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Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform

Judith A. Smith†

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 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 dangerous 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.”2 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 Linda’s lie as evidence against her. The jury convicted Linda of murder in the second degree and she was sentenced to seventeen years to life in prison.3

† Associate in Law, Columbia Law School, 2001-04. I would like to thank Philip Genty, Carol Sanger, and Lyria Bennett-Moses for their invaluable insights and comments.
1. Marcela Rojas, Escape From Abuse: Clemency Seen as Milestone for Victims, J. NEWS, May 19, 2003, at 1A.
2. Id.
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, so criminal court was not an option. Instead, she went to family court to obtain a civil protection order against him. Ultimately, the court told her that the only way it could have granted a civil order of protection against her stalker and former rapist was if her mother had stayed married to him.

Despite two decades of change, domestic violence remains a threat to women’s safety. Even the most conservative numbers indicate that, each year, women victimized by their intimate partners number in the millions. The data available do not emphasize whether the victims are married to their abusers. Instead, they reflect the reality that women in all forms of intimate relationships can be victims of abuse by their partners. 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. In 2000, 1247 women—about thirty-three percent of all women killed—were killed by their intimate partners; from 1993 to 1998, intimate partner violence made up twenty-two percent of all violent crime against women. Domestic violence is still the leading cause of injury to women between ages fifteen and forty-four in the United States—injuring more women than car accidents, muggings, and rapes combined.

6. This Article focuses on the threat of domestic violence as it applies to women. This does not mean to deny that men also fall victim to domestic violence, but recognizes the reality that the majority of domestic violence victims are female. See, e.g., CALLIE MARIE RENNISON & SARA WELCHANS, U.S. DEP’T OF JUSTICE, NO. 178,247, INTIMATE PARTNER VIOLENCE 1, available at http://www.ojp.gov/bjs/pub/pdf/ipv.pdf (last revised Jan. 31, 2002) (concluding that in 2000, eighty-five percent of domestic violence was committed against women).
8. The statistics cited here address the prevalence of “intimate partner” violence, which includes violence committed by current or former spouses, boyfriends, or girlfriends. See, e.g., RENNISON & WELCHANS, supra note 6, 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.”).
9. See PATRICIA TJADEN & NANCY THOEENES, NAT’L INST. OF JUSTICE, NO. 181,867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 10, available at http://www.ncjrs.org/pdffiles1/nij/181867.pdf (2000). The study surveyed 8000 women by telephone. The study also concluded that because many women are re-victimized, an estimated 4.8 million rapes and assaults are perpetrated against women each year. Id.
10. RENNISON & WELCHANS, supra note 6, at 1.
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Because of its prevalence, the response to domestic violence has been dramatic and widespread, especially in the last ten years when more pressure has been brought to bear on the issue. There are now more shelters, training programs, and legislative initiatives. 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 like 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.

Domestic violence civil protection orders are effective yet underused weapons against domestic violence. Domestic violence civil protection orders differ from other types of civil and criminal orders of protection. They provide remedies and benefits to victims that are unavailable in criminal court or in other civil proceedings, including provisions for child custody, maintenance, counseling, reduced filing-fees, and provisions requiring an abuser to vacate a shared residence. Studies suggest that protection orders are effective in preventing and deescalating some forms of domestic violence. They also “work” in other ways by giving a victim a sense of control over her life.

Rennison’s study estimates that between the years of 1993 and 1998, the number of nonlethal violent crimes (defined as rape, sexual assault, robbery, aggravated assault and simple assault) committed by intimate partners against females declined by twenty percent. RENNISON & WELCHANS, supra note 6, at 1.

12. Every state now has a statutory scheme in place that is meant to address the problem of domestic violence, and domestic violence civil protection orders fall under these schemes. See, e.g., MASS. GEN. LAWS ch. 208, § 34D, ch. 209, § 32, ch. 209A, §§ 5A, 7, ch. 209C, § 15 (2001). Nevertheless, this Article does not suggest that criminal courts should be divested of jurisdiction over criminal acts; instead, this Article argues that victims of domestic violence should be able to use the authority of civil courts to supplement the protection.


14. This terminology is 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 n.25 (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, in contrast to the criminal system. See id.; Peter Finn, Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse, 23 FAM. L.Q. 43, 44-45 (1989). Compare 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, 811-1141 (1993), with id. at 1142-88. For instance, in Colorado, a protection order is issued automatically in all criminal and juvenile cases involving victims. The order is entered at the time of
They are underused in part because they are not available to all victims, or to victims of all types of crime. In every state, the availability of domestic violence civil protection orders is limited to those victims who are in certain defined relationships and who are victims of certain types of crime. 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. Similarly, while some states grant protection to all types of violence, too many states still deny protection to victims of a whole host of crimes despite their relationship to their abusers.

New York in particular has the most restrictive domestic violence civil protection order coverage in the union. It grants civil orders of protection only to victims who satisfy two limiting criteria. First, they must be members of the abuser’s “family or household,” as defined in an unduly restrictive fashion. Second, a victim must establish that the abuser’s crime was among the state’s official “family offenses.” This list is also unduly restrictive and does not contemplate treating a large number of violent crimes as crimes of domestic violence. As a result of this dual inquiry, a large number of victims are denied civil protection orders either because they do not share the requisite relationship with their abusers or because they were not victims of the “correct” type of violent crime.

This dual inquiry exists not only in New York’s civil system, but also in its criminal system. In its 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. As a result, even in New York’s criminal court, a victim must show both that she is a defined family or household member of the attacker and that she was a victim of a particular

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16. New York law defines members of the same “family or household” as only including the following: “(a) persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another; and (d) persons who have a child in common, regardless [of] whether such persons have been married or have lived together at any time.” N.Y. CRIM. PROC. LAW § 530.11 (McKinney Supp. 2004); N.Y. FAM. CT. ACT § 812(1) (McKinney 2004).

17. The list of “family offenses” includes only the following specific crimes, each of which is defined in turn 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, and stalking in the first, second, third, and fourth degree. N.Y. CRIM. PROC. LAW § 530.11; N.Y. FAM. CT. ACT § 812.
“family offense.”

New York’s suffering system retains the vestiges of the scheme its legislature established in the 1960s, 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 family and non-family members unequally protected. Nevertheless, the legislature has refused to improve upon the system to ensure adequate protection to all victims from all crimes of domestic violence. The reasons the legislature historically has given to deny coverage no longer exist, and there are few, if any, contemporary rationales that exist to maintain the differential treatment of victims.

As one of the first states to enact legislation allowing victims of domestic violence access to civil orders of protection, New York provides a perfect case study for the more national problems that restricting access to protection orders creates. Like much of the country, as the problem of domestic violence gained recognition, New York experienced a policy shift in its approach to domestic violence, yet it also held fast to its traditional view of the family unit, or more particularly, to its view of marriage. While New York began the trend of allowing civil orders of protection in the domestic violence context, it still holds fast to a traditional view of the family in a way that not only denies protection to most “non-wives,” but provides inadequate protection to wives as well. New York’s system was created in the 1960s, a time when domestic violence was thought to be “private.” The legislature was convinced that its aptly named “family court” alone could handle the problems of domestic violence within the private confines of the family. The primary goal was to keep traditional families together.

However, over time, the domestic violence movement has attempted to refocus the goal from family cohesion to violence termination. Nevertheless, New York, like much of the country, has steadfastly refused to recognize relationships that are non-traditional and has allowed violence in some relationships to continue. This refusal prevails despite overwhelming evidence that victims of domestic violence are not limited to those who are married to their abusers. In New York, like in most of the nation, only a portion of victims is entitled to relief.

The goal of civil orders of protection is to end domestic violence, not to keep traditional families together. To this end, New York and the rest of the states should amend their laws to allow members of all intimate relationships and victims of all forms of domestic crimes the additional benefits that civil orders of protection provide.

Using New York as a model, this Article will ultimately argue that all states

18. N.Y. CRIM. PROC. LAW § 530.11.
19. See infra note 207 and accompanying text.
should amend their domestic violence civil protection order statutes to capture all remaining victims of 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 provides background information about civil protection order legislation as it has developed in New York and other states. Part II surveys relationship and act requirements nationwide, showing that New York's system prevents the most victims from obtaining protection orders. Part III briefly explains the structure and limitations of New York's "bifurcated" system for granting orders of protection in civil and criminal court. Part IV demonstrates that civil orders of protection are effective in the battle against domestic violence. Part V provides a historical explanation for New York's existing differential treatment of domestic violence victims. Finally, Part VI argues 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 opportunity to seek civil orders of protection.

I. BACKGROUND OF CIVIL PROTECTION ORDERS

Before the 1970s, protection orders were sought primarily by prosecutors in connection with existing criminal cases. The only place where a victim could obtain a civil order of protection was divorce court. The courts' civil powers to issue orders of protection were considered secondary to their substantive powers, and most chose not to exercise these powers outside the context of divorce proceedings.

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

21. Id.
23. 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 government intervention and review. See, e.g., MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 6, 11 (1985); ELIZABETH PLECK, DOMESTIC TYRANNY 72 (1987). The fact that legislators were slow to respond most likely reflects the enduring point of view that domestic violence was a private matter to be dealt with within the confines of the home; 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 (1988). But others have suggested that the pervasive idea that domestic violence was a "private" matter until it was brought into "public" view is largely ahistorical. Instead, it is suggested, wife-beating was

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accepted that treatment, rather than criminal prosecution, was the best solution for problems in the family.\textsuperscript{24} The legislature sought not to punish but to provide "practical help."\textsuperscript{25} As a result, the legislature enacted the Family Court Act, which also created the procedure to obtain civil orders of protection.\textsuperscript{26} The Act granted 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."\textsuperscript{27} The exclusive jurisdiction provisions were eliminated in 1996,\textsuperscript{28} and the Criminal Court now enjoys concurrent jurisdiction over the cases that can also be heard in Family Court.\textsuperscript{29} 

By the late 1970s, the problem of domestic violence and the failure of government to respond adequately were gaining recognition across the country.\textsuperscript{30} The clear push by victims' advocates and feminists was to strengthen governmental responses to domestic violence, especially in the criminal justice system.\textsuperscript{31} 

Until 1976, only one state other than New York offered civil domestic violence protection orders.\textsuperscript{32} 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.\textsuperscript{33} Pennsylvania passed its Protection from Abuse Act of 1976, which protected as an affirmative, statutory, and therefore, "public" right until the mid-nineteenth century. Professor Reva Siegel 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 B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2120 (1996).

25. Id.; The Family Court Act, Report of Joint Legislative Committee on Court Reorganization, 1962 N.Y. Laws 3428, 3444.
27. Id.
29. N.Y. CRIM. PROC. LAW § 530.12(14) (McKinney Supp. 2004). The demise of exclusivity did not alter the district attorney's discretion to pursue criminal charges against a defendant in criminal court.
created an avenue for victims of domestic violence to obtain protection orders outside the context of criminal court or civil divorce proceedings.\textsuperscript{34} Other states began following suit. By 1994, all fifty states had adopted some form of domestic violence civil protection order legislation.\textsuperscript{35} States are repeatedly revisiting their protection order legislation to expand protection, to reduce the cost of obtaining orders, to streamline the process, and to create state and national registries for the protection orders.\textsuperscript{36}

Civil protection orders offer options for relief that are often more comprehensive than those available in criminal and other non-domestic violence orders.\textsuperscript{37} Civil protection orders can require the abuser to stay away from the victim to refrain from contacting, threatening, harassing, or stalking the victim, or from committing acts of violence against her.\textsuperscript{38} Also, in some states, judges issuing civil protection orders can include orders relating to child custody and visitation.\textsuperscript{39} They can also require person to seek counseling\textsuperscript{40} or drug or alcohol treatment,\textsuperscript{41} they can grant the petitioner possession of the residence or other property,\textsuperscript{42} child support, or other economic relief,\textsuperscript{43} and they can keep the respondent from accessing the petitioner’s personal information.\textsuperscript{44}

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.\textsuperscript{45} Often these provisional measures are granted ex parte, without the abuser’s presence.\textsuperscript{46} But to satisfy due process requirements, courts require an evidentiary hearing shortly after the issuance of the temporary order, and the restrained party must

\begin{itemize}
  \item \textsuperscript{34} Grau et al., \textit{supra} note 32, at 14.
  \item \textsuperscript{35} \textit{BUZAWA \& BUZAWA}, \textit{supra} note 22, at 234; Matthew J. Carlson et al., \textit{Protective Orders and Domestic Violence: Risk Factors for Re-Abuse}, 14 J. FAM. VIOLENCE 205, 206 (1999).
  \item \textsuperscript{36} U.S. DEP’T OF JUSTICE, NO. 189,190, ENFORCEMENT OF PROTECTIVE ORDERS 3 (2002), \textit{available at} http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin4/ncj189190.pdf (“In 1992, Massachusetts became the first state with a computerized database of all domestic violence restraining orders issued within the state... Under Massachusetts law, criminal and civil record searches are required for each protective order application.”). Several states have followed Massachusetts’ lead by improving protection order verification procedures. \textit{Id.} at 3 & n.24.
  \item \textsuperscript{37} See discussion infra Section IV.
  \item \textsuperscript{38} See, \textit{e.g.}, COLO. REV. STAT. § 13-14-102 (2001); N.M. STAT. ANN. § 40-13-5 (Michie 2003).
  \item \textsuperscript{39} See, \textit{e.g.}, COLO. REV. STAT. § 13-14-102; KAN. STAT. ANN. § 60-3107 (2003).
  \item \textsuperscript{40} See, \textit{e.g.}, KAN. STAT. ANN. § 60-3107.
  \item \textsuperscript{41} See, \textit{e.g.}, COLO. REV. STAT. § 13-14-102; CAL. FAM. CODE § 6300 (Deering 2002).
  \item \textsuperscript{42} See, \textit{e.g.}, KAN. STAT. ANN. § 60-3107; OHIO REV. CODE ANN. § 3113.31(E)(1)(b) (Anderson 2003); N.M. STAT. ANN. 40-13-5(A)(1).
  \item \textsuperscript{43} See, \textit{e.g.}, KAN. STAT. ANN. § 60-3107.
  \item \textsuperscript{44} See, \textit{e.g.}, MICH. COMP. LAWS § 600.2950 (2003).
  \item \textsuperscript{45} See, \textit{e.g.}, KAN. STAT. ANN. § 60-3107 (2003); Waul, \textit{supra} note 7, at 53.
  \item \textsuperscript{46} Chaudhuri \& Daly, \textit{supra} note 20, at 230-31.
\end{itemize}
be given notice of the hearing. After a hearing, the court can render the order “permanent,” but this usually means the order will remain in effect for a time certain, determined by statute, typically one to two years. Civil rules of procedure apply, including a standard of proof that is lower than in criminal cases. A judge need only determine, usually by a preponderance of the evidence, that the facts alleged in the petition occurred and that the behavior is likely to continue.

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. Most also provide that a violation of a civil protection order is grounds for charges of civil or criminal contempt. In some states, a repeat violator of protection orders can be charged with a felony and be subjected to both fines and jail time. Very few require a minimum term of confinement for protection order violations. Almost every state has enacted warrantless arrest

48. Waul, supra note 7, at 52. Some states have extended the protection to three years, see, e.g., KAN. STAT. ANN. § 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., 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); N.J. STAT. ANN. § 2C:12-10.1 (West 2004) (making protection orders issued in stalking cases permanent unless sought to be dissolved by the victim).
49. In criminal cases, an order of protection can remain in effect only if the fact-finder determines beyond a reasonable doubt that the defendant committed the underlying acts or crimes. See, e.g., N.Y. CRIM. PROC. LAW § 530.12(5) (McKinny Supp. 2004).
50. Waul, supra note 7, at 54.
52. See 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); Kinports & Fischer, supra note 51, at 165. 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 (McKinney 2003) (violating 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 (McKinney 2004) (granting family court power to jail respondent for up to six months jail for willful violation of a civil protection order). 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 does not violate the Constitution’s Double Jeopardy Clause. United States v. Dixon, 509 U.S. 688 (1993); People v. Wood, 742 N.E.2d 114 (N.Y. 2000) (interpreting N.Y. PENAL LAW § 215.52 (McKinney 2003)). 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) (“[W]e 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.’”).
55. See, e.g., HAW. REV. STAT. § 586-11 (2003) (imposing minimum jail time of forty-eight hours for the first offense and thirty days for the second); 720 ILL. COMP. STAT. 5/12-30; IOWA CODE § 236.14
policies for those suspected of violating a valid protection order.\textsuperscript{56}

II. THE RELATIONSHIP AND ACT REQUIREMENTS

To qualify for a civil domestic violence order of protection, a person must satisfy two requirements: a relationship requirement and an act requirement. Thus, a victim must show both that she shares a particular type of relationship with her abuser and that she suffered a particular variety of abuse at his hands. The following Sections discuss these two requirements nationwide and the Appendices detail the relationship and the act requirements of each state.

A. The Relationship Requirement

To qualify for a domestic violence civil protection order, the petitioner must establish her relationship with the respondent.\textsuperscript{57} In 1995, thirty-three states limited the availability of civil protection orders to individuals who were married, related by blood, shared a child, or were living with the respondent.\textsuperscript{58} Since then, several states have amended their statutes to make protection orders more broadly available. Now, all fifty permit victims related to their abusers by blood or marriage to seek domestic violence orders of protection. The Subsections that follow survey the states on how they handle couples who share a child, those who cohabit, those where in intimate relationships, those who are pregnant, and those who are in same-sex relationships.\textsuperscript{59}

1. Parents of a Common Child

As late as 1993, only forty-one states provided for the protection of parents of a common child.\textsuperscript{60} Today, forty-nine states provide protection.\textsuperscript{61} This

\footnotesize{
58. \textit{Id.} at 339 & n.44 (collecting statutes).
59. A table reflecting the breakdown of states' treatment of each type of relationship is attached as Appendix A.
60. Klein & Orloff, supra note 15 at 824 & n.95 (collecting statutes).
61. ALA. CODE § 30-5-2 (2003); ALASKA STAT. § 25.35.200 (Michie 2002); ARIZ. REV. STAT. § 13-3601 (2004); ARK. CODE ANN. § 9-15-103 (Michie 2003); CAL. FAM. CODE § 6211 (Deering 2004); COLO. REV. STAT. § 13-14-101 (2003); CONN. GEN. STAT. § 46b-38a (2004); D.C. CODE ANN. 16-1005 (2001); DEL. CODE ANN. tit. 10, § 1041 (2002); FLA. STAT. ch. 741.28 (2000); GA. CODE ANN. § 19-13-1 (2004); HAW. REV. STAT. § 586-1 (2003); IDAHO CODE § 39-6303 (2003); 750 ILL. COMP. STAT. 60/103 (West 2003); IND. CODE § 35-41-1-10.6 (2003); IOWA CODE § 236.2 (2003); KAN. STAT.
}
includes two states that do not directly provide for co-parents, but effectively allow for protective orders by allowing coverage for members of past or current dating relationships. The remaining state, Louisiana, provides protection only if the two parents cohabit, and it limits this protection to cohabitants of the opposite sex.

2. **Cohabitation**

Today, forty-seven states protect cohabitants, and two of the remaining three protect dating cohabitants. This leaves only New York as the only state without any protection at all. Of the states that expressly protect cohabitants, all


62. These states are Vermont, see Vt. Stat. Ann. tit. 15, § 1101, and Mississippi, where the Attorney General has ruled 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," Miss. Op. Att'y Gen. No. 2000-0588 (Oct. 6, 2000).


64. Id.


66. Indiana and Montana do not specifically include cohabitants but they do provide protection to members of a dating relationship. See Ind. Code § 35-41-1-10.6 (2003); Mont. Code Ann. § 45-5-206 (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. See Haraway v. Phillips, 841 So. 2d 275, 276 (Ala. Civ. Ct. App. 2002) (interpreting Ala. Code § 30-5-2 (2003)).
but Delaware, include both current and past cohabitants.\(^7\) Five states deny protection to cohabitants of the same sex.\(^8\)

### 3. Dating, Sexual and Intimate Relationships

In 1995, fifteen states authorized domestic violence civil protection orders based solely on a dating relationship.\(^9\) Today, a total of thirty-six states provide protection to members of some form of dating relationship.\(^10\) Some states require that the relationship be sexual in order for the participants to

\(^{67}\) See Del. Code Ann. tit. 10, § 1041 (2002). Other states such as Rhode Island limit protection to those who were cohabitants within a certain time. See R.I. Gen. Laws § 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.").


\(^{69}\) The District of Columbia, Puerto Rico, and the U.S. Virgin Islands also authorize this protection. See Brustin, supra note 57, at 340 & n.47 (collecting statutes).

receive protection, but most merely require something more than a platonic relationship. Also, most states that offer the protection to members of dating relationships do so without regard to the age of the people involved. However, some limit the protection to adults. Of these states, two limit protection to members of a current relationship. Two others require the relationship to have taken place within a certain time frame.

4. 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. Most victims would be entitled to protection under the dating relationship protection offered in Minnesota and thirty-three other states. However, in states like New York where the jurisdiction of the courts

71. See, e.g., ME. REV. STAT. ANN. tit. 19A, § 4002 ("are or were ‘sexual partners’"); OR. REV. STAT. § 107.705 ("persons who have been involved in a sexually intimate relationship with each other within two years immediately preceding the filing").

72. See, e.g., HAW. REV. STAT. § 386-1(2) ("‘dating relationship’ does not include a ‘casual acquaintance’ or ordinary fraternization between persons in a business or social context"); NEV. REV. STAT. 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.").

73. See, e.g., COLO. REV. STAT. § 13-14-101; IND. CODE § 35-41-10.6(2)-(3) (is dating or has dated the other person; is or was engaged in a sexual relationship with the other person); KAN. STAT. ANN. § 60-3102 (1997 & Supp. 2003) (includes "intimate partners and household members," which includes those in a "dating relationship" to be determined by a list of factors).

74. See, e.g., WIS. STAT. § 813.12(1) ("‘Dating relationship’ means a romantic or intimate social relationship between 2 adult individuals."); WASH. REV. CODE § 26.50.010 ("persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship").

75. Mississippi and North Dakota limit protection to members of a current dating relationship. MISS. CODE ANN. § 93-21-3 ("individuals who have a current dating relationship"); N.D. CENT. CODE § 14-07.1-01 ("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." N.D. CENT. CODE § 14-07.1-01.


77. See ARIZ. REV. STAT. § 13-3601(A) (2004); MINN. STAT. § 518B.01(2)(b) (2004) (Minnesota also amended its statute to allow victims in dating relationships to obtain civil orders of protection); UTAH CODE ANN. § 30-6-1 (2004). For a discussion of pregnancy and domestic violence, see EVAN STARK & ANNE FLITCRAFT, WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH 17 (1996); Hortensa Amaro et al., Violence During Pregnancy and Substance Abuse, 80 AM. J. PUB. HEALTH, 575 (1990); and Judith McFarlane et al., Assessing for Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care, 267 JAMA 3176-78 (1992).

78. 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 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 & Orloff, supra note 15, at 828-29. But, it may be better yet to omit the relationship requirement and
to provide civil protection orders is limited, women who are pregnant with their abusers' children may be denied protection.79

5. Same-Sex Relationships

As of 1993, ten states specifically denied protection to couples in same-sex relationships.80 Several other states had statutes open to interpretation.81 Today, that number has been cut in half. Five states still limit protection to persons in heterosexual relationships.82

Until 2000, many states did not provide coverage to couples in dating relationships, provided coverage only to cohabitating couples living "as spouses,"83 or had statutory ambiguities that brought their coverage of same-sex couples into question.84 Since then, policymakers in all but five of these states have either added coverage for dating couples, regardless of their genders, or courts in these states have interpreted statutes as applying to same-sex couples.85

extend the availability of civil protection orders to anyone in reasonable fear of another.

79. See, e.g., Gina C. v. Stephen F., 576 N.Y.S.2d 776, 776 (Fam. Ct. 1991) (finding that unborn child was not "child" within meaning of the 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). In re Robert F. Z. v. Michelle McG., 513 N.Y.S.2d 628 (Fam. Ct. 1987) (family court lacked jurisdiction in case of putative father who denied paternity of unborn child and pregnant mother). In Gina C., 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.


81. Id.


83. See, e.g., OHIO REV. CODE ANN. § 3113.31(A)(3) (Anderson 1993) (explaining that a "[f]amily or household member" can be only "a spouse, a person living as a spouse, or a former spouse of the respondent").

84. See e.g., supra note 82.

85. 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 that homosexual couple fit definition of "couple" for purposes of a domestic violence protection order).
6. No Relationship Requirement

A few states have removed their relationship requirements entirely. These states allow anyone to obtain civil protection without demonstrating a specific relation to the abuser; however, orders without relationship requirements do not typically confer the same benefits as domestic violence protection orders.\textsuperscript{86}

7. Summary

In ten years, the coverage of domestic violence civil protection orders has increased dramatically. The number of states offering protection to members of dating relationships has more than tripled.\textsuperscript{87} Only twelve states still restrict coverage of domestic violence civil protection orders to circumstances where a woman is or was married or related to her abuser, shares a child with him, or has cohabited with him.\textsuperscript{88} Three states have amended statutes to allow victims who are pregnant to petition for protection orders against the fathers of their unborn children.\textsuperscript{89} Remaining states, save one, also permit victims who are dating their abusers to obtain civil protection orders.\textsuperscript{90}

In states where victims fall outside statutory relationship definitions, they are unable to obtain domestic violence civil protection orders. In such situations, individuals must rely on criminal courts or creative civil courts to obtain protection.\textsuperscript{91} It can be difficult and expensive, and the remedies provided under civil protection order statutes may not be otherwise available. Neither may the criminal system suffice; there may not be evidence to sustain proof

\textsuperscript{86} See, e.g., ARIZ. REV. STAT. § 12-1809 (2004) (allowing “any person” to obtain an injunction against another for acts of harassment); CAL. CIV. PROC. CODE. § 527.6 (West 2004) (allowing any “person” to obtain an injunction against another for “harassment,” which is defined as “unlawful violence [or] a credible threat of violence . . . that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.”). Illinois also allows victims of sex crimes to obtain orders of protection regardless of the relationship to the attacker, but they do not contain the same provisions as domestic violence protection orders. 740 ILL. COMP. STAT. 22/201 (West 2003).

\textsuperscript{87} In 1993, only eleven states offered protection to members of dating relationships. Klein & Orloff, \textit{supra} note 15, at 835 & n.169.


\textsuperscript{89} See, e.g., ARIZ. REV. STAT. § 13-3601(A); MINN. STAT. § 518B.01(2)(b) (Minnesota also amended its statute to allow victims in dating relationships to obtain civil orders of protection); UTAH CODE ANN. § 30-6-1. For a discussion of pregnancy and domestic violence, see STARK & FLITCRAFT, \textit{supra} note 77; Amaro et al., \textit{supra} note 76, at 575-79 (1990); and McFarlane et al., \textit{supra} note 77, at 3176-78.

\textsuperscript{90} See \textit{supra} note 70 and accompanying text.

\textsuperscript{91} Brustin, \textit{supra} note 57, 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).
beyond a reasonable doubt, or the government may simply be unwilling to prosecute.

B. The Act Requirement

To obtain a civil domestic violence protection order, a victim must not only establish her relationship to the abuser, she must also establish that she suffered a type of domestic violence recognized by statute. All states have act requirements; these are described in the Appendix. The most common problem with these definitions is that they are too narrow. Many statutes exclude violent crimes such as sexual assault, attempted murder, and child abuse, where victims deserve strenuous protection from additional harm. Statutes also exclude seemingly less violent crimes, where protection orders are particularly effective in forestalling future violence.

Domestic violence falls along a spectrum; it includes serious physical violence as well as less physical acts where aggressors seek to exert their power over victims. Yet states fail to explicitly cover this scope of domestic crimes in their protection statutes. For instance, a surprising number of states do not specifically include sexual assault within their definitions of domestic violence.


93. See infra Appendix B.

94. Of violent crimes by abusers in intimate relationships reported by female victims, eighty-five to eighty-eight percent were assaults, ten to eleven percent were robberies, and two to three percent were rapes. See Klein & Orloff, supra note 15, at 850.
Battered Non-Wives

even though it is well documented that sexual assault is often present in abusive relationships. At best, in the states that neglect sexual assault, courts must liberally construe other provisions, like coverage for bodily injury, as granting sexual assault victims the protection they need and deserve. At worst, victims of sexual assault find themselves inexplicably outside the realm of civil protection order coverage.

Child abuse and other crimes associated with children are often similarly excluded. While most states allow orders of protection to be sought on behalf of children, the omission of child abuse as an act of domestic violence ignores the reality that an abuser may threaten his victim’s children, or may interfere with or threaten to interfere with her custody of them, as a means to coerce and control her. Moreover, some states fail to include children of victims who are not also the children of the abuser in their definitions of protected relationships. These abused children may never be eligible for civil protection.

Other frequently excluded crimes that fit a common-sense definition of domestic violence are kidnapping, false imprisonment, menacing, stalking, and violations of existing protection orders. Property crimes, such as destruction of private property, criminal mischief, theft, and trespass, are also often omitted from definitions of domestic violence, even though these crimes often form a pattern of attempts to intimidate and control. If one of the goals of protection orders is to deescalate future incidents of domestic violence, curbing an abuser’s use of property destruction to intimidate his victim would certainly further that aim.

Several states adopt the penal code definitions of crimes. This tactic burdens victims by requiring that they prove every element of multi-element offenses. This seems at odds with the fundamental rationale for protection orders, which is the urgent need to protect victims from future harm.

95. A few states do provide separate protection order laws for victims of sexual assault, but they usually do not contain the same types of provisions that domestic violence protection orders do. See, e.g., 740 ILL. COMP. STAT. 22/201 (2003).

96. “[A] study of 2,291 adult working women found that 39 percent of rapes were committed by husbands, partners, or relatives.” Margaret Cain, The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future, 34 TULSA L.J. 367, 370 (1999) (quoting Violence Against Women: Victims of the System: Hearings on S. 15 Before the Senate Comm. on the Judiciary, 102d Cong. 193, 259 (1991) (statement of Dr. Leslie R. Wolfe, Executive Director, Center for Women’s Policy Studies)). “If reported, one-third of all domestic violence cases would have been charged as felony rape or felony assault if they had been committed against strangers,” and “[n]umerous studies confirm that between 33% and 46% of battered women are raped and/or sexually assaulted by their abusive partners.” Klein & Orloff, supra note 15, at 850, 857.

97. Compare TENN. CODE ANN. § 36-3-601(8)(f) (including children of persons in a protected relationship regardless of parentage), with OR. REV. STAT. § 107.705(3) (“family or household member” does not specifically include children of the parties).

98. For a state-by-state survey of how these acts are treated, see infra Appendix B.


100. Certainly, as with any type of crime or petition, there is a danger that a petitioner will file a
A few states have gloriously broad definitions of domestic violence or definitions that include "catch-all" provisions to incorporate as many acts as possible. But states which incorporate all crimes or acts that could constitute domestic violence are ultimately few in number. To better protect victims, states should amend their laws to explicitly capture more crimes in their definitions of domestic violence.

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 are in family court and criminal court. The only place a victim can obtain a civil order of protection is in family court, and then only if she meets two separate criteria: She must suffer a "family offense," and she must have been victimized by a member of her "family or household." If she fails to meet either test, the family court lacks jurisdiction, and she is barred entirely from obtaining civil protection.

The dual inquiry also exists in the criminal system. 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 types of criminal orders: "family offense" criminal orders of protection and standard criminal orders of protection. Criminal family offense orders are available only to the same victims who would be entitled to

wrongful or inaccurate claim. However, all states have contempt provisions to handle such claims and some have passed statutes making the filing of false claims for a protection order a crime. See, e.g., PA. STAT. ANN. tit. 23, § 6106(a.1) (2003) ("A person who knowingly gives false information to any law enforcement officer with the intent to implicate another under this chapter commits an offense...").


102. N.Y. CRIM. PROC. LAW §§ 530.11-.13 (McKinney Supp. 2004); N.Y. FAM. CT. ACT § 842 (McKinney 2004); N.Y. DOM. REL. LAW §§ 240(3), 252 (McKinney 2004). New York does not provide for a person to obtain any civil protection order from the general civil courts. While beyond the scope of this Article, it is notable that any other crime victim lacks civil means to obtain a protection order. The only way for such a victim in New York to obtain protection from harm is to file a 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. See N.Y. CRIM. PROC. LAW § 530.12(14) (2003). This seems particularly troubling for victims of certain crimes such as sexual assault and stalking, especially where proof may not be strong enough to sustain a criminal case but would clear a lower threshold. Some states have made efforts to provide civil orders of protection to victims of sexual assault, while others provide protection to any person in imminent danger or in reasonable fear of another. See 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); infra note 182.

103. N.Y. FAM. CT. ACT § 812 (McKinney 2004).
jurisdiction in family court. They offer unique benefits that standard criminal orders do not. As in family court, to obtain a family offense criminal order, the victim must be both a victim of a “family offense” and a member of the defendant’s “family or household” as defined in the Family Court Act.104

Thus, New York has a “bifurcated” system—one of the most difficult systems in the country to navigate. It treats victims differently based on their relationships with abusers and the crimes that abusers commit. This Article focuses on problems with this bifurcated system. It takes issue both with the system’s 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 where it is useful and needed.

This Part briefly examines the procedures and remedies available to two separate sets of victims: those who are entitled to jurisdiction in family court and those who are not. Section A looks at the protections and procedures available to a person who can invoke the jurisdiction of family court by showing she was a victim of a “family offense” at the hands of a member of her “family or household.” Such a victim is entitled both to a civil order of protection and to a “family offense” criminal order. Section B looks at victims who cannot invoke the jurisdiction of family court. They cannot obtain civil orders or “family offense” criminal orders and are limited to standard criminal orders of protection. Victims who can obtain civil orders of protection and family offense criminal orders of protection are accorded valuable benefits that standard orders cannot provide.

A. Victims Entitled to Jurisdiction in Family Court

Only a victim who can show she suffered a “family offense” at the hands of a member of her “family or household” is entitled to jurisdiction in family court. She is entitled both to a civil order of protection in family court and—if criminal charges are pending—to a “family offense” order of protection in criminal court.

“Family offenses” include the following crimes, which are defined by New York penal law:105 disorderly conduct,106 harassment in the first and second degrees,107 aggravated harassment in the second degree,108 menacing in the

104. See N.Y. CRIM. PROC. LAW § 530.11 (McKinney Supp. 2004).
106. However, disorderly conduct is not limited to public conduct but also includes disorderly conduct not in a public place. N.Y. FAM. CT. ACT § 812 (McKinney 2004); N.Y. CRIM. PROC. LAW § 530.11 (McKinney Supp. 2004).
108. Id. § 240.30.
second and third degrees, reckless endangerment, assault in the second and third degrees, attempted assault, and stalking in the first, second, third, and fourth degrees.

"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 of whether such persons have been married or have lived together at any time.” The next Subsections examine the unique benefits and procedures available to victims who meet the two tests through civil orders in family court and family offense orders in criminal court.

1. Civil Orders of Protection in Family Court

A victim must file a petition in family court to obtain a civil order of protection. This petition must allege that the respondent engaged in conduct constituting one of the delineated “family offenses” and that the petitioner is a member of the respondent’s “family or household.” If the abuser has committed a crime other than one of the “family offenses,” such as a sex crime, first degree assault, kidnapping, or criminal mischief, the victim 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. Her only remedy is to proceed in criminal court, to seek a “non family offense” criminal order of protection.

Once she satisfies the two requirements, a victim may obtain a temporary order of protection, often the same day she files the petition. After a final hearing, the order can be made permanent. The court can require the abuser

109. Id. § 120.14-.15.
110. Id. § 120.20-.25.
111. Id. § 120.00-.05.
112. Id. §§ 110.00, 120.
113. Id. § 120.45-.60 (McKinney 2004).
116. See infra Section III.B.
117. N.Y. FAM. CT. ACT § 828(1)(a). The order is not effective, however, until either the order and a summons to an adversarial hearing are served on the respondent or the judge issues a warrant for the respondent’s arrest. Id. §§ 825, 827(a)(v)-(vi). The temporary order remains in place until the final hearing takes place, which can be a few days to a few weeks depending on the time it takes to serve the respondent with the petition. Id. §§ 827-28, 842.
118. Once issued, a “permanent” order remains in place for two years unless aggravating
to do any or all of the following: to stay away from the home, school, business, or place of employment of any other party; to 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 a child, the other parent, or any person to whom custody is awarded; or to refrain from harassing, intimidating, or threatening such persons;\textsuperscript{119} to refrain from acts creating an unreasonable risk to health, safety or welfare of a child;\textsuperscript{120} to pay counsel and other fees in connection with the petition; 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."\textsuperscript{121} The order can also include provisions for child support and provisions revoking licenses to possess firearms.\textsuperscript{122}

If the abuser violates the order, the victim has a few choices. First, she can call the police. A police officer must arrest where there is probable cause to believe that an abuser has committed a felony against a family or household member, whether there is a protection order or not.\textsuperscript{123} An officer must also
arrest if there is probable cause to believe that an abuser has violated the provisions of a valid family offense order of protection. Finally, a police officer must 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. These provisions authorizing arrest without a warrant apply only to violations of “family offense” civil and criminal orders of protection, not to standard criminal orders.

Immediate arrest is not a victim’s only option. She can also return to family court to file a civil “violation of court order” or contempt petition. If the violation also constituted a “family offense,” she can initiate an entirely new family offense proceeding in family court. She can also ask the district attorney to file a complaint in criminal court instead of, or in addition to, filing a complaint in family court. Finally, she can ask the district attorney to file a complaint for criminal contempt or ask the court to invoke its own powers to punish contempt. In sum, the victim has the options of treating the violation as a new criminal offense, a civil contempt proceeding, a criminal contempt proceeding, or a combination of the three.

2. Criminal Orders of Protection

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

THIRD WORLD L.J. 159, 179-181 (2003) (arguing that mandatory arrest policies can be parallel with the goal of empowering victims).

124. N.Y. FAM. CT. ACT § 168(1).
125. N.Y. CRIM. PROC. LAW § 140.10(4)(b) (McKinney 2004).
126. Id.
127. N.Y. FAM. CT. ACT § 846(a). At a contempt hearing in family court, the court need only be “satisfied by competent proof” that the abuser violated the order’s terms. Id. § 846-a.. 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 to surrender any guns, or commit the respondent to jail for up to six months for each violation. Id.
128. Id. § 847.
129. Id.
130. See N.Y. PENAL LAW §§ 215.50-.51 (McKinney 2003). Repeat violations of family offense orders of protection result 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. Id. § 215.51. This same provision does not apply to non-family orders of protection.
131. N.Y. JUD. LAW § 750 (McKinney 2003). These powers exist independent of criminal contempt charges. The court has the power to impose up to three months imprisonment and can impose a fine of one thousand dollars. Id. § 751. These contempt penalties should not reduce any sentence for any original offense of which the defendant is also found guilty. N.Y. CRIM. PROC. LAW § 530.12(10) (McKinney Supp. 2004).
a criminal or family court, or both." Simultaneous or subsequent cases may proceed in both venues. To obtain a "family offense" order of protection in criminal court, a victim must again show that she is a victim of one of the delineated family offenses at the hands of someone from her same family or household. If she cannot, her remedy is to seek a non-family offense order of protection in criminal court.

If the crime was committed by a family or household member, the victim may file a complaint with the criminal court, with the police, or with the prosecutor's office, alleging that the defendant has committed a "family offense." But the victim is not in charge of this proceeding. Only the police or prosecutor's office may investigate the charges and arrest the abuser. The prosecutor may decide not to pursue the case and has discretion to dismiss the case.

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

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; orders restraining the defendant from creating unreasonable risks to the health, safety, or welfare of a child, family, or household member; orders to allow a party to enter the shared residence to obtain belongings; and orders that the defendant surrender guns

134. See generally id. § 100.15 (allowing 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, 655 N.E.2d 161 (N.Y. 1995). But see People v. Van Sickle, 192 N.E.2d 9 (N.Y. 1963) (upholding a 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 § 100.40. While this procedure is available for victims, it is rarely used. Instead, the victim typically files a complaint with the police. Telephone Interview with Andrew Seewald, Assistant District Attorney, Manhattan District Attorney's Office (Oct. 6, 2003).
135. N.Y. CRIM. PROC. LAW § 120.10-90.
136. The decision as to whether and how to proceed with a criminal action always belongs to the government. See, e.g., id. § 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.").
137. See id § 530.12.
138. Unlike other offenses, the time for adjournment of "family offenses" contemplating dismissal is one year instead of the standard six months. Id. § 170.55(2).
139. Id. § 530.12(1)(a)-(e) (McKinney Supp. 2004).
140. Id. The court may also issue a temporary protection order ex parte upon the filing of a criminal
and licenses to carry or possess them.\textsuperscript{141}

In contrast to family court, 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.\textsuperscript{142}

Unlike proceedings in family court, which require proof by a preponderance of the evidence, a "permanent" criminal order of protection can only be issued if the underlying crime is proved beyond a reasonable doubt.\textsuperscript{143}

If a defendant violates a "family offense" criminal order of protection, the victim has several options. First, she can call the police. As in 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 they are required to do so.\textsuperscript{144}

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.\textsuperscript{145} She may also request that the prosecutor file criminal contempt charges, that the court invoke its criminal contempt penalty powers,\textsuperscript{146} or that the court exercise its powers under the criminal order of protection statute.

B. \textit{Victims Denied Jurisdiction in Family Court: 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 complaint for good cause. \textit{Id.} § 530.12(3).

\begin{itemize}
  \item \textsuperscript{141}. \textit{Id.} § 530.14.
  \item \textsuperscript{142}. \textit{Compare id.} § 530.12(1)(a)-(e), \textit{with} \textit{N.Y. FAM. CT. ACT} § 842(1)(a-i) (McKinney 2004).
  \item \textsuperscript{143}. \textit{See} \textit{N.Y. CRIM. PROC. LAW} § 530.12(5). 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. \textit{Id.} For Class A misdemeanor actions, the duration cannot exceed three years from the date of conviction. \textit{Id.} In other offenses, the duration of the order cannot exceed one year from the conviction's date. \textit{Id.}
  \item \textsuperscript{144}. \textit{N.Y. CRIM. PROC. LAW} § 140.10.
  \item \textsuperscript{145}. \textit{See supra} note 127 and accompanying text.
  \item \textsuperscript{146}. \textit{See supra} note 130 and accompanying text.
\end{itemize}
criminal protection order in criminal court. 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. Other than the entitlement definitions, the procedure for obtaining a standard order of protection is identical to that for obtaining family offense criminal orders. A victim may file a complaint alleging that a defendant has committed a crime. 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 it.

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. Temporary orders can also be issued at other times throughout the proceeding, including when the matter is adjourned in contemplation of dismissal. A granted order will remain in effect while the prosecution is pending and for the period during which a case is adjourned pending dismissal.

The terms of a standard criminal order of protection are even more limited than the terms of "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 victims of the alleged offense and such members of the family or household of such victims." The court can also include orders restraining the defendant from buying or owning guns. But the remedy is problematic because there are no provisions for restitution or payment of medical expenses, provisions requiring access to the victim's personal belongings, or provisions providing for probation before conviction, batterer intervention programs, or drug and alcohol counseling.

When a victim of a crime other than a "family offense" shares a child with the defendant, the scenario is even more problematic. 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

147. N.Y. CRIM. PROC. LAW § 530.13 (McKinney Supp. 2004)
148. Id.
149. See, e.g., id. § 100.15.
150. Id. § 530.13(2).
151. Id. §§ 170.55(3)-(4), 530.12(1).
152. 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. Id. § 170.55(2).
153. Id. § 530.13.
154. Id. § 530.14.
155. Compare id. § 530.12(1)(a)-(e), with N.Y. FAM. CT. ACT § 842 (McKinney 2003).
unreasonable risk to the health, safety, or welfare of a child.\textsuperscript{156} While courts have authority to issue "other conditions," courts are typically unwilling to depart too far from statutorily delineated provisions. The court lacks 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 if the crime involved was not a "family offense."\textsuperscript{157}

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 beyond a reasonable doubt.\textsuperscript{158} 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.\textsuperscript{159}

Where a defendant violates a standard criminal order of protection, the victim can call the police. But, unlike in the case of family offense order violations that mandate arrest without needing a warrant, it is unclear whether police can make a warrantless arrest of a defendant who violates a standard order.\textsuperscript{160} The victim may request that the prosecutor file criminal contempt charges\textsuperscript{161} or that the court invoke its criminal contempt penalty powers,\textsuperscript{162} but

\begin{itemize}
\item \textsuperscript{156} Compare N.Y. CRIM. PROC. LAW § 530.12(1)(b) (McKinney Supp. 2004), with id. § 530.12(1)(d).
\item \textsuperscript{157} See N.Y. FAM. CT. ACT § 812(4) (McKinney 2004) (requiring the chief administrator of the courts to "prescribe an appropriate form to implement" the provisions of the law); Criminal Court Non-Family Offense Order of Protection Form, \textit{available at} http://forms.lp.findlaw.com/form/courtforns/state/ny/ny000013.pdf (2004). The pre-printed form has only one line for "other conditions" as the court specifies. Also, in New York, family offense and non-family offense cases are treated differently in criminal court, which will be discussed in more detail infra.
\item \textsuperscript{158} N.Y. CRIM. PROC. LAW § 530.13(4).
\item \textsuperscript{159} 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. \textit{Id.}
\item \textsuperscript{160} The non-family offense statute provides that "[t]he 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." \textit{Id.} § 530.13(6). 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. \textit{See id.} § 140.10(4)(b). In any case, it is certainly clear that there are no mandatory arrest provisions that apply to violators of standard orders.
\item \textsuperscript{161} \textit{Id.} § 530.13(7). 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 (McKinney 2003). 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. \textit{Id.} § 215.50.
\item \textsuperscript{162} N.Y. JUD. LAW § 751 (McKinney 2003).
\end{itemize}
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then the government controls the proceedings.163

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 him to surrender firearms if there is a substantial risk that he may use or threaten to use them against the victim.164 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.165

IV. THE BENEFITS OF CIVIL PROTECTION ORDERS

Civil protection orders provide unique benefits and remedies to domestic violence victims that supplement the protections of the criminal justice system. This Part sets out why civil orders are a necessary component of a domestic violence protection scheme. First, in New York, as in other states, civil orders provide procedural benefits criminal orders cannot. Second, civil orders provide emotional and other intangible benefits unavailable in criminal court. Third, at least some evidence suggests that civil orders successfully work to deter future acts of violence. Finally, civil orders and their procedures work to prevent the escalation of violence. All domestic violence victims should have access to the benefits that civil orders of protection provide.

A. Procedural, Emotional, and Policy Benefits

Civil protection orders provide unique benefits in addition to forestalling future violence. First, they are easier to obtain than criminal convictions and criminal orders of protection. A lower standard of proof applies—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 may have evidence to support a finding that she is in danger, or that a past crime occurred, under a lower burden of proof. Also, civil orders can provide protection more quickly than criminal orders of protection. In civil court, a temporary order can be issued upon the victim's sworn statement,166 and a hearing for a permanent order can be held shortly thereafter. In contrast, while a temporary order can be granted in criminal cases in relatively short order, a conviction and

163. But unlike in family offense orders where the government must make “reasonable efforts to notify” the victim of 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. PROC. LAW § 530.12(14) (McKinney Supp. 2004).
164. Id. § 530.14(3)(b).
165. Id.
166. Kinports & Fischer, supra note 51, at 165.
“permanent” criminal order can take months or even years.\(^{167}\)

Second, civil protection orders empower the victim. They can have a positive effect on the emotional well-being of victims by giving them a choice of remedies. This choice gives victims control over both their cases and, more importantly, their lives.\(^{168}\) It also gives control back to a victim who may otherwise be in a powerless situation.\(^{169}\) In criminal cases, the decision is always the government’s as to whether and how to proceed.\(^{170}\) But in a civil action, the victim chooses when and where to file, and she can seek remedies specific to her needs. Furthermore, when an order is violated, the victim can choose whether or not to enforce the order by calling the police\(^ {171}\) or by filing a contempt petition.\(^ {172}\) In a contempt proceeding, a victim can often request a warrant for the abuser’s arrest.\(^ {173}\) 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.\(^ {174}\)

In this way, the victim, rather than the state, has control over what happens to her. Studies show that this type of empowerment affects a victim’s sense of well-being. In one study, seventy-two percent of women who obtained protection orders reported life improvements. After six months, that number rises to eighty-five percent, and more than ninety percent of women reported an

\(^{167}\) 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. EVE BIZAWA ET AL., NAT’L INST. OF JUSTICE, NO. 181,427, RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING: FINAL REPORT (1999), available at http://www.ncjrs.org/pdffiles1/nij/grants/181427.pdf.


\(^{169}\) One of Lenore Walker’s groundbreaking works about domestic violence suggests that the dynamic of battering relationships includes dominance, power, and control. LENORE WALKER, THE BATTERED WOMAN (1979).

\(^{170}\) See, e.g., N.Y. CRIM. PROC. LAW § 530.12(14) (McKinney Supp. 2004) ("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.")

\(^{171}\) 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 199 and accompanying text.

\(^{172}\) 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).


\(^{174}\) See, e.g., MINN. STAT. § 518B.01(14)(b); MISS. CODE ANN. § 93-21-21 (2003); W. VA. CODE § 48-27-902.
increase in emotional well-being and security.\textsuperscript{175} Other studies have resulted in similar findings.\textsuperscript{176}

Further, civil orders of protection are far more comprehensive 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.\textsuperscript{177} They can also require that an abuser enter drug, alcohol, anger-management or batterer's education counseling or that the abuser surrender firearms. They can issue orders regarding the possession and use of shared residences, automobiles, or other personal effects or can order the abuser to vacate a shared residence.\textsuperscript{178} They also can require that the abuser pay the mortgage or rent on the victim's residence or pay for victim's counsel.\textsuperscript{179} 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.\textsuperscript{180} Also, most states have a catch-all provision that allows courts discretion to fashion additional remedies specific to each victim.\textsuperscript{181} In contrast, statutes governing orders of protection issued in criminal court are usually limited in their remedies, or at least they do not delineate the relief that the court is entitled to provide. 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.\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{175} Keilitz et al., \textit{supra} note 168, at 55.
\item \textsuperscript{177} See, e.g., \textit{COLO. REV. STAT.} § 13-14-102(15)(e) (2003) (allowing the 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); \textit{IND. CODE} § 34-26-5-9(5) (2004); \textit{MD. CODE ANN.}, \textit{FAM. LAW} § 4-506(6)(d)-(9) (2003).
\item \textsuperscript{178} See, e.g., \textit{COLO. REV. STAT.} § 13-14-102(15)(c); \textit{IND. CODE} § 34-26-5-9(b)(4), (5); \textit{MD. CODE ANN.}, \textit{FAM. LAW}§ 4-506(3), (12).
\item \textsuperscript{179} See, e.g., \textit{IND. CODE} § 34-26-5-9(c)(3) (2003).
\item \textsuperscript{180} \textit{Id.}; \textit{KAN. STAT. ANN.} § 60-3107; \textit{MD. CODE ANN.}, \textit{FAM. LAW} § 4-506(4)(d) (Supp. 2003).
\item \textsuperscript{181} See, e.g., \textit{ALASKA STAT.} § 18.66.100(c)(16) (Michie 2002) (providing that a protection order may "order other relief the court determines necessary to protect the petitioner or any household member"); \textit{COLO. REV. STAT.} § 13-14-102(15)(f) (stating that a court may issue an order of protection with "[s]uch other relief as the court deems appropriate").
\item \textsuperscript{182} Illinois, for instance, does not have a statute allowing the court to issue criminal orders of protection in connection with any ongoing criminal case. Instead, criminal protection orders are available only in certain cases. For example, 720 \textit{ILL. COMP. STAT.} 5/12-30 (West 2003) defines the crime of violation of a protection order as including only violation of domestic violence protection orders. As a result, if a person does not fall within the state's definition of protected person under the domestic violence statute, a criminal order of protection is unavailable. A prosecutor may seek a protection order in criminal court under the bail statute. \textit{Id.} § 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
Civil protection orders can more closely align the interests of the state with those of the victim. This serves several goals. First, assignment of interests may increase a victim’s participation in the case. A victim may not wish her abuser to face criminal charges. She may need the abuser’s continued financial support, she may fear retaliation stemming from criminal charges, or she may simply want to end the violence but not the relationship. If she seeks the broader remedies that civil court offers, she 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.

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 criminalize 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, official 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 public court, and the court’s issuance of that order, sends the message that the violence is unacceptable. Additionally, the combination of a victim seeking sanctions because of an order’s violation, and the police or court issuing those sanctions, sends a stronger public social message that domestic violence is intolerable.

Civil orders of protection may also be less costly than criminal remedies, both for victims and for the courts. 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. A civil protection order hearing will often be less time-consuming for the victim and less expensive for the state than criminal proceedings. A temporary civil order of protection is typically granted after a victim files a

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stepchild does not meet the definition, nor does a victim of stranger sex assault. Illinois recently passed a separate civil statute, effective January 1, 2004, which allows victims of sexual assault to seek a civil order of protection regardless of their former relationship with the assailant. See 740 ILL. COMP. STAT. 22/213.


184. See supra note 23.

185. For a discussion of the distinction between the “public” and “private” spheres, and its effect on victims of domestic violence, see Elizabeth M. 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 suggests 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.

186. BUZAWA & BUZAWA, supra note 22, at 237.


188. BUZAWA & BUZAWA, supra note 22 at 237.
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.

B. Prevention of Repeated 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 found that a protection order did not reduce the likelihood of subsequent violence,189 more recent studies have reported that filing for a protection order resulted in a significant reduction in future abuse. In one such study, the researchers studied thirty women who had obtained protection orders in Massachusetts.190 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.191

In a 1999 study, researchers concluded that victims who filed for protection orders experienced a sixty-six percent decrease in abuse.192 The same study concluded that permanent protection orders resulted in a sixty-eight percent decrease in violence, while temporary protection orders resulted in a fifty-two percent decrease.193 Most recently, in 2003, a study revealed that victims who obtained and maintained civil protection orders were safer than those without them in the five-month period after they were initially threatened.194 In the four months following that period, the effect of the protection order grew, and women who maintained their orders were less likely to have been sexually

189. Richard A. Berk et al., Mutual Combat and Other Family Violence Myths, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 207 (David Finkelhor et al. eds., 1983); Grau et al., supra note 32, at 21-25; Horton et al., supra note 176, at 272; Waul, supra note 7, at 54. The problem with most of these studies is their lack of control groups. As a result, it is impossible to know whether the number of victims who were re-victimized is significantly different from the number of victims who have suffered abuse, but have not secured an order of protection. Also, while most of 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 still would have escaped further abuse had they not received an order of protection. The Grau study did use a control group, however, and concluded 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 et al., supra note 32, at 24 tbl.3 (finding that fifty-four percent of victims without protection orders experienced re-abuse, while forty-four percent 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. (finding that sixty-five percent without protection orders were re-abused, while sixty-seven percent with protection orders were re-abused).

190. Chaudhuri & Daly, supra note 20, at 230-32.

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

192. Carlson, supra note 35, at 214 tbl.II. This 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.

193. Id. at 214.

194. Holt et al., supra note 13 (conducting an interview study of 448 women over a period of nine months).
abused or injured or to have received medical care for their abuse.\textsuperscript{195} 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 victim.\textsuperscript{196}

Although most studies about the "effectiveness" of civil orders of protection focus on the prevention of future violence, there are additional arguments for why civil protection orders accomplish their goals, and why, in addition to criminal charges and criminal protection orders, they should be available to all victims. More scientific study of these other benefits is needed.

C. 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 not only to punish violence, but also to prevent it from escalating. Once an order is in place, its violation usually constitutes its own criminal offense, or it subjects the violator to penalties for criminal contempt.\textsuperscript{197}

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.\textsuperscript{198} Most states provide for the arrest of abusers who violate a civil order without a warrant. As a result, the police are more likely to arrest, and prosecutors are more likely to prosecute those acts that might otherwise be characterized as too minor to merit their attention.\textsuperscript{200} At least one study has
shown that arrests for protection order violations reduce the severity of future violence.\textsuperscript{201}

An abuser need not necessarily commit an act that would constitute a crime in order 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. By eliminating this communication and contact, it may be easier to deter an abuser from escalating violent conduct. Further, civil orders can provide terms unavailable in criminal court, and these may also form the basis of violation proceedings. For instance, the abuser may refuse to pay child support or medical benefits in an attempt to intimidate the victim. Child support may be unavailable in a criminal order of protection, but with a civil order, the abuser’s conduct may result in a new violation chargeable in criminal court or through contempt proceedings.

Protection order violations may be easier to prove than new substantive crimes. For example, 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 is to prove an underlying crime like assault or harassment. Additionally, in several states, repeat violations of civil orders of protection result in increased penalties and mandatory jail time.\textsuperscript{202} Also, several states increase penalties for crimes that also violate an existing protection order.\textsuperscript{203} Obviously, to take advantage of these increased penalties, 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,\textsuperscript{204} the threat and use of the penalties associated with protection order violations can serve as an additional deterrent to violence escalation and can allow the protective powers of the state

\textsuperscript{201} Adele Harrell & Barbara E. Smith, \textit{Effects of Restraining Orders on Domestic Violence Victims, in DO ARRESTS AND RESTRAINING ORDERS WORK?}, supra note 33, at 214, 234. This interview study showed 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 that other types of less severe abuse would recur. \textit{Id.}

\textsuperscript{202} See, e.g., HAW. REV. STAT. § 586-11(a) (2004) (imposing minimum forty-eight hours jail for first offense, and minimum of thirty days for the second); 720 ILL. COMP. STAT. 5/12-30(d) (2004) (making repeated violations of civil protection orders a Class Four felony); IOWA CODE § 236.14 (2001); TEX. PENAL CODE ANN. § 25.07 (Vernon 2003) (categorizing a conviction for protection order violation the third time as a Class Three felony along with violations of a protection order by assault or stalking); WASH. REV. CODE § 26.50.110(5) (2003) (making the third violation of a protection order a Class C felony regardless of whether the previous convictions involved the same victim).

\textsuperscript{203} See, e.g., N.C. GEN. STAT. § 50B-4.1(d) (2003) ("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.").

\textsuperscript{204} See Harrell & Smith, supra note 201, at 230 (showing that patterns of violence and abuse appeared to recur when measured by the history of abuse during the year before the restraining order).
to aid a victim before she is subject to more serious assaults.

D. Conclusion

Civil orders of protection provide benefits to domestic violence victims that are distinct from and can supplement the remedies and protections available in criminal court. The civil system in both New York and in other states offers 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 escalation. Finally, civil orders provide intangible benefits as well: They empower victims who may otherwise feel powerless, they help the state to send the message that domestic violence is intolerable, and they provide a less expensive 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 Part provides a historical explanation for New York’s existing system and argues that it must be changed.

V. NEW YORK’S BIFURCATED SYSTEM: A HISTORICAL EXPLANATION

New York’s system has become outdated, unresponsive, and inadequate to protect victims of domestic violence. As discussed, New York’s family and criminal court systems treat victims differently depending on whether they meet the criteria for “family and household” members and “family offenses.” Victims who can satisfy the dual inquiry are entitled both to civil protection and heightened protection in criminal court. Those who fail either inquiry are limited to protection in the form of a standard criminal order of protection; they are denied the additional benefits and protections that civil and family offense criminal orders provide.

New York’s bifurcated system denies protection to victims in two important ways. First, New York’s definition of “family and household” member excludes a 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 those, such as former stepchildren or former foster children, who were once related by a marriage that has ended.205 Second, New York’s definition of “family offense” is problematic because it is highly specific and

excludes a large number of acts that can constitute domestic violence. While some of the excluded crimes are less violent, most of the excluded crimes, such as sex offenses, are much more violent. 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 comes from the 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 instead of the greater protections that a “family offense” criminal order provides.

This bifurcated system is what remains of New York’s pioneering voyage into the domestic violence realm. The system was created in the 1960s when “family offenses” were in the exclusive jurisdiction of the family courts. This was a time when domestic violence was thought to be “private” such that family court was the proper venue to handle the problems of domestic violence within the private confines of the family. The goal was to keep traditional families together.

However, a policy shift took place that has now rightly focused attention on ending violence. But currently, only some victims are entitled to adequate 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.

A. Building a Bifurcated System: The Exclusive Original Jurisdiction Provisions

Article Eight of the Family Court Act, entitled “Family offense Proceedings,” was introduced in 1962. As discussed above, the legislature intended to decriminalize domestic violence and to put related issues in a court that was supposedly well-suited and uniquely-qualified to solve what was then considered a private, family matter. Section 811 of Article Eight stated that


207. The drafter’s report of original chapter 686 of the Family Court Act, 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: 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 section’s purpose was to help “preserve the family” and to provide “practical help”:

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.208

The original version of the statute gave exclusive original jurisdiction to the family court “over any proceeding concerning acts which would constitute disorderly conduct or assault between spouses or between parent and child or between members of the same family or household.”209 In 1969, in addition to disorderly conduct and assault, the legislature added harassment, menacing, reckless endangerment, and attempted assault to the crimes over which the family court had exclusive jurisdiction.210

The Family Court Act changed the crimes it covered into “family offenses” when committed against family or household members, and the criminal court could hear “family offenses” only if the family court transferred the case.211 This procedure basically decriminalized family offenses. The family court’s discretionary transfer power was used in just two percent of the 18,511 petitions that were filed in 1971-72, and the 17,277 petitions filed in 1972-

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.

Id. at 172 (quoting Family Court Act, Report of Joint Legislative Committee on Court Reorganization, 1962 N.Y. Laws 3428, 3444)

208. Family Court Act of 1962, at 2310.

209. Id.


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73. But this act also created the only civil means short divorce for victims of domestic violence to obtain civil protection orders.

B. The Early Years: Cohabitants as "Members of the Same Family or Household"

In the original version of the statute, the expression "members of the same family or household" was left undefined. 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 abusers advocated this more expansive definition of family or household to avoid the sanctions of criminal court.

For instance, in People v. Dugar, 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 lived with them as a single domestic unit, they were of the same "household." Because they were of the same household, he argued, jurisdiction in criminal court existed only if the case was transferred from family court, which otherwise had the exclusive right to settle the dispute. 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." But, the court went on to observe:

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.

212. Id. at 359; see also Peter Wessel, Jurisdiction over Family Offenses in New York: A Reconsideration of the Provisions for Choice of Forum, 31 SYR. L. REV. 601, 610 (1980).
213. See Family Court Act of 1962, at 2209.
215. Id. at 154.
216. Id. at 155.
217. Id. at 153.
218. Id. 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.
It seems the court in *Dugar* was well-meaning in 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 resolution was a double-edged sword. *Dugar* was the first case to decide whether cohabitants were covered by the family court statute. While the court seemed willing to consider cohabitant relationships as functionally and legally the same as marital ones, and seemed comfortable with the conciliatory purposes of family court, the court paved the way for more abusers to commit violent acts against cohabitants only to ask the criminal court to dismiss their cases on jurisdictional grounds.\(^{219}\)

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 that such reasoning would provide to undeserving members of "immoral" unions.\(^{220}\) 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.\(^{221}\)

Here, the court recognized the important role that civil orders of protection play in ending violence, especially in cohabitation relationships. From its statement

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219. See, e.g., People v. Johnson, 265 N.Y.S.2d 260 (Dist. Ct. 1965) (transferring an indictment for second-degree assault to family court where victim and defendant had held themselves out as husband and wife).

220. See, e.g., People v. Ostrander, 295 N.Y.S.2d 293 (County Ct. 1968). There, the court refused to dismiss an indictment for first degree assault where the defendant, a woman 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 297. In rejecting *Dugar's* reasoning, the court explained that "if a literal interpretation of the word, 'household' were adopted, . . . Article 8 of the Family Court Act would be available to homosexuals living together as husband and wife, and polygamists." *Id.* at 296 n.1. Also, in *Best v. Macklin*, 260 N.Y.S.2d 219 (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 "[i]t is the public policy of this State not to place children in a situation which would impair their morals." *Id.* at 221.

221. People v. James, 287 N.Y.S.2d 188 (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).
that the need for protection in non-marital relationships is “too self-evident to require elucidation,” the court recognizes that members of non-marital relationships may be more willing to assault their partners. While difficult to gauge, some studies suggest that this is, in fact, still the case.\textsuperscript{222}

Ultimately, the question of whether family court had jurisdiction over cohabitants was resolved by New York’s Court of Appeals in \textit{People v. Allen}.\textsuperscript{223} There, the court held that only members of a solemnized marriage or a “recognized”\textsuperscript{224} common-law union were “family or household” members for purposes of civil protection order jurisdiction. Specifically, the court held that the primary purpose of the Family Court Act, namely family cohesion, was inapplicable to non-marital relationships, that the state had no interest in maintaining.\textsuperscript{225}

C. The “Family Offense” Conundrum

At the same time the courts were addressing what types of families belonged in family court, the courts were also facing questions about what sorts of cases should be dismissed from criminal court. As stated, in 1964, all cases between family or household members that involved the “family offenses” of disorderly conduct, assault or attempted assault, harassment, menacing, or reckless endangerment first had to be filed in a family court that seemed unwilling to transfer its cases to the criminal division.\textsuperscript{226} Abusers were using the family court original jurisdiction provisions more frequently, and in more violent cases, to request that their criminal cases be dismissed.

More interesting than the specific grounds on which the \textit{Allen} court ruled to exclude cohabitants from family court were the specific criminal cases it refused to dismiss. Like \textit{Dugar}, \textit{Allen} dealt with defendants who were asking the court to dismiss their criminal cases. But unlike \textit{Dugar}, whose defendant had committed misdemeanor assault, \textit{Allen} dealt with far more violent offenses. All three defendants had already been convicted and sentenced for 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 girl friend with an

\textsuperscript{222} See Klein and Orloff, \textit{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).

\textsuperscript{223} 261 N.E.2d 637 (N.Y. 1970).

\textsuperscript{224} The court specifically refused to “recognize” cohabitation relationships: “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.” \textit{Id.} at 640.

\textsuperscript{225} Id.

\textsuperscript{226} See \textit{supra} notes 210 & 212 and accompanying text.
He had been sentenced to four years imprisonment. It is not a stretch to think that perhaps the *Allen* court was also concerned that the defendants who were convicted and sentenced for these crimes would escape criminal scrutiny altogether.

Later courts also excluded other more violent crimes from the jurisdiction of the family court by limiting the list of "family offenses" through creative statutory interpretation. In *Whiting v. Shepard*, a defendant who was accused of murdering his four month-old daughter argued that his case should be transferred to the family court. The court denied the request, holding that even though assault is a basic element of the crimes of murder and manslaughter, these violent offenses were not within the family court's exclusive jurisdiction, even when committed by one family member against another. The court relied heavily 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. . . . [T]he Legislature certainly did not intend that these crimes should come within the jurisdiction of the Family Court.

Instead, the court explained, "[t]he 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."

However, the court also 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 court's "practical help." In *People v. Bronson*, a husband threatened he would kill his wife that night. He then attempted to run over her with his truck. The grand jury indicted the defendant on charges of 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 hold that, like with murder, even though assault was a basic element of

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229. *Id.* at 416.
230. *Id.*
231. *Id.*
233. The court noted that the victim was the defendant's "alleged" wife, but did not reach "the validity of the ceremonial marriage." *Id.* at 216, 218.
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attempted murder, it did not bring it within the list of family offenses “even though such offenses may be committed between spouses.” The court held that because the defendant was originally charged with attempted murder, the fact that the court later added first degree assault to the charge was inapposite. However, 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 sexual assaults even though they involved family or household members. Again, the court seemed concerned with keeping more violent crimes in criminal court. In People ex rel. Doty v. Krueger, 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” 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.”

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 case 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 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.”

However, the realities of a system’s failings that separated some “serious”

234. Id at 217.
236. Id. at 583.
237. Id.
238. 282 N.Y.S.2d 481, 484-85 (1967) (internal citations omitted). 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.
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 did not protect women from further violence and even death.\(^\text{239}\) As reform efforts began to intensify 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 "had the net effect of giving an abusing spouse a practical license to continue assaults."\(^\text{240}\)

D. The Bifurcated System Completed: Evolving Toward Ending Violence

Changes to the Family Court Act and the accompanying criminal statutes have been slow and piecemeal, resulting 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.\(^\text{241}\) That year, in what ultimately proved an awkward change, the statute was amended to allow concurrent jurisdiction in the family and criminal courts, but only until victims chose where to file. Once they chose their forum, they could not file in the other.\(^\text{242}\)

Also in 1977, the Family Court Act's provisions relating to the definition of "family or household member" underwent change. Adopting the Allen court's formulation, 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 to the second degree."\(^\text{243}\) However, women's advocates complained that this definition was too narrow.\(^\text{244}\) The main complaints were that the definition excluded formerly married spouses and informal or meretricious relationships, and that it even excluded such relationships when they had produced children.\(^\text{245}\)

To further facilitate the process of allowing victims to proceed in criminal court, the legislature officially named the list of crimes in the Family Court Act

\(^{239}\) Besharov, \textit{supra} note 24, at 173.


\(^{241}\) \textit{Daniel T.}, 408 N.Y.S. at 215.

\(^{242}\) 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." Act of July 19, 1977, ch. 449, § 1, 1977 N.Y. Laws 632, 633. 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, \textit{supra} note 24, at 181.

\(^{243}\) \textit{Id}.

\(^{244}\) See Besharov, \textit{supra} note 24, at 184-85.

\(^{245}\) \textit{Id}.
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“family offenses” and passed a statute to deal with victims of such “family offenses” in criminal court. In 1977 it passed section 530.1,246 “Protection for victims of family offenses,” which incorporated the same definitions of “family or household member” found in the Family Court Act.247 It provided a system by which the criminal court could issue protection orders in cases involving family members and involving the limited list of “family offenses.”248 A corollary statute, providing for orders of protection for victims of non-family offenses, was enacted in 1981.249 It provided for the criminal court to issue less comprehensive “non family offense,” or standard, criminal orders of protection to victims who were not victims of the delineated family offenses, or who were not a “family or household member” of the abuser.250 These two different statutes that handle the different classifications of crimes and victims remain in effect today.251

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 attempted murder, and assault in the first degree—assault with a deadly weapon.252 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.253

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. Additionally, it sent the message that the same acts when committed against members of the same family or household were “family offenses,” but when committed against a non-family member were real crimes.

Also in 1981, section 811 of the Family Court Act, which stated the Act’s intent about “practical help” and the importance of family cohesion, was

246. This provision now appears as section 530.12.
248. Id.
250. Id.
251. Id. §§ 530.12, .13 (McKinney Supp. 2003).
252. Besharov, supra note 24, at 181.
repealed.\textsuperscript{254} Presumably, this was meant to reflect a shift toward a focus on ending violence. Section 812(b) 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."\textsuperscript{255} The legislature stated "that the 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."\textsuperscript{256} But, the problem was still the jurisdictional provisions, since once a victim chose family court, the criminal court lost jurisdiction.\textsuperscript{257}

As a result, the legislature began adding and deleting family offenses from the list, carefully excluding the most violent crimes from the list to protect criminal court jurisdiction. The legislature was careful to use the same language as the Penal Law so that the offenses were tied to existing definitions. As of 1994, the statute listed the following crimes: disorderly conduct, harassment in the first and second degree, reckless endangerment, menacing in the second and third (but not the first) degree, assault in the second and third (but not the first) degree, and attempted assault between members of the same household or former spouses.\textsuperscript{258}

In 1994, the Family Court Act was amended once again 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 seventy-two hours after she filed her petition.\textsuperscript{259} In making this change, the legislature restated its commitment to ending violence, and it minimized any focus on family cohesion. Instead, the goal was to end the violence. In support of this position, the legislature called domestic violence "a crime [that] destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members."\textsuperscript{260} 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.\ldots{} It 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.\textsuperscript{261}

Despite the evolution of the law in New York, the legislature explained that "death and serious physical injury by and between family members continues

\begin{itemize}
\item \textsuperscript{255} Act of July 7, 1981, § 14, at 831.
\item \textsuperscript{256} Besharov, \textit{supra} note 24, at 174.
\item \textsuperscript{257} \textit{See supra} note 242 and accompanying text.
\item \textsuperscript{258} Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, § 7, 1994 N.Y. Laws 786, 787
\item \textsuperscript{259} \textit{Id.} at 789.
\item \textsuperscript{260} \textit{Id.} at 786.
\item \textsuperscript{261} \textit{Id.}
\end{itemize}
unabated. The victims of family offenses must be entitled to the fullest protections of our civil and criminal laws."\(^{262}\) The intent was not to normalize domestic violence, but to condemn its more serious forms in public.\(^{263}\)

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.\(^{264}\)

Nevertheless, the exclusive original jurisdictional provisions functionally remained in effect because the choice of forum was still irrevocable after seventy-two hours. As a result, some acts were crimes while others were still merely "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 address domestic violence were only 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 had been 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.\(^{265}\)

The choice of forum was not eliminated until 1996, when the criminal court was given concurrent jurisdiction over all "family offenses."\(^{266}\) In 1999, the

\(^{262}\) Id.

\(^{263}\) Specifically, the legislature stated:

A great deal of progress has been achieved in the effort to heighten public awareness about domestic violence and to provide services for affected 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.

\(^{264}\) Id.

\(^{265}\) Id. at 787.

\(^{266}\) N.Y. PENAL LAW § 215.51 (McKinney 1999). The language of section 215.51 was amended in 2003 to incorporate previous convictions of first degree criminal contempt. Id. § 215.51 (McKinney 2004). This provision does not 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 Assemb. B. 8999, 2003 N.Y. Laws 1844. 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. 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. Id. § 215.52.

\(^{266}\) The ultimate election requirement’s elimination did not eliminate the district attorney’s
year the stalking offenses were created, the legislature added to the list of "family offenses" first, second, third and fourth degree stalking. 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 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 share a child. 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 Services Law, the Domestic Violence Prevention Act. 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 over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such 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] have resulted in . . . injury or have created a substantial risk of physical or emotional harm . . . [and] such act or acts are or are alleged to have been committed by a family or household member.

Not only does this definition include additional crimes such as kidnapping, attempted murder, and all forms of menacing and harassment, but the definition of family or household member is much more expansive. It not only includes the same individuals as those under section 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 household" or "any other category of individuals deemed to be a victim of domestic violence as defined by the discretion to decide not to pursue criminal charges against a defendant in criminal court. N.Y. CRIM. PROC. LAW § 530.12(14) (McKinney Supp. 2004).

268. Id.
269. N.Y. SOC. SERV. LAW §§ 459-a to 459-g (McKinney 2003).
270. Id. § 459-a(1).
271. Notably, the statute does not list sex crimes and stalking crimes, but presumably the statement that the list is non-exhaustive would seem to encompass all crimes that could be characterized as domestic violence.
272. N.Y. SOC. SERV. LAW § 459-a(2)(e).
department in regulation."273 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."274 Consequently, this definition includes more crimes that render a domestic violence victim eligible for services, and it includes virtually all forms of intimate relationships.275

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 consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another; and (d) persons who have a child in common, regardless [of] whether such persons have been married or have lived together at any time."276 Almost yearly, there have been unsuccessful attempts to extend the definition at least to include unmarried cohabitants.277 The courts continue to interpret the jurisdictional requirement strictly.278 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 has affected both the civil and criminal systems.

VI. A CALL FOR REFORM

Today, the focus of civil protection orders in family court is not family

273. Id. § 459-a(2)(f).
275. Some relationships may still be excluded, however, such as persons formerly related by marriage if they did not share a household, or members of a dating relationship who do not have access to each other's household.
277. See, e.g., S.B. 5438, 220th Leg., Reg. Sess. (N.Y. 2003) (seeking to expand definition to "persons residing together continually or at regular intervals, currently or in the past"); Assemb. B. 988, 214th Leg., Reg. Sess. (N.Y. 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."); S.B. 5883, 198th Leg., Reg. Sess. (N.Y. 1981) (seeking to expand definition to include "persons who are residing together as though they were married to one another"); Besharov, supra note 24, at 186.
278. See e.g., Gina C. v. Stephen F., 576 N.Y.S.2d 776, 777 (Fam. Ct. 1991) ("These proceedings and the relief they provide are purely statutory and must be strictly construed by the Court.").
cohesion or "practical help." Instead, the purpose of such orders is to stop the violence and to prevent it from escalating. Given this new focus and the shift in the perceptions about domestic violence generally and civil orders of protection 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 accorded 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 within abusers' "families or households" are not adequately protected because of many crimes that should be included in the list of "family offenses" are omitted. Victims of these crimes cannot seek civil protection but must rely solely on the criminal system. Standard criminal protection orders, while providing some shelter, 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 of married couples apply equally to members of other intimate relationships. Civil orders of protection, unlike criminal ones, aim to prevent and deter future acts of violence. There is little reason to deny civil orders of protection to all members of intimate relationships and to provide their benefits to all 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

When the family court has jurisdiction over the "family offense" proceeding, the civil system works. It provides an extra remedy for the victim in addition to her options 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 can pursue civil contempt proceedings herself. Also, if the abuser violates the order, he is subject to additional criminal and civil penalties not only due to the underlying act, but also due to the fact that he has 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.

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 great number of crimes—both more violent and less so—that should be characterized as crimes of domestic violence. 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; first degree assault; first degree menacing; aggravated harassment; reckless endangerment; kidnapping; coercion; unlawful imprisonment; attempted murder; criminal mischief; arson; criminal trespass; burglary; robbery; eavesdropping; unlawful surveillance; and weapons crimes. 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 if she was a victim of a crime not listed as a family offense. Instead, she must avail herself of the remedies available only in criminal court while hoping 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, a victim of domestic violence is economically dependent on her abuser. 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, but this is not true in criminal court. Standard 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, these remedies will not usually specifically address future violent conduct, nor is the

279. 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).

280. 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).

281. Id. § 120.10.

282. Id. § 120.20-25.

283. See, e.g., id. § 135.60 (penalizing coercion in the second degree, which is compelling or inducing 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 injure the coerced person).

284. Id. § 250.05.

285. Id. § 250.40-50.

286. See id. art. 265.

287. N.Y. FAM. CT. ACT § 842 (McKinney 2004).
criminal system adequately equipped to address the violation of such orders.

Finally, if denied a remedy in civil court, the victim is denied all benefits that civil orders of protection provide over, and in addition to, those available in criminal court. The victim may wish to proceed first in civil court to avoid subjecting the abuser to criminal sanctions: she may need his continued financial support, or she may fear retaliation if she should pursue criminal charges. Also, 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 control the case rather than to entrust 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. The list is unduly restrictive; it undermines the seriousness of the acts that are included, and excludes entirely the acts that are not. The legislature should amend the statute to 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 or threatened acts constituting a crime in violation of chapter 40 of the consolidated laws of New York, or any municipal ordinance violation, including acts or threatened acts of violence or coercion regarding the children of either party, or any act or pattern of acts, including threatened acts, 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.

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, this statute incorporates all possible acts of domestic violence.

Essentially, that the definition of family offenses remains so limited is more of a historical accident that resulted from reform that was piecemeal, slow, and restricted by the exclusive jurisdiction provisions. In the 1960s, the focus was on familial cohesion. That is no longer the case. While the legislature’s desire then may have been to deal with less serious forms of violence in family court,

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288. See Part III, supra.

289. Again, this is not to suggest that the state is divested of its right or ability to pursue any appropriate charges in criminal court against an alleged abuser. Instead, it is suggested that victims should have the ability to avail themselves of the additional benefits that civil court provides.

290. This proposed statute is loosely based on COLO. REV. STAT. § 13-14-102 (2003). Colorado's law 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. Id. “Domestic abuse” is defined as “any act or threatened act of violence” committed against members of protected relationships or any act or threatened act of violence against the children of either of the parties. Id. § 13-14-101.
the focus now is on ending violence and on 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 protections provided in civil court. The historical basis for this system is plain: It was set up in a different era. Now, because the state can seek 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 of—and in some cases because of—the nature of the crime.

Other states should similarly amend their domestic violence statutes to capture the remaining acts that can constitute domestic violence. There is little reason to deny a victim of sexual assault, for example, a civil protection order simply because she was a victim of the wrong type of crime. Many of the existing schemes remain outdated and inflexible. Holding steadfast to outdated definitions of domestic violence undermines the seriousness of the crimes included, and—with little rationale—denies protection to deserving victims. New York should take the lead in a national campaign to reform domestic violence laws to include all types of domestic violence crimes.

B. Definition of “Family or Household Member”: Continued Rationales and Problems

A sad truth is that acts of domestic violence plague all forms of intimate relationships. These vicious acts are not limited to married couples or divorced parents. While New York may be wary of actually redefining “family or household” to include nontraditional relationships, no sound reason exists for failing to extend protection to all members of intimate relationships, especially in light of the governmental interests that support civil orders of protection. Accordingly, the legislature must revisit the scheme that is currently in place to 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. 292

A statute like this would serve several goals. First, it would bring New York into agreement with the forty-nine other states that currently allow protection to cohabitants. Second, it would bring New York into agreement with the majority of states that provide protection to members of dating relationships. 293 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 notion is false. A large amount of evidence suggests that domestic violence pervades not only 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

292. 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 dating relationship. . . . ‘Dating relationship’ means a social relationship of a romantic or intimate nature.”

293. While a discussion of such orders is 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, stalking, or harassment 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 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,” “harassment,” or “sex assault or abuse.” See, e.g., COLO. REV. STAT. § 13-14-102(1).
in particular concluded that unmarried men who live with their partners were more violent to their partners than their married counterparts.\textsuperscript{294} According to the New York State Division of Criminal Justice Services, in 2000 alone, there were more than 23,000 cases of domestic violence among unmarried couples living together.\textsuperscript{295} Studies also suggest that women living with men at the time of the violent incident that led 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.\textsuperscript{296}

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.\textsuperscript{297} Studies have concluded that one out of ten high school students experiences physical violence in dating relationships,\textsuperscript{298} while other surveys place the figure as high as twenty-eight percent\textsuperscript{299} or thirty-nine percent.\textsuperscript{300} A study of emergency room records found that seventy-two percent of domestic violence victims did not live with their abusers.\textsuperscript{301}

Partner abuse is also a serious problem in gay and lesbian relationships.\textsuperscript{302} Same-sex partner abuse is considered the third largest health problem facing gay men.\textsuperscript{303} Estimates set same-sex partner abuse as high as fifty percent,\textsuperscript{304} but the most conservative estimate is twenty percent.\textsuperscript{305} Regardless of the actual numbers of victims and incidents of abuse, it is plain that violence occurs in same-sex relationships,\textsuperscript{306} and the members of such relationships should also be

\textsuperscript{296} Harrell & Smith, supra note 201, at 233.
\textsuperscript{299} Brustin, supra note 57, at 333 (citing BARRIE LEVY, IN LOVE AND IN DANGER: A TEEN’S GUIDE TO BREAKING FREE OF ABUSIVE RELATIONSHIPS 28 (1993)).
\textsuperscript{300} Id.
\textsuperscript{303} ISLAND & LETELLIER, supra note 302, at 1.
\textsuperscript{304} Id. at 13.
\textsuperscript{305} Id. at 267-68.
\textsuperscript{306} See Nancy Hammond, \textit{Lesbian Violence and the Reluctance to Identify Abuse, in NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING} 190 (Kerry Lobel ed., 1986); Bricker, supra note 305, at 1388; Klein, supra note 15, at 834; Ruthan Robson, \textit{Lavender Bruises: Intra-Lesbian
given protection in New York State.

A second possible government rationale for failing to amend the statute is a concern about opening the floodgates to a large amount of people thus overburdening the family courts. 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 constituted only about eight percent of its case load. While this number may go up somewhat if the relationship provisions are expanded, it should not create a large burden on this court. Also, an overburdening of family court is not an adequate rationale to deny some victims equal 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.” Acts of domestic violence in relationships other than marital ones can 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 cause a greater 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.
By failing to protect more victims of domestic violence, the legislature is actually imposing more costs on society. 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.” 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 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 ensue. However, there are procedures and penalties in place for those who file false affidavits. Also, 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, aside from personal jurisdiction, venue, and the like, no statutes limit a person’s ability to file civil claims for negligence or breach of contract. The system relies on its own procedural safeguards to filter out meritless claims. Similarly, the procedural safeguards in place in a proceeding for a civil order of protection should serve the same purposes, and they are deserving of the same trust. And the stakes in civil protection order proceedings, such as physical safety, are arguably stronger than in other types of civil actions; therefore, the balance of risks versus benefits would seem to militate in favor of allowing more victims to seek civil orders of protection.

Fifth, the government may believe that it need not extend protection to relationships outside those already defined because the state has an interest in putting its scarce resources toward those relationships it wants to promote, legitimize, and maintain. 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 particularly upon relationships between members of the same-sex, especially in light of the recent debate regarding the legitimacy

in cases in which contact and abuse continue).


312. 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” in the Family Court Act 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, N.Y. L.J., May 31, 2002, at 1; see also Newell, supra note 307 (“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.”).
of gay marriages.\textsuperscript{313}

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 household”\textsuperscript{314} or “unrelated persons who have had intimate or continuous social contact with one another and who have access to one another’s household.”\textsuperscript{315} Consequently, the legislature has little basis on which to stake its claim that it cannot extend protection to same-sex relationships.

The rationales for “family offense” proceedings in family court have undergone a social shift. Historically, those proceedings were intended 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 ending violence. In recognition of this social shift, the legislature moved to criminalize more acts of domestic violence, explaining that:

[V]iolence 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.\textsuperscript{316}

As the momentum of this social shift gained strength, the legislature repealed the provisions regarding the importance of family cohesion and “practical help” and amended the statutes to reflect the new social focus not to keep the family unit intact, but to “stop the violence, end the family disruption, and obtain protection.”\textsuperscript{317} 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.”\textsuperscript{318} Consequently, by its own acts historically, the legislature cannot claim that the purposes of the family offense proceedings are to keep


\textsuperscript{314} N.Y. SOC. SERV. LAW § 459-a(2)(e) (McKinney 2003).

\textsuperscript{315} N.Y. COMP. CODES R. & REGS. tit. 18, § 452.2(g)(2)(vi) (1995).

\textsuperscript{316} Governor’s Bill Memorandum, 1980 N.Y. Laws 1877, 1878; Besharov, supra note 24, at 182.


\textsuperscript{318} Besharov, supra note 24, at 174.
"legitimate" families together; their intent is to end violence.

Also, practically speaking, to the extent that 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 from him. The civil protection order 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 or parental status of the victim.

In other states, similar systems that dole out protection to couples based on their membership in more traditional or "legitimate" relationships also still exist and most likely still exist on similarly outdated rationales: "Practical help" to traditional families and allocation of scarce resources to families that fit a more traditional archetype. But, in light of the modern objective that protection orders serve, to end violence, those rationales no longer withstand scrutiny. Like New York, these states seem to maintain the focus on an outdated goal of keeping traditional families together.

New York was among the first states to provide civil protection orders in a domestic violence context. It should attempt to regain its position as a leader in the area of domestic violence, and it should work to stimulate renewed interest in all states in providing victims of domestic violence with adequate protection. At least in the domestic violence context, New York, like the rest of the country, should revisit its parochial, outdated view of the family unit. The original pioneer in domestic violence law should lead a new nationwide charge to ensure that members of all intimate relationships and victims of all types of domestic violence can access the shelter that civil orders of protection provide.

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 changes in the social view of domestic violence. The focus began to shift from keeping families together to

319. See supra note 32 and accompanying text.
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criminalizing acts of domestic violence and bringing it to public attention. As a result, in an attempt to deal with the tension between the two interests, the legislature created, by 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. It 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 that the civil order of protection statutes serve. It is not at all clear that the legislature can satisfy that burden here.

The rationales for extending coverage of civil orders of protection to all victims of domestic violence are not limited to the borders of New York. The same arguments apply to those states that still adhere to old notions of the family at the expense of the physical safety of wives and non-wives alike. The need for reform, both in New York and nationwide, is plain. Domestic violence does not exist only between the members of relationships that legislatures have sanctioned for protection. Instead, violence cuts across all forms of romantic relationships and across all types of crimes. Victims of violence in those relationships deserve the same protection. Each state should expand its civil protection order laws to ensure that all victims and all types of domestic violence are covered.

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320. 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:

A great deal of progress has been achieved in the effort to heighten public awareness about domestic violence and to provide services for affected 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.

APPENDIX A: THE RELATIONSHIP REQUIREMENTS*

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*Protection for victims Related or Married to their attackers is available in all states.

b. Pregnant
c. Excluding those of the same sex
d. Time-limited
f. Current only
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*Protection for victims Related or Married to their attackers is available in all states.

- g. Any other person with a sufficient relationship to the abusing person as determined by the court
- h. Present spouses of ex-spouses
- i. Only if living as spouses
## APPENDIX B: THE ACT REQUIREMENTS

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ALA. CODE § 30-5-2 (2003). Alabama defines domestic violence “abuse” as the occurrence of one or more of the following acts, attempts, or threats between family or household members” as defined by Alabama penal law: Assault, attempt, child abuse, criminal coercion, harassment, kidnapping, menacing, other criminal conduct, reckless endangerment, sexual abuse, stalking, theft, trespass, and unlawful imprisonment.

ALASKA STAT. § 18.66.990 (Michie 2002). Alaska defines domestic violence as the following offenses between members of protected relationships, or attempts to commit the following offenses as defined by Alaska penal law: crimes against the person, burglary, criminal trespass, arson, criminal mischief, terrorist threatening, violation of protection order, and harassment.

ARIZ. REV. STAT. ANN. § 13-3601 (2004). Arizona defines “domestic violence” as including any of the following offenses, as defined by the penal code, occurring between members of defined relationships: Endangerment, threatening or intimidating; assault and aggravated assault, custodial interference, unlawful imprisonment, kidnapping, criminal trespass, criminal damage to property; interfering with judicial proceedings, disorderly conduct, harassment, stalking, eavesdropping, repeated incidences of domestic violence, and child or vulnerable adult abuse. Other than sex crimes committed against children or vulnerable adults, Arizona’s statutory definition of domestic violence does not include sexual offenses, including “sexual assault of a spouse,” which, despite use or threatened use of force, can constitute a class 1 misdemeanor. See id. § 13-1406.01

ARK. CODE ANN. § 9-15-103 (Michie 2003). Arkansas defines “domestic abuse” as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, assault, or any sexual conduct between members of protected relationships that constitutes a crime under state law.

CAL. FAM. CODE § 6203 (Deering 2004). California defines “abuse” in the context of domestic violence protection orders as any of the following: Intentionally or recklessly causing or attempting bodily injury, sexual assault, placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another, and engaging in any behavior that the state’s protective order statute allows the court to enjoin. These acts include molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, destroying personal property, contacting, coming within a specified distance of, or disturbing the peace of the other party. Id. § 6320.

COLO. REV. STAT. §§ 13-14-101, 13-14-102 (2003). Colorado allows a court to issue a protection order to prevent assaults and threatened bodily harm, “domestic abuse,” emotional abuse of the elderly or an at-risk adult, and stalking. “Domestic abuse” is defined as “any act or threatened act of violence” committed against members of protected relationships or any act or threatened act of

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1. Includes menacing and stalking.

2. For purposes of this table a “catch all” is a provision that defines domestic violence as including any violation of the criminal code, or any act of violence or threatened violence. See, e.g., ALA. CODE § 30-5-2(a)(1)(h) (2003).

3. Indicates whether states adopt the penal code definitions of crimes.
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Violence against the children of either of the parties. To obtain an order, a person must file a complaint “alleging that the defendant has committed acts that would constitute grounds for a civil protection order. Id. § 13-14-102(5). The court may issue a civil protection order if the it finds that an imminent danger exists to the person seeking protection by considering the most recent incident of abuse or threat of harm occurred as well as all other relevant evidence concerning the safety and protection of the persons seeking the protection order. Id. § 13-14-102(4)(a).

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* Idaho Code §§ 39-3604, -6303, (2003) defines “domestic violence” for the purpose of obtaining an order of protection as the “physical injury, sexual abuse or forced imprisonment or threat thereof” against a member of a protected relationship.

IL

750 Ill. Comp. Stat. 60/103, 60/203 (West 2003). Illinois allows a member of a protected relationship to obtain a protection order for “abuse,” which is defined as “physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation.” “[P]hysical abuse” includes “sexual abuse” as well as confinement, sleep deprivation, and conduct creating an immediate risk of physical harm. Id. § 103. “Harassment” is conduct that “would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner,” and includes stalking behavior, and threatened parental interference. Id. “Intimidation of a dependent” is defined as “subjecting a person who is dependent because of age, health or disability to participation in or the witnessing of: physical force against another or physical confinement or restraint of another which constitutes physical abuse as defined in this Act, regardless of whether the abused person is a family or household member.” Id. “Interference with personal liberty” is defined as “committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage.” Id. “Willful deprivation” is defined as “willfully denying a person who because of age, health or disability requires medication, medical care, shelter, accessible shelter or services, food, therapeutic device, or other physical assistance, and thereby exposing that person to the risk of physical, mental or emotional harm.” Id. Illinois also allows victims of sex crimes, regardless of relationship, to obtain orders of protection, but they do not contain the same provisions as domestic violence protection orders. 740 Ill. Comp. Stat. 22/201.

IN

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* Ind. Code § 34-6-2-34.5 (2003) Allows a member of a protected relationship to obtain a protection order for “domestic or family violence,” which is defined as “attempting to cause, threatening to cause, or causing physical harm,” causing “fear of physical harm,” causing “sexual activity by force, threat of force, or duress,” against a member of a protected relationship, or stalking or a sex offense whether or not the stalking or sex offense is committed by a family or household member.

IA

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* Iowa Code § 236.2 defines “domestic abuse” as “committing assault” as defined by the penal code.
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against a member of a protected relationship. The penal code defines assault as an act “intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another,” any “act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive,” or pointing or displaying a firearm toward another. *Id.* § 708.1.

KS: KAN. STAT. ANN § 60-3102 (2003). Kansas defines domestic “abuse” as the following: “Intentionally attempting to cause bodily injury, or intentionally or recklessly causing bodily injury,” “intentionally placing, by physical threat, another in fear of imminent bodily injury,” or engaging in the following acts with a minor under sixteen who is not the offender’s spouse: sexual intercourse or “any lewd fondling or touching.”

KY: KY. REV. STAT. ANN. § 403.720 (Michie 2003). Kentucky defines “domestic violence and abuse” as “physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault” between members of a protected relationship. While Kentucky does not explicitly list offenses against children, its protected relationship definitions include both common children and children of any member of the protected relationship. As a result, any act of “domestic violence and abuse” against a child of one of the members of a qualifying relationship would also qualify as domestic violence. *See id.* § 403.720(2), (3).

LA: LA. REV. STAT. ANN. § 46:2132 (West 2003). “Domestic abuse” includes but is not limited to physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injury and defamation” committed against a member of a protected relationship.

ME: ME. REV. STAT. ANN. tit. 19A, § 4002(1) (West 1998). Maine defines domestic “abuse” as the following acts occurring between members of protected relationships or their children: “attempting to cause or causing bodily injury or offensive physical contact, including sexual assaults” as defined under Maine’s penal code, “attempting to place or placing another in fear of bodily injury through any course of conduct, including, but not limited to, threatening, harassing or tormenting behavior,” “compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage.”

MD: MD. CODE ANN., FAM. § 4-501 (2003). Maryland defines “abuse” as any of the following: an act that causes serious bodily harm or in fear of imminent serious bodily harm, assault, rape or attempted rape, sexual offense or attempted sexual offenses, both as defined under Maryland’s penal code, false imprisonment, and child abuse if the person sought to be protected is the child harmed.

MA: MASS. GEN. LAWS ch. 209A, §§ 1, 3, 4 (2004) defines “abuse” in the context of protection orders as “attempting to cause or causing physical harm,” “placing another in fear of imminent serious physical harm,” or “causing another to engage involuntarily in sexual relations by force, threat or duress.”

MI: MICH. COMP. LAWS § 600-2950(1), (4) (2004). In Michigan, a court may issue a protection order if it has reasonable cause to believe that a person may commit one or more of the following acts against a
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member of a protected relationship: entering onto premises, assaulting, attacking, beating, molesting, or wounding a protected person individual, threatening to kill or physically injure a protected person, removing children from the individual having custody, purchasing or possessing a firearm, interfering with petitioner's efforts to remove petitioner's children or personal property from premises, interfering with petitioner's employment or education, stalking, and any other act or conduct that "imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." Id. § 600-2950(1)(j).

MINN. STAT. § 518B.01(2), (4) (2003). To obtain an order of protection, a member of a protected relationship must allege that the respondent committed one of the following acts of "domestic abuse": physical harm, bodily injury, or assault, the infliction of fear of imminent physical harm, bodily injury, or assault, terrorist threats (essentially menacing), criminal sexual conduct as defined by penal law, or interference with an emergency call. Id.

MO. REV. STAT. §§ 455.010, § 455.020 (2004). Missouri law states that a member of a protected relationship, or a victim of stalking, may obtain a protection order by filing a petition alleging "abuse" or stalking. Id. § 455.020. "Abuse" is defined as the following acts: placing another in fear of physical harm, causing physical harm to another, coercion, harassment, or stalking. Id. § 455.010.

MONT. CODE ANN. §§ 45-5-206, 40-15-102 (2004). Montana allows members of protected relationships to obtain an order of protection if he or she is in reasonable fear of bodily injury, or if he or she is a victim of one of the following offenses as defined by Montana’s penal law: assault and aggravated assault, intimidation, “partner or family member assault,” criminal endangerment, negligent endangerment, assault on a minor, assault with a weapon, unlawful restraint, kidnapping, aggravated kidnapping, arson, stalking, incest, sexual assault, or sexual intercourse without consent. Additionally, Montana allows the families of victims of deliberate homicide or mitigated deliberate homicide to obtain protection orders. Id. § 40-15-102(2)(a).

NEB. REV. STAT. §§ 42-903, -924 (2004). Nebraska’s law allows victims of domestic abuse to file for an order of protection and defines “abuse” as the following acts between members of protected relationships: attempting to or causing bodily injury, placing, by physical menace, another in fear of imminent bodily injury, or sexual conduct that violates Nebraska penal law.

NEV. REV. STAT. 33.018, .020 (2003) A court will issue a protection order if it determines an act of domestic violence occurred or there is a threat of domestic violence. 33.020. “[D]omestic violence” is defined as the following acts between members of a protected relationship: battery, assault, “compelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform,” sexual assault, harassment, stalking, arson, trespassing, larceny, destruction of private property, carrying a concealed weapon without a permit, false imprisonment, unlawful entry of the other’s residence, or forcible entry. Id. 33.018.

N.J. STAT. ANN. §§ 2C:25-19, 2C:25-28(a) (West 2004). In New Jersey, a member of a protected relationship can obtain a protection order by alleging the following acts of “domestic violence” as defined in the penal code: homicide, which includes manslaughter, vehicular homicide, and leaving the scene of an accident, assault, terrorist threats, kidnapping, criminal restraint, false imprisonment, sexual assault, criminal sexual contact, lewdness, criminal mischief, burglary, criminal trespass,
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<td>N.H. REV. STAT. ANN. § 173B:1, :3 (2004). New Hampshire allows members of protected relationships to obtain a protection order for the following acts of “abuse” as defined by the penal code where such acts constitute a “credible threat” to the petitioner: assault, reckless conduct, criminal threatening, sexual assault, interference with freedom, destruction of property, unauthorized entry, and harassment.</td>
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<td>N.M. STAT. ANN. §§ 40-13-2 to -3(B) (Michie 2003). To obtain a civil protection order, a member of a protected relationship must file a petition setting out specific facts showing the “domestic abuse.” Id. § 40-13-3(B). “Domestic abuse” is defined as any incident by one member of a protected relationship against another resulting in physical harm, severe emotional distress, bodily injury or assault, a threat causing imminent fear of bodily injury, criminal trespass, criminal damage to property, repeatedly driving by a residence or work place, telephone harassment, stalking, harassment, or harm or threatened harm to children. Id. § 40-13-2(C).</td>
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<td>N.Y. FAM. CT. ACT § 812 (McKinney 2004); N.Y. CRIM. PROC. LAW § 530.11 (McKinney Supp. 2004). In New York, a member of a protected relationship can obtain a protection order by filing a petition in family court alleging that the respondent engaged in conduct constituting one of the following offenses as defined by the penal code: 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, and stalking.</td>
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<td>N.C. GEN. STAT. § 50B-1 to -2 (2003). A member of a protected relationship may obtain a civil order of protection by alleging acts of “domestic violence against himself or herself or a minor child who resides with or is in the custody of such person.” Id. § 50B-2(a). “Domestic violence” is defined as attempting to cause bodily injury, causing bodily injury, placing the aggrieved party in fear of imminent serious bodily injury or continued harassment, as defined by the penal code, that rises to such a level as to inflict substantial emotional distress, or committing a sexual offense as defined by the penal code. Id. § 50B-1(a).</td>
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<td>N.D. CENT. CODE §§ 14-07.1-01 to -02 (2004). A member of a protected relationship may obtain an order of protection by filing a verified application alleging acts of “domestic violence.” Id. § 14-07.1-02. “Domestic violence” is defined as physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault. Id. § 14-07.1-01.</td>
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<td>OHIO REV. CODE ANN. § 3113.31(A)(1), (C) (Anderson 2003). A member of a protected relationship may obtain an order of protection by filing a petition alleging acts of “domestic violence,” which is defined as attempting to cause or recklessly causing bodily injury, placing another person by the threat of force in fear of imminent serious physical harm or committing stalking as defined in the penal code, or committing any act of child abuse as defined in the penal code.</td>
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|       | OKLA. STAT. tit. 22, §§ 60.1-2 (2003). A victim of “domestic abuse” or harassment at the hands of a member of a protected relationship may apply for an order of protection. Id. § 60.2. “Domestic abuse” is defined as any act of physical harm, or the threat of imminent physical harm, and
APPENDIX B: THE ACT REQUIREMENTS

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“harassment” is defined as a pattern of conduct that seriously alarms or annoys the person, and which would cause a reasonable person to suffer substantial emotional distress. *Id.* § 60.1. A person may seek a domestic violence protection order for stalking and rape regardless of their relationship to the offender. *Id.*

OR. REV. STAT. §§ 107.705, 107.710 (2003). A member of a protected relationship who is a victim of “abuse” and who is in imminent harm of further abuse may apply for a protection order by filing a petition alleging the abuse. *Id.* § 107.710. “Abuse” is defined as the following acts between members of a protected relationship: attempting to cause or causing bodily injury, placing another in fear of imminent bodily injury, or causing another to engage in involuntary sexual relations by force or threat of force. *Id.* § 107.705.

PA. CONS. STAT. §§ 6102, 6106 (2001). A member of a protected relationship may apply for a protection order by filing a petition with the court alleging “abuse.” *Id.* § 6106. “Abuse” is defined as the following: attempting to cause or causing bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault, incest, placing another in reasonable fear of imminent serious bodily injury, false imprisonment as defined by the penal code, physically or sexually abusing minor children, engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. *Id.* § 6102.

R.I. GEN. LAWS §§ 8-8.1-1, -3, 15-15-1, -3 (2003). A member of a protected relationship may apply for an order of protection by filing a complaint alleging “domestic abuse.” *Id.* §§ 8-8.1-3, 15-15-3. “Domestic abuse,” includes the following: “attempting to cause or causing physical harm... placing another in fear of imminent serious physical harm... causing another to engage involuntarily in sexual relations by force, threat of force, or duress. Acts of domestic abuse also include acts against minor children of cohabitants. *Id.* § 8-8.1-1. Presumably, a similar provision specifically addressing the children of other parties was not added because they are already included in the state’s definition of “family or household” member. But, this construction denies the reality that abuse against children can be used as a pattern of intimidation or threats against the mother. By not adding a provision that child abuse constitutes abuse in its own right, a mother can only receive a protection order on behalf of her children. She cannot, under a strict construction of the law, obtain an order of protection for herself under such circumstances. Additionally, the legislature did not add a provision for child abuse against non-common children of members of dating relationships; this creates a potentially dangerous gap in the law.

S.C. CODE ANN. §§ 20-4-20, -40 (Law. Co-op. 2003). Members of protected relationships may file a petition, which “must allege the existence of abuse to a household member.” *Id.* § 20-4-40. “Abuse” is defined as the following acts between members of protected relationships: physical harm, bodily injury, assault, the threat of physical harm, and sexual criminal offenses, as defined by statute. *Id.* § 20-4-20.

S.D. CODIFIED LAWS §§ 25-10-1 to -3 (Michie 2003). To apply for a protection order, a member of a protected relationship must file a petition alleging “domestic abuse.” *Id.* § 25-10-3. “Domestic abuse” is defined as “physical harm, bodily injury, attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury.” *Id.* § 25-10-1.
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TENN. CODE ANN. §§ 36-3-601 to -602 (2003). A member of a protected relationship who has been subjected to, or threatened with or placed in fear of, “domestic abuse” by another member of the relationship, may file a petition for a protection order alleging such abuse. Id. § 36-3-602. “Domestic abuse” is defined as “inflicting or attempting to inflict physical injury on an adult or minor by other than accidental means, placing an adult or minor in fear of physical harm, physical restraint, or malicious damage to the personal property of the abused party.” Id. § 36-3-601(3).

TEX. FAM. CODE ANN. §§ 71.003, .004, .0021, 82.002 (Vernon 2003). A member of a protected relationship may apply for a protection order by alleging “family violence.” Id. § 82.002. “Family violence” is defined as an act by one member of a family or household against another that is “intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault,” child abuse, as defined by the penal code by a member of a family or household toward a child of the family or household, or “dating violence.” Id. § 71.004. “Dating violence” means an act by a member of one dating relationship against another and that is “intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the individual in fear of imminent physical harm, bodily injury, assault, or sexual assault.” Id. § 71.0021. Acts against children of the members of the dating relationship are not covered by the definition of “family violence,” or “dating violence.” Id. §§ 71.0021, .004

UTAH CODE ANN. §§ 30-6-1 to -2, 77-36-1 (2003). A member of a protected relationship who has suffered “abuse” or “domestic violence” or “to whom there is a substantial likelihood of . . . abuse or domestic violence” from another member of the relationship may seek a protection order. Id. § 30-6-2. “‘Abuse’ means causing or attempting to cause a physical harm, or placing another in reasonable fear of imminent physical harm.” Id. § 30-6-1. “Domestic violence” is defined as “any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one [member of a protected relationship] against another.” Id. §§ 30-6-1(6), 77-36-1 “‘Domestic violence’ also means commission or attempt to commit, any of the following offenses by one member of the relationship against another,” each defined in the penal code:

- aggravated assault, assault, criminal homicide, harassment, telephone harassment, kidnapping, child kidnapping, or aggravated kidnapping, mayhem, sexual offenses, stalking, unlawful detention, violation of a protective order or ex parte protective order, any offense against property, possession of a deadly weapon with intent to assault, discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, disorderly conduct, or child abuse.

Id. § 77-36-1(2).

VT. STAT. ANN. tit. 15, §§ 1101, 1103 (2003). A member of a protected relationship may seek relief from “abuse” by filing a complaint. Id. tit. 15, § 1103. “Abuse” is defined as one of the following acts between members of protected relationships: “attempting to cause or causing physical harm[1] . . . placing another in fear of imminent serious physical harm[2] . . . [or] abuse to children as defined by penal law.” Id. tit. 15, § 1101.

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<td>WASH. REV. CODE ANN. §§ 26.50.010, .020 (West 2003). A person may file a petition for a protection order alleging he or she has been the victim of “domestic violence.” <em>Id.</em> § 26.50.020. “Domestic violence” means “physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members... sexual assault of one family or household member by another or... stalking as defined in [the penal code] of one family or household member by another family or household member.” <em>Id.</em> § 26.50.010.</td>
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<td>W. VA. CODE §§ 48-27-202, -403 (2003). A member of a protected relationship may file a petition for a protection order for “domestic violence” or “abuse.” “Domestic violence” or “abuse” are defined as the occurrence of one or more of the following acts between members of protected relationships:... attempting to cause or causing physical harm to another,... placing another in reasonable apprehension of physical harm, creating fear of physical harm by harassment, psychological abuse or threatening acts, committing either sexual assault or sexual abuse as defined in the penal code, and holding, confining, detaining or abducting another person against that person’s will. <em>Id.</em></td>
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<td>WIS. STAT. § 813.12(1), (5) (2003). A person may file a petition that “the respondent engaged in, or based on prior conduct of the petitioner and the respondent may engage in, domestic abuse of the petitioner.” <em>Id.</em> “Domestic abuse” means any of the following by one member of a protected relationship against another: infliction of physical pain, physical injury or illness, intentional impairment of physical condition, sex assault as defined by the penal code, damage to property as defined by the penal code, or a threat to engage in the above acts. <em>Id.</em></td>
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<td>WYO. STAT. ANN. §§ 35-21-102 to -103 (Michie 2003). “A victim of ‘domestic abuse’ may petition the court for an order of protection.” <em>Id.</em> § 35-21-103. “Domestic abuse” means the following acts between members of a protected relationship: physically abusing, threatening to physically abuse, attempting to cause or causing physical harm or acts which unreasonably restrain the personal liberty of another, placing another in reasonable fear of imminent physical harm, or causing a household member to engage involuntarily in sexual activity by force, threat of force or duress. <em>Id.</em> § 35-21-102.</td>
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