁷⁰ It sets forth requirements and definitions for residential and non-residential services for domestic violence victims. This Act also defines a victim of domestic violence as follows:

[A]ny person 16 years of age or older, any married person or parent accompanied by his or her minor child or children in situations in which such person or person's child is a victim of an act which would constitute a violation of the Penal Law, including, but not limited to acts constituting disorderly conduct, harassment, menacing, reckless endangerment, kidnapping, assault, attempted assault, or attempted murder” which result in injury or risk of harm . . . and such acts or acts are or alleged to have been committed by a “family or household member.”²⁷¹

Not only does this definition include additional crimes such as kidnapping, attempted murder, and all forms of menacing and harassment,²⁷² but its definition of family or household member is much more expansive. It not only includes the same individuals as those under sections 812 of the Family Court Act, but it also includes “unrelated persons who are continually or at regular intervals living in the same household or who have in the past continually or at regular intervals lived in the same household²⁷³ or “any other category of individuals deemed to be a victim of domestic violence as defined by the department in regulation.”²⁷⁴ One of the department of social services regulations that governs residential domestic violence programs defines “family or household member” as including “unrelated persons who have had intimate or continuous social contact with one another and who have access to one another’s household.”²⁷⁵ Consequently, this definition both includes more crimes that render a domestic violence victim eligible for services, and includes virtually all forms of intimate relationships.²⁷⁶

²⁷⁰ N.Y. Soc. Serv. Law § 459-a – 459-g (McKinney 2003)

²⁷¹ N.Y. Soc. Serv. Law § 459-a(1) (McKinney 2003)

²⁷² Notably, the statute excludes sex crimes and stalking crimes, but presumably the explicit statement that the list is non-exhaustive would seem to encompass all crimes of domestic violence.

²⁷³ N.Y. Soc. Serv. Law § 459-a(1)(ii)(e) (McKinney 2003).

²⁷⁴ N.Y. Soc. Serv. Law § 459-a(1)(ii)(f) (McKinney 2003).

²⁷⁵ N.Y. Comp. Codes R. & Regis. tit. 18, § 452.2(g)(2)(vi) (2003).

²⁷⁶ Some relationships may still be excluded, however, such as persons formerly

Nevertheless, the legislature has refused to adopt these same definitions for the purposes of civil and criminal domestic violence protection orders. Currently, for purposes of the Family Court Act, and for “family offenses” in criminal court, “members of the same family or household means the following: (a) persons related by consanguinity²⁷⁷ or affinity;²⁷⁸ (b) persons legally married to one another; (c) persons formerly married to one another; and (d) persons who have a child in common regardless whether such persons have lived together at any time.”²⁷⁹ Almost yearly, there have been unsuccessful attempts to extend the definition to at least include unmarried cohabitants.²⁸⁰ The courts continue to interpret the jurisdictional requirement strictly.²⁸¹ The legacy of the exclusive jurisdiction provisions remains to the detriment of domestic violence victims.

New York’s legislature created the family court “family offense” civil protection order provisions to decriminalize domestic violence. The aim was to provide “practical help” to families and to forward the goal of family cohesion. Because of this historic context, and because of the change in social perceptions regarding domestic violence that took place over time, the legislature and the courts worked together to create a bifurcated system that pervaded in both the civil and criminal systems. It treated victims differently depending on whether they were a member of the

related by marriage if they did not share a household, or members of a dating relationship who do not have access to one another’s household.

²⁷⁷ “Consanguinity” is the “relationship by blood.” Bryan A. Garner, *A DICTIONARY OF MODERN LEGAL USAGE* 204 (2nd ed.)

²⁷⁸ “A relation of affinity is based upon marriage and divorce destroys the foundation of that relation.” *Escalante*, 653 N.Y.S.2d at 993 *citing* BLACK’S LAW DICTIONARY 59 (6th ed. 1990).

²⁷⁹ N.Y. Crim. P. Law § 530.11; N.Y. Fam. Ct. Act § 812(1)(a)-(d).

²⁸⁰ *See, e.g.*, Assembly Bill A-7408, Senate Bill S-5883 (1981) (seeking to expand definition to include “persons who are residing together as though they were married to one another”); Assembly Bill A-988 (1997) seeking to expand definition to include “unrelated persons who are continually or at regular intervals living in the same household or who have in the past continually or at regular intervals lived in the same household.”); Senate Bill S-5438 (2003) (seeking to expand definition to “persons residing together continually or at regular intervals, currently or in the past.”); Besharov, *supra* note 23 at 186;

²⁸¹ *See e.g., Gina C. v. Stephen F.*, 576 N.Y.S.2d 776, 777 (N.Y. Fam. Ct. 1991) (“These proceedings and the relief they provide are purely statutory and must be strictly construed by the Court.”).

same “family or household” as their abusers and whether they were victims of specific “family offenses.”

VI. A CALL FOR REFORM

Today, the focus of civil orders of protection in family court is not family cohesion or “practical help.” Instead, the purpose of such orders in both family and criminal court is to stop the violence and to prevent violence from escalating. Given that new focus and the social shift in the perceptions about domestic violence generally and civil orders of protection more particularly, the bifurcated system no longer works. Not only are some victims of domestic violence completely unable to obtain civil orders of protection, others are only provided protection for less serious “family offenses.” It is time for New York’s legislature to change its system to reflect this social shift and to provide equal protection to all victims of domestic violence.

New York’s differential treatment of family offenses from non family offenses creates two problems: not all victims of domestic violence are protected, and those who are, are not protected adequately. Victims of abusers’ “families or households” are not adequately protected because of the legacy of the bifurcated system that has developed since the 1960s. Many crimes that should be included in the list of “family offenses” are omitted. This means that even if victims are part of the abusers family or household, they cannot obtain a civil order of protection from an abuser, and must instead rely solely on the criminal system. “Non family offense” criminal orders of protection, while providing some protection, are insufficient in relation to the additional benefits that civil orders provide.

Also, New York’s definition of “family or household member” in the family and criminal courts is too narrow. It not only excludes members of dating relationships, but, unlike any other state in the country, it completely excludes members of cohabitation relationships. Many of the concerns relating to married couples also relate to members of other intimate relationships. Civil orders of protection, unlike criminal ones, are to prevent and deter future acts of violence. There is little reason to deny them to all members of intimate relationships and to provide their benefits to these victims in addition to the remedies available in criminal court. The law should be reformed to provide adequate protection to all victims.

A. Definition of “family offense”: continuing problems

Assuming the family court has jurisdiction over the “family offense” proceeding, the complaints about the civil system are few. It provides an extra remedy for the victim in addition to the options available to her in criminal court. In family court, she can seek the specific types of relief,

including orders relating to children, that apply to her situation. If an abuser violates the terms of the order, she has a multitude of options. She can seek the help of police, she can request that criminal charges or criminal contempt charges be filed, she can initiate a new proceeding in family court, or, she has the further option of pursuing civil contempt proceedings. Also, if the abuser violates the order, he is subject to additional criminal and civil penalties not only due to the violative act, but also due to the fact that he violated an existing order. In this way, the victim is empowered to make her own decisions and to seek her own remedies, and the state's interests in prevention of future risk of abuse and escalation of abuse are met.

But, the primary problem with the Family Court Act here is that it does not provide protection to family victims unless the abuser commits a "family offense." The court is divested of jurisdiction over a huge number of crimes, both more violent and less so, that certainly could be characterized as crimes of domestic violence.²⁸² The list of crimes that could include domestic violence, but that are currently excluded from the list of family offenses include the following: all sex crimes;²⁸³ first degree assault;²⁸⁴ first degree harassment; first degree menacing; aggravated harassment; reckless endangerment;²⁸⁵ kidnapping; coercion²⁸⁶; unlawful imprisonment; attempted murder; criminal mischief; arson; criminal trespass; burglary; robbery; eavesdropping;²⁸⁷ unlawful surveillance;²⁸⁸ and

²⁸² Professor Merica has defined domestic violence as "a pattern of interaction that includes the use of physical violence, coercion, intimidation, isolation, and/or emotional, economic, or sexual abuse by one intimate partner to maintain power and control over the other intimate partner." Jo Ann Merica, *The Lawyer's Basic Guide to Domestic Violence*, 62 TEX. B.J. 915, 915 (1999).

²⁸³ New York has at least twenty-five separate sex crimes, none of which are "family offenses." See N.Y. Penal Law Art. 130 (McKinney 2003).

²⁸⁴ N.Y. Penal Law § 120.10 (McKinney 2003)

²⁸⁵ N.Y. Penal Law § 120.20-.25 (McKinney 2003)

²⁸⁶ See, e.g., N.Y. Penal Law § 135.65 (McKinney 2003) (A person commits coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a right to abstain from, by means of instilling in the victim fear that that defendant will cause injury, damage to property, etc.).

²⁸⁷ N.Y. Penal Law § 250.05 (McKinney 2003).

²⁸⁸ N.Y. Penal Law §250.40-.50 (McKinney 2003).

weapons crimes.²⁸⁹ Even if a victim is or was married to, is related to, or shares a child with the perpetrator, she cannot obtain any form of civil protection. Instead, she must avail herself of the remedies available only in criminal court and hope that the prosecutor will proceed with her case and that it can be proved beyond a reasonable doubt. This may also serve to reward abusers who commit more serious crimes because they avoid the lesser burdens of proof and additional sanctions applicable in family court.

The difference between family and non family offenses also presents special problems if the victim and the abuser share children. Often victims of domestic violence are economically dependent on their abusers. She may rely on him for medical expenses and child support. In family court, the order of protection can include remedies relating to child support and visitation as well as medical expenses,²⁹⁰ but this is not true in criminal court. The non family offense criminal orders do not specifically provide for orders relating to children, and the criminal court lacks jurisdiction over some provisions such as child custody and support. While a victim may seek other remedies in family court, they will not usually specifically address future violent conduct, nor is the criminal system adequately equipped to address the violation of such orders.

Finally, if denied a remedy in civil court, the victim is denied all the benefits that civil orders of protection provide over, and in addition to, those available in criminal court.²⁹¹ She may wish to avoid subjecting the abuser to criminal sanctions in criminal court because she needs his continued financial support, or she may fear increased retaliation if she pursues criminal charges. She may wish to use the civil contempt proceedings available in civil court, which are not available in criminal court. Or, she may simply want to be in control of the case rather than trusting her decisions to a prosecutor.

The legislature needs to revisit and reform its list of “family offenses.” There is no reason to keep the “family offense” provisions limited to a specific list of crimes. This is unduly restrictive; it undermines the seriousness of the acts that are included, and excludes entirely the acts that are not. It also requires that the victim allege facts sufficient to satisfy the elements of each crime. Instead, the statute should be amended to

²⁸⁹ See N.Y. Penal Law Art. 265 (McKinney 2003).

²⁹⁰ N.Y. Fam. Ct. Act. § 842 (McKinney 2003).

²⁹¹ See section III *supra*.

include a more generic definition of acts of domestic violence. For instance, the legislature may consider adopting a statute that provides for civil orders of protection “to prevent domestic violence.” In turn, “domestic violence” could be defined as the following:

an act or pattern of acts that include acts or threatened acts of violence, or any act or pattern of acts constituting a crime in violation of chapter 40 of the consolidated laws of New York, or any municipal ordinance violation, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been in an intimate relationship.²⁹²

A statute such as this eliminates a victim’s need to establish that the abuser committed acts satisfying every element of a specific crime. Instead, a statute such as this incorporates all acts constituting domestic violence.

In the 1960s, the focus was on familial cohesion. That is no longer the case. While legislature’s desire then may have been to deal with less serious forms of violence in family court, the focus there is now on ending violence, and preventing future violence from recurring or escalating. Criminal orders of protection alone are insufficient to serve this goal. Victims should be able to avail themselves of the additional protection provided in civil court. The historical basis for this system is plain. It was set up during a different time. But, the evolution toward change has been needlessly slow. Now, because the state is not divested of seeking criminal charges even if the offender is a member of the victim’s family or household, a victim should be allowed to seek every form of protection that she can regardless, and in some cases because of, the nature of the crime.

B. Definition of “family or household member”: continued rationales and problems

Acts of domestic violence do not occur only between married and formerly married people and between parents of a common child. Instead, domestic violence occurs in all forms of intimate relationships. While New York need not necessarily amend its statute to redefine “family or household” to protect the members of these relationships in the same way, it should extend the same protection to all members of intimate relationships that are currently available to members of the same “family or household.”

²⁹² This proposed statute is loosely based on Colo. Rev. Stat. § 13-14-102 (2003). Colorado’s system allows “any municipal court of record . . . any county court, and any district court” to have original concurrent jurisdiction to issue a temporary or permanent civil restraining order against an adult or a juvenile who is ten years of age or older for the purposes of preventing assaults and threatened bodily harm, domestic abuse, emotional abuse of the elderly, and stalking. The courts have

While in some circumstances the legislature may be able to provide rational reasons why it may not wish to redefine “family or household member” to include other types of relationships, it cannot provide rational reasons to deny protection to all victims of domestic violence in light of the stated governmental interests in providing civil orders of protection.²⁹³

As a result, the legislature should revisit the scheme that is currently in place and should redefine the types of relationships entitled to civil protection order coverage. New York has two options. First, it could amend the existing definition of “family or household” to include cohabitants and members of dating relationships. Second, it could amend the statutory scheme to allow all victims of domestic violence to obtain orders of protection even if the remedy is not in family court, and create a new definition of “intimate relationship.” Outside the context of provisions for children, there is little reason to keep civil orders of protection in family court. Instead, the legislature could provide original, concurrent jurisdiction to any court of record as well as, or instead of, family court. Then, the legislature could expand the types of relationships entitled to protection without changing its definition of “family or household.” For instance, in connection with the statute proposed above, it could adopt the following definition of “intimate relationship:”

A relationship between persons related either by blood, marriage, or former marriage, between past or present spouses, past or present cohabitants, persons who are the parents of the same child, or between two persons, including two persons not of the opposite sex, who have or had a social relationship of a romantic, but not necessarily sexual nature.²⁹⁴

²⁹³ While this article briefly touches on the concepts of equal protection here, an in-depth discussion of it is beyond its scope. For a more in-depth discussion of the intersection of the Equal Protection Clause and civil orders of protection, particularly as it relates to same-sex relationships, see Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335 (1995); Pamela M. Jablow, Note, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1117 (2000).

²⁹⁴ This proposed language borrows from Colo. Rev. Stat. § 18-6-800.3(2) (2003) and Miss. Code Ann. § 93-21-3(a), (d) (2003). Colorado’s statute reads as follows: “‘Intimate relationship’ means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.” Mississippi’s statute defines abuse and dating relationship as follows: “‘Abuse’ means the occurrence of one or more of the following acts between family or household members who reside together or who formerly resided together or between individuals who have a current

A statute like this would serve several goals. First, it would bring New York into compliance with the forty-nine other states that currently allow protection to cohabitants. Second, it would bring New York into compliance with the majority of states that provide protection to members of dating relationships.²⁹⁵ Finally, it would simply provide protection where it is needed.

However, New York's legislature has refused to pass statutes expanding the definition of "family or household" to include cohabitants and dating relationships, or to provide civil orders of protection to all victims of domestic violence in a forum outside family court. The government may state several reasons; however, the reasons are neither rational nor related to the interests that the legislature has stated for providing civil orders of protection.

One reason the legislature has failed to change the law may be that it believes domestic violence is not a problem outside the relationships currently covered. Empirically, this is not the case. A large amount of evidence suggests that domestic violence pervades not only into marital relationships, but other intimate relationships as well, such as cohabitation relationships, dating relationships, and same-sex relationships. Few studies have focused specifically on unmarried cohabitants, but there is no indication that domestic violence does not occur at the same rates as in other types of intimate relationships. One study in particular concluded that non-married men who live with their partners were more violent to their partners than their married counterparts.²⁹⁶ According to the New York State Division of Criminal Justice Services, in the year 2000 alone, there

dating relationship." "Dating relationship" means a social relationship of a romantic or intimate nature.

²⁹⁵ While a discussion of such orders are outside the scope of this article, a statute such as this would give the legislature freer reign to provide civil protection orders to victims of crimes other than domestic violence. For instance, to provide civil orders of protection to victims of sex crimes or stalking at the hands of a stranger, the legislature would currently be required to amend its definition of "family or household" to include rapists and stalkers. For obvious reasons this is more than untoward. Instead, under a statutory scheme like the one proposed here, the legislature would only need to add a provision stating that in addition to preventing "domestic violence" civil orders of protection are necessary to prevent "stalking" or "sex assault or abuse." See, e.g. Colo. Rev. Stat. § 13-14-102(1) (2003).

²⁹⁶ Douglas A Brownridge, Shiva S Halli, *Understanding Male Partner Violence Against Cohabiting and Married Women: An Empirical Investigation with a Synthesized Model*, 17 J. FAM. VIOL. 341-361 (2002).

were more than 23,000 cases of domestic violence among unmarried couples living together.²⁹⁷ Studies also suggest that women living with men at the time of the violent incident that lead to a protection order are significantly less likely to experience any type of abuse after an order is in place than women who do not live with their abusers.²⁹⁸

Members of dating relationships experience a startling amount of violence. National surveys reveal that over thirty-five percent of both men and women inflict some form of physical aggression or sustained violence on their dating partners.²⁹⁹ Teens in dating relationships are also affected by intimate violence. In terms of the actual number of teens affected, research indicates that approximately one out of ten high school students experiences physical violence in dating relationships.³⁰⁰ Other surveys of students in dating relationships show that an average of twenty-eight percent of the students experienced dating violence.³⁰¹ Overall, studies indicate that anywhere from nine percent to thirty-nine percent of high school students experience dating violence at some point.³⁰² A study of emergency room records found that 72 percent of the victims of domestic violence were not living with the abuser at the time they were assaulted.³⁰³

Partner abuse is also serious problem in gay and lesbian

²⁹⁷ Kim Meslin, *Domestic Violence Protection Questioned*, OBESERVER DISPATCH, Dec. 27, 2002 at 01.

²⁹⁸ Adele Harrell, Barbara Smith, *Effects of Restraining Orders on Domestic Violence Victims* 233 in *DO ARRESTS AND RESTRAINING ORDERS WORK?* (Buzawa & Buzawa eds. 1996).

²⁹⁹ Roger J.R. Levesque, *Dating Violence, Adolescents, and the Law*, 4 Va. J. Soc. Pol'y & L. 339, 345 (1997); Jacquelyn W. White & Marry P. Koss, *Courtship Violence: Incidence in a National Sample of Higher Education Students*, 6 VIOLENCE & VICTIMS 247 (1991).

³⁰⁰ Brustin, *supra* note 55 at 333; *Legal Responses to Teen Dating Violence*, 29 Fam. L. Q. 331 (1995); Denise Gamache, *Domination and Control: The Social Context of Dating Violence*, in *DATING VIOLENCE, YOUNG WOMEN IN DANGER* 73 (Barrie Levy, ed., 1991).

³⁰¹ Burstin, *supra* note 55 at 333; Barrie Levy, *IN LOVE AND IN DANGER: A TEEN'S GUIDE TO BREAKING FREE OF ABUSIVE RELATIONSHIPS* 28 (1993).

³⁰² Burstin, *supra* note 55 at 333.

³⁰³ Finn, *supra* note 183 at 47; Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 74 n.52 (1984)

relationships.³⁰⁴ Same sex partner abuse is considered the third largest health problem facing gay men.³⁰⁵ Estimates set same-sex partner abuse as high as fifty percent,³⁰⁶ but the most conservative estimate is twenty percent.³⁰⁷ Regardless of the actual numbers of victims and incidents of abuse, it is plain that violence occurs in same-sex relationships, and the members of such relationships are also entitled to protection in New York State.³⁰⁸

A second possible government rationale for failing to amend the statute is its concern for opening the floodgates to a large amount of people thus overburdening the family courts.³⁰⁹ There are three responses to this. First, the legislature has the option of providing the same civil protection order remedies in a court other than family court. Second, as of 2002, family offense petitions in family court only constituted about eight percent of its case load.³¹⁰ While this number may go up somewhat if the relationship provisions are expanded, it should not create a large burden on

³⁰⁴ Carla M. Da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251, 267 (1994).

³⁰⁵ *Id.*; David Island & Patrick Letellier, *MEN WHO BEAT THE MEN WHO LOVE THEM* 1 (1991).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Klein, *supra* note 15 at --- Nancy Hammond, *NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING* (Kerry Lobel ed., 1986); Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony For Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379 (1993); Ruthan Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman Abuse*, 67 N.Y.U. L. REV. 520 (1992).

³⁰⁹ In denouncing a proposed amendment to amend the definition of family or household to include cohabitants, Senator Stephen Saland stated his belief that his decision was due to "a very serious resource problem The state's family courts are already overburdened with a variety of family matters that are deemed to be priorities, such as neglect and juvenile delinquency." Kim Meslin, *Domestic Violence Protection Questioned*, OBESERVER DISPATCH, Dec. 27, 2002 at 01; *See also* Patti Jo Newell, *Senate Blocks Help for Domestic Violence Victims*, TIMES UNION, ALBANY, June 20, 2002 A14.

³¹⁰ *Id.*

this court. Second, an overburdening of family court is not an adequate rationale to deny some victims of the same type of harm the same protection. As the legislature itself stated, domestic violence “is a crime which destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members.”³¹¹ Acts of domestic violence in relationships other than marital ones create the identical problems, and the legislature has identical interests in ending the violence.

Third, the government may reason that it is too expensive to provide victims of violence in other relationships with civil orders of protection. However, the costs of *not* providing civil orders of protection may, in fact, cause a greater cost burden. As Professor Freedman has observed:

The hard work of sorting out how to respond in the domestic violence cases in the civil courts and particularly in family court can come to seem a low priority or even a poor investment of legal and decisional resources. Yet, unless the resources necessary to improve the fact-finding capacity of civil courts are provided, many domestic violence matters that could have been handled civilly will instead escalate and be shunted into the criminal courts, with greater costs to society and far less satisfactory results to the individuals and families (and especially the children) who are involved. Of course, many victims and their children will benefit significantly from having access to civil remedies, even if criminal remedies are later needed to address a continuation or escalation of abusive behavior.³¹²

By failing to include more victims of domestic violence, the legislature is actually imposing more costs on society, both tangible and intangible. As the legislature has stated, domestic violence “results in tremendous costs to our social services, legal, medical and criminal justice systems, as they are all confronted with its tragic aftermath,” and that is “the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.”³¹³ Not only does this increase economic costs, it sends a message to the public at large that abuse in some relationships is more tolerable than in others. Like criminal

³¹¹ L. 1994, c. 222, §1.

³¹² Ann Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL’Y & LAW 567, 590 (2003); *Domestic Violence: Law Enforcement and the Courts*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 303, 313-16 (Claire M. Renzetti et al. eds., 2001) (discussing evidence of the benefits of civil protection orders to victims of domestic violence even in cases in which contact and abuse continue).

³¹³ L. 1994, c. 222, §1.

charges that send a social message that such conduct is intolerable, and that place domestic violence in a public forum, civil remedies provide these same social benefits, and can send the same public messages.

Fourth, there may be some concern that if the legislature expands the types of relationships entitled to protection, more frivolous claims for protection orders will result. However, there are procedures and penalties in place for those who file false affidavits. Second, there is no indication that people who file for civil orders of protection make false claims at a greater rate than people who file other types of civil claims. For instance, other than personal jurisdiction venue and other similar provisions, there are not statutes limiting a person's ability to file a civil claim for negligence, breach of contract, or other claims in civil court, yet the system relies on its own procedural safeguards to filter out claims without merit. Similarly, the procedural safeguards in place in a proceeding for a civil order of protection should serve the same purposes, and are deserving of the same trust. Also, the stakes involved in a civil order of protection remedy, namely one's physical safety, are arguably stronger than those in other types of civil actions, namely money; therefore, the balance of risks versus benefits would seem to militate allowing more victims to seek civil orders of protection.

Finally, the government's most likely argument is that it need not extend protection to relationships outside those already defined because the state has an interest in putting its scarce resources toward relationships it has an interest in promoting, legitimizing, and maintaining.³¹⁴ In this way, the argument goes, the state serves its interests in promoting traditional families rather than non-traditional ones by limiting the remedy of civil orders of protection to "legitimate" families. This argument comes to bear especially upon relationships between members of the same sex, especially in light of the recent debate regarding the legitimacy of gay marriages.³¹⁵

³¹⁴ Ross Levi, legislative counsel for the Empire State Pride Agenda was quoted as saying that the legislature refused to expand the definition of "family and household" because "there are those [in the legislature] who see an inclusion of lesbian and gay people in any definition of family as anathema, and the end of civilized society as we know it." John Caher, *Bill Would Define "Family" More Broadly*, 221 N.Y. L. J. 104 (2002); See also Newell, *supra* note 309 ("Other members of the Senate indicate that the real reason the Senate won't act [to change the definition of "family or household member"] is concern that expanding access to family court will legitimize same-sex and unmarried heterosexual relationships.").

³¹⁵ Andrew Koppleman, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 35 (2002); John G. Culhane, *"Clanging Silence": Same-Sex Couples and Tort Law*, 89

But, the state already passed a law “legitimizing” and providing members of such relationships protection from domestic violence back in 1987. That was the year the legislature passed the Domestic Violence Prevention Act which defines “family or household member” as including “unrelated persons who are continually or at regular intervals living in the same household or who have in the past continually or at regular intervals lived in the same household³¹⁶ or, “unrelated persons who have had intimate or continuous social contact with one another and who have access to one another’s household.”³¹⁷ Consequently, the legislature has little basis on which to stake its claim that it cannot extend protection to such relationships.

Additionally, the rationales for “family offense” proceedings in family court have undergone a social shift. Historically, those proceedings were to provide “practical help” and were meant to keep traditional families, even violent ones, together. Also, they were meant to keep “domestic quarrels” out of the public eye. But, over time, this focus changed to one on ending the violence. In recognition of this social shift, the legislature acted to criminalize more acts of domestic violence, explaining that “violence in the home is as serious a breach of public order and safety as violence in the streets. . . . Strengthening of legal sanctions against violence in the home is a step toward stopping it in individual cases, and toward educating the public that violence in the homes is as much a criminal act as violence in a public place.”³¹⁸

Also, as this social shift gained strength, it repealed the provisions regarding the importance of family cohesion and “practical help,” and amended the statutes to reflect the new social focus not on keeping the “family unit intact,” but to “stop the violence, end the family disruption, and

KY. L.J. 911, 938 (2000-01); Michael Wald, *Same-Sex Couple Marriage: A Family Perspective*, 9 VA. SOC. POL’Y & L. 291, 292 (2001); Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN’S RTS. L. REP. 263, 285 (1992) (finding that discrimination against homosexuals is closely related to deeply held gender-specific social and sexual roles within a culture).

³¹⁶ N.Y. Soc. Serv. Law § 459-a(1)(ii)(e) (McKinney 2003).

³¹⁷ N.Y. Soc. Serv. Law § 459-a(1)(ii)(f); N.Y. Comp. Codes R. & Regis. tit. 18, § 452.2(g)(2)(vi) (2003).

³¹⁸ Governor’s Bill Memorandum, McKinney’s Session Laws of 1980, chaps. 530, 531, 532, pp. 1877-78; Besharov, *supra* note 23 at 182.

obtain protection.”³¹⁹ Its new “first priority is protecting family members by ending the violence. After that is accomplished, counseling and reconciliation can be undertaken in an atmosphere of security for all members of the family.”³²⁰ Consequently, by its own acts historically, the legislature cannot claim that the purposes of the family offense proceedings are to keep legitimate families together; their intent is to end violence. The fact that the definition of family and household is so limited is more of a historical accident than evidence of intent to keep such families together. Also, practically speaking, to the extent it can be argued that civil protection orders constitute a “marital incentive,” the incentive is an absurd one. Essentially, by providing civil orders of protection only to those who are married or share children, the statute encourages a victim to marry or have children with the person who is abusing her so that she can then seek a civil order of protection that orders him to stay away. The civil order of protection remedies actually encourage victims of violent relationships not only to seek help, but to exit the relationship. The legislature can no longer rely on outdated, inapplicable rationales for a system that distributes protection based on the marital status, or parental status, of the victim.

CONCLUSION

New York has one of the most restrictive statutory structures in the nation for victims of domestic violence to obtain civil protection orders. It finds the need for protection only where the definitions of “family offense” and “family or household member” intersect. There is a historical explanation for this odd state of the law. Beginning in the 1960s, the legislature attempted to deal with domestic violence in a more private forum. It sought to defuse violence in families and was attempting, above all, to keep these families together. Over time, though, the legislature responded to a change in the social view of domestic violence. The focus began to shift from keeping families together, to criminalizing acts of domestic violence and bringing it to public attention.³²¹ As a result, in an

³¹⁹ N.Y. Fam. Ct. Act. §812(b) (McKinney 1981).

³²⁰ Fields, *supra* note 217; Besharov, *supra* note 23 at 174.

³²¹ For example, in 1994 in connection with the Family Protection and Domestic Violence Intervention Act, which eliminated the need for a victim to limit her choice of jurisdiction to criminal or civil court, the legislature found the following

A great deal of progress has been achieved in the effort to heighten public awareness about domestic violence and to provide services for affective family members . . . These efforts have also played a key role in bringing this issue into the open In recent years, for example, what

attempt to deal with the tension between the two interests, the legislature created, in what can fairly be characterized as a historical accident, the bifurcated system that exists today.

But, the shift in the role that civil orders of protection played from keeping families together to deterring and deescalating future violence renders the historical rationales meaningless as applied to their more contemporary goals. New York can provide few reasons for maintaining its current system, and must reform its civil protection order statutes to capture all victims of domestic violence, and to include all crimes as bases for protection. To the extent the legislature can provide current rationales to maintain its differential treatment of domestic violence victims, it must at least provide rational reasons that bear some relation to the goals the civil order of protection statutes serve. It is not at all clear that the legislature can satisfy that burden here.

The need for reform is plain. Domestic violence does not exist only between the members of relationships that the legislature has sanctioned for protection. Instead, violence cuts across all forms of romantic relationships and the victims of violence in those relationships deserve the same protection. This is true not only for New York, but for every state. Each state should expand its civil protection order coverage to include all victims, and all types of domestic violence.

was once largely considered a private matter has come to be more correctly regarded as criminal behavior.

New York Family Protection and Domestic Violence Intervention Act, § 1 (1994).

APPENDIX A

State	Related	Married	Share child	Cohabitation (past or present)	Dating	Other	Excludes Same Sex?
Alabama	•	•	•	• as interpreted by case law, . <u>Haraway v. Phillips</u> , 2002 WL 1728619 (Ala.Civ.App.2002).			
Alaska	•	•	•	•	•		
Arizona	•	•	•	•		Pregnant	
Arkansas	•	•	•	•			
California	•	•	•	•	•		
Colorado	•	•	•	•	•		
Connecticut	•	•	•	•	•		
D.C.	•	•	•	•	•		
Delaware	•	•	• only persons of opposite sex	• only present cohabitants of opposite sex			• cohabitants and persons sharing child
Florida	•	•	•	•			
Georgia	•	•	•	•			
Hawaii	•	•	•	•	•		
Idaho	•	•	•	•	•		
Illinois	•	•	•	•	•		

Indiana	•	•	•		•		
Iowa	•	•	•	• within the past year	•		
Kansas			•	•	•		
Kentucky	•	•	•	•			
Louisiana	•	•		• opposite sex only			• cohabitants
Maine	•	•	•	•	•		
Maryland	•	•	•	• current only			
Massachusetts	•	•	•	•	•		
Michigan	•	•	•	•	•		
Minnesota	•	•	•	•	•	Pregnant	
Mississippi	•	•	Not by statute Protected by AG opinion Op. Atty. Gen. No. 2000- 0588, Carrubba, October 6, 2000	•	• current dating relations hip		
Missouri	•	•		•			
Montana	•	•	•		• opposite sex only		• dating relationships
Nebraska	•	•	•	•			
Nevada	•	•	•	•	•		

New Hampshire	•	•	•	•	•		
New Jersey	•	•	•	•	•	Pregnant	
New Mexico	•	•	•		•		
New York	•	•	•				
North Carolina	•	•	•	• opposite sex only	• opposite sex only		• cohabitation and dating relationships
North Dakota	•	•	•	•	• current only	Any other person with a sufficient relationship to the abusing person as determined by the court	
Ohio	•	•	•	•			Neutral, but case law has interpreted as being opposite sex only.
Oklahoma	•	•	•	•	•	Present spouses of ex-spouses	
Oregon	•	•	•	•	• within past 2 years		
Pennsylvania	•	•	•	•	•		
Rhode Island	•	•	•		•		

South Carolina	•	•	•	• opposite sex only			• cohabitants
South Dakota	•	•	•	•			
Tennessee	•	•	•	•	•		
Texas	•	•	•	•	•		
Utah	•	•	•	• living as a spouse		Pregnant	
Vermont	•	•		•	•		
Virginia	•	•	•	• within 1 year			
Washington	•	•	•	•	•		
West Virginia	•	•	•		•		
Wisconsin	•	•	•	•	•		
Wyoming	•	•	•	•	•		