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INTRODUCTION

Domestic violence occurs among all races and socioeconomic groups.[1] An estimated four million American women are battered

1. *See generally* MARK A. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST

each year by their husbands or partners.[2] Approximately ninety-five percent of all adult domestic violence victims are women.[3] An estimated fifty percent of all American women are battered[4] at some time in their lives.[5] According to one national survey, violence will

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WOMEN IN KENTUCKY (1980); Angela Browne, *Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3184, 3186 (1992).

2. EVAN STARK ET AL., NATIONAL CLEARING HOUSE ON DOMESTIC VIOLENCE, WIFE ABUSE IN THE MEDICAL SETTING: AN INTRODUCTION FOR HEALTH PERSONNEL (1981); Browne, *supra* note 1, at 3185.

3. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983). Of all spousal violence reported in the National Crime Survey, 91% were victimizations of women committed by husbands or ex-husbands. PATSY A. KLAUS AND MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (1984). Analysis of police and court records in North America and Europe have persistently indicated that women constitute 90-95% of the victims of those assaults in the home reported to the criminal justice system. Russel P. Dobash, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 74-75 (1992). Women were six times more likely than men to be victimized by a spouse, ex-spouse, boyfriend, or girlfriend. CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 1 (1991).

4. As used in this Article, the term "battered" includes unlawful acts committed against a family member that may range from one incident to an ever increasing pattern of repeated incidents. It includes all actions which would fall within a standard dictionary's definition of "battery": "The unlawful beating of another including every willful, angry and violent or negligent unlawful touching of another's person or clothes or anything attached to his person or held by him." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 187 (3d ed. 1961). Battering as discussed in this Article also includes all activities that are precluded by the criminal laws and/or the civil protection order laws of each state. In general, however, most of the battered women who come into contact with the legal system have been subject to an escalating pattern of repeated abuse. Domestic violence is under-reported to police. Research indicates that between 43% and 90% of the time, spousal abuse is *not* reported. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE (1980). From 1979-87, 48% of battered women stated that they did not report violence to the police because it was a private or personal matter, or because they felt they could take care of it themselves, and 19% reported that they did not call because they were afraid of reprisal by the offender or his family or friends. HARLOW, *supra* note 3, at 3.

5. LENORE E. WALKER, TERRIFYING LOVE 106 (1989) [hereinafter TERRIFYING LOVE]. Of all adult women, 50% have been victims of violence more than once by the man they live with in a legal or quasi-legal marriage. This could mean up to 20 million adult married women are at risk of abuse. LENORE E. WALKER, THE BATTERED WOMAN at ix, 19 (1979) [hereinafter BATTERED WOMAN]; *see* Murray A. Straus, *Wife-Beating: Causes, Treatment and Research Needs*, *in* BATTERED WOMEN: ISSUES OF PUBLIC POLICY 154 (United States Comm'n on Civil Rights ed., 1978) (estimating that domestic violence occurs in 60% of all marriages). The National Institutes of Mental Health conducted a survey from which they estimated that the incidence of physical marital violence is between 50% and 60%. Alan Rosenbaum and K. Daniel O'Leary, *Children: The Unintended Victims of Marital Violence*, 51 AM. J. ORTHOPSYCH. 692 (1982).

An estimated 85% of all women with disabilities have been victims of domestic violence and 50% of all women over 60 who live with a male partner are abused by their partners. Judge Richard L. Price, Love and Violence: Victims and Perpetrators, Remarks at the

occur at least once in twenty-eight percent of all marriages.[6] Among intact couples, one of every eight husbands carries out one or more acts of physical aggression against his wife each year.[7] Repeated severe violence occurs in one out of every fourteen marriages.[8] In a survey of American college students, twenty-one to thirty percent reported at least one occurrence of physical assault with a dating partner.[9] Even these figures are likely to be low. Most national estimates are obtained from surveys which have typically excluded the very poor, those who do not speak English fluently, those whose lives are especially chaotic, military families, and persons who are hospitalized, homeless, institutionalized, or incarcerated.[10] Therefore, some have estimated that the number of women battered each year is closer to six million.[11]

Domestic violence is the single largest cause of injury to women in the United States—more significant than auto accidents, rapes, and muggings combined.[12] Spousal abuse, specifically wife battering, may exceed even alcoholism in its magnitude as a health problem. In a seven-year period during the Vietnam War, the United States lost 39,000 soldiers in the line of duty; "during the same time period (1967-1973) 17,500 American women and children were killed by members of their families."[13] According to the Attorney General's

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New York City Coalition for Women's Mental Health (Jan. 1991). Further, 18% of hospital injury visits by women over 60 are prompted by abuse. Evan Stark, *Rethinking Homicide: Violence, Race, and the Politics of Gender*, 20 INT'L J. HEALTH SERVS. 3, 21 (1990).

6. WOMEN'S ACTION COALITION, WAC STATS: THE FACTS ABOUT WOMEN 55 (1993). It is estimated that the number of women abused by their husbands in 1989 was greater that the number of women who got married that year. *Ten Facts About Violence Against Women: Hearing on S.101-939 Before the Committee on the Judiciary on Women and Violence*, 101st Cong., 2d Sess. 78 (1990).

7. PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTIONS TO VIOLENCE IN 6,415 FAMILIES (Murray A. Straus et al. eds., 1987); Browne, *supra* note 1, at 3185.

8. DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 4 (1988).

9. TERRIFYING LOVE, *supra* note 4, at 42.

10. Angela Browne, *Violence Against Women By Male Partners: Prevalence, Outcomes and Policy Implications*, 48 AM. PSYCHOL. 1077 (1993).

11. Senator Joseph Biden, Remarks in the Rotunda of Russell Senate Office Building at the Opening of an Art Exhibition on Domestic Violence Sponsored by Senator Paul Wellstone (Oct. 26, 1993).

12. Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 1, 58 (1992); Evan Stark & Anne Flitcraft, *Violence Among Intimates: An Epidemiological View*, *in* HANDBOOK OF FAMILY VIOLENCE 293, 301 (Van Hassett et al. eds., 1987).

13. PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 19 (1990).

Task Force on Family Violence, "[t]he legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between the victim and the abuser."[14]

Largely in response to the women's movement in the late 60's and the 70's, significant legal reform efforts in the past twenty years have been directed at ending domestic violence and creating a broad array of legal remedies for battered women. Currently, all fifty states plus the District of Columbia and Puerto Rico make civil protection orders available to victims of domestic violence. Many of these state statutes were enacted or significantly modified since the mid-eighties.[15] In addition, an unprecedented number of appellate decisions involving domestic violence have been reported during this same period.

Domestic violence advocates,[16] judges,[17] and legislators must have adequate grounding and training in the law and in the dynamics of domestic violence. Domestic violence is an exceedingly complex problem, presenting many unique challenges. In order to offer meaningful relief to battered women, attorneys and advocates must become familiar with court decisions from across the country.

This Article presents a comprehensive survey of civil protection order statutes and state appellate opinions in all fifty jurisdictions, the District of Columbia, and Puerto Rico.[18] We examine recent developments and trends, and highlight innovations. We include recommenda-

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14. WILLIAM L. HART ET AL., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE 4 (1984).

15. For an overview of statutory provisions aimed at deterring domestic violence that are being recommended jointly by judges, battered women's advocates, batterer's defense attorneys, prosecutors, and other legal experts, see NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994) [hereinafter MODEL CODE].

16. The National Council of Juvenile and Family Court Judges recommends that bar associations provide training for attorneys on domestic violence as part of continuing legal education programs. MODEL CODE, *supra* note 15, § 512.

17. The National Council of Juvenile and Family Court Judges recommends that state domestic violence codes contain provisions requiring and setting the course content for judicial education on domestic violence. MODEL CODE, *supra* note 15, § 510.

18. We have reviewed cases in order to provide an overview of what appellate courts are doing in domestic violence cases. Additionally, we have included some trial level decisions, including some that were either unreported or unofficially reported. These have been included to illustrate how these courts are tackling important domestic violence issues. Our review of statutes is current through September 1, 1993. Our review of civil protection order cases is current through December 1993. Custody, divorce, and criminal cases are current through December 1992 and include a representative sampling of decisions rendered through December 1993.

tions for further legislative reform and for creative development of case law. We have incorporated available social science research, the published policies and recommendations of judicial authorities, and the legal literature written by domestic violence experts. Moreover, our recommendations are based on our experience as domestic violence advocates. Each of us has represented battered women in court for more than a decade.

In addition to civil protection orders, we discuss and analyze statutes and judicial opinions from related areas of the law, including custody and criminal laws specifically addressing domestic violence issues. Advocates seeking to explore the full potential of the civil protection order statutes in their states should use this research in preparing briefs and arguments to persuade judges to issue bold and effective protection orders in domestic violence cases.

I. CIVIL PROTECTION ORDERS

Civil protection orders are an important tool for protecting victims of domestic violence. However, a report from The National Institute of Justice found that most judges have outdated, and even improper, views concerning domestic violence.[19] Prior to receiving training, many judges believe that domestic violence consists of verbal harassment or a rare shove, and that domestic violence was a "relationship problem" amenable to marriage counseling.[20] The National Institute of Justice found that as judges learned about the dynamics of family violence relationships, they came to view domestic violence as a complex problem of persistent intimidation and physical injury[21]—in short, as a violent crime as serious as any other assault

19. PETER FINN AND SARAH COLSON, NATIONAL INST. OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 4 (1990) [hereinafter NIJ CPO STUDY].

20. *Id.* This is a view held by many in our society who do not understand the dynamics of domestic violence. Developing familiarity with these dynamics aids in developing solutions that effectively assist battered women and stop the violence.

21. Anne L. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, *in* DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION 23, 33 (Jacqueline A. Agtuca et al. eds., 1992) [hereinafter DOMESTIC VIOLENCE IN CIVIL COURT CASES] ("[Domestic violence is] purposeful and instrumental behavior . . . directed at achieving compliance from and control over the abused party . . . . The pattern is not impulsive or out of control, rather tactics have been selectively chosen by the perpetrator because they work. Batterers choose to use violence to get what they want from the victim. They choose times and places and types of abuse that will make the victim most responsive and subject the abuser to the least risk of discovery.").

and battery.[22] Unfortunately, judicial education on domestic violence has only reached a relatively small number of judges across the country. Significant efforts are underway to help ensure that all judges who hear domestic violence cases receive this crucial training.[23]

Judicial training is only one important step toward ensuring that battered women and children can successfully turn to our courts for effective protection. The National Institute of Justice Civil Protection Order study found that these battered women are in direct need of assistance from attorneys in civil protection order proceedings.[24] Women who appear in court with legal representation are much more likely to receive civil protection orders than those women who appear *pro se*, and those orders are much more likely to contain more effective and complete remedies.[25] However, the numbers of attorneys

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22. *See* NIJ CPO STUDY, *supra* note 19.

23. In March of 1993, the National Council of Juvenile and Family Court Judges held the first national judicial training on domestic violence. This conference was sponsored by the State Justice Institute. Similar conferences are beginning to be planned on state and local levels. Two important training manuals for judges presented and used at the national conference were also developed with State Justice Institute funds. The manuals should serve as invaluable resources to judicial and attorney training on domestic violence in the future. *See generally* JANET CARTER ET AL., DOMESTIC VIOLENCE: THE CRUCIAL ROLE OF THE JUDGE IN CRIMINAL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION (1991) [hereinafter DOMESTIC VIOLENCE IN CRIMINAL COURT CASES]; *see also* DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note 21.

To be effective, all judicial and attorney training efforts on domestic violence must also address gender bias that exists in our judicial system. "Studies of gender bias in the courts document how courts too often disbelieve credible evidence of domestic violence and discount its seriousness. Too often, judges ignore the substantive law along with the evidence. Too often, their orders hurt women and children who come to court in family law cases." Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 249 (1993). Czapanskiy, as well as the majority of gender bias reports, confirm that gender-biased judicial behavior has a profound effect on the credibility of women's testimony. *See id.* at 249, 254 n.18, 263; *see also* ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS: DRAFT REPORT OF THE CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS 30 (1991); THE FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS (1984); GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM (1991), *reprinted in* 8 GA. ST. U. L. REV. 539, 706 (1992) (finding a "strong perception by both the bar and the judiciary that, at least in rape and in domestic violence cases, a female comes to court in Georgia bearing a credibility burden, a burden based on a stereotypic view of gender that does not affect males in the same way. The effect of such undue skepticism frequently places female litigants in a position where they must offer more evidence than do male litigants. In cases involving domestic violence and rape, female victims must often defend themselves against suggestions and accusations that they themselves provoked the act or are exaggerating the extent of the violence.").

24. NIJ CPO STUDY, *supra* note 19, at 19.

25. Only approximately 11% of litigants in domestic violence cases were likely to re-

who have been trained on domestic violence law and dynamics is infinitesimally small. Significant attention needs to be given to increase attorney training locally and nationally.[26]

Protection orders, when properly drafted and enforced, are effective in eliminating or reducing domestic abuse.[27] The effectiveness of protection orders may, however, "depend on whether they provide the requested relief in sufficient detail."[28] The effectiveness of protection orders is also "determined largely by whether they are consistently enforced."[29] Unfortunately, widespread enforcement of civil protection orders is lacking.[30] This severe problem can be reduced by increasing judicial and lawyer education, and by increasing representation of petitioners in civil protection order cases.[31] Studies demonstrate that offering protection and services to battered women significantly reduces the number killed by their batterers,[32] while at the same time reducing the numbers of women who find no other way to stop the violence but to kill their batterers.[33]

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ceive needed legal assistance. Czapanskiy, *supra* note 23, at 251 (citing ADVISORY COUNCIL ON FAMILY LEGAL NEEDS OF LOW INCOME PERSONS, INCREASING ACCESS TO JUSTICE FOR MARYLAND'S FAMILIES 49 (1992)).

26. A comprehensive training manual for attorneys representing battered women who seek civil protection orders has been written by the authors of this Article. LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS (1993). This manual can assist attorneys by proceeding step by step through the civil protection order process. Although this training manual focuses on the law in the District of Columbia, much of its contents are equally applicable to other jurisdictions. The manual includes almost 300 pages of sample pleadings and direct examination questions.

27. NIJ CPO STUDY, *supra* note 19, at 1; *see also* BATTERED WOMAN, *supra* note 4, at 212; Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy* 4 WOMEN & POL. 13-28 (1984) (providing detailed analyses of the effectiveness of restraining orders); Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 70 n.35 (1984).

28. NIJ CPO STUDY, *supra* note 19, at 2, 7.

29. *Id.* at 2.

30. *Id.*

31. *Id.* at 3. The failure to enforce protection orders is perhaps the weakest link in the legal safeguards now available to women. In several well-publicized cases, women who had obtained civil protection orders were then murdered by the same men who had been ordered to stay away from them. This is a result of inadequate police enforcement and the judges' unwillingness to jail men for violating such orders. *See* Eric Schmitt, *Family Violence: Protection Improves but not Prevention*, N.Y. TIMES, Jan. 17, 1989, at B1.

32. The numbers of shelters and services available to assist battered women in a state positively correlates with a drop in the numbers of women killed by intimate partners. Karen D. Stout, *"Intimate Femicide": Effects of Legislation and Social Services*, 4 AFFILIA 25 (1989).

33. Research indicates that there is a correlation between an increase in legal protection and services for battered women and a decrease in the number of homicides committed by

All attorneys who practice family law represent battered women, but many do not do so knowingly. Too few lawyers make the effort to investigate whether their clients have been victims of domestic violence, and therefore, often fail to present evidence of abuse at trial[34] or may enter into mediated agreements that are dangerous to the client because of the history of abuse.[35] Few family lawyers have been specifically trained on domestic violence and the use, effectiveness, and enforcement of civil protection orders.[36] Furthermore, pro bono attorneys need to be recruited and trained to help meet the critical needs of battered women for trained quality legal representation. This Article is intended to be a major resource for attorneys and advocates who assist battered women, for the judges who hear these sensitive and important cases, and for the legislators who wish to improve their jurisdictions' laws pertaining to domestic violence.

A. *Nature of Relationship Between Parties for Which Protection Orders Are Available*[37]

1. Spouses and Former Spouses

The overwhelming trend in both state statutes and case law is to grant protection orders against former spouses.[38] Forty-six states, as well as the District of Columbia and Puerto Rico, embrace this ap-

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women against male partners. From 1979 to 1984, this type of homicide decreased by more than 25%. Angela Browne & Kirk R. Williams, Resource Availability for Women at Risk: Its Relationship to Rates of Female-Perpetrated Homicide, Paper Presented at the American Society of Criminology Annual Meeting (Nov. 11-14, 1987).

34. *See* Czapanskiy, *supra* note 23, at 260.

35. *Id.*

36. For example, Washington State courts are statutorily required to give special treatment to custody cases where a child or parent has been subjected to violence by the other parent. A study of lawyer's practice found that almost 33% of all lawyers did not discuss rights and remedies under this provision in the code with their clients or bring abusive behavior suffered by their clients to the attention of the court. Lawyers who failed to raise the issue before the court stated that they did not believe their client's assertions about domestic violence or they felt that the violence was too insignificant or unimportant to bring to the attention of the court. Of all lawyers interviewed, none reported skepticism about clients who claimed that they were not abusive. Czapanskiy, *supra* note 23, at 257, 258 n.33.

37. *See generally* MODEL CODE, *supra* note 15, § 102(2).

38. Campbell v. Campbell, 584 So. 2d 125 (Fla. Dist. Ct. App. 1991) (affirming the issuance of a protection order for former wife when former spouse was soon to be released from jail); People v. Hazelwonder, 485 N.E.2d 1211 (Ill. App. Ct. 1985); Christenson v. Christenson, 472 N.W.2d 279 (Iowa 1991); Boniek v. Boniek, 443 N.W.2d 196 (Minn. Ct. App. 1989); Steckler v. Steckler, 492 N.W.2d 76 (N.D. 1992); Thomas v. Thomas, 540 N.E.2d 745 (Ohio Ct. App. 1988) (affirming issuance of civil protection order against husband even though divorce pending); Baldwin v. Moses, 386 S.E.2d 487 (W. Va. 1989).

proach.[39] Moreover, New York, Pennsylvania, Maryland, and Ohio[40] have statutorily overruled cases that denied protection orders against former spouses.[41] Statutory protection of former, as well as current, spouses is a well-founded policy in light of the Justice Department's National Crime Survey, which revealed that seventy-five percent of all reported domestic abuse was reported by separated or divorced women.[42] Violence is often triggered by the anger aroused by threatened

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39. ALASKA STAT. §§ 25.35.010, 25.35.060 (1991 & Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1993); ARK. CODE ANN. §§ 9-15-103, 9-15-20 (Michie 1993); CAL. FAM. CODE §§ 70, 75 (West Supp. 1993); COLO. REV. STAT. ANN. §§ 14-4-101 to -102 (Supp. 1993); CONN. GEN. STAT. ANN. §§ 46b-15, 46b-35 (West Supp. 1993); DEL. CODE ANN. tit. 10 §§ 945, 947 (1993); D.C. CODE ANN. §§ 16-1001, -1005 (Supp. 1993); GA. CODE ANN. §§ 19-13-1, 19-13-4 (Supp. 1993); HAW. REV. STAT. §§ 586-1, 586-5.5 (Supp. 1992); IDAHO CODE §§ 39-6303 to -6304 (1993); 725 ILCS 5/112A-3 to 112A-14 (1993); IND. CODE ANN. §§ 34-4-5.1 to -5.3 (West Supp. 1993); IOWA CODE ANN. §§ 236.2-.5 (West Supp. 1993); KAN. STAT. ANN. §§ 60-3102-3107 (Supp. 1993); KY. REV. STAT. ANN. §§ 403.720-.725 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. §§ 46:2134 to :2136 (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 19 §§ 762, 766 (West Supp. 1993); MD. CODE ANN., FAM. LAW §§ 4-501, -506 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A §§ 3, 8 (West 1993); MICH. COMP. LAWS ANN. § 600.2950 (West 1986); MINN. STAT. ANN § 518B.01 (West Supp. 1993); MISS. CODE ANN. §§ 93-21-3 to -15 (1993); MO. ANN. STAT. §§ 455-010 to -020 (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-121 (1993); NEB. REV. STAT. §§ 42-903 to -924 (Supp. 1992); N.H. REV. STAT. ANN. §§ 173.B:1 to .B:4 (Supp. 1992); N.J. STAT. ANN. § 25:2C:20 (West 1992); N.M. STAT. ANN. §§ 40-13-2 to -3 (Michie Supp. 1993); N.Y. FAM. CT. ACT § 821 (McKinney Supp. 1994); N.C. GEN. STAT. §§ 50-B-1, to -3 (Supp. 1993); N.D. CENT. CODE §§ 14-07.1-01 to -02 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Andersen Supp. 1992); OR. REV. STAT. §§ 107.705-.718 (1991); 23 PA. CONS. STAT. ANN. §§ 6102, 6108 (1991 & Supp. 1993); P.R. LAWS ANN. tit. 8, §§ 602, 621 (Supp. 1990); R.I. GEN. LAWS §§ 15-15-1, 15-15-3 (1988 & Supp. 1993); S.C. CODE ANN. §§ 20-4-20, 20-4-040 (Law. Co-op 1985); S.D. CODIFIED LAWS ANN. §§ 25-10-1, 25-10-3 (1984); TENN. CODE ANN. §§ 36-3-601, 36-3-602, 36-3-605 (1991 & Supp. 1993); TEX. FAM. CODE ANN. §§ 71.01, 71.04 (West Supp. 1993); UTAH CODE ANN. §§ 30-6-1 to -2 (Supp. 1993); VT. STAT. ANN. tit. 15, §§ 1101, 1103 (1989 & Supp. 1993); VA. CODE ANN. § 161-253.1 (Michie Supp. 1993); WASH. REV. CODE ANN. §§ 26.50.010, 26.50.030 (West Supp. 1993); W. VA. CODE §§ 48-2A-2, 48-2A-4 (Supp. 1993); WIS. STAT. ANN. § 813.12 (West Supp. 1993); WYO. STAT. §§ 35-21-102, 35-21-103 (Supp. 1993).

40. These states have statutorily removed the requirement that parties reside together for a civil protection order to issue. MD. CODE ANN., FAM. LAW. §§ 4-501, 4-506 (Supp. 1993); N.Y. FAM. CT. ACT § 821 (McKinney Supp. 1994); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1992); 23 PA. CONS. STAT. ANN. §§ 6102, 6108 (1991 & Supp. 1993).

41. Barbee v. Barbee, 537 A.2d 224 (Md. 1988) (holding civil protection orders are to issue only to spouses, parents, children, or blood relatives who live together at the time of the abuse); People v. Williams, 24 N.Y.S.2d 274 (N.Y. 1969) (affirming holding that assault which occurs after divorce does not fall under the domestic violence statute); State v. Allen, 536 N.E.2d 1195 (Ohio Ct. App. 1987); Margoles v. Margoles, No. 1724, 1987 Phila. Cty. Rptr. LEXIS 20 (C.P. Ct. Phila. Cty. June 23, 1987) (holding domestic violence statute only applies to family members who reside together or formerly resided together where both parties continue to have legal access to the residence).

42. BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION 3 (1988); HARLOW, *supra*

loss and excessive feelings of dependency—making the period during and after separation an extremely dangerous time.[43] Women who are divorced or separated are at higher risk of assault than married women.[44] The risk of assault is greatest when a woman leaves or threatens to leave an abusive relationship.[45] Nonfatal violence often escalates once a battered woman attempts to end the relationship.[46] Furthermore, studies in Philadelphia and Chicago revealed that twenty-five percent of women murdered by their male partners were separated or divorced from their assailants.[47] Another twenty-nine percent of women were murdered during the separation or divorce process.[48] State statutes need to protect women and children during and after the break-up of relationships because of their continuing, and often heightened, vulnerability to violence.

2. Family Members (Parents, Siblings, Aunts, Uncles, Grandparents, and In-Laws)

Forty-seven states and the District of Columbia provide for the issuance of civil protection orders to family members.[49] Case law

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note 3, at 5 (stating that "separated or divorced women were 14 times more likely than married women to report having been a victim of violence by a spouse or ex-spouse"); NATIONAL CLEARINGHOUSE AGAINST DOMESTIC VIOLENCE, NCADV VOICE (1992).

43. John Bowlby, *Violence in the Family as a Disorder of the Attachment and Caregiving Systems*, 44 AM. J. PSYCHOANAL. 9, 22-23 (1984).

44. Stark & Flitcraft, *supra* note 11, at 307-08.

45. *See* Ganley, *supra* note 21, at 24. Separated or divorced women are six times more likely to be victims of violent crime than widows and four and one half times more likely than married women. HARLOW, *supra* note 3, at 5; *see also* Elis Desmond, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas", "Advocates", and "Counsellors"*, 10 INT'L J.L. & PSYCH. 403, 408 (1987).

46. David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 13 RESPONSE TO THE VICTIMIZATION WOMEN & CHILDREN 13 (1990). Perpetrators of domestic violence view the abused party's attempts to leave the relationship as the ultimate act of resistance and consequently increase their violence in response to attempts by the victim to leave. Ganley, *supra* note 21, at 24.

47. Ganley, *supra* note 21, at 24.

48. Noel A. Casanave & Margaret A. Zahn, Women, Murder, and Male Domination: Police Reports of Domestic Homicide in Chicago and Philadelphia, Paper Presented at the American Society of Criminology Annual Meeting (Oct. 1986). This paper additionally found that husbands were commonly motivated to kill their wives because they felt abandoned or feared they were losing control over them. In one study of spousal homicide, over one-half of the male defendants were separated from their victims. Franklin E. Zimring et al., *Intimate Violence: A Study of Intersexual Homicide*, 50 U. CHI. L. REV. 910, 916 (1983).

49. ALA. CODE § 30-5-2 (1989); ALASKA STAT. § 25.35.200 (Supp. 1993) (parent, child, grandparent, grandchild, member of the same social unit); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1993); ARK. CODE ANN. § 9-15-103 (Michie 1993) (parents and children, persons related by blood within the fourth degree of consanguinity); CAL. FAM. CODE § 70 (West

has also recognized various kinds of family relationships for purposes of issuing a protection order. Protection orders may be issued to prevent violence and harassment from a sibling,[50] a step-sibling,[51] a parent,[52] a step-parent,[53] and an in-law.[54]

1993); COLO. REV. STAT. ANN. § 14-1-101 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 945 (1993); D.C. CODE ANN. § 16-1004 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-1 (Supp. 1993) (includes foster child and parent); HAW. REV. STAT. § 586-1 (Supp. 1992); IDAHO CODE § 39-6303 (1993); 750 ILCS 60/103 (Smith Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-1 (West Supp. 1993); IOWA CODE ANN. § 236.2 (West Supp. 1993) (must be adult family member of the same household); KAN. STAT. ANN. § 60-3102 (Supp. 1992); KY. REV. STAT. ANN. § 403.720 (Michie/ Bobbs-Merill Supp. 1992); LA. REV. STAT. ANN. § 46:2132(3) (West Supp. 1993) (includes foster child and parent); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-501(h) (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B-01 (West Supp. 1993) (parents, children, and persons related by blood); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. ANN. STAT. § 455-010 (Vernon Supp. 1993); MONT. CODE ANN. § 49-4-121 (1993); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. § 33.018 (Michie 1986); N.H. REV. STAT. ANN. § 173.B:1 (Supp. 1992); N.J. STAT. ANN. § 25:2C:20 (West 1992); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993) (including relative); N.Y. FAM. CT. ACT § 846 (McKinney Supp. 1994); N.D. CENT. CODE § 14-07.1-01 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); 23 PA. CONS. STAT. ANN. § 6102 (1992); R.I. GEN. LAWS § 15-15-1 (1988); S.C. CODE ANN. § 20-4-40 (Law. Co-op. 1985) (must be adult family member of the same household); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984); TENN. CODE ANN. § 36-3-601 (1991); TEX. FAM. CODE ANN. § 71.01 (1992) (includes foster child and foster parent); UTAH CODE ANN. § 30-6-1 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1101 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.010 (West Supp. 1992) (must be adult family member of the same household); W. VA. CODE § 48-2A-2 (Supp. 1993); WIS. STAT. ANN. § 813-122 (West Supp. 1993) (adult family member); WYO. STAT. § 35-21-102 (Supp. 1993) (parents and adult children).

50. *See, e.g.*, State v. Wong, 861 P.2d 759 (Haw. Ct. App. 1993) (affirming issuance of a protection order to a brother); State v. Scott, 555 A.2d 667 (N.J. Super. Ct. App. Div. 1989) (granting sister a restraining order against her brother); S. v. S., 311 N.Y.S.2d 169 (N.Y. Fam. Ct. 1970) (granting sister a protection order against her brother whose child she bore); State v. Taylor, No. 57679, 1990 Ohio App. LEXIS 4749 (Ohio Ct. App. Nov. 1, 1990) (holding brother and sister relationship covered).

51. *See, e.g.*, Wright v. Wright, 583 N.E.2d 97 (Ill. App. Ct. 1991) (upholding grant of civil protection order between minor step-brother and step-sister).

52. *See, e.g.*, Stuckey v. Stuckey, 768 P.2d 694 (Colo. 1989) (affirming grant of a protection order to wife and son against the son's father); *In re* Price, 593 A.2d 1185 (Del. 1992) (defining "family" for purposes of the family court jurisdiction to include related persons whether or not they live in the same home; in this case, a protection order was issued where the parties were father and son living under different roofs); Thomas v. Thomas, 477 A.2d 728 (D.C. 1984) (affirming propriety of granting civil protection order to father against son); Rosenbaum v. Rosenbaum, 541 N.E.2d 872 (Ill. App. Ct. 1989) (affirming where son and his wife obtained civil protection order against son's mother); Anthony T. v. Anthony J., 510 N.Y.S.2d 810 (N.Y. Fam. Ct. 1986) (granting son civil protection order against his father for making harassing telephone calls); Lucke v. Lucke, 300 N.W.2d 231 (N.D. 1980) (affirming grant of civil protection order to 18 year old daughter against father who attempted to

Data from the Bureau of Justice Statistics supports this approach.[55] A survey of domestic violence victims from 1979 through 1987 which studied reports of women who suffered rape, robbery, or assault at the hands of a family member found that more women were battered by other relatives[56] than were battered by current spouses.[57] It is therefore exceptionally important for victims of domestic violence at the hands of any family member to receive protection. This protection must be available whether or not the victim resides with the family member perpetrating the violence.[58]

Domestic violence statutes must offer coverage to a wide range of extended family relationships to fully reflect the reality of American family life. In the past, and increasingly in the future, extended families, composed of grandparents, aunts, uncles, and cousins, share households or remain in close daily contact with each other to meet

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have an incestuous relationship with her); Murray v. Murray, 623 N.E.2d 1236 (Ohio Ct. App. 1993) (upholding grant of petition for protection order and reversing custody award where step-mother dragged her step-daughter by the hair, pushed her down, and pounded her head against the floor); Reynoldsburg v. Eichenberger, 1990 Ohio App. LEXIS 1613 (Ohio Ct. App. Apr. 18, 1990) (temporary protection order issued against father on behalf of mother and child).

53. *See, e.g.*, Johnson v. Miller, 459 N.W.2d 886 (Wis. Ct. App. 1990) (affirming decision below wherein step-daughter received restraining order against step-father). In the only published decision limiting this coverage, *Evans v. Evans*, a Florida court refused to issue a civil protection order based on a step-parent relationship because the parties never lived together. 599 So. 2d 205 (Fla. Dist. Ct. App. 1992). However, the Florida legislature later overruled the case by amending the statute to extend coverage to person's related by blood or marriage regardless of whether the parties ever resided together. *See* FLA. STAT. ANN. § 741.30(b) (West Supp. 1993).

54. Caldwell v. Coppola, 268 Cal. Rptr. 453 (Cal. Ct. App. 1990) (awarding protection order to sister-in-law, even though she did not live with the petitioner); Clifford v. Krueger, 297 N.Y.S.2d 990 (N.Y. Sup. Ct. 1969) (granting brother-in-law civil protection order); People v. Harkins, 268 N.Y.S.2d 482 (N.Y. Cty. Ct. 1966) (holding that "family members" includes brother-in-law for purposes of issuing a civil protection order); People v. Keller, 234 N.Y.S.2d 469 (N.Y. Dist. Ct. 1962) (holding that a mother-in-law, who did not live in the same house, was a "family member" under the statute).

55. HARLOW, *supra* note 3, at 1-3.

56. This category would include, for example, in-laws, uncles, cousins, and extended family members.

57. Among reported cases for rape, robbery, and assault: 9.6% were abused by another relative, 9.1% were abused by a current spouse, 5.5% were abused by a sibling, 3.3% were abused by a parent, and 2.7% were abused by a child. The largest categories of abusers were ex-spouses (34.5%) and boyfriends (31.8%). HARLOW, *supra* note 3, at 1-3.

58. *See, e.g., In re* Price, 593 A.2d 1185 (Del. 1992) (defining "family" to include persons who did not live under the same roof); Caldwell v. Coppola, 268 Cal. Rptr. 453 (Cal. Ct. App. 1990) (protection order awarded to sister-in-law, even though she did not live with the petitioner); People v. Keller, 234 N.Y.S.2d 469 (N.Y. Dist. Ct. 1962) (mother-in-law, who did not live in the same house, was a "family member" under the statute).

both economic and emotional needs.[59] This is particularly true for various racial and ethnic communities in the United States who consistently embrace the extended family model.[60] For example, the Latino community, which is the fastest growing segment of the American population, relies heavily on extended family relationships.[61]

The Supreme Court has recognized the significant role extended families play in American life. In *Moore v. East Cleveland*,[62] the Court struck down an East Cleveland zoning ordinance that attempted to restrict extended family members from living together in the same household as unconstitutional under the Fourteenth Amendment due process clause.[63] The Court held that the Constitution protects this larger conception of family,[64] and clarified that the state can neither lightly deny the choice of individuals to live with extended family members, nor force people to live in certain narrowly defined family patterns.[65]

Justices Brennan and Marshall, in their powerful concurrence, focused on the "cultural myopia" of the arbitrary line drawn by the zoning ordinance.[66] These Justices concluded that the ordinance displayed a "depressing insensitivity toward the economic and emotional needs of a very large part of our society."[67] In particular, they noted that the "nuclear family" pattern is most often found in white suburbia but that the extended family model was dominant among early ethnic immigrants and remains prominent in many minority communities.[68] The extended family remains a vital and indeed growing part of American society which the state may not arbitrarily restrict.[69]

Both the majority opinion and the concurrence in *Moore* demon-

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59. *See* Moore v. East Cleveland, 431 U.S. 494, 504-05 (1977).

60. *See, e.g.*, Nancy Feigenbaum, *Ties that Bind Keep Hispanics Far from Capital*, ORLANDO SENTINEL, Feb. 24, 1994, at B4.

61. *Id.*

62. 431 U.S. 494.

63. *Id.* at 505-06.

64. *Id.*

65. *Id.*

66. *Id.* at 507-08.

67. *Id.*

68. *Id.* at 508.

69. *Id.* at 506-13. Lower courts have also issued decisions based on *Moore*'s "Extended Family Doctrine." *See, e.g.*, Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982) (finding liberty interest of a half-sister in continued foster care of her half-sister and half-brother); Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984) (striking down as unconstitutional a zoning ordinance which limited the occupation of a single family dwelling to persons related by blood, adoption, or marriage and not more than one unrelated person).

strate the respect which the state must accord the extended family model. The rationale of the *Moore* decision makes it incumbent upon states not to arbitrarily preclude extended family relationships when considering whether civil protection order statutes should safeguard a particular family or household member. The definition of "family members" embraced by civil protection order statutes must be equally applicable to all concepts of family as they exist in the reality of our diverse family relationships. The vitality of nuclear families and extended families in many communities in the United States must be recognized, and protections against all violence in all families must be provided.

3. Children

Thirty-eight states and the District of Columbia issue civil protection orders on behalf of the minor children of one or both parties.[70] Moreover, protection orders may be issued to children as household members related by blood or marriage.[71] In several states,

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70. ALA. CODE § 30-5-2 (1989); ALASKA STAT. § 25.35.200 (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1993); ARK. CODE ANN. § 9-15-103 (Michie 1993); CAL. FAM. CODE § 70 (West 1993); COLO. REV. STAT. ANN. § 14-1-101 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 945 (1993); D.C. CODE ANN. § 16-1004 (1989); GA. CODE ANN. § 19-13-1 (Supp. 1993) (includes foster children); HAW. REV. STAT. § 586-1 (Supp. 1993); IDAHO CODE § 39-6303 (1993); 750 ILCS 60/103 (Smith Hurd Supp. 1993); KAN. STAT. ANN. § 60-3102 (Supp. 1992); KY. REV. STAT. ANN. § 403.720 (Michie/Bobbs-Merill Supp. 1993); LA. REV. STAT. ANN. § 46:2132(4) (West Supp. 1993) (includes foster children); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-501 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B-01 (West Supp. 1993); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. REV. STAT. § 455-010 (Vernon Supp. 1993) (separate civil protection order for children); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. ANN. § 33.018 (1992); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993); N.Y. FAM. CT. ACT § 846 (McKinney Supp. 1994); N.D. CENT. CODE § 14-07.1-01 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); 23 PA. CONS. STAT. ANN. § 6102 (1992); S.C. CODE ANN. § 20-4-40 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984); TEX. FAM. CODE ANN. § 71.01 (1992) (includes foster child); UTAH CODE ANN. § 30-6-1 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1101 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.010 (Supp. 1993); W. VA. CODE § 48-2A-2 (Supp. 1993); WIS. STAT. ANN. § 813.122 (West Supp. 1993) (adult family member).

71. ALA. CODE § 30-5-2 (1989); ALASKA STAT. § 25.35.200 (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1993); ARK. CODE ANN. § 9-15-103 (Michie 1993); CAL. FAM. CODE § 70 (West 1993); COLO. REV. STAT. ANN. § 14-1-101 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 945 (1993); D.C. CODE ANN. § 16-1004 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-1 (Supp. 1993) (includes foster children); HAW. REV. STAT. § 586-1

emancipated minors may petition for their own protection order.[72] Furthermore, most courts issue civil protection orders based on petitions filed by parents or other adults on behalf of children.[73] A pro-

(Supp. 1993); IDAHO CODE § 39-6303 (1993); 750 ILCS 60/103 (Smith Hurd Supp. 1993); KAN. STAT. ANN. § 60-3102 (Supp. 1992); KY. REV. STAT. ANN. § 403.720 (Michie/Bobbs-Merill Supp. 1993); IND. CODE. ANN. § 34-4-5.1-1 (West Supp. 1993); LA. REV. STAT. ANN. § 46:2132(4) (West Supp. 1993) (includes foster children); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-501 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B-01 (West Supp. 1993); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. REV. STAT. § 455-010 (Vernon Supp. 1993) (separate civil protection order for children); MONT. REV. STAT. ANN. § 40-40121 (1993); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. ANN. § 33.018 (1992); N.J. STAT. ANN. § 2C:25-19 (West 1992); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993); N.Y. FAM. CT. ACT § 846 (McKinney Supp. 1994); N.D. CENT. CODE § 14-07.1-01 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); 23 PA. CONS. STAT. ANN. § 6102 (1992); R.I. GEN. LAWS § 15-15-1 (1988); S.C. CODE ANN. § 20-4-40 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984); TENN. CODE ANN. § 36-3-601 (1991); TEX. FAM. CODE ANN. § 71.01 (1992) (includes foster child); UTAH CODE ANN. § 30-6-1 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1101 (Supp. 1993); VA. CODE ANN. § 16.1-253.1 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.010 (Supp. 1993); W. VA. CODE § 48-2A-2 (Supp. 1993); WIS. STAT. ANN. § 813.122 (West Supp. 1993) (adult family member); WYO. STAT. § 35-21-102 (Supp. 1993).

72. ALA. CODE § 30-5-2(2) (1989) ("Any person 19 years of age or older, or who otherwise is emancipated."); IND. CODE ANN. § 34-4-5.1-1 (1992) ("person" who may petition any court for a protection order includes human beings aged 18 or older, and emancipated minors) (West Supp. 1993); LA. REV. STAT. ANN. § 46:2132(4) (1982) ("adult [who may seek relief alleging abuse] means . . . any person under the age of eighteen who has been emancipated by marriage or otherwise"); N.J. STAT. ANN. § 2C:25-18 (West 1992) ("victim of domestic violence means . . . any person who is 18 years of age or older or who is an emancipated minor"); 23 PA. CONS. STAT. ANN. § 6102 (1992) ("An adult or emancipated minor may seek relief under this chapter . . . . "); R.I. GEN. LAWS § 15-15-1 (Supp. 1993) ("'Cohabitants': 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 . . . or who are residing in the same living quarters."); WYO. STAT. § 35-21-102(a)(1) (Supp. 1993) ("'Adult' means a person who is sixteen years of age or older.").

73. *See, e.g.*, Harriman v. Harriman, 1990 Conn. Super. LEXIS 1200 (Conn. Super. Ct. Sept. 25, 1990) (holding that a father can obtain a temporary restraining order on behalf of his child where he can prove that he or the child had been subjected to abuse as defined under the state statute); Robinson v. United States, 317 A.2d 508, 510-12 (D.C. 1974) (holding that director of social services petitioned on behalf of child for a protection order against the child's mother's boyfriend with whom she and the child had lived for three years and with whom the mother had two children in common); Campbell v. Campbell, 584 So. 2d 125 (Fla. App. 1991) (affirming that a father's sexual battery of his three year old daughter warranted the mother's petitioning for the issuance of a temporary protection order against him); Keneker v. Keneker, 579 So. 2d 1083 (La. Ct. App. 1991) (affirming decision granting non-custodial mother a temporary protection order under the domestic abuse assistance statute on behalf of her minor child alleging that the custodial father had engaged in sexual behavior with the minor child); Harper v. Harper, 537 So. 2d 282, 283-85 (La. Ct. App. 1988) (hold-

tection order for an abused mother may also include protection for her children, who are not abused themselves.[74] The District of Columbia Court of Appeals' reasoning in *Cruz-Foster v. Foster*[75] would support the granting of protection orders to children in such cases, even where no recent physical or sexual abuse exists.[76] The *Cruz-Foster* decision requires court consideration of the "entire mosaic" of past abuse to adequately determine the need for protection.[77]

In Missouri, children may receive a civil protection order separate from that issued to the petitioning parent.[78] Case law also supports the issuance of civil protection orders based on sexual abuse of minor children.[79] In *S. v. S.*,[80] the court issued a civil protection order to a minor sister against her minor brother who raped and impregnated her.[81]

Some courts have, however, limited the forum in which civil protection orders issued *against* minors may be enforced. In *Diehl v.*

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ing that where the husband constantly made threats to his wife, tried to pull her from her car, had a bad temper and scared their child, the finding of domestic abuse was sufficient to entitle the wife to file for a civil protection order on behalf of the child); Cooke v. Naylor, 573 A.2d 376, 377-79 (Me. 1990) (acknowledging the mother's right to file a petition for domestic abuse on behalf of her minor children); Kass v. Kass, 355 N.W.2d 335, 336-38 (Minn. Ct. App. 1984); Curtis v. Curtis, 574 So. 2d 24, 26 (Miss. 1990) (affirming grant of order to father on behalf of his children after he kidnapped his children from Utah and took them to Mississippi, because the children's mother, his wife, had substantially abused and neglected them); Flury v. Howard, 813 P.2d 1052, 1053 (Okla. 1991) (issuing protection order based on petition by minor girl's parents against the girl's minor boyfriend); McCoy v. McCoy, 621 A.2d 144 (Pa. 1993) (affirming issuance protection order on behalf of minor child against her father and step-mother who hit her child in face with a belt buckle and slapped her); Keith v. Keith, 28 Pa. D. & C.3d 462, 462-63 (C.P. 1984).

74. *See, e.g., In re* Marriage of Patricia K. McCoy, 625 N.E.2d 883 (Ill. App. Ct. 1993) (holding that abuse of one household member is sufficient to extend protection to children and other household members who may be at risk of retaliation by respondent).

75. 597 A.2d 927 (D.C. 1991).

76. *Id.* at 931-32.

77. *Id.*

78. MO. REV. STAT. § 455-010 (1992).

79. Campbell v. Campbell, 584 So. 2d 125 (Fla. App. 1991) (upholding temporary protection order against father for sexual battery of his three year old daughter); Keneker v. Keneker, 579 So. 2d 1083 (La. Ct. App. 1991) (upholding grant of temporary protection order to non-custodial mother against custodial father on behalf of their minor child alleging inappropriate sexual behavior); McCleod v. United States, 568 A.2d 1094 (App. D.C. 1990) (civil protection order issued against father on behalf of minor son based on father's sexual abuse of child). *But see* Keith v. Keith, 28 Pa. D. & C.3d 462 (C.P. 1984) (where the court refused to renew a civil protection order beyond a year against a father who sexually abused his two minor children even though his close proximity caused them stress, fear, and emotional strain, since no new acts of abuse had occurred within the proceeding year).

80. 311 N.Y.S.2d 169 (N.Y. 1970).

81. *Id.*

Drummond,[82] the court issued a civil protection order against the petitioner's sixteen year old boyfriend.[83] The *Diehl* court held that while a civil protection order may issue against a minor, enforcement of the order must occur in the juvenile court.[84] This approach allows the courts to intervene to offer civil protection against child defendants, while placing enforcement in the court most able to protect the rights of juvenile defendants and offer juveniles appropriate sentencing alternatives.[85] As our civil protection order issuing courts are appropriately moving toward protecting victims of dating violence and are seeing more drug-related assaults by juveniles on family members, we urge all jurisdictions to adopt this balanced approach.

Courts may also issue a civil protection order to a parent against an adult child.[86] Courts in large cities are beginning to see greater numbers of cases in which parents seek civil protection orders against their adult or minor children who are abusing drugs. Civil protection orders can offer families experiencing these problems an opportunity to intervene to protect themselves and obtain help for their children before they might be required to turn to the criminal justice system for help. For example, in *Wright v. Wright*,[87] the court issued a civil protection order to a mother against her husband's minor son based on the son's sexual abuse of the mother's minor daughters.[88]

Civil protection orders are also regularly issued to adult children. Courts have issued civil protection orders based on an attempted incestuous relationship with an adult child,[89] and for harassment of an adult child.[90] Courts have also issued civil protection orders to an adult child who was injured as a result of an attempted assault by her

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82. 2 Pa. D. & C.4th 376 (C.P. 1989).

83. *Id.* at 378-79.

84. *Id.*

85. *Id.*

86. Thomas v. Thomas, 477 A.2d 728 (D.C. 1984) (issuing civil protection order against son restraining him from visiting his father's house, removing any items from the house, and from molesting, assaulting, threatening, or physically abusing his father).

87. 583 N.E.2d 97 (Ill. App. Ct. 1991).

88. *Id.*

89. Lucke v. Lucke, 300 N.W.2d 231, 235-36 (N.D. 1980) (affirming lower court issuance of a civil protection order against father based on an attempt to have an incestuous relationship with his 18 year old daughter).

90. *See* Rosenbaum v. Rosenbaum, 541 N.E.2d 872, 873-74 (Ill. App. Ct. 1989) (affirming civil protection order issued to adult son and his wife against his mother based on harassment); Anthony T. v. Anthony J., 510 N.Y.S.2d 810, 811-13 (Fam. Ct. 1986) (issuing civil protection order against father for making harassing telephone calls to his son).

step-father on her mother.[91]

Courts have also addressed the issue of whether adoption severs the parent-child relationship for purposes of issuing a protection order. In *Robert R. v. Eve. M.*,[92] the family court held that an adoption with the consent of the biological father terminated the parent-child relationship for purposes of issuing a protection order and therefore denied a civil protection order to a biological father against his biological daughter based on harassment.[93]

4. Parents of a Child in Common

Unmarried parties who share a child in common are frequently eligible for protection orders.[94] Forty-one states, the District of Columbia, and Puerto Rico issue civil protection orders between parents of a child in common.[95] A child in common between parties may also serve as a basis for issuance of a protection order between one party's child and the other party. In *Robinson v. United States*,[96] the court held that a protection order may issue on behalf of a child

91. Johnson v. Miller, 459 N.W.2d 886 (Wis. Ct. App. 1990).

92. 517 N.Y.S.2d 116 (Fam. Ct. 1987).

93. *Id.* at 116-17.

94. *See* Maksuta v. Higson, 577 A.2d 185, 186-87 (N.J. Super. Ct. App. Div. 1990) (affirming grant of mutual civil protection order issued between unmarried cohabitants who shared three children in common).

95. ALASKA STAT. § 25.35.200 (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1993); CAL. FAM. CODE § 70 (West 1993); COLO. REV. STAT. ANN. § 14-4-101 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 945 (1993); D.C. CODE ANN. § 16-1004 (1989); GA. CODE ANN. § 19-13-1 (Supp. 1993); HAW. REV. STAT. § 586-1 (Supp. 1992); IDAHO CODE § 39-6303 (1993); 750 ILCS 60/103 (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-1 (West 1993); IOWA CODE ANN. § 236.2 (West Supp. 1993); KY. REV. STAT. ANN. § 403.720 (Michie/Bobbs-Merill 1992); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-501 (Supp. 1992); MASS. GEN. L. ANN. ch. 209A, § 1 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. REV. STAT. § 455-010 (Vernon Supp. 1993); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. ANN. § 33-018 (Michie 1986); N.H. REV. STAT. ANN. § 173-B:1 (Supp. 1992); N.J. STAT. ANN. § 2C:25-20 (West 1992); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1992); N.Y. FAM. CT. ACT §§ 846, 812 (McKinney Supp. 1994); N.D. CENT. CODE § 14-07.1-01 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); OR. REV. STAT. § 107.705 (1991); 23 PA. CONS. STAT. ANN. § 6102 (1992); P.R. LAWS ANN. tit. 8, § 602 (Supp. 1990); R.I. GEN. LAWS § 15-15-1 (1988); S.C. CODE ANN. § 20-4-40 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-1 (1986); TENN. CODE ANN. § 36-3-60 (1991); TEX. FAM. CODE ANN. § 71-01 (West 1992); UTAH CODE ANN. § 30-6-1 (Supp. 1993); VA. CODE ANN. § 16.1-253.1 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.120 (West Supp. 1993); W. VA. CODE § 48-2A-2 (Supp. 1992); WIS. STAT. ANN. § 813.122 (West Supp. 1993); WYO. STAT. § 35-21-102 (Supp. 1993).

96. 317 A.2d 508 (D.C. 1974).

against the child's mother's boyfriend with whom she and the child had lived for three years and with whom the mother had two children in common.[97]

However, despite this coverage some victims of abuse still fall through dangerous gaps in the statutes. An important issue is whether a civil protection order may issue against a putative father and whether a civil protection order may issue when the petitioner is pregnant with the respondent's child. Some state statutes explicitly address this issue and permit coverage.[98] In other states, case law addresses this concern. In *Lydia B. v. Pedro G.*,[99] the court held that the petitioner's allegation that the parties share children in common establishes eligibility for a civil protection order against the respondent.[100] The court rested its decision, in part, on the legislative history and intent of amendments to the statute which extended coverage to former spouses and persons who share a child in common.[101] The court concluded that any construction of the act which distinguished between putative and adjudicated fathers or required such adjudication to file a petition would

> undermine the intent of the statute, as amended, to extend protection to persons outside of the conventional marital family. In view of the fact that it can take at least as many months to resolve a paternity action . . . a petitioner would be denied access to this court, which might unnecessarily endanger not only the natural mother, but the child as well.[102]

Case law is divided, however, on whether a petitioner is eligible for a civil protection order when she is pregnant with the respondent's child. Some courts have held that a pregnant woman

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97. *Id.* at 510-14.

98. Five state statutes explicitly address these issues. The Illinois and Minnesota statutes affirmatively extend coverage to parents of an alleged child in common. 750 ILCS 60/103 (Smith-Hurd Supp. 1993); MINN. STAT. ANN. § 518B.01 (West 1993). Arizona, Minnesota and Tennessee explicitly grant civil protection order eligibility when the pregnancy of a child in common is involved. ARIZ. REV. STAT. ANN. § 13-3601(A) (Supp. 1993) ("[i]f the victim or the defendant is pregnant by the other party"); MINN. STAT. ANN. § 518B.01 (Supp. 1993) ("a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time"); TENN. CODE ANN. § 36-3-601(4)(E) (1991) ("persons whose sexual relationship has resulted in a current pregnancy").

99. 576 N.Y.S.2d 178 (Fam. Ct. 1991).

100. *Id.* at 179-80.

101. *Id.* at 180.

102. *Id.* at 179.

may receive a civil protection order because she comes within the purpose and intent of the "child in common" provision of the state domestic violence statute.[103] In *Gloria C. v. William C.*,[104] the court held that the mother of an unborn child could petition and receive a protection order on the child's behalf after her husband punched her in the stomach and threw her to the floor.[105] The child's birth was not a condition precedent to the order's enforcement.[106] The court extended protection to the fetus where the petitioner wanted to continue her pregnancy and her husband told her he was trying to force her to have a spontaneous abortion. The court noted that the respondent consciously directed his violence toward the unborn child.[107]

In two cases where courts ruled that pregnant women were not covered under the civil protection order statute, the courts expressed dissatisfaction with this limitation and specifically recommended that statutes be changed so as to remedy this problem. In *Woodin v. Rasmussen*,[108] and *Gina C. v. Stephen F.*,[109] the courts, through very strict statutory interpretation, reluctantly denied standing to obtain civil protection orders to petitioners who were pregnant with the respondents' children.[110] The courts concluded that an unborn child was not a child within the meaning of the statutes.[111] However, in each case the court recognized that this interpretation left a dangerous gap in the statute.[112] The court in *Woodin* specifically noted its concern about the continuing relationship between the parents of an unborn child in common, which leads to continuing risk.[113] The *Woodin* court concluded that the legislature may wish to extend protection to the petitioner.[114] Moreover, the court in *Gina C.*[115] specifically called on the legislature to remedy the statutory oversight and confer civil protection order protection to a pregnant woman

103. Alvarez v. Itoh, IF 343-87 (D.C. Super. Ct. Apr. 28, 1987).
104. 476 N.Y.S.2d 991 (Fam. Ct. 1984).
105. *Id.* at 998.
106. *Id.* at 993-98.
107. *Id.* at 991.
108. 455 N.W.2d 535 (Minn. Ct. App. 1990).
109. 576 N.Y.S.2d 776 (Fam. Ct. 1991).
110. *Woodin*, 455 N.W.2d at 536-37; *Gina C.*, 576 N.Y.S.2d at 776-77.
111. *Woodin*, 455 N.W.2d at 536-37; *Gina C.*, 576 N.Y.S.2d at 776-77.
112. *Woodin*, 455 N.W.2d at 537; *Gina C.*, 576 N.Y.S.2d at 777.
113. 455 N.W.2d at 537.
114. *Id.*
115. 576 N.Y.S.2d at 777.

carrying the respondent's child.[116]

Social science research demonstrates the importance of extending civil protection order coverage not only to parties who share a child in common, but also to pregnant women who are carrying the batterer's child.[117] Data gathered on pregnancy and battering reveal that pregnant women face significant and increased risk of physical abuse.[118] Recent research indicates that 37% of all obstetrical patients across race, class, and educational lines are physically abused while pregnant.[119] Abuse often begins or escalates during pregnancy.[120] Among battered women, 17% have been physically abused during pregnancy,[121] with 60% of those women reporting more than

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116. *Id.* The only other case which deals with the issues of pregnancy and standing is rather unusual. In *Robert F. Z. v. Michelle McG.*, the court refused to issue a civil protection order based on a child in common when the petitioner, the putative father of the respondent's unborn child, denied paternity of the fetus in a parallel paternity suit. 513 N.Y.S.2d 628, 628-29 (Fam. Ct. 1987).

117. Violence occurs during pregnancy in almost one quarter of the families reporting violence. Richard J. Gelles, *Violence and Pregnancy: A Note on the Extent of the Problem and Needed Services*, FAMILY COORDINATOR, Jan. 1975, at 81.

118. A disproportionately large number of women are assaulted while they are pregnant. Battered women are 3 times more likely to be injured while pregnant. Evan Stark & Anne E. Flitcraft, *Woman-Battering, Child Abuse and Social Heredity: What is the Relationship?*, *in* MARITAL VIOLENCE 147 (N. Johnson ed. 1985).

119. Browne, *supra* note 1, at 3187; A. Henton et al., *Battered and Pregnant*, 77 AM. J. PUB. HEALTH 1337, 1337-39 (1987). Among pregnant women, 59% report that battering occurred during their first pregnancy, 63% during the second, and 55% during their third pregnancy. BATTERED WOMAN, *supra* note 4. One study indicated that 63% of the clients in a battered women health center were battered during pregnancy. WILLIAM STACEY & ANSON SHUPE, THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA 219 tbl. 5-3 (1983); Gelles, *supra* note 117, at 81-86. A Texas survey found that between 20% and 25% of all obstetrical patients are abused women. Stark & Flitcraft, *supra* note 11, at 307-08; *see also* Jacquelyn C. Campbell, *Nursing Assessment for Risk of Homicide with Battered Women*, ADVANCES IN NURSING SCIENCE, July 1986, at 36, 38 (finding 20-25% of all pregnant women are battered). Among women reporting abuse during pregnancy, 60% reported two or more episodes of abuse. Judith McFarlane et al., *Assessing for Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry Into Prenatal Care*, 267 JAMA 3176 (1992).

120. Abuse may begin during pregnancy or may increase during the prenatal period. Campbell, *supra* note 119, at 78. Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. Planned Parenthood of Southeastern Penn. v. Casey, 112 S.Ct. 2791, 2827 (1992). Most battered women report that the battering became more acute during the pregnancy and the child's infancy. STACEY & SHUPE, *supra* note 119, at 31-32 (1983). Approximately 29% of battered women report that battering increased after they became pregnant. Judith McFarlane, *Battering During Pregnancy: Tip of the Iceberg Revealed*, 15 WOMEN AND HEALTH 69, 71-72 (1989).

121. FAMILY VIOLENCE COALITION, BROKEN BODIES AND BROKEN SPIRITS: FAMILY VIOLENCE IN MARYLAND AND RECOMMENDATIONS FOR CHANGE (1991); McFarlane, *supra* note 120, at 71-72. Nearly 50% of abusive husbands batter their pregnant wives. *Ten Facts About Violence Against Women: Hearing on S.101-939 Before the Committee on the Judiciary on*

one incident.[122] The primary predictor of battering during pregnancy is prior abuse; in one study, 87.5% of women battered during the current pregnancy were physically abused prior to pregnancy.[123] Often the worst abuse can be associated with pregnancy.[124] Battering during pregnancy increases the risk of miscarriage and low-birth weight births.[125] The March of Dimes reports that more babies are born with birth defects as a result of the mother being battered during pregnancy than from the combination of all the diseases for which we immunize pregnant women.[126]

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 follow the lead of Alaska, California, Massachusetts, New Hampshire, North Dakota, Washington, and Puerto

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Women and Violence, 101st Cong., 2d Sess. 78 (1990). Men who batter pregnant women are three times more likely to be violent and commit crimes outside the home. ANNE S. HELTON, PROTOCOL OF CARE FOR THE BATTERED WOMAN: PREVENTION OF BATTERING DURING PREGNANCY 5 (1986); *see also* ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, WOMEN ABUSE: FREQUENT AND SEVERE (1983) (30%); Diane Bohn, *Domestic Violence and Pregnancy*, 35 J. NURSE-MIDWIFERY 86, 88-91 (1990) (40%); Campbell, *supra* note 119, at 45 (45.6%); Stark & Flitcraft, *supra* note 11, at 309 (28%).

122. McFarlane et al., *supra* note 119, at 3176.

123. *Id.*

124. Battering during pregnancy often involves blows to the victim's abdomen and stomach resulting in miscarriages and injuries to their reproductive organs. *See* Gelles, *supra* note 117, at 83; *see also* CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 52 (1989). Some abuse during pregnancy was focused on the head and abused women were twice as likely as non-abused women to begin prenatal care during the third trimester. McFarlane et al., *supra* note 119, at 3177.

125. MARCH OF DIMES, ALL PREGNANT WOMEN SHOULD BE EVALUATED FOR BATTERING DURING ROUTINE PRENATAL CARE (1992); Stark & Flitcraft, *supra* note 11. Battered wives are four times more likely to bear infants of low birth weight. *Ten Facts About Violence Against Women: Hearing on S.101-939 Before the Committee on the Judiciary on Women and Violence*, 101st Cong., 2d Sess. 78 (1990). Battered women are four times more likely than non-battered women to deliver low-birthweight babies. McFarlane, *supra* note 120, at 69; Gelles, *supra* note 117, at 83.

126. NATIONAL COMMISSION TO PREVENT INFANT MORTALITY, DEATH BEFORE LIFE: THE TRAGEDY OF INFANT MORTALITY 16 (1988); MARCH OF DIMES, *supra* note 125, at 3; *see also Ten Facts About Violence Against Women: Hearing on S.101-939 Before the Committee on the Judiciary on Women and Violence*, 101st Cong., 2d Sess. 135 (1990); Stark & Flitcraft, *supra* note 11 (finding increased risk of injury to the child); Sara Buel, Remarks at the Opening Plenary Session of the National Council of Juvenile and Family Court Judges Conference entitled Courts and Communities: Confronting Violence in the Family (March 25, 1993). Low-birthweight babies are more likely to have birth defects and are 40 times more likely to die in the first month of life. MARCH OF DIMES, *supra* note 125, at 1-2.

Rico.[127] These statutes have amended statutory language 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.

5. Unmarried Persons of Different Genders Living as Spouses

Forty-four states, the District of Columbia, and Puerto Rico will issue civil protection orders to unmarried parties who live together as spouses.[128] Courts look at a range of circumstances to determine whether parties "reside together" within the meaning of the domestic violence statutes. When defining "residing together," courts have interpreted the phrase to include live-in relationships of varying lengths and duration, whether or not the relationship produces children.[129] In

127. ALASKA STAT. § 25.35.200 (Supp. 1993); CAL. FAM. CODE § 70 (West 1993); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1993); N.H. REV. STAT. ANN. § 173-B:1 (Supp. 1992); N.D. CENT. CODE § 14.07.1-01 (Supp. 1993) (including any other substantial relationship); P.R. LAWS ANN. tit. 8, §§ 602, 621 (Supp. 1990); WASH. REV. CODE ANN. § 26.50.010 (West Supp. 1993); WIS. STAT. ANN. § 813.122 (West Supp. 1993). Additionally, Illinois' criminal procedure statute covering domestic violence authorizes a court to issue a criminal protection order based upon a dating relationship or an engagement. 750 ILCS 60/103 (Smith-Hurd Supp. 1993).

128. ALA. CODE § 30-5-2 (1989); ALASKA STAT. § 25.35.200 (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1993); CAL. FAM. CODE § 70 (West 1993); COLO. REV. STAT. ANN. § 14-1-101 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 945 (1993); D.C. CODE ANN. § 16-1004 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-1 (Supp. 1993); HAW. REV. STAT. § 586-1 (Supp. 1992); IDAHO CODE § 39-6303 (1993); 750 ILCS 60/103 (Smith Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-1 (West Supp. 1993); IOWA CODE ANN. § 236.2 (West Supp. 1993); KAN. STAT. ANN. § 60-3102 (Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-501(h) (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B-01 (West Supp. 1993); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. REV. STAT. § 455-010 (Vernon Supp. 1993); MONT. CODE ANN. § 49-4-121 (1993); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. ANN. § 33.018 (Michie 1986); N.H. REV. STAT. ANN. § 173.B:1 (Supp. 1992); N.J. STAT. ANN. § 25:2C:20 (West 1992); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993); N.Y. FAM. CT. ACT § 846 (McKinney Supp. 1994); N.D. CENT. CODE § 14-07.1-01 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); OR. REV. STAT. § 107.705 (1991); 23 PA. CONS. STAT. ANN. § 6102 (1992); P.R. LAWS. ANN. tit. 8, §§ 602, 621 (Supp. 1990); R.I. GEN. LAWS § 15-15-1 (1988); S.C. CODE ANN. § 20-4-40 (Law. Co-op. 1985); TENN. CODE ANN. § 36-3-601 (1991); TEX. FAM. CODE ANN. § 71.01 (1992); UTAH CODE ANN. § 30-6-1 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1101 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.010 (West Supp. 1992); W. VA. CODE § 48-2A-2 (Supp. 1993); WIS. STAT. ANN. § 813-122 (West Supp. 1993); WYO. STAT. § 35-21-102 (Supp. 1993).

129. State v. Simy, 772 P.2d 1145, 1146 (Ariz. Ct. App. 1989) (live-in girlfriend);

Yankoskie v. Lenker, the court outlined five factors which indicate that the parties are "persons living as spouses": 1) the duration of the relationship, 2) the frequency of contact, 3) the parties financial interdependence, 4) whether the parties raised children together, and 5) whether the parties engaged in tasks designed to maintain a common household.[130]

Weighing various factors, courts have concluded that maintenance of a separate residence does not bar a finding of "residing together."[131] In *Yankoskie*, the court held that the parties, a boyfriend and girlfriend, did live as spouses even though they maintained separate residences.[132] The parties had three children in common, he visited her apartment almost daily with her consent, and they had shared a residence in the past.[133] In *Sapon v. Fisher*,[134] the court found a

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Maksuta v. Higson, 577 A.2d 185 (N.J. Super. Ct. App. Div. 1990) (parties who lived together for 28 years and had two children together but had never married); Cooper v. Merkel, 470 N.W.2d 253 (S.D. 1991) (parties who lived together for seven years). *But see* State v. Taylor, 1990 Ohio App. LEXIS 4749, at *5 (Ohio Ct. App. Nov. 1, 1990) (holding proper the dismissal of a criminal domestic violence prosecution where the defendant abused a woman he previously had lived with and with whom he had two children, where the criminal domestic violence statute at the time placed a one year time bar on previous cohabitants and did not extend coverage to persons who share a child in common). Today, however, both the Ohio civil protection order statute and the criminal domestic violence statute have been amended and would extend coverage to the petitioner if the parties share a child in common. *See* Robinson v. United States, 317 A.2d 508, 510-14 (D.C. 1974) (holding that a protection order may issue on a child against the child's mother's boyfriend with whom she and the child had lived for three years and with whom the mother had a child in common); Hawaii v. Ibous, 857 P.2d 576 (Haw. Sup. Ct. 1993) (extending coverage to a live-in girlfriend).

130. 526 A.2d 429, 432 (Pa. Super. Ct. 1987). *But see* Jackson v. United States, 357 A.2d 409 (App. D.C. 1976) (holding no mutual residence for purposes of issuing a protection order where the couple only lived together for three months, the defendant did not pay rent, the petitioner considered the apartment hers, the couple had no children in common, and the defendant gave his mother's address as his residence). *Jackson*, however, illustrates why dating relationships should be covered as well.

131. *See* Sapon v. Fisher, IF 745-89 (D.C. Superior Court 1989) (finding mutual residence where girlfriend and boyfriend had for some period of time spent every night together at each other's apartments, she had clothing at his apartment, and her mother wrote her at his apartment); *see also* People v. Holifield, 252 Cal. Rptr. 729 (Cal. Ct. App. 1988) (holding the parties were cohabitating where respondent lived with victim in her hotel room for more than half of the three months proceeding the assault, the respondent had no regular place to stay, brought his belongings with him each time he came and slept with and had occasional sex with the victim); People v. Ballard, 249 Cal. Rptr. 806 (Cal. Ct. App. 1988) (holding the defendant was living with victim for two years where they often shared the same bed even though he had his own apartment); Yankoskie v. Lenker, 526 A.2d 429 (Pa. Super. Ct. 1987) (holding that parties were living as spouses even though they maintained separate residences, where the petitioner bore the respondent three children in three years, visited her apartment daily, and they shared a residence in the past).

132. *Yankoskie*, 526 A.2d at 432.

133. *Id.* at 430-31.

mutual residence where a boyfriend and girlfriend alternated between sleeping at each other's apartments for some period of time, where she kept clothing at his apartment, and where her mother wrote her at his apartment.[135] In *State v. Tripp*,[136] the court found that the parties were co-residents for purposes of the domestic violence statute where the defendant stayed with his girlfriend approximately three times a week for less than 14 weeks at a house where the victim was housesitting, where there was no certainty of continued use, where neither paid rent, where both had alternative separate residences, and where the defendant kept his clothes, did his laundry, ate his meals, and slept at the house on a continuous basis.[137] In a criminal domestic violence case, *People v. Holifield*,[138] a court interpreted "residing together" to include the respondent sleeping with and having occasional sex with the victim in the victim's hotel room for half of the three months proceeding the assault where the respondent had no regular place to stay and where he brought his belongings with him when he came.[139]

In addition to interpreting "residing together" to include circumstances where the parties maintain separate residences, courts have held that parties were cohabitating even if they did not plan to marry,[140] and in criminal prosecutions, even absent a finding of any sexual relationship. In *People v. Ballard*,[141] the court held that for purposes of a criminal felony cohabitant abuse statute, it need not find a sexual relationship to establish jurisdiction.[142] The court noted that "[c]ohabitation means simply to live or dwell together in the same habitation; evidence of lack of sexual relations is irrelevant."[143]

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134. IF 745-89 (D.C. Superior Court 1989).

135. *Id.*

136. 795 P.2d 280 (Haw. 1990).

137. *Id.* at 281-83.

138. 252 Cal. Rptr. 729 (Cal. Ct. App. 1988).

139. *Id.*

140. Grant v. Wright, 536 A.2d 319 (N.J. Super. Ct. App. Div. 1988) (holding parties lived together even though they were not going to marry because the petitioner wanted children and the respondent did not).

141. 249 Cal. Rptr. 806 (Cal. Ct. App. 1988).

142. *Id.* at 809.

143. *Id.*; *see also* State v. Wagner, 1993 Ohio App. LEXIS 3986 (Ohio Ct. App. Aug. 11, 1993) (holding parties resided together where they shared a residence for two weeks, the defendant expressed intention to stay, and they had a sexual relationship). *But see* State v. Allen, 536 N.E.2d 1195 (Ohio Ct. App. 1988) (holding that evidence of sexual relations alone, without any other evidence of cohabitation, may not be sufficient to establish that parties were "residing together." The victim initially stated that she and the defendant never

Courts should issue civil protection orders even where the defendant will be incarcerated for the duration of the protection order. In *Maldonado v. Maldonado*,[144] the District of Columbia Court of Appeals reversed, as an abuse of discretion, a trial judge's decision not to extend a civil protection order based solely on the fact that the husband would be incarcerated during the duration of the civil protection order.[145] The appellate court noted that the defendant could escape or be released prior to the expiration of the extended civil protection order and that he had the potential to continue, from jail, to threaten and harass the petitioner via the mail, telephone, or a third party.[146] Understanding the danger release from incarceration poses to domestic violence victims, courts will issue protection orders where a defendant will soon be released from jail and pose a potential threat to the petitioner. In *Campbell v. Campbell*,[147] the court issued a protection order to a petitioner where her husband was incarcerated for sexual battery of their daughter but would soon be released.[148] The court held that the injunction was proper because the "husband had a violent temper, behaved violently in the past, blamed [the petitioner] for the arrest, and . . . would soon be released from jail."[149]

6. Intimate Partners of the Same Gender

For state civil protection order statutes to address fully the domestic violence crisis, they must recognize and combat violence in both homosexual and heterosexual intimate relationships. The civil protection order statutes of thirty-four states, Puerto Rico, and the District of Columbia extend their coverage to homosexual relationships by providing protection to those who have lived together or who have had an intimate relationship.[150] Other jurisdictions offer

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lived together, but later recalled that he had lived with her for three or four months three or four years ago. The court found that since she had only pointed to evidence of sexual relations, there was insufficient evidence of cohabitation).

144. 1993 D.C. App. LEXIS 227 (D.C. Ct. App. June 22, 1993).

145. *Id.* at *6.

146. *Id.* at *8.

147. 584 So. 2d 125 (Fla. Dist. App. Ct. 1991).

148. *Id.*

149. *Id.* at 26. *But see* Vanderhurst v. Rice, 17 Pa. D. & C.3d 225, 228 (C.P 1980) (refusing to hold that the respondent's five year incarceration constituted a constructive mutual residence with petitioner to establish "residing together" for purposes of the domestic violence statute).

150. ALASKA STAT. § 25.35.060 (1993) (dating or courtship relationship); CAL. FAM. CODE § 70 (West Supp. 1993) (dating relationship); COLO. REV. STAT. ANN. § 14-4-101 (Supp. 1993) (intimate relationship); CONN. GEN. STAT. ANN. § 46b-38a (West Supp. 1993)

this relief by case law and statutory interpretation by trial courts. In *Bryant v. Bryant*,[151] the New Jersey Supreme Court expressly interpreted their amended statute as applying to homosexual relationships which turn violent.[152]

Ohio case law states affirmatively that its criminal domestic violence statute applies to relationships between persons of the same gender living together. In *State v. Hadinger*,[153] the appellate court vacated a trial court's decision to dismiss a domestic violence prose-

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(persons "presently residing together or who have resided together"); D.C. CODE ANN. § 16-1001 (1992) (parties who share or have shared a mutual residence); GA. CODE ANN. § 19-13-1 (Supp. 1993) ("other persons living or formerly living in the same household"); HAW. REV. STAT. § 586-1 (Supp. 1992) ("persons jointly residing or formerly residing in the same dwelling unit"); IDAHO CODE § 39-6303 (1993) ("persons who reside or have resided together"); 750 ILCS 60/103 (Smith-Hurd Supp. 1993) (persons who have or formerly shared a common dwelling); IND. CODE ANN. § 34-4-5.1-1 (West Supp. 1993); IOWA CODE ANN. § 236.2 (West Supp. 1993) (persons cohabitating); KAN. STAT. ANN. § 60-3102 (Supp. 1992) (persons who reside together or formerly resided together where both parties continue to have access to the residence); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992) (persons presently or formerly living together as sexual partners); MD. CODE ANN., FAM. LAW § 4-501 (Supp. 1993) (persons in a sexual relationship who live or have lived together); MASS. GEN. L. ANN. ch. § 209A, § 1 (West Supp. 1993) (substantive dating relationship); MICH. COMP. LAWS ANN. § 600-2950 (West 1986) ("person residing or having resided in the same household"); MINN. STAT. ANN. § 518B.01 (West Supp. 1993) (persons presently or previously resided together); NEB. REV. STAT. § 42-903 (Supp. 1992) (persons residing together or who have resided together); NEV. REV. STAT. ANN. § 33.018 (Michie 1986) (person with whom residing or with whom previously resided); N.H. REV. STAT. ANN. § 173.B:1 (Supp. 1992) (current or former sexual or intimate partners); N.J. STAT. ANN. § 2C:25-19 (West 1992) (present or former household member); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993) (present or former household member); N.D. CENT. CODE § 14-07.1-01 (Supp. 1993) (persons in a dating or other sufficient relationship); OHIO REV. CODE ANN. § 3113.31 (Baldwin Supp. 1992) (person cohabitating with respondent); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992) ("persons living in the same household or who formerly lived in the same household"); OR. REV. STAT. § 107.705 (1991) (persons who are cohabiting or previously cohabitated); 23 PA. CONS. STAT. ANN. § 6102 (1991) (sexual or intimate partners); P.R. LAWS ANN. tit. 8, § 602 (Supp. 1990) (intimate consensual relationship); R.I. GEN. LAWS § 8-8.1-1 (Supp. 1992) (persons who shared an intimate sexual relationship within the last six months); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984) (persons who live or have lived together); TENN. CODE ANN. § 36-3-601 (1991) (persons jointly residing in same dwelling unit); TEX. FAM. CODE ANN. § 71.01 (West Supp. 1993) (persons who live or previously lived together); UTAH CODE ANN. § 30-6-1 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.010 (West Supp. 1993) (dating relationship); W. VA. CODE § 48-2A-2 (West Supp. 1992) ("current or former sexual intimate partners"); WIS. STAT. ANN. § 813.12 (West Supp. 1993) (person currently or previously residing in a place of abode with another person); WYO. STAT. § 35-21-102 (Supp. 1993) (includes other adults sharing common living orders).

151. 624 A.2d 584 (N.J. 1993).

152. *Id.* (stating that the act applies to "lesbians and gay men caught in violent relationships").

153. 573 N.E.2d 1191 (Ohio Ct. App. 1991).

cution where one woman bit the hand of another woman with whom she was "living as a spouse," remanding the case.[154] The appellate court focused on the fact that the parties lived together rather than on their sexual relationship, and rejected a construction of the statute which would require the parties' ability to marry under state law as a prerequisite for coverage.[155] The court noted that since the statute defined "person living as a spouse" to include a person "who otherwise is cohabitating with the offender," it reflected the legislature's intent to protect domestic violence victims regardless of gender or gender preference.[156] The Ohio criminal domestic violence statute and civil protection order statute contain identical definitions of "person living as a spouse."[157] Since the standard for criminal prosecution is higher than that for issuance of a civil protection order, civil protection order issuing courts in other jurisdictions should extend coverage to homosexual relationships as well. In *Glater v. Fabianich*,[158] the appellate court upheld a decision below to grant a petition for a protection order to a man whose male roommate pushed him, choked him, and repeatedly threatened him after their intimate relationship ended.[159] The lower court granted the protection order after an analysis of the parties' living arrangements.[160] The petitioner had stayed at the respondent's apartment every night for three months, kept clothing there, spent 90% of his time in the apartment, and contributed to household expenses.[161]

The policy considerations which compel the state to act to protect victims of domestic violence in heterosexual relationships are equally applicable to homosexual relationships.[162] Domestic violence exists in homosexual as well as heterosexual relationships.[163] The

154. *Id.* at 1191.
155. *Id.* at 1192-93.
156. *Id.* at 1193.
157. OHIO REV. CODE ANN. § 3113.31.
158. 625 N.E.2d 96 (Ill. Ct. App. 1993).
159. *Id.* at 98.
160. *Id.*
161. *Id.* at 99.
162. NANCY HAMMOND, NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986); Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony For Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379 (1993); Ruthan Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman Abuse*, 67 N.Y.U. L. REV. 520 (1992).
163. The New York City Gay and Lesbian Anti-Violence Project noted a 180% increase

dynamics of violence in abusive homosexual and lesbian intimate relationships resembles the patterns of abuse in heterosexual relationships. The rate of occurrence of the violence, its severity, and its tendency to escalate over time are very similar. Studies indicate that abuse occurs in approximately 20% of all homosexual and lesbian relationships.[164] Like battered partners in heterosexual relationships, homosexual intimates also report physical assaults, assaults with weapons, rape, property damage, harassment, death threats, and psychological abuse, including threats of exposure of the victims sexual orientation.[165] The dynamics of violence in homosexual relationships also reveal the same tendency of the violence to escalate in both frequency and severity as the relationship progresses.[166] Significant separation violence during and closely following the end of the relationship also exists in abusive homosexual and lesbian relationships.[167] Finally, homosexual and lesbian victims, like their heterosexual counterparts, also typically make several attempts before they are successful and finally leave their batterer.[168] Consequently, state protection order statutes must also extend coverage to homosexual and lesbian victims of intimate abuse.

7. Dating Relationships

Twelve progressive state statutes in Alaska, California, Maine, Massachusetts, New Hampshire, New Mexico, North Dakota, Pennsylvania, Puerto Rico, Rhode Island, Washington, and West Virginia extend coverage of protection orders to parties in dating relationships.[169] Courts in Wisconsin, Pennsylvania, and Oklahoma support

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in domestic violence cases recorded between 1990 to 1991. In 1991, domestic violence cases comprised 31% of its case load. NYC GAY AND LESBIAN ANTI-VIOLENCE PROJECT, 1991 ANNUAL REPORT 2 (1991).

164. Bricker, *supra* note 162, at 1388.

165. *Id.* at 1389-91.

166. *Id.* at 1392.

167. *Id.*

168. *Id.* at 1393.

169. ALASKA STAT. § 25.35.200 (Supp. 1993) ("person . . . in a dating, courtship, or engagement relationship with the respondent"); CAL. FAM. CODE § 70 (West Supp. 1992) ("person with whom the respondent has had a dating or engagement relationship"); ME. REV. STAT. ANN. tit. 19, § 762(4) (1992) ("includes individuals presently or formerly living together as sexual partners"); MASS. GEN. L. ANN. ch. 209A, § 1 (West 1992) ("persons who . . . are or have been in a substantive dating or engagement relationship, which shall be adjudged by district, probate or Boston municipal courts consideration of the following factors: (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the

this innovative approach of issuing civil protection orders based on a dating relationship.[170]

Social science research that documents violence in dating relationships supports offering broader civil protection order coverage to dating partners and adolescents.[171] A study of teen dating violence found that roughly one in four students experienced actual violence, either as victims or as perpetrators.[172] A 1985 survey at a midwest-

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length of time elapsed since the termination of the relationship"); N.H. REV. STAT. ANN. § 173-B:1 (Supp. 1992) ("intimate partners means persons currently or formerly involved in a romantic relationship, whether or not such relationship was ever sexually consummated"); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993) (person with whom petitioner has continuing personal relationship); N.D. CENT. CODE § 14.07.1-01 (Supp. 1993) ("family or household member means . . . persons who are in a dating relationship . . . [or] any other sufficient relationship to the abusing person"); 23 PA. CONS. STAT. ANN. § 6102 (1992) ("sexual or intimate partner"); P.R. LAWS ANN. tit. 8, § 602 (Supp. 1990) ("Marital relationship shall mean . . . those who have or have had an intimate consensual relationship."); R.I. GEN. LAWS § 8-8.1-1 (Supp. 1992) ("persons who shared an intimate sexual relationship within the past six (6) months"); WASH. REV. CODE ANN. § 26.50.010(2)-(3) (West Supp. 1993); ("persons sixteen years of age or older with whom a respondent sixteen years of age or older has or has had a dating relationship . . . . 'Dating relationship' means a social relationship of a romantic nature. Factors that the court may consider in making this determination include: (a) the length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties"); W. VA. CODE § 48-2A-2 (Supp. 1993) ("current or former sexual or intimate partners").

170. Flury v. Howard, 813 P.2d 1052 (Okla. 1991) (issuing order against person with whom petitioner had a dating relationship); Diehl v. Drummond, 2 Pa. D. & C.4th 376 (C.P. 1989) (issuing order against petitioner's 16 year old boyfriend); Banks v. Pelot, 460 N.W.2d 446 (Wisc. Ct. App. 1990) (issuing order to girlfriend against respondent who she had dated on and off for two years).

171. In some domestic violence cases the perpetrator and/or the victim may be adolescents who are engaging in the same pattern of abusive behavior as occur in adult relationships. *See* Ganley, *supra* note 21, at 22.

Estimates of the rates of physical violence in dating relationships range from 20% to 67%. *See, e.g.*, ANGELA BROWNE, WHEN BATTERED WOMEN KILL 42 (1987) (21%-30%); RICHARD GELLES & CLAIRE PEDRICK CORNELL, INTIMATE VIOLENCE IN FAMILIES 65 (1987) (10%-67%); NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET: 1992 ADDENDUM ONLY 14 (1992) (stating that "studies of high school and college students conducted during the 1980s have reported rates of dating violence ranging from 12% to 65%"); NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *Family Violence: The Facts*, 1 JUV. AND FAM. JUST. TODAY 21, 21 (1993); Lisa Morrell, *Violence in Premarital Relationships*, 7 RESPONSE 17 (1984) (21.2%); Nona K. O'Keefe et al., *Teen Dating Violence*, SOCIAL WORK, Nov./Dec. 1986, at 465, 465-66 (12%-26.9%); Linda P. Rouse et al., *Abuse in Intimate Relationships: A Comparison of Married and Dating College Students*, 3 J. INTERPERSONAL VIOLENCE 414, 422-23 (1988) (reporting that 28.2% of heterosexual dating students had been pushed, shoved, or grabbed by a dating partner, and that 30% of battered women eventually marry someone who had abused them during courtship); Stark & Flitcraft, *supra* note 11, at 301 (discussing four studies of premarital or courtship violence on college campuses, with findings of physical aggression or threats in 13.5%, 19%, 31.5%, and 42% of the relationships, respectively); Price, *supra* note 4 (33%).

172. O'Keefe, *supra* note 171, at 467 (12%-26.9%) (noting that high school students who

ern university found higher rates of violence in dating relationships than between married couples.[173] Another study reported that 32% of domestic violence offenders are boyfriends or ex-boyfriends.[174]

These studies demonstrate that the prevalence of violence in dating relationships rivals and may surpass the rate of violence between married or cohabitating couples. Authorizing the use of civil protection orders to protect against dating violence provides an important opportunity to intervene early to halt escalating violence and teach youthful offenders that violence in intimate relationships will not be tolerated. Learning this lesson while young may prevent many future cases of adult domestic violence. To address fully the domestic violence crisis, all state statutes should be amended to extend civil protection order coverage to dating relationships.

8. Persons Offering Refuge

Two forward-looking state statutes, from Hawaii and Illinois, explicitly extend civil protection order protection to persons with whom the abused party seeks refuge.[175] California case law also supports this approach.[176] This innovative extension of civil protection order coverage recognizes that batterers often direct violence and intimidation against persons who give aid and refuge to abused parties. Batterers may seek to control and isolate the abused party by making threats against persons who give shelter or assistance.[177] By

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reported spousal violence between their parents had a statistically greater rate of violence in their dating relationships. More than 51% of students who witnessed their parents being abusive to each other had been involved in an abusive relationship. Furthermore, 47% of the students who were abused as children had been in a dating relationship in which violence occurred.)

173. Jan. E Stets & Murray A. Strauss, *The Marriage License as a Hitting License: A Comparison of Assaults in Dating, Cohabiting, and Married Couples, in* PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTION TO VIOLENCE IN 8,145 FAMILIES 227, 227-44 (Murray A. Straus & Richard J. Gelles eds., 1990).

174. HARLOW, *supra* note 3, at 2.

175. HAW. REV. STAT. § 586-4 (Supp. 1992) ("The order may be granted to any person who . . . filed a petition on behalf of a family or household member"); 725 ILCS 5/112A-4 (Smith Hurd Supp. 1993) ("Persons protected by this Act [include] . . . any person residing or employed at a private home or public shelter which is housing an abused family or household member").

176. *See, e.g.*, Caldwell v. Coppola, 268 Cal. Rptr. 453 (Cal. Ct. App. 1990) (upholding issuance of civil protection order to protect both the petitioner and her sister who gave her refuge).

177. Ganley, *supra* note 21, at 19, 37, 53 ("Domestic violence ripples out into the community as the perpetrator's violence also results in the death or injury of those attempting to assist the victim . . . ." Assaults and threats can be directed toward persons offering refuge

extending coverage to persons offering refuge and assistance, these civil protection order statutes undermine the batterer's ability to intimidate others from aiding the abused party, and reduce the abused party's reluctance to seek assistance from others.

Separated women are very vulnerable to continued abuse from their husbands or intimate partners. Violence often escalates after separation.[178] Batterers often stalk their partners who leave them and will threaten or harass not only their intimate partner, but also the persons who shelter her.[179] The stalking and harassment may continue for months, or even years, after separation.[180] Many battered women will resist seeking shelter and assistance from friends and family out of fear of placing them and their children in danger from the batterer.[181]

Perhaps most importantly, providing civil protection order protection to persons who offer refuge undermines the batterer's sense of control, alleviates the abused party's sense of isolation, and significantly improves the abused party's safety. Further, extending civil protection order coverage to persons offering refuge may also vastly improve the quality of evidence that can be presented in civil protection order contempt trials and criminal domestic violence proceedings. It may help prevent batterers from scaring off key witnesses who might otherwise assist the victim by testifying. Offering protection to persons who offer refuge to battering victims may help limit the batterer's access to them, while also calming their legitimate fears of the batterer.

9. Other Persons Covered

Progressive jurisdictions extend civil protection order coverage to other persons who are not currently family members or intimates. For

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and others both inside and outside the courtroom.).

178. H.M. Hughes, *Impact of Spouse Abuse on Children of Battered Women*, 2 VIOLENCE UPDATE 1, 1-11 (1992).

179. *Id.*

180. *Id.* 1-11; *see also* BROWNE, *supra* note 171, at 114. Women who fled have been forced back at gunpoint, forced to return when the batterer held a gun to a child's head, tracked across state lines to get them to return, and tracked down after seven years. CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 28 (1987).

181. According to one researcher, 80% of batterers engage in violent behavior towards other targets, including acting abusively towards other people. Lenore E. Walker, Eliminating Sexism to End Battering Relationships, Remarks at the American Psychological Association (1984).

example, Florida and Oklahoma protect the present spouse of the batterer's ex-spouse.[182] Forty states and the District of Columbia protect persons who formerly lived as spouses.[183] Thirty-seven states recognize that violence may extend to all persons living in the home when a victim is stalked and harassed by the batterer.[184] To ensure

182. FLA. STAT. ANN. § 741.30 (West 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); *see also* 750 ILCS 60/103 (Smith-Hurd Supp. 1993) (providing that a criminal protection order will issue to a person related by a present or prior marriage).

183. ALASKA STAT. § 25.35.200 (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1992); CAL. FAM. CODE § 70 (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-101 (Supp. 1993); CONN. GEN. STAT. ANN. § 46b-38a (West Supp. 1992); D.C. CODE ANN. § 16-1001 (1992); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-1 (Supp. 1993); HAW. REV. STAT. § 586-1 (Supp. 1992); IDAHO CODE § 39-6303 (1992); 750 ILCS 60/103 (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-1 (West Supp. 1993); IOWA CODE ANN. § 236.2 (West Supp. 1993); KAN. STAT. ANN. § 60-3102 (Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1992); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. REV. STAT. § 455.010 (Supp. 1993); MONT. CODE ANN. § 40-4-121 (1993); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. ANN. § 33.018 (Michie 1986); N.H. REV. STAT. ANN. § 173-B:1 (Supp. 1992); N.J. STAT. ANN. § 2C:25-19 (West 1992); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1992); N.C. GEN. STAT. § 50B-1 (1989); N.D. CENT. CODE § 14-07.1-01 (1993); OHIO REV. CODE ANN. § 3113.31 (Baldwin Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); OR. REV. STAT. § 107.705 (1991); 23 PA. CONS. STAT. ANN. § 6102 (1991); R.I. GEN. LAWS § 8-8.1-1 (Supp. 1993); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984); TENN. CODE ANN. § 36-3-60 (Supp. 1993); UTAH CODE ANN. § 30-6-1 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1101 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.120 (West 1992); W. VA. CODE § 48-2A-2 (Supp. 1992); WIS. STAT. ANN. § 813.12 (West Supp. 1993); WYO. STAT. § 35-21-102 (Supp. 1993).

184. ALASKA STAT. § 25.35.200 (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1992); ARK. CODE ANN. § 9-15-103 (Michie Supp. 1993); CAL. FAM. CODE § 70 (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-101 (Supp. 1993); CONN. GEN. STAT. ANN. § 46b-38a (West Supp. 1992); GA. CODE ANN. § 19-13-1 (Supp. 1993); HAW. REV. STAT. § 586-1 (Supp. 1992); IDAHO CODE § 39-6303 (1992); 750 ILCS 60/103 (Smith-Hurd Supp. 1993) IND. CODE ANN. § 34-4-5.1-1 (West Supp. 1993); IOWA CODE ANN. § 236.2 (West Supp. 1993); MD. CODE ANN., FAM. LAW § 4-501 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1992); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. REV. STAT. § 455.010 (Supp. 1993); MONT. CODE ANN. § 40-4-121 (1993); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. ANN. § 33.018 (Michie 1986); N.H. REV. STAT. ANN. § 173-B:1 (Supp. 1992); N.J. STAT. ANN. § 2C:25-19 (West 1992); N.C. GEN. STAT. § 50B-1 (1989); N.D. CENT. CODE § 14-07.1-01 (1993); OHIO REV. CODE ANN. § 3113.31 (Baldwin Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); OR. REV. STAT. § 107.705 (1991); 23 PA. CONS. STAT. ANN. § 6102 (1991); R.I. GEN. LAWS § 8-8.1-1 (Supp. 1993); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984); TENN. CODE ANN. § 36-3-60 (Supp. 1993); UTAH CODE ANN. § 30-6-1 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.120 (West 1992); WIS. STAT. ANN. § 813.12 (West Supp. 1993); WYO. STAT. § 35-21-102 (Supp. 1993).

a safe living environment for women whom shelters cannot accommodate,[185] these states grant civil protection order coverage to unrelated household members.[186] Four states limit this protection to unrelated household members who are present or past sexual partners.[187] Thirty-five states extend civil protection order coverage to former unrelated household members.[188] The New Mexico statute provides for is-

185. Battered women's shelters can accept only a fraction of the battered women and children who turn to them for help. *Women and Violence, Hearings on S.101-939 Before the U.S. Senate Judiciary Committee*, 101st Cong., 2nd Sess. 128 (1990); Olga Dwyer & Eileen Tully, N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, HOUSING FOR BATTERED WOMEN 9 (1989). Domestic violence is the main reason most families with children are homeless in the United States. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, REPORT ON THE 1988 NATIONAL SURVEY OF SHELTERS FOR THE HOMELESS 14 (1989).

186. ALASKA STAT. § 25.35.200 (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1992); ARK. CODE ANN. § 9-15-103 (Michie Supp. 1993); CAL. FAM. CODE § 70 (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-101 (Supp. 1993); CONN. GEN. STAT. ANN. § 46b-38a (West Supp. 1992); GA. CODE ANN. § 19-13-1 (Supp. 1993); HAW. REV. STAT. § 586-1 (Supp. 1992); IDAHO CODE § 39-6303 (1992); 750 ILCS 60/103 (Smith Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-1 (West Supp. 1993); IOWA CODE ANN. § 236.2 (West Supp. 1993); MD. CODE ANN., FAM. LAW § 4-501 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1992); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. REV. STAT. § 455.010 (Supp. 1993); MONT. CODE ANN. § 40-4-121 (1993); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. ANN. § 33.018 (Michie 1986); N.H. REV. STAT. ANN. § 173-B:1 (Supp. 1992); N.J. STAT. ANN. § 2C:25-19 (West 1992); N.C. GEN. STAT. § 50B-1 (1989); N.D. CENT. CODE § 14-07.1-01 (1993); OHIO REV. CODE ANN. § 3113.31 (Baldwin Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); OR. REV. STAT. § 107.705 (1991); 23 PA. CONS. STAT. ANN. § 6102 (1991); R.I. GEN. LAWS § 8-8.1-1 (Supp. 1993); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984); TENN. CODE ANN. § 36-3-60 (Supp. 1993); UTAH CODE ANN. § 30-6-1 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.120 (West 1992); WIS. STAT. ANN. § 813.12 (West Supp. 1993); WYO. STAT. § 35-21-102 (Supp. 1993).

187. KY. REV. STAT. ANN. § 403.720(3) (Baldwin Supp. 1992); LA. REV. STAT. ANN. § 46:2132 (West 1982 & Supp. 1993); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1976); W. VA. CODE § 48-2A-2 (Supp. 1993).

188. ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1992); ARK. CODE ANN. § 9-15-103 (Michie Supp. 1993); CAL. FAM. CODE § 70 (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-101 (Supp. 1993); CONN. GEN. STAT. ANN. § 46b-38a (West Supp. 1992); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-1 (Supp. 1993); HAW. REV. STAT. § 586-1 (Supp. 1992); IDAHO CODE § 39-6303 (1992); 750 ILCS 60/103 (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-1 (West Supp. 1993); IOWA CODE ANN. § 236.2 (West Supp. 1993) (applying where parties lived together within past year); KAN. STAT. ANN. § 60-3102 (Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992) (applying to past or present sexual partners); MASS. GEN. L. ANN. ch. 209A, § 1 (West Supp. 1992); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MO. REV. STAT. § 455.010 (Supp. 1993); MONT. CODE ANN. § 40-4-121 (1993); NEB. REV. STAT. § 42-903 (Supp. 1992); NEV. REV. STAT. ANN. § 33.018 (Michie 1986); N.J. STAT. ANN. § 2C:25-19 (West 1992); N.M. STAT. ANN. § 40-13-2 (Michie Supp.

suance of a civil protection order to a person with whom the petitioner has a continuing relationship,[189] and North Dakota offers protection to a member of any "sufficient" relationship with the abuser.[190] The approach adopted by New Mexico and North Dakota allows the court to intervene and offer protection to stop violence in a broad array of cases. Under such statutes, civil protection orders may issue against stalkers or against a person who consistently pursues the petitioner with unwanted advances.[191] Finally, Illinois recognizes the increased vulnerability of persons with disabilities, and therefore explicitly extends coverage to the assistants of dependent adults.[192]

In *Sandoval v. Mendez*,[193] the District of Columbia Court of Appeals refused to overturn the dismissal of a petition for a protection order against a household member with whom the trial court found the petitioner did not share an intimate relationship. The petitioner lived with her boyfriend, her boyfriend's cousin, and the cousin's boyfriend.[194] She filed for a civil protection order against the boyfriend of her boyfriend's cousin.[195] The Court of Appeals upheld the dismissal of the petition based on what it described as the trial court's "not plainly wrong" factual finding of no intimate rela-

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1993); N.D. CENT. CODE § 14-07.1-01 (1993); OHIO REV. CODE ANN. § 3113.31 (Baldwin Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); OR. REV. STAT. § 107.705 (1991); 23 PA. CONS. STAT. ANN. § 6102 (1991); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984); TENN. CODE ANN. § 36-3-60 (Supp. 1993); UTAH CODE ANN. § 30-6-1 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.010 (West 1992); W. VA. CODE § 48-2A-2 (Supp. 1993) (applying to past and present sexual partners); WIS. STAT. ANN. § 813.12 (West Supp. 1993).

189. N.M. STAT. ANN. § 40-13-2(D) (Michie Supp. 1993) ("'household member' means . . . a person with whom the petitioner has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for purposes of this section").

190. N.D. CENT. CODE § 14.07.1-01.4 (Supp. 1993) (defining "[f]amily or household member" as including any "person with a sufficient relationship to the abusing person as determined by the court").

191. This approach is being proposed by the Federal Anti-Stalking Task Force of the Department of Justice Programs. George Lardner, *Federal Task Force Suggest States Make Stalking a Felony Offense*, WASH. POST, Sept. 12, 1993, at 19.

192. 750 ILCS 60/103 (Smith-Hurd Supp. 1993); *see also* 725 ILCS 5/112A-3 (Smith-Hurd Supp. 1993). The Illinois criminal statute on domestic violence allows for the issuance of a criminal civil protection order to persons with disabilities and their assistants. Approximately 85% of all women with disabilities have been victims of domestic violence in their intimate relationships. Price, *supra* note 4.

193. 521 A.2d 1168 (D.C. 1987).

194. *Id.* at 1169.

195. *Id.*

tionship.[196] It concluded that the trial court's failure to consider whether an intimate relationship required a sexual relationship was harmless error.[197] The strong dissent, however, argued that the majority ignored the issue of law of what constitutes an "intimate relationship."[198] The dissent argued that the trial court had indeed concluded that an intimate relationship within the meaning of the statute requires a sexual relationship.[199] The dissent concluded, however, that based on the legislative history of the code section as well as common understanding of the meaning of "intimate," which is broader than "sexual," the trial court erred by not finding an intimate relationship.[200]

The *Sandoval* majority failed to recognize the danger present in household relationships which are neither familial or sexual in nature.[201] The need to protect against violence happening behind closed doors is equally compelling in these relationships. In *Sandoval*, the parties included extended-family members living under the same roof where the boyfriend of one cousin beat the other cousin's female partner.[202] Extending the Supreme Court's ruling in *Moore v. East Cleveland*[203] to this context, it becomes even more compelling that domestic violence statutes should extend to both extended family members and unrelated household members, because they are vulnerable to abuse in their own home and may be forced to leave their home to avoid violence.

B. Who May File For Protection Under Civil Protection Order Statutes

1. Abused Party

Statutes and case law in all states and the District of Columbia provide that the adult abused party may petition the court for an

196. *Id.*
197. *Id.*
198. *Id.* at 1172-73.
199. *Id.* at 1172.
200. *Id.* at 1173.
201. *But see, e.g.*, People v. Sirvano, 21 Cal Rptr. 2d 350 (Cal. Ct. App. 1993) (holding wife's housemate to be a "cohabitant" in the context of a criminal case); *In re* Marriage of Patricia McCoy, 1993 WL 512877 (Ill. App. Ct. 1993) (holding that issuance of protection order to petitioner may extend protection to petitioner's household members. Abuse of one household member is sufficient basis to include other household members in protection order aimed to prevent respondent's retaliation).
202. *Id.*
203. 431 U.S. 494 (1977).

order of protection.[204] Kentucky statutorily provides that any resident who has fled within the state in order to escape domestic violence is eligible to file a petition for a protection order in the district court of their usual residence, or the district court of their current residence.[205] The courts of New York have made that state the first in the country to extend eligibility to file for a civil protection order to anyone who has fled there in order to avoid abuse, as long as the respondent has minimal contacts with the state.[206] Several states al-

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204. ALA. CODE § 30-5-5 (1989); ALASKA STAT. § 25.35.010 (Supp. 1962); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1992); ARK. CODE ANN. § 9-15-201 (Michie Supp. 1993); CAL. FAM. CODE § 75 (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-102 (Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 946 (Supp. 1993); D.C. CODE ANN. § 16-1004 (1992); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-4 (Supp. 1993); HAW. REV. STAT. § 586-4 (Supp. 1992); IDAHO CODE § 39-6304 (1993); 750 ILCS 60/103 (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-1 (West Supp. 1993); IOWA CODE ANN. § 236.3 (West Supp. 1993); KAN. STAT. ANN. § 60-3104 (Supp. 1992); KY. REV. STAT. ANN. § 403.725 (Baldwin Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 764 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-504 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 3 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600-2950 (West 1986); MINN. STAT. ANN. § 518B.01(4) (West Supp. 1993); MISS. CODE ANN. § 93-21-7 (Supp. 1993); MO. REV. STAT. § 455.020 (Supp. 1993); MONT. CODE ANN. § 40-4-121 (1993); NEB. REV. STAT. § 42-924 (Supp. 1992); NEV. REV. STAT. ANN. § 33.020 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4 (1990); N.J. STAT. ANN. § 2C:25-28 (West 1992); N.M. STAT. ANN. § 40-13-3 (Michie Supp. 1992); N.Y. FAM. CT. ACT § 846 (McKinney Supp. 1994); N.C. GEN. STAT. § 50B-1 (1989); N.D. CENT. CODE § 14-07.1-02 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Baldwin Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.2 (West Supp. 1993); OR. REV. STAT. § 107.710 (1991); 23 PA. CONS. STAT. ANN. § 6106 (1991); R.I. GEN. LAWS § 8-8.1-2 (Supp. 1993); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 25-10-3 (1984); TENN. CODE ANN. § 36-3-602 (1991); UTAH CODE ANN. § 30-6-2 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1103 (1989); WASH. REV. CODE ANN. § 26.50.010 (West Supp. 1993); W. VA. CODE § 48-2A-4 (Supp. 1993); WIS. STAT. ANN. § 813.12 (West Supp. 1993); WYO. STAT. § 35-21-103 (Supp. 1993); *see, e.g.*, State *Ex rel.* Patrick v. Kidd, 631 S.W.2d 666, 668 (Mo. Ct. App. 1982) (holding that the policy not allowing *pro se* petition under the Protection from Abuse Act when the person seeking to do so is represented by counsel in a pending action for dissolution of marriage was contrary to the intent of the Act); Lucke v. Lucke, 300 N.W.2d 231, 232, 234 (N.D. 1980) (holding an eighteen year old may file for her own protection as an adult); *see also* MODEL CODE, *supra* note 15, § 301.

205. KY. REV. STAT. ANN. § 403.725(1) (Baldwin Supp. 1992) ("Any family member who has been a resident of this state or has fled to this state to escape domestic violence and abuse may file a verified petition in the District Court of the county in which he resides. If the petitioner has left his usual place of residence within this state in order to avoid domestic violence and abuse the petition may be filed and a proceeding held in the District Court in the county of his usual residence or the District Court in the county of current residence.").

206. Pierson v. Pierson, 555 N.Y.S.2d 227 (Fam. Ct. 1990) (Jurisdiction over a Florida resident was upheld. After having experienced repeated threats and assault on herself and her son by her husband, petitioner left Florida and moved to New York with her son where she filed for a protection order. Her husband appealed the order on the ground that the New

low an emancipated minor to file on his or her own behalf,[207] and most state courts allow a parent or other adult to file for a civil protection order on behalf of a minor child.[208]

There is a clear consensus that in order to be most effective, civil protection orders must be available to victims with or without an attorney. Domestic violence experts recommend that state statutes specify the availability of *pro se* procedures for the filing, service, and enforcement of civil protection orders, and that sample forms should be developed and used.[209] Of those few jurisdictions that originally required a government attorney to file the petitioners' protection orders, most have now adopted a *pro se* process.[210] Although

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York Family Court lacked subject matter jurisdiction. The Family Court held that where the defendant was personally served with legal process, the family court had subject matter jurisdiction of the family offense proceeding notwithstanding the fact that all of the incidents occurred outside the state. The defendant's return to New York satisfied the "minimal contacts" requirement, and had the appellant remained in Florida the risk of continued family violence would have dissipated unlike in the present situation.).

207. ALA. CODE § 30-5-2(2) (1989) ("Any person 18 years of age or older, or who otherwise is emancipated."); IND. CODE ANN. § 34-4-5.1 (West Supp. 1993) ("person" who may petition any court for a protection order includes human beings aged 18 or older and emancipated minors); LA. REV. STAT. ANN. § 46:2132(1) (West 1982) ("adult [who may seek relief alleging abuse] means any person under the age eighteen who has been emancipated by marriage or otherwise"); N.J. STAT. ANN. § 2C:25-19 (West 1992) ("victim of domestic violence means . . . any person who is 18 years of age or older or who is an emancipated minor"); 23 PA. CONS. STAT. ANN. § 6106(A) (1992) ("An adult or emancipated minor may seek relief under this chapter."); R.I. GEN. LAWS § 8-8.1-1 (Supp. 1993) ("'Cohabitants': [e]mancipated minors or persons (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 . . . or who are residing in the same quarters."); WYO. STAT. § 35-21-102(a)(1) (Supp. 1993) (filing may be completed by anyone sixteen years of age or older).

208. *See supra* note 73.

209. Hart, *supra* note 11, at 25. Courts must not only ensure that court forms are developed, but also that they be made and kept readily available to *pro se* petitioners. When forms are unavailable, victims must seek and often pay for legal representation to assist them in obtaining a civil protection order. Lack of access to lawyers combines with unavailability of forms to bar battered women from relief through the courts. *See Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System* (1991), *reprinted in* 8 GA. ST. U. L. REV. 539, 586 (1992).

210. For example, the District of Columbia's original civil protection order statute had a policy that required the city's prosecuting attorney to file on behalf of the victim. A *pro se* process was established in 1982 largely in response to the very limited number of state funded attorneys available to represent battered women, leaving many victims without access to the courts. The legislative history of the 1982 amendment sheds light on the purpose of allowing victims to file on their own behalf:

> *Section 4* amends D.C. Code, sec. 16-1003 to create a victim's right to pursue privately a civil protection order in addition to the current right to seek protection through a petition filed by the Office of the Corporation Counsel. The creation of a private right of action is designed: (1) to promote a prompt resolution of an

requiring an attorney may have appeared to be beneficial to the abused party on its face, as it gives her theoretical representation by a skilled professional, in practice it hinders access to the judicial system's protection. The right to petition either with or without a lawyer enables more abused parties to swiftly seek assistance from the courts, and can serve to empower them in their struggle to combat and terminate the violence which has plagued their lives. As the National Institute of Justice concluded "*[p]ro se* petitioning, particularly in cases in which legal counsel is not generally available to lower and middle-income victims, is an important component in guaranteeing access to protection."[211]

In recognizing the benefits of the *pro se* process, however, it is also necessary to acknowledge the problems. While we need a process that guarantees access to all needy abused persons, battered women who can obtain legal assistance from trained counsel are much more likely to receive civil protection orders which contain complete and effective relief.[212] Ideally, the country needs more attorneys who are able and willing to act as battered women's advocates.[213]

Another solution to the lack of legal representation for battered women is to increase the role of lay advocates. Ideally, battered women's advocates' services to battered women in court will complement services available from volunteer and legal services attorneys.

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intrafamily offense problem; and (2) to facilitate the effectiveness of the civil protection remedy by not requiring all alleged victims to go through the already heavily burdened Office of the Corporation Counsel.

COMMITTEE ON THE JUDICIARY, COUNCIL OF THE DISTRICT OF COLUMBIA REPORT 83 (May 12, 1982) (committee report on The Proceedings Regarding Intrafamily Offenses Amendment Act of 1982).

211. NIJ CPO STUDY, *supra* note 19, at 24.

212. *Id.* at 19.

213. TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS, DISTRICT OF COLUMBIA COURTS, FINAL REPORT 146, 161 (May 1992) [hereinafter D.C. TASK FORCE] (finding that civil protection orders are more likely to be awarded after trial if petitioner is represented by counsel and fewer cases are returned to files without court action. The report concluded that counsel should be appointed to represent petitioners in civil protection order contempt actions for enforcement and that representation of petitioners by members of the private bar should be encouraged). For a full discussion of attorney representation of petitioners in civil protection order cases, see *infra* notes 1612-23 and accompanying text.

As violence continues, greater numbers of battered women turn to informal and formal sources for help. Between the first and last violent incident, the use of lawyers rises from 6% to 50%, while that of social service agencies increases from 8% to 43%. SUSAN SCHECTER, WOMEN AND MALE VIOLENCE 232 (1982).

This solution requires cooperation between lawyers and non-lawyer advocates, who should be authorized to represent battered women who go to court seeking civil protection orders. Lay battered women's advocates can help battered women prepare court papers, talk with them in the halls of court houses about their rights, and assist battered women who have uncomplicated cases. Cases that present complex or contested issues would be referred for representation by attorneys.[214] Both the National Council of Juvenile and Family Court Judges and the National Institute of Justice strongly recommend the expansion of the use of lay advocates to assist victims of domestic violence.[215]

2. Adults Authorized To File Civil Protection Order Petitions on Behalf of Other Adults, Children, and Incapacitated Persons

Two state statutes specify that an adult may file for another adult who is unable to go to court.[216] Ohio has taken the lead by providing that an adult can file on behalf of any other abused adult in the household, whether or not the adult petitioner is related to the victim.[217] This statute expands upon the Ohio appellate court's finding in *Carney v. Pankey*[218] that the mother of an adult victim can petition for a civil protection order on the victim's behalf.[219]

Most states, either by case law, statute,[220] or practice, routinely permit adult household members or other adults to file for a protection order on behalf of a minor child or incompetent.[221] Courts have

214. *See infra* notes 1606-11 and accompanying text for a complete discussion of the benefits of lay advocacy.

215. Richard J. Gable & Ellen H. Nimick, *Evaluation of the Family Violence Project of the National Council of Juvenile and Family Court Judges*, 41 JUV. & FAM. CT. J. 45, 47 (1990); *see also* NIJ CPO STUDY, *supra* note 19, at 24-26.

216. 725 ILCS 40/103(12) (1993); N.J. STAT. ANN. § 2C:25-28(h) (West 1992).

217. OHIO REV. CODE ANN. § 3113.31(c) (Baldwin 1992).

218. No. 87 C.A. 85, 1988 WL 34644 (Ohio Ct. App. March 4, 1988)

219. *Id.* (holding that the statute stating that any parent or adult household member may seek relief on behalf of another family or household member applied to adult victims of domestic violence); *see also In re* Matter of J.E.P., 432 N.W.2d 483 (Minn. Ct. App. 1988).

220. ALA. CODE § 30-5-5 (1992); ARK. CODE ANN. § 9-15-201 (Michie 1992); DEL. CODE ANN. tit. 10, § 945 (1993); HAW. REV. STAT. § 586-1 (1992); KAN. STAT. ANN. § 60-3102 (1992); KY. REV. STAT. ANN. § 403-25(2) (Baldwin, 1992); LA. REV. STAT. ANN. § 46:2134 (West 1992); OHIO REV. CODE ANN. § 3113.31 (Baldwin 1992); WASH. REV. CODE ANN. § 26.50.020 (West 1992); W. VA. CODE § 48-2A-2 (1992).

221. *See supra* part I.A.3 for further discussion of the coverage of children in civil protection orders. *See also* MODEL CODE, *supra* note 15, § 301.

allowed both custodial and noncustodial parents to file for civil protection orders on behalf of their children against the other parent,[222] the boyfriend of the other parent,[223] step-siblings or half-siblings,[224] or the child's paternal aunts.[225] Statutes also authorize government attorneys to file for civil protection orders on behalf of domestic violence victims.[226]

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222. *See, e.g.*, Harriman v. Harriman, 1990 Conn. Super. LEXIS 1200 (Conn. Super. Ct. Sept. 25, 1990) (holding that a father can obtain a temporary restraining order on behalf of his child where he can prove that he or the child had been subjected to abuse as defined under the state statute); Campbell v. Campbell, 584 So. 2d 125 (Fla. Dist. Ct. App. 1991) (holding that a father's sexual battery of his three year old daughter warranted allowing the mother's petition for the issuance of a temporary protection order against him, despite the petition having been procedurally improper); Ellibee v. Ellibee, 826 P.2d 462 (Idaho 1991); Wright v. Wright, 583 N.E.2d 97 (Ill. App. Ct. 1991); Tillman v. Snow, 571 N.E.2d 578 (Ind. Ct. App. 1991); Keneker v. Keneker, 579 So. 2d 1083 (La. Ct. App. 1991) (upholding grant of a temporary protection order to noncustodial mother under the domestic abuse assistance statute on behalf of her minor child alleging that the custodial father had engaged in inappropriate sexual behavior with the minor child); Harper v. Harper, 537 So. 2d 282 (La. Ct. App. 1988) (holding that where the husband constantly made threats to his wife, tried to pull her from her car, had a bad temper, and scared their child, the finding of domestic abuse was sufficient to entitle the wife to file for a civil protection order on behalf of the child); Cooke v. Naylor, 573 A.2d 376 (Me. 1990) (acknowledging the mother's right to file a petition for domestic abuse on behalf of her minor children); Kass v. Kass, 355 N.W.2d 335 (Minn. Ct. App. 1984); Curtis v. Curtis, 574 So. 2d 24 (Miss. 1990) (holding that under the protection order statute, a civil protection order may be issued to a father on behalf of his children where the children's mother, his wife, had substantially abused and neglected them); Steckler v. Steckler, 492 N.W.2d 76 (N.D. 1992); *In re* Penny R., 509 A.2d 338 (Pa. Super. Ct. 1986); Rosenberg v. Rosenberg, 504 A.2d 350 (Pa. Super. Ct. 1986) (holding that the mother could only obtain temporary visitation rights and ancillary relief against sexually abusive father regarding her minor children because the Protection From Abuse Act was not meant to establish procedure for determining permanent custody of children); Keith v. Keith, 28 Pa. D. & C.3d 462 (C.P. 1984). *But see* Holcombe v. Foster, 388 S.E.2d 807 (S.C. 1990) (holding mother may not seek a protection order for her emancipated 18 year old daughter).

223. *See, e.g.*, *In re* Marriage of Eldert, 511 N.E.2d 945 (Ill App. Ct. 1987) (upholding the grant if two *ex parte* orders awarding custody to father when he alleged that the mother's boyfriend spanked and battered his child).

224. Wright v. Wright, 583 N.E.2d 97 (Ill. App. Ct. 1991) (holding that order of protection pursuant to the Illinois Domestic Violence Act of 1986 may be entered against a minor, in this case, the father's son).

225. Tillman v. Snow, 571 N.E.2d 578 (Ind. Ct. App. 1991) (upholding a civil protection order prohibiting contact between the child and her natural father and paternal aunts).

226. *See, e.g.*, D.C. CODE ANN. § 16-1003 (1992); TEX. FAM. CODE ANN. § 71.04 (West Supp. 1993).

C. *Conduct Sufficient to Support Issuance of a Civil Protection Order*[227]

The following sections discuss the various types of acts which courts have identified as abuse sufficient to support the issuance of a protection order. In *Knuth v. Knuth*,[228] the Minnesota Court of Appeals discussed generally the broad range of acts which may warrant a civil protection order.[229] The court held that a civil protection order may issue not only for actual physical harm, but also for acts which inflict the fear of imminent bodily injury.[230] While the court must find some overt action indicating present intent to do harm or cause fear of imminent harm, the court does not need to find an overt physical act.[231] A verbal threat can be sufficient to inflict fear of imminent physical harm.[232] The cases which follow reflect this broad approach to defining domestic abuse.

Victims of domestic abuse experience a cycle of violence which escalates over time.[233] Victims of domestic violence suffer various types of abuse during the course of their relationships with batterers. The various forms of abuse that can form the basis for issuance of a civil protection order may include emotional abuse, threats, harassment, and stalking. Such abuse often escalates into attempts to harm the victim, sexual assault, and battery.[234] As the frequency of battering episodes increase, the more severe each battering incident often becomes. When battering continues over years, it becomes more and more dangerous, progressing from punches to the use of weapons.[235] Since the cycle of violence in an abusive relationship tends to escalate into more violent behavior, civil protection orders should issue based on a wide range of abuse in order to permit early intervention and prevention of more serious injuries.[236]

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227. *See generally* MODEL CODE, *supra* note 15, at §§ 102, 201.

228. 1992 Minn. App. LEXIS 696 (Minn. Ct. App. June 19, 1992).

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. TERRIFYING LOVE, *supra* note 4, at 30.

234. TERRIFYING LOVE, *supra* note 4, at 44 (indicating that 66% of women reported battering becoming more frequent, 65% reported that physical abuse worsened, and 73% reported psychological abuse becoming more severe); BROWNE, *supra* note 171, at 68.

235. GILLESPIE, *supra* note 124, at 129 (stating that the number of women hit with an object in the most serious incident of violence was twice the number hit with an object in the first incident); *see also* TERRIFYING LOVE, *supra* note 4.

236. Domestic violence is cyclical. The violence increases in both frequency and severity

1. Criminal Acts

A wide range of criminal acts may form the basis for a civil protection order. State statutes specifically authorize protection orders based on almost any criminal act,[237] including physical abuse of the petitioner or a child,[238] criminal trespass,[239] kidnapping,[240]

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unless there is outside intervention. Ganley, *supra* note 21, at 23. Ganley emphasizes that:

> Domestic violence consists of a wide range of behaviors, including some of the same behaviors found in stranger violence. Some acts of domestic violence are criminal (hitting, choking, kicking, assault with a weapon, shoving, scratching, biting, rape, unwanted sexual touching, forcing sex with third parties, threats of violence, harassment at work, stalking, destruction of property, attacks against pets, etc.) while other behaviors may not constitute criminal conduct (degrading comments, interrogating children or other family members, suicide threats or attempts, controlling access to the family resources: time, money, food, clothing, shelter, as well as controlling the abused party's time and activities, etc.). Whether or not there has been a finding of criminal conduct, evidence of these behaviors indicates a pattern of abusive control which has devastating effects on the family.

Id.

237. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-38a(3) (West 1992); D.C. CODE ANN. § 16-1002 (1992); LA. REV. STAT. ANN. § 46:2132 (West 1992); N.Y. FAM. CT. ACT § 812 (McKinney Supp. 1994).

238. ALA. CODE § 30-5-2 (1992); ALASKA STAT. § 25.35.060 (1992); ARIZ. REV. STAT. ANN. § 13-3601 (1992); CAL. FAM. CODE § 5500 (West 1993); COLO. REV. STAT. ANN. § 14-4-101 (1992); CONN. GEN. STAT. ANN. § 46b-15 (West 1992); DEL. CODE ANN. tit. 10, § 945 (1992); D.C. CODE ANN. § 16-100 (1992); FLA. STAT. ANN. § 741.30 (West 1992); GA. CODE ANN. § 19-13-1 (1992); HAW. REV. STAT. § 586-1 (1992); IDAHO CODE § 39-6303 (1992); 725 ILCS 40/2311 (1993); IND. CODE ANN. § 34-4-5.1-1 (1992); IOWA CODE ANN. § 236.2 (West 1992); KAN. STAT. ANN. § 60-3102 (1992); KY. REV. STAT. ANN. § 403.720 (Baldwin 1992) (issuing for threats of physical and sexual abuse as well); LA. REV. STAT. ANN. § 46:2132 (West 1992); ME. REV. STAT. ANN. tit. 19, § 26 (1992); MD. CODE ANN., FAM. LAW § 4-501 (1992); MASS. GEN. L. ANN. ch. 209A, § 1 (West 1992); MICH. COMP. LAWS ANN. § 93.21 (West 1992); MINN. STAT. ANN. § 518B.01 (West 1992); MISS. CODE ANN. § 93-21-3 (1992); MO. REV. STAT. § 455.010 (1992); MONT. CODE ANN. § 40-4-121 (1992); NEB. REV. STAT. § 42-903 (1992); NEV. REV. STAT. ANN. § 33.018 (1992); N.H. REV. STAT. ANN. § 173-B:1 (1992); N.J. STAT. ANN. § 2C: 25-19 (West 1992); N.M. STAT. ANN. § 40-13-2 (Michie 1992); N.Y. FAM. CT. ACT § 812 (McKinney Supp. 1994); N.C. GEN. STAT. § 50B-1 (1992); N.D. CENT. CODE § 14-07.1-01 (1992); OHIO REV. CODE ANN. § 3113.31 (Baldwin 1992); OKLA. STAT. ANN. tit. 43, § 322-60.1 (West 1992); OR. REV. STAT. § 107.705 (1992); 23 PA. CONS. STAT. ANN. § 6102 (1992); R.I. GEN. LAWS § 15-15-1 (1992); S.C. CODE ANN. § 20-4-20 (Law. Co-op. 1992); S.D. CODIFIED LAWS ANN. § 25-10-1 (1992); TENN. CODE ANN. § 36-3-601 (1992); TEX. FAM. CODE ANN. § 71.01 (West 1992); UTAH CODE ANN. § 30-6-1 (1992); VT. STAT. ANN. tit. 15, § 1101 (1992); VA. CODE ANN. § 16.1-233 (1992); WASH. REV. CODE ANN. § 26.50.010 (West 1992); W. VA. CODE § 48-2A-2(3) (Supp. 1993); WIS. STAT. ANN. § 813-12 (West 1992); WYO. STAT. § 35-21-122 (1992).

239. *See, e.g.*, DEL. CODE ANN. tit. 10, § 945 (1993); N.J. STAT. ANN. § 2C:25-19 (1992); N.M. STAT. ANN. § 40-13-2 (Michie 1992); WASH. REV. CODE ANN. § 10.99.020 (1992).

240. DEL. CODE ANN. tit. 10, § 945 (1993); N.J. STAT. ANN. § 2C:25-19 (West 1992); WASH. REV. CODE ANN. § 10.99.020 (West 1992).

burglary,[241] malicious mischief,[242] interference with child custody,[243] and reckless endangerment.[244]

Research data supports this approach. Of violent crimes by intimates reported by female victims, 85-88% were assaults, 10-11% were robberies, and 2-3% were rapes.[245] Approximately one-quarter of the assaults were aggravated, meaning that the offender had used a weapon or had seriously injured the victim. The remaining assaults were simple, indicating either a minor injury—bruises, black eyes, cuts, scratches, swelling, or undetermined injuries requiring less than 2 days of hospitalization—or a verbal threat of harm.[246] One-half of these incidents classified as "simple assaults" actually involve bodily injury at least as serious as the injury inflicted in 90% of all robberies and aggravated assaults.[247] 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.[248] Epidemiologic surveys found that abuse ranged from being slapped, punched, kicked, or thrown bodily to being scalded, choked, smothered, or bitten.[249] Typically, assaultive episodes involve a combination of assaultive acts, verbal abuse, and threats. Over 80% of all assaults against spouses and ex-spouses result in injuries. Victims of marital violence have the highest rates of internal injuries and unconsciousness.[250] The injury rate is only 54% for victims of stranger vio-

241. N.J. STAT. ANN. § 2C:25-19 (West 1992); WASH. REV. CODE ANN. § 10.99.020 (West 1992).

242. N.J. STAT. ANN. § 2C:25-19; N.Y. FAM. CT. ACT § 812(1) (McKinney 1993) (defining the offense of disorderly conduct to include conduct not in a public place); WASH. REV. CODE ANN. § 10.99.020 (West 1992).

243. DEL. CODE ANN. tit. 10, § 945 (1993); *see also* Gasaway v. Gasaway, 616 N.E.2d 610 (Ind. 1993) (awarding protection order based on respondent's attempt to kidnap his child).

244. N.Y. FAM. CT. ACT § 812(1) (McKinney 1992); WASH. REV. CODE ANN. § 10.99.020 (1992).

245. HARLOW, *supra* note 3, at 2; *see also* KLAUS & RAND, *supra* note 3.

246. *Id.*

247. NIJ CPO STUDY, *supra* note 19, at 4; *see also* PATRICK A. LANGAN & CHRISTOPHER A. INNES, BUREAU OF JUSTICE STATISTICS, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 1, 3 (1986).

248. *Women and Violence: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 72 (1990) (statement of Helen R. Newborne, Executive Director, and Sally Goldfarb, Staff Attorney, NOW Legal Defense and Education Fund on Violence Against Women).

249. Browne, *supra* note 1, at 3186. In a study of abusive men, one-third reported that their partners sustained broken bones or other substantial injuries as a result of their violence. James Ptacek, *Why Do Men Batter Their Wives?*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 135 (Kersti Yllo & Michele Bogard eds., 1988).

250. Browne, *supra* note 1, at 3186. Women are three times more likely than men to re-

lence.[251]

Case law indicates that battery is the most common criminal ground for issuance of a civil protection order. Courts issue civil protection orders for striking and kicking the petitioner,[252] beating the petitioner,[253] breaking an infant's leg,[254] shoving an infant's face against a door,[255] yanking the petitioner by the hair,[256] pulling out the petitioner's hair,[257] throwing the petitioner on the floor,[258] bruising a child's back, legs, and buttocks,[259] physically restraining the petitioner,[260] twisting the petitioner's wrist,[261] pounding the petitioner's head on the floor,[262] choking the petitioner,[263] slapping

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quire medical care for injuries sustained in family assaults. Glenda Kaufman et al., *The Drunken Bum Theory of Wife Beating*, 34 SOC. PROBS. 218 (1987).

251. Browne, *supra* note 1, at 3186.

252. *See generally* People v. Ballard, 249 Cal. Rptr. 806 (Ct. App. 1988) (affirming issuance of order where respondent grabbed and hit petitioner, held her outside of a window and made her urinate on the floor); Colorado v. Brockelman, 1993 Colo. App. LEXIS 270 (Ct. App. Oct. 21, 1993) (affirming order where defendant hit victim in face several times and choked her); Todd v. Todd, 772 S.W.2d 14 (Mo. Ct. App. 1989) (affirming order where respondent stuck and kicked his wife); Gloria C. v. William C., 476 N.Y.S.2d 991 (Fam. Ct. 1984) (granting petition where respondent hit the petitioner in the head, punched her in the stomach while pregnant, and threw her to the floor); Commonwealth v. Smith, 552 A.2d 292 (Pa. Super. Ct. 1988) (issuing order where respondent hit petitioner with his car and struck petitioner on head and neck with an open and closed fist).

253. Parkhurst v. Parkhurst, 793 S.W.2d 634 (Mo. Ct. App. 1990) (affirming grant where respondent beat petitioner on one occasion); Delisser v. Hardy, 749 P.2d 1207 (Or. Ct. App. 1988) (holding protection order properly issued on basis of defendant's forced entry into petitioner's apartment, physical abuse of petitioner and his threats to get her fired from her job).

254. Yankoskie v. Lenker, 526 A.2d 429 (Pa. Super. Ct. 1987) (holding civil protection order properly issued where the respondent broke his infant son's leg and shoved his son's face against a cellar door).

255. *Id.*

256. Pierson v. Pierson, 555 N.Y.S.2d 227 (Fam. Ct. 1990); *see also* Sielski v. Sielski, 604 A.2d 206 (N.J. Super. Ct. Ch. Div. 1990) (granting a protection order where defendant yanked petitioner from her bed by her hair, slapped her about the face and neck, attempted to push her face in the toilet, threw cold water on her, and yanked at her pubic hair).

257. *Pierson*, 555 N.Y.S.2d at 227.

258. *Id.*; *see also* Gloria C. v. William C., 476 N.Y.S.2d 991 (Fam. Ct. 1984) (granting petition where respondent hit the petitioner in the head, punched her in the stomach while pregnant, and threw her to the floor); Murray v. Murray, 623 N.E.2d 1236 (Ohio Ct. App. 1993).

259. *Pierson*, 555 N.Y.S.2d at 227. *But see* Harriman v. Harriman, No. 97826, 1990 Conn. Super. LEXIS 1200, at *1 (Conn. Super. Ct. Sept. 25, 1990) (holding that spanking a child on one occasion is insufficient to issue a civil protection order).

260. Synder v. Synder, 629 A.2d 977 (Pa. Sup. Ct. 1993).

261. Sell v. Sell, No. 00063, 1991 Pa. Super. LEXIS 1746 (Pa. Super. Ct. June 6, 1991) (holding that wife's need to seek medical treatment after husband twisted her wrist was sufficient to issue a civil protection order).

262. *Murray*, 623 N.E.2d 1236.

the petitioner on the face and neck,[264] attempting to push the petitioner's face in the toilet,[265] throwing cold water on the petitioner,[266] yanking at the petitioner's pubic hair,[267] punching a pregnant petitioner in the stomach,[268] and ordering trained dogs to attack the petitioner.[269]

Other criminal acts which are grounds to issue a civil protection order include: firing shots into the petitioner's home,[270] assaulting the petitioner's friend,[271] forcibly or unlawfully entering the petitioner's home,[272] and breaking down petitioner's door.[273]

Several courts have specifically issued civil protection orders based on criminal acts involving a motor vehicle.[274] These have included striking the petitioner with a car,[275] pursuing the petitioner in a high speed chase,[276] attempting to pull the petitioner from her car,[277] and driving away quickly while the petitioner had her hands on the car, cauing her to be thrown into a tree.[278] In *Christenson v.*

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263. Colorado v. Brockelman, 1993 Colo. App. LEXIS 270 (Colo. Ct. App. Oct. 21, 1993); *see also Synder*, 629 A.2d 977.

264. Sielski v. Sielski, 604 A.2d 206, 207 (N.J. Sup. Ct. Ch. Div. 1990).

265. *Id.*

266. *Id.*

267. *Id.*

268. Gloria C. v. William C., 476 N.Y.S.2d 991 (Fam. Ct. 1984).

269. Jane Y. v. Joseph Y., 474 N.Y.S.2d 681, 682 (Fam. Ct. 1984).

270. Clifford v. Krueger, 297 N.Y.S.2d 990 (Sup. Ct. 1969).

271. People v. Stevens, 506 N.Y.S.2d 995, 996 (Sup. Ct. 1986) (issuing a protection order where respondent unlawfully entered wife's home and assaulted her friend).

272. *Id.*; *see also* People v. Williams, 300 N.Y.S.2d 89 (N.Y. 1969) (holding protection order properly granted where defendant refused to leave his grandparents' home and threatened his uncle with a knife when confronted); Delisser v. Hardy, 749 P.2d 1207, 1208 (Or. Ct. App. 1988) (affirming the grant of an order where defendant, inter alia, forced his way into petitioner's apartment); State v. Kilponen, 737 P.2d 1024 (Wash. Ct. App. 1987) (holding defendant's conviction for armed burglary was sufficient basis for issuing protection order); Johnson v. Miller, 459 N.W.2d 886 (Wis. Ct. App. 1990) (entering step-daughter's residence by force sufficient to support protection order).

273. People v. Stevens, 506 N.Y.S.2d 995, 996 (Sup. Ct. 1986).

274. *See, e.g.*, Christenson v. Christenson, 472 N.W.2d 279 (Iowa 1991); *see also* Harper v. Harper, 537 So. 2d 282 (La. Ct. App. 1988); Capps v. Capps, 715 S.W.2d 547 (Mo. Ct. App. 1986); Commonwealth v. Smith, 552 A.2d 292 (Pa. Super. Ct. 1988).

275. *Smith*, 552 A.2d at 292.

276. *Christenson*, 472 N.W.2d at 279.

277. *Harper*, 537 So. 2d at 282; *see also* Synder v. Synder, 629 A.2d 977 (Pa. Super. Ct. 1993).

278. *Capps*, 715 S.W.2d at 547. In one 1968 case, Seymour v. Seymour, 289 N.Y.S.2d 515 (Fam. Ct. 1968), the court held that a husband's attempt to force his wife's car off the road by abruptly swerving his car in front of her did not constitute a family offense because it did not constitute an assault resulting in physical pain or injury or disorderly conduct under the Penal Code. Today, many jurisdictions, including New York, would issue a civil

Christenson,[279] the court issued a protection order to the petitioner when the respondent initiated a high speed car chase, rejecting the respondent's argument that the car chase did not amount to an assault.[280] The court liberally construed the domestic violence act, noting that it served a protective, rather than punitive, function.[281] It held that the pursuit of the petitioner at high rates of speed qualified as an assault since the defendant had the ability to strike the petitioner's car during the chase, which could have led to a collision resulting in physical injury.[282]

Finally, courts will also appropriately issue a civil protection order when someone other than the petitioner is injured by violence directed toward the petitioner. In *Johnson v. Miller*,[283] the court issued a civil protection order where a step-father physically injured his step-daughter during an attempt to injure her mother.[284] The court noted that:

> [w]hether [the defendant's] anger was directed exclusively at [his step-daughter] or at both women—or neither—is beside the point. His violent conduct [during the step-daughter]'s presence in the home in which she resided—and which resulted in physical injury to her—coupled with his return and forcible entry into [her] residence, provides an adequate foundation for a determination that he "may [have] engage[d] in domestic abuse" of [her].[285]

This decision recognizes that a civil protection order should be issued even if the defendant's violence injures someone other than his intended target. By the batterer's own violent actions, he creates a dangerous environment where unintended victims may be injured. In these cases, a civil protection order should issue based on the attempt, or based on the battery via transferred intent.[286]

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protection order in such a case based on attempts or harassment. *See, e.g.*, Hayes v. Hayes, 500 N.Y.S.2d 475, 476 (Fam. Ct. 1986).

279. 472 N.W.2d 279 (Iowa 1991).

280. *Id.* at 280-81.

281. *Id.* at 280.

282. *Id.*

283. 459 N.W.2d 886 (Wis. Ct. App. 1990).

284. *Johnson*, 459 N.W.2d at 887.

285. *Id.* at 887 (quoting WIS. STAT. ANN. § 813.12 (West 1990)).

286. The concept of transferred intent is well established in both criminal and tort law. *See, e.g.*, Jackson v. Follette, 462 F.2d 1041, 1047 n.10 (2d Cir. 1972); *see also* Yates v. Evatt, 111 S. Ct. 1884, 1886 (1991). The concept of transferred intent first appeared in criminal law and then became part of tort law. The criminal rule finds guilt in cases where a shooting, striking, throwing of an object, or poisoning results in an unexpected injury to an

Criminal domestic violence cases also illustrate criminal acts which could warrant and support issuance of a civil protection order. Successful criminal domestic violence prosecutions include where the defendant beat the victim with a breadboard,[287] stabbed the victim,[288] punched the victim in the face resulting in memory loss,[289] sodomized the victim,[290] held the victim outside of a window,[291] forced the victim to urinate on the floor,[292] assaulted the victim,[293] forced the victim into her car, drove on the wrong side of the road, and threatened to kill them both,[294] and drove the victim onto a dirt road, pulled out a knife, and ordered her to strip.[295]

2. Sexual Assault and Marital Rape

State statutes and case law in all fifty states, the District of Columbia, Puerto Rico, and all U.S. territories[296] recognize marital rape and sexual assault of a spouse or a cohabitant as domestic violence. Thirty-two states, the District of Columbia, and Puerto Rico issue civil protection orders based on sexual abuse of the petitioner.[297] In five additional states, the rape of a spouse or a cohabi-

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unintended person. The intent to injure is transferred from the intended to the unintended victim. In tort law as well, cases hold the defendant liable for a battery to an unintended person where the intent was to commit a battery against another person. *See* WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS 37-39 (5th ed. 1984).

287. People v. Thompson, 206 Cal. Rptr. 516, 517 (Ct. App. 1984).

288. Arizona v. Lavers, 814 P.2d 333 (Ariz.), *cert. denied*, 112 S.Ct. 343 (1991).

289. State v. Harper, 761 P.2d 570, 571 (Utah Ct. App. 1988).

290. *Thompson*, 206 Cal. Rptr. at 517.

291. People v. Ballard, 249 Cal. Rptr. 806, 807 (Ct. App. 1988).

292. *Id.*

293. People v. Singleton, 532 N.Y.S.2d 208 (Crim. Ct. 1988); *see also* Hawaii v. Ibuos, 857 P.2d 576 (Haw. 1993).

294. State v. Hobbs, 801 P.2d 1028, 1029 (Wash. Ct. App. 1990).

295. Gilbert v. Georgia, 433 S.E.2d 664 (Ga. Ct. App. 1993).

296. Sexual Abuse Act of 1986 § 87(b), 18 U.S.C. §§ 2241-45 (1993).

297. ALASKA STAT. § 25.35 (1993); ARIZ. REV. STAT. ANN. § 13-3602 (1994); ARK. CODE ANN. § 9-15-206 (Michie 1993); CAL. FAM. CODE § 55-231 (West 1993); CONN. GEN. STAT. ANN. § 46b-15 (West 1993); DEL. CODE ANN. tit. 10, §§ 945-46 (1993); D.C. CODE ANN. §§ 16-1001, 16-1004 (1993); FLA. STAT. ANN. § 741.30 (West 1993); GA. CODE ANN. §§ 19-13-1, 19-13-4 (1993); IDAHO CODE § 39-6303 (1993); 750 ILCS 60/102, 60/210 (1993); LA. REV. STAT. ANN. § 46:2132 (West 1992); ME. REV. STAT. ANN. tit. 19, § 766 (West 1992); MD. CODE ANN., FAM. LAW §§ 4-501, 4-506 (1993); MASS. GEN. L. ANN. ch. 209A, §§ 1, 3 (1992); MINN. STAT. ANN. § 518B.01 (West 1992); MO. REV. STAT. §§ 455.010, 455.020 (Vernon 1993); NEV. REV. STAT. ANN. §§ 33.018, 33.020 (Michie 1993); N.H. REV. STAT. ANN. § 173-B:1 (1992); N.J. STAT. ANN. §§ 2C:25-3, 2C:25-13 (West 1993); N.M. STAT. ANN. §§ 40-13-2, 40-13-3 (Michie 1993); N.Y. FAM. CT. ACT § 842 (McKinney Supp. 1994); OHIO REV. CODE ANN. § 3113.31 (Anderson 1992); OKLA. STAT. ANN. tit. 22, §§ 60.1, 60.2 (West Supp. 1994); OR. REV. STAT. § 107.705 (1992); 23

tant is a violation of the criminal code, and thus is a criminal act which supports the issuance of a civil protection order.[298] Only seven states define a rape or sexual assault sufficient to issue a civil

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PA. CONS. STAT. ANN. §§ 6102(a), 6107(b) (1992); P.R. LAWS ANN. tit. 8, § 601 (1990); R.I. GEN. LAWS § 15-5-3 (1993); S.C. CODE ANN. § 20-4-40 (Law. Co-op. 1992); UTAH CODE ANN. §§ 30-6-1, 30-6-2 (1993); WASH. REV. CODE ANN. §§ 26.50.010, 25.050.030 (West 1993); W. VA. CODE §§ 48-2A-2, 48-2A-5 (1993); WIS. STAT. ANN. § 813-12 (West 1993); WYO. STAT. §§ 35-21-102, 35-21-103 (1993).

In four of these states, husbands and cohabitants can be charged with rape of their wives or girlfriends. GA. CODE ANN. § 16-6-1(a) (1993); MASS. GEN. L. ANN. ch. 265, § 22 (1992); N.J. STAT. ANN. § 2C:14-5(b) (West 1993); OR. REV. STAT. § 163.305 (1992).

Seventeen of these states' statutes authorize issuance of a civil protection order based on a definition of rape or sexual assault of a family member that is broader than that defined in the states' criminal statutes. Since civil protection order proceedings are civil and preventative in nature, states have been willing to issue civil protection orders based on broader definitions of sexual assault and rape than that required when the offender is being charged criminally with rape or sexual assault. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1406 (1993) (charging husband with sexual assault of wife if husband used force or threat); CAL. PENAL CODE § 262 (West 1993) (charging husband with rape if force or threat was used *and* if wife reports rape within 90 days, unless wife is mentally incapacitated); CONN. GEN. STAT. ANN. § 53a-67 (West 1993) (requiring that spouse/cohabitant be charged with more than first degree rape); IDAHO CODE § 18-6107 (1993) (charging husband with rape only when he uses force, violence, threat of immediate and great bodily harm, intoxicating substance, narcotic or anesthetics, or if wife is mentally incapacitated); LA. REV. STAT. ANN. § 14.41 (West 1993) (charging husband/cohabitant with rape only if there is a court order of separation or an order prohibiting physical or sexual abuse); MINN. STAT. ANN. § 609.349 (West 1993) (charging husband with rape only if spouses are living apart or if one party has filed for legal separation); NEV. REV. STAT. ANN. § 200.373 (Michie 1993) (charging husband with rape only if force or threat was used); N.H. REV. STAT. ANN. §§ 632-A2, 632-A3, & 632-A5 (1992) (charging husband with rape of wife only if wife is mentally incapacitated or under the age of consent); N.M. STAT. ANN. § 30-9-10, 30-9-11 (Michie 1993) (charging husband with rape only if the parties are separated or legal action has been filed for divorce or separation); OHIO REV. CODE ANN. § 2907.02 (Anderson 1993) (charging husband with rape only if force or threat of force is used, unless wife is mentally incapacitated); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1994) (charging husband with rape only if he used force or threat of force); 18 PA. CONS. STAT. ANN. § 3103 (1993) (providing that husband/cohabitant can only be charged with lesser crime of spousal sexual assault); R.I. GEN. LAWS § 11-37-1 (1993) (providing husband cannot be charged with first degree rape unless wife is mentally incapacitated, and is chargeable only with rape in all other circumstances); S.C. CODE ANN. § 16-3-658 (Law. Co-op. 1992) (charging husband with rape only if parties are separated); UTAH CODE ANN. § 76-5-402 (1993) (providing that husband cannot be with rape); WASH. REV. CODE ANN. §§ 9A.44.010, 9A.44.040, 9A.44.050 (West 1993) (limiting rape charges against husbands to first degree and second degree rape only); W. VA. CODE § 61-8B-6 (1993) (charging husband with lesser offense of sexual assault of a spouse).

For a full discussion of marital rape, see DIANA E.H. RUSSELL, RAPE IN MARRIAGE 375-81 app. II (1990).

298. COLO. REV. STAT. ANN. § 18-3-402 (West 1993); GA. CODE ANN. § 13A-6-60 to -61 (1975); IND. CODE ANN. § 35-42-4-1(b) (West 1993); NEB. REV. STAT. § 28-319 (1992); VT. STAT. ANN. tit. 13, § 3252 (1993); *see* Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986).

protection order as narrowly as they do criminal rape.[299]

Twenty-nine states and the District of Columbia have statutes authorizing civil protection orders based on sexual abuse of a child.[300] Courts have also issued civil protection orders based on sexual abuse of the petitioner's child.[301] Defendants have been convicted for sexu-

299. HAW. REV. STAT. §§ 707-730 to 707-732 (1992) (charging husbands with first through third degree rape only, not fourth or fifth degree rape); IOWA CODE ANN. § 709.2-.4 (West 1993) (charging only husband with first or second degree rape; both husbands and cohabitants can be charged with third degree sexual abuse of a mate, which carries a lesser penalty, unless wife is mentally incapacitated); KAN. CRIM. CODE ANN. §§ 21-3501, 21-3502 (Vernon 1993) (charging husband with rape); MONT. CODE ANN. §§ 45-5-502, 45-5-503 (1993) (providing that husbands/cohabitants can be charged with rape and sexual assault); N.C. GEN. STAT. § 14-27.8 (1993) (providing that husband can be charged with rape regardless of whether the parties are separated); VA. CODE ANN. § 18.2-61 (Michie 1993) (providing that husband who rapes wife can be charged with marital sexual assault where there is physical injury if wife reports assault within 10 days); WYO. STAT. §§ 6-4-302 to -307 (1993) (providing that husband can be charged with first or second degree rape but not with third or fourth degree rape).

300. ALASKA STAT. § 25.35 (1993); ARIZ. REV. STAT. ANN. § 13-3602 (Supp. 1994); ARK. CODE ANN. § 91-15-206 (1993); CAL. FAM. CODE § 55 (West 1993); CONN. GEN. STAT. ANN. § 46b-15 (West 1993); DEL. CODE ANN. tit. 10, § 945 (1993); D.C. CODE ANN. § 16-1004 (1993); FLA. STAT. ANN. § 741.30 (West 1993); IDAHO CODE § 39-6303 (1993); 750 ILCS 60/102, 60/201 (1993); KAN. CIV. PROC. CODE ANN. § 60-3107 (Vernon 1993); LA. REV. STAT. ANN. 46:2132 (West 1992); ME. REV. STAT. ANN. tit. 19, § 766 (West 1992); MASS. GEN. L. ANN. ch. 209A, §§ 1, 3 (1992); MINN. STAT. ANN. § 518B.01 (West 1992); MISS. CODE ANN. §§ 93-21-3, 93-21-15 (1993); MO. REV. STAT. §§ 455.010, 455.020 (Vernon 1993); NEV. REV. STAT. ANN. § 33-018 (Michie 1993); N.M. STAT. ANN. § 40-13-2 (Michie 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson 1992); OKLA. STAT. ANN. tit. 22, § 60.1 (West Supp. 1994); 23 PA. CONS. STAT. ANN. § 6102(a) (1993); P.R. LAWS ANN. tit. 8, § 601 (1992); R.I. GEN. LAWS § 15-5-3 (1993); S.C. CODE ANN. § 20-4-40 (Law. Co-op. 1992); UTAH CODE ANN. §§ 30-6-1, 30-6-2 (1993); VT. STAT. ANN. tit. 15, § 1104 (1993); WASH. REV. CODE ANN. §§ 26.50.010, 26.050.030 (1993); W. VA. CODE § 48-2A-2 (1993); WIS. STAT. ANN. § 813-12 (West 1993); WYO. STAT. §§ 35-21-102, 35-21-103 (1993).

301. *E.g.*, Campbell v. Campbell, 584 So. 2d 125, 126 (Fla. 1991) (issuing a protection order where father committed sexual battery on his three year old daughter); Wright v. Wright, 583 N.E.2d 97 (Ill. App. Ct. 1991) (issuing mother a civil protection order against her husband and his son, both of whom were sexually abusing her daughters); Keneker v. Keneker, 579 So. 2d 1083, 1084 (La. Ct. App. 1991) (granting non-custodial mother a temporary protection order on behalf of her minor child based on custodial father's alleged inappropriate sexual behavior toward the child); Cooke v. Naylor, 573 A.2d 376, 377 (Me. 1990) (holding court properly issued civil protection order on behalf of minor child based on alleged sexual abuse); Lucke v. Lucke, 300 N.W.2d 231, 232 (N.D. 1980) (affirming issuance of civil protection order against father who attempted an incestuous relationship with his 18 year old daughter); Rosenberg v. Rosenberg, 504 A.2d 350, 351 (Pa. Super. Ct. 1986) (granting protection order where respondent sexually abused his 10 year old daughter); *see also* Tung v. Oshima, 1993 Minn. App. LEXIS 691 (Minn. Ct. App. June 29, 1993) (reversing denial of a protection order predicated on alleged sexual abuse upon finding an abuse of discretion in accepting respondent's explanation of why he was bathing with his seven year-old and four year-old).

al assault of their wives.[302] Clearly, courts may issue civil protection orders based on marital rape and sexual assault in those jurisdictions where the state may criminally prosecute a defendant on that basis.

Marital rape is an integral part of marital violence.[303] Numerous studies confirm that between 33% and 46% of battered women are raped and/or sexually assaulted by their abusive partners.[304] Between 50% and 85% of women who have experienced rape in an intimate relationship such as marriage indicate that they have been sexually assaulted at least 20 times by their partners.[305] Research indicates the most violent assaults often include sexual as well as physical attacks, and that battered women who are sexually assaulted by their partners typically experience more severe non-sexual attacks than

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302. State v. Schackart, 737 P.2d 398 (Ariz. Ct. App. 1987) (upholding conviction where defendant ordered estranged wife to remove her clothes and sexually assaulted her); People v. Thompson, 206 Cal. Rptr. 516 (Ct. App. 1984) (affirming defendant's conviction for spousal rape where wife reported at least two incidents); State v. Ulen, 623 A.2d 70 (Conn. App. Ct. 1993) (upholding conviction for sexual assault where evidence showed defendant violated a protection order, forced wife to engage in sex at gunpoint, and inserted barrel of gun into her vagina); State v. Wendling, No. 12015, 1990 WL 197957 (Ohio Ct. App. Dec. 6, 1990) (affirming decision holding respondent in contempt of civil protection order based on marital rape); Commonwealth v. Shoemaker, 518 A.2d 591 (Pa. Super. Ct. 1986) (convicting husband who came to wife's residence while they were separated, threatened her with a knife, and forced her to have oral sex and vaginal intercourse).

303. *See* WOMEN'S ACTION COALITION, WAC STATS: THE FACTS ABOUT WOMEN 49, 55 (1993) [hereinafter WAC STATS].

304. BROWNE, *supra* note 171, at 2-5; RUSSELL, *supra* note 297; Irene H. Frieze & Angela Browne, *Violence in Marriage*, *in* FAMILY VIOLENCE: CRIME AND JUSTICE, A REVIEW OF RESEARCH 163 (Lloyd Ohlin & Michael Tonry eds., 1989). Research by the State of Kentucky found 79% of domestic violence victims had experienced forced sexual relations with a spouse and 21% with a live-in partner. The majority of victims were assaulted more than once and many indicated several different types of sexual abuse: 75% forced vaginal intercourse, 57% forced sex after being beaten, 36% forced oral-genital sex, 30% forced anal intercourse, 16% forced sex with an object, and 8% forced sex in the presence of others. FREDERICK J. COWAN, ATTORNEY GENERAL, ADULT ABUSE, NEGLECT AND EXPLOITATION: A MEDICAL PROTOCOL FOR HEALTH CARE PROVIDERS AND COMMUNITY SERVICE AGENCIES 129 (1991). Almost 80% of battered women are forced to have sex with their abuser after the battered women has said "no." Lenore E. Walker, Eliminating Sexism to End Battering Relationships, Paper Presented at the American Psychological Association (1984). Fifty-nine percent of battered women reported being repeatedly sexually abused, and an additional 13.9% reported being raped by their batterer at least once. Campbell, *supra* note 119, at 36.

305. DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 23 (1985) (finding that 10% of women report at least one sexual assault in response to force or threat by a husband or partner and that 50 to 87% of women who experienced rape in an intimate relationship were sexually assaulted at least 20 times). Approximately 14% of wives are sexually assaulted in some manner by their husbands. OFFICE OF THE ATTORNEY GENERAL, SEXUAL ASSAULT/ABUSE: A HOSPITAL/COMMUNITY PROTOCOL FOR FORENSIC AND MEDICAL EXAMINATION 3 (1991); Frieze & Browne, *supra* note 304, at 188.

other abused women.[306] Approximately 75% of battered women who killed or tried to kill their abusers had been raped by them.[307] Clearly, both state legislatures and a growing number of courts recognize that sexual assault can often be an integral part of the cycle of violence in an abusive relationship, and protection against continued sexual assaults must be available.

3. Interference with Personal Liberty

A batterer may resort to tactics which, although not necessarily violent in and of themselves, seek to control and frighten an abuse victim. Such conduct often serves to restrict or interfere with the victim's activities and freedom. Consequently, eight states and Puerto Rico provide by statute that civil protection orders will issue based on interference with the petitioner's personal liberty.[308] Case law delineates the variety of acts which might constitute interference with personal liberty forming the basis for issuance of a civil protection order. These have included: concealing children and parental kidnapping,[309] locking the petitioner out of the marital home and threatening to physically remove her,[310] physically restraining petitioner from leaving her home or calling the police,[311] and grabbing the steering wheel of petitioner's car while she is driving, pulling the car out of gear, and attempting to pull the car to the side of the road.[312] An Illinois court criminally convicted a man for unlawful restraint of his wife, based on a violation of an existing order of protection.[313]

306. LEE H. BOWKER, BEATING WIFE BEATING 52-54, 56-59 (1983).

307. Campbell, *supra* note 119; *see also* EWING, *supra* note 180, at 9.

308. CONN. GEN. STAT. ANN. § 46b-15 (West 1993); DEL. CODE ANN. tit. 10, § 945 (1993); GA. CODE ANN. § 19-13-1 (1993); 725 ILCS 5/112A-3 (1993); NEV. REV. STAT. ANN. § 33.018 (Michie 1993); N.H. REV. STAT. ANN. § 173-B:1(1992); P.R. LAWS ANN. tit. 8, § 601 (1990); VT. STAT. ANN. tit. 15, § 1104 (1992); WYO. STAT. § 35-21-102 (1993).

309. Sanders v. Shepard, 541 N.E.2d 1150 (Ill. App. Ct. 1989) (enforcing a civil protection order issued based on concealment of child and parental kidnapping).

310. Wagner v. Wagner, 15 Pa. D. & C.3d 148, 151-52 (C.P. 1980) (issuing civil protection order where respondent locked the petitioner out of the marital home and threatened to physically remove her from the home).

311. *In re* Marriage of Blitstein, 569 N.E.2d 1357, 1358-59 (Ill. App. Ct. 1991) (affirming protection order issued where respondent physically restrained petitioner from calling the police or leaving her home).

312. Ickes v. Ickes, 3 Pa. D. & C.4th 166 (C.P. 1989) (issuing protection order where respondent grabbed steering wheel of petitioner's car three times while she was driving, tried to pull the car out of gear, and tried to pull the car to the side of the road).

313. People v. Williams, 582 N.E.2d 1158, 1160 (Ill. App. Ct. 1991) (upholding conviction for unlawful restraint where respondent grabbed petitioner from behind and refused to let her go).

Indeed, many states' statutes will specifically issue protection orders based on false imprisonment.[314] The courts and legislatures need to continue to identify and broaden the range of behavior which restrict a petitioner's movement and activities that may serve as grounds for issuance of a civil protection order.[315]

4. Threats

Protection orders may also issue on the basis of threats of violence or acts which place the petitioner in fear of imminent bodily harm. Threats are acts of domestic violence because they seek to intimidate and control the petitioner. Social science research reveals that threats and harassment, left unchecked, frequently escalate to greater violence.[316] Although the common stereotype of "domestic violence" tends to be that of relatively minor assaults and squabbles, 41% of battered women report being regularly threatened by their abusers,[317] and over one-third of domestic assaults involve severe actions, such as punching, kicking, choking, beating up, and threatening with or using a gun or a knife.[318] Many battered women's lives are threatened.[319] Of all women killed by their abusers, 41% to 50% previously had been threatened with death and 39% had been threatened or assaulted with a weapon.[320] Threats are often effectively

314. *See, e.g.*, DEL. CODE ANN. tit. 10, § 947 (Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-505 (Supp. 1993); MINN. STAT. ANN. § 518B:01 (West Supp. 1993); MO. REV. STAT. § 455.050 (Vernon Supp. 1993); NEV. REV. STAT. ANN. § 33-020 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4 (Supp. 1992); N.J. STAT. ANN. § 2C:25-19 (West 1992); 23 PA. CONS. STAT. ANN. § 6108 (1991); WASH. REV. CODE ANN. § 10.99.040 (1993); W. VA. CODE § 48-2A-5 (Supp. 1993).

315. Examples of other tactics batterers use to restrict a domestic violence victim's movement and/or ability to flee a violent relationship that could serve as a basis for issuance of a civil protection order under this theory might include threats to turn the domestic violence victim in for deportation if she flees or threats that if she leaves, she will never see her children again.

316. GILLESPIE, *supra* note 124, at 129.

317. Diane R. Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOLENCE 107, 113 (1990).

318. Angela Browne, Testimony before the U.S. Senate Committee on the Judiciary (Dec. 1990).

319. EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS 6 (1988) (finding 70% of battered women have their lives threatened); ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, WOMAN ABUSE: FREQUENT AND SEVERE 1991 (50% of battered women have their lives threatened).

320. Sometimes, these threats lead the battered woman to retaliate when she believes her death is imminent. *See* P.D. Chimobos, *quoted in* Leslie Henderson, *Till Death Do Us Part: Abuse by Husband Drove Woman to Murder*, KNOXVILLE J. Feb. 28, 1984, at p. A1; *see also* EWING, *supra* note 180.

used by batterers to secure the return of battered women to abusive homes.[321]

Consequently, nearly all states, the District of Columbia, and Puerto Rico issue civil protection orders based on threats of physical abuse.[322] Courts specifically recognize a wide range of behaviors which constitute threats. A threat to kill the petitioner is the most common threat for which a court will issue a civil protection order.[323] In *Pendleton v. Minichino*,[324] a Connecticut court found present and immediate danger sufficient to issue a civil protection order based on the respondent's prior history of depression and his recent remark to petitioner that "[t]his time I'm not going alone. You

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321. Joel Dvoskin, *Legal Alternatives for Battered Women Who Kill Their Abusers*, 6 BULLETIN OF THE AAPL 335, 350 (1978).

322. ALA. CODE § 30-5-7 (1989); ALASKA STAT. § 25-35.010 (1991); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1993); CAL. FAM. CODE § 5650 (West 1993); COLO. REV. STAT. ANN. § 14-4-102 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 947 (Supp. 1993); D.C. CODE ANN. § 16-1005 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); HAW. REV. STAT. § 586-5.5 (Supp. 1992); IDAHO CODE § 39-6306 (1993); 750 ILCS 5/112A-14 (1993); IND. CODE ANN. § 34-4-5.1-5 (West Supp. 1992); IOWA CODE ANN. § 236.5 (West Supp. 1993); KAN. CIV. PROC. CODE § 60-3107 (Vernon Supp. 1993); KY. REV. STAT. ANN. § 403.750 (Michie/Bobbs-Merill Supp. 1992); LA. REV. STAT. ANN. § 46:2136 (West 1982); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-505 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 3 (West Supp. 1992); MICH. COMP. LAWS ANN. § 93-21 (West 1992); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MISS. CODE ANN. § 93-21-15 (Supp. 1993); MO. REV. STAT. § 455-050 (Vernon Supp. 1993); NEB. REV. STAT. § 42-924 (Supp. 1993); NEV. REV. STAT. ANN. § 33.020 (1993); N.H. REV. STAT. ANN. § 173-B:4 (Supp. 1992); N.J. STAT. ANN. § 2C:25-19 (West 1992); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); N.Y. FAM. CT. ACT § 841 (McKinney Supp. 1994); N.C. GEN. STAT. § 50B-3 (1989); N.D. CENT. CODE § 14-07.1-01 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4 (West 1992); OR. REV. STAT. § 107.718 (1991); 23 PA. CONS. STAT. ANN. § 6108 (1991); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990); R.I. GEN. LAWS § 15-15-3 (Supp. 1993); S.C. CODE ANN. § 20-4-60 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-5 (1984); TEX. FAM. CODE § 71.11 (West Supp. 1993); UTAH CODE ANN. § 30-6-2 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1104 (1989); VA. CODE ANN. § 16.1-253.1 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.030 (West Supp. 1993); W. VA. CODE § 48-2A-5 (Supp. 1993); WIS. STAT. ANN. § 813.12 (West 1993); WYO. STAT. § 35-21-103 (1988).

323. *See, e.g.*, Glater v. Fabianich, 625 N.E.2d 96 (Ill. Ct. App. 1993) (finding threat where respondent said he "wanted [petitioner] erased"); Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992) (upholding order of protection based upon husband's threats to kill his wife); Eichenberger v. Eichenberger, 1993 Ohio App. LEXIS 5282 (1993); Strollo v. Strollo, 828 P.2d 532, 534-35 (Utah Ct. App. 1992) (reversing dismissal of application for protection order based on respondent's threat to kill the petitioner if she served him with divorce papers); People v. Salvato, 285 Cal. Rptr. 837 (Ct. App. 1991); Hall v. Hall, 408 N.W.2d 626 (Minn. Ct. App. 1987) (upholding issuance of order where husband made threats to kill wife during custody proceedings).

324. 1992 Conn. Super. LEXIS 915 (Super. Ct. 1992).

better watch your back."[325] While other evidence of abuse existed, including physical assault and property damage, the court concluded that the threat alone could constitute family violence sufficient to issue a protection order.[326] Other conduct which courts have held constitutes a threat sufficient to support a civil protection order includes threats of violence,[327] threatening and following the petitioner,[328] leaving a threatening note,[329] threatening to physically remove petitioner from the home if she did not voluntarily leave,[330] threatening to burn down petitioner's home with her in it,[331] threatening to get the petitioner fired from her job,[332] and verbally and physically abusing the petitioner in front of their child.[333] Courts have also perceived intimidating threats in acts such as leaving a shredded marriage certificate[334] or, in the criminal context, tomato juice covered clothes, on the victim's doorstep.[335]

Several cases recognize a threat sufficient to issue or extend a protection order where the defendant will be or has been recently released from jail. In *Campbell v. Campbell*,[336] the Florida District Court of Appeals upheld the trial court's determination that the respondent's release from jail, in the context of past violence, sexual battery of his child, and expressed resentment against his wife, posed a threat sufficient to support the issuance of a civil protection order.[337] In *Cruz-Foster v. Foster*,[338] the District of Columbia Court

325. *Id.* at *4-*5.

326. *Id.* at *24-*25.

327. Glater v. Fabianich, 625 N.E.2d 96 (Ill. Ct. App. 1993) (affirming a finding of danger where respondent told petitioner "[w]e're going to have a chat and it won't be pretty"); Harper v. Harper, 537 So. 2d 282 (La. Ct. App. 1988) (upholding a protection order based on husband's constant threats); Parkhurst v. Parkhurst, 793 S.W.2d 634 (Mo. Ct. App. 1990) (finding verbal threats of violence sufficient); Synder v. Synder, 629 A.2d 977 (Pa. 1993) (finding a threat where respondent threatened to have sex with petitioner).

328. Banks v. Pelot, 460 N.W.2d 446 (Wis. Ct. App. 1990) (upholding issuance of civil protection order based on respondent following and threatening the petitioner) (unpublished decision; full text at 1990 WL 130858).

329. Boniek v. Boniek, 443 N.W.2d 196 (Minn. Ct. App. 1989) (upholding issuance of a civil protection order based on respondent leaving parties' marriage certificate cut up into little pieces with a threatening note on petitioner's doorstep, his driving around the petitioner's home, and his becoming physically aggressive toward an insurance salesman he found in the petitioner's home).

330. Wagner v. Wagner, 15 Pa. D. & C.3d 148 (C.P. 1980).

331. Ickes v. Ickes, 3 Pa. D. & C.4th 166 (C.P. 1989).

332. Delisser v. Hardy, 749 P.2d 1207 (Or. Ct. App. 1988).

333. *In re* Marriage of Ingram, 531 N.E.2d 97 (Ill. App. Ct. 1988).

334. Boniek v. Boniek, 443 N.W.2d 196 (Minn. Ct. App. 1989).

335. People v. Salvato, 285 Cal. Rptr. 837 (Ct. App. 1991).

336. 584 So. 2d 125 (Fla. Dist. Ct. App. 1991).

337. *Id.* at 126.

of Appeals vacated the trial court's decision not to extend a protection order to the petitioner where the respondent had been recently released from jail after serving a sentence for contempt of a prior civil protection order, and where the respondent came to and telephoned the petitioner's work place.[339] The appellate court held that the "entire mosaic" of past abuse is critical to a trial court's determination whether to extend a protection order.[340] The Court of Appeals vacated and remanded the trial court's decision because the judge did not consider the entire history of past events, including severe and frequent abuse, threats to kill, false imprisonment, and chronic violations of an existing protection order, which might have suggested the truly threatening nature of the defendant's behavior in lurking about the petitioner's work place and calling her.[341]

In *Maldonado v. Maldonado*,[342] the District of Columbia Court of Appeals recognized the seriousness of threats made by an incarcerated defendant.[343] The appellate court reversed the trial court's denial of an extension of a protection order where the trial court's sole basis for denying the extension was the fact that defendant was incarcerated during the duration of the civil protection order.[344] The court of appeals specifically noted that:

> with respect to the portion of the original order barring threats directed at the wife and children and the telephoning of the wife, the wife would be left open to harassment or threatening communications from the husband should he gain access to a telephone. In addition, threats can be communicated by mail or through third parties. Although threats to commit physical harm by one incarcerated may, in some instances, not rise to the level of seriousness that physical abuse does, such conduct nonetheless can have significant adverse effects upon the victim . . . . At a minimum, the wife is entitled to be free of abuse or threats by the husband whether committed by telephone or the mail.[345]

A California court has also criminally convicted a defendant for

338. 597 A.2d 927 (D.C. Ct. App. 1991).
339. *Id.*
340. *Id.* at 931.
341. *Id.* at 932.
342. 631 A.2d 40 (D.C. Ct. App. 1993).
343. *Id.*
344. *Id.* at 44.
345. *Id. But see* Trowell v. Meads, 618 So. 2d 351 (Fla. 1988) (refusing to issue permanent protection order where defendant threatened petitioner by telephone from prison).

acts which included making threats over the telephone to his wife.[346] Having provided the basis for a criminal prosecution, this behavior should also be sufficient to issue a civil protection order.

Batterers often make threats of suicide as a method of exerting control over their battered intimate partner. These threats are often made in an effort to convince her that she should dismiss a civil protection order petition or recant previously given testimony.[347] Unfortunately, recent threats of suicide by the respondent may not be sufficient to issue a civil protection order where there have been no concurrent acts of violence. In *Bjergum v. Bjergum*,[348] the court reversed the entry of a full civil protection order, despite the petitioner's allegations that the respondent had threatened to commit suicide as recently as a week prior to the hearing.[349]

In *Hayes v. Hayes*,[350] the court dismissed a former wife's petition for a civil protection order which had been based on her former husband's threat to shoot her and her boyfriend and burn down her house, since the statement was made to her daughter and the respondent did not authorize or understand that the daughter would relay the threat to the petitioner.[351] However, the analysis used in *Hayes* is inconsistent with other case law which holds a person criminally liable for threats to another person even where the threat is communicated only to a third party. The District of Columbia Court of Appeals, in *United States v. Baish*,[352] held that a person threatens another when he utters words which are intended to convey a desire to inflict physical injury and these words are communicated or conveyed to someone—either the object of the threat or to a third party.[353] Therefore, in the *Hayes* case, the defendant committed a criminal threat when he conveyed to his daughter as a third party his intent to physically injure his former wife. The threat is just as dangerous whether or not the third party relays the threat directly to the person threatened.

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346. People v. Salvato, 285 Cal. Rptr. 837 (Ct. App. 1991) (upholding conviction where respondent left threatening messages on victim's telephone machine. Respondent's message stated that there would be "bad trouble" if the petitioner did not agree to his property settlement terms).

347. Ganley, *supra* note 21, at 19, 23.

348. 392 N.W.2d 604 (Minn. Ct. App. 1986).

349. *Id.* at 606.

350. 500 N.Y.S.2d 475 (Fam. Ct. 1986).

351. *Id.* at 478.

352. 460 A.2d 38 (D.C. Ct. App. 1983).

353. *Id.* at 42.

5. Attempts To Harm

Protection orders should issue based on an attempt to harm the petitioner. This is a particularly important ground for issuance of a civil protection order because of the role attempts play in controlling a victim of abuse. A court's refusal to issue a civil protection order based on an attempt to injure the petitioner may reinforce, in both parties' minds, the legitimacy of the batterer's behavior. Law enforcement officials and the courts should act against attempts to harm, as they are clear precursors to further violence, serious injury, or death.[354]

An attempt to harm a family member demonstrates that the respondent is disposed to violence not only on that occasion but on others as well.[355] Attempts are punished as crimes under criminal codes because a defendant who attempts to commit a crime "has sufficiently manifested [his] dangerousness."[356] Consequently, the legislatures of thirty-nine states, the District of Columbia, and Puerto Rico authorize courts to issue civil protection orders based on attempts to harm.[357] Case law illustrates the variety of behavior that

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354. Domestic violence tends to escalate in both frequency and severity over time. BROWNE, *supra* note 171, at 68; Geraldine Butts Stahly, Victim Rights and Issues: Special Problems of Battered Woman as Victim/Witness in Partner Abuse Cases, Paper Presented at the Western Society of Criminology Conference, Los Vegas, Nevada (Feb. 27, 1978). The pattern of abuse has a distinct and predictable cycle. GILLESPIE, *supra* note 124, at 129. Typically episodes involve a combination of assaultive acts, verbal abuse and threats. Browne, *supra* note 1, at 3186. In a study of abusive men, one third reported that their partners sustained broken bones or other substantial injuries as a result of their violence. *See* James Ptacek, *Why Do Men Batter Their Wives?*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 135 (Kersti Yllo & Michele Bogard eds. 1988).

355. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 499 (2d ed. 1986).

356. *Id.* at 495.

357. ALA. CODE § 30-5-7 (1989); ALASKA STAT. § 25-35.010 (1991); ARIZ. REV. STAT. ANN. § 13-3601 (Supp. 1993); CAL. FAM. CODE § 5650 (West 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 947 (Supp. 1993); D.C. CODE ANN. § 16-1005 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-4 (Supp. 1993); IDAHO CODE § 39-6306 (1993); 725 ILCS 5/112A-14 (Supp. 1993); IND. CODE ANN. § 34-4-5.1-5 (West Supp. 1992); KAN. CIV. PROC. CODE § 60-3107 (Vernon Supp. 1993); LA. REV. STAT. ANN. § 46:2136 (West 1982); ME. REV. STAT. ANN. tit. 19, § 766 (1992); MD. CODE ANN., FAM. LAW § 4-505 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 3 (West Supp. 1993); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MISS. CODE ANN. § 93-21-15 (Supp. 1992); MO. REV. STAT. § 455-050 (Vernon Supp. 1993); NEV. REV. STAT. ANN. § 33.020 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4 (Supp. 1993); N.J. STAT. ANN. § 2C:25-3 (West 1992); N.M. STAT. ANN. § 40-13-5 (1989); N.Y. FAM. CT. ACT § 841 (McKinney Supp. 1994); N.C. GEN. STAT. § 50B-3 (1989); N.D. CENT. CODE § 14-07.1-02 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4 (West 1992); OR. REV. STAT. § 107.718 (1991); 23 PA. CONS. STAT. ANN. § 6108 (1991); P.R. LAWS ANN. tit. 8, § 621

constitutes attempts to harm sufficient for issuance of a civil protection order. This behavior includes: the respondent repeatedly grabbing the steering wheel of the petitioner's car while petitioner was driving, and pulling the car out of gear and attempting force the car to the side of the road;[358] the respondent attempting to have an incestuous relationship with his eighteen-year-old daughter;[359] and the respondent attempting to assault the petitioner.[360] Courts have identified why attempts to harm are sufficient to find domestic violence. In *Ickes*,[361] the court found domestic abuse sufficient to issue a civil protection order where the respondent attempted to force the plaintiff's car off the road "[b]ecause the inquiry focuses on the fear generated in plaintiff and not on any actual injury inflicted."[362] Most courts will issue protection orders based on attempts. Those few cases in which the court failed to issue a civil protection order despite substantial evidence of an attempt to harm the petitioner have occurred in a minority of jurisdictions, where the statute authorizing civil protection orders at the time the cases were decided incorporated a higher criminal standard of proof for attempt.[363] Criminal attempt requires, 1) the intent to do an act or bring about certain circumstances proscribed by law, and 2) an act beyond mere preparation in further-

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(Supp. 1990); R.I. GEN. LAWS § 15-15-3 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 25-10-5 (1984); TENN. CODE ANN. § 36-3-605 (1991); TEX. FAM. CODE Ann. § 71.11 (West Supp. 1993); UTAH CODE ANN. § 30-6-2 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1103 (1989); VA. CODE ANN. § 16.1-253.1 (Michie Supp. 1993); W. VA. CODE § 48-2A-5 (Supp. 1993); WIS. STAT. ANN. § 813.12 (West 1993); WYO. STAT. § 35-21-103 (1988).

358. Ickes v. Ickes, 3 Pa. D. & C.4th 166 (C.P. 1989); *see also* Gilbert v. Georgia, 433 S.E.2d 664 (Ga. 1993) (convicting defendant where evidence sufficient to support of finding of reasonable apprehension of fear without harm. Defendant drove wife to dirt road, pulled knife on her and forced her to strip).

359. Lucke v. Lucke, 300 N.W.2d 231 (N.D. 1980).

360. Yankoskie v. Lenker, 526 A.2d 429 (Pa. Super. Ct. 1987).

361. 3 Pa. D. & C.4th 166.

362. *Id.*

363. The court in Popeski v. Popeski, 3 Pa. D. & C.4th 200 (C.P. 1989), denied a petition for a civil protection order where respondent threw a set of keys which struck her son and threw a butcher knife across the room, because the court found insufficient evidence of intent to harm. The court in Seymour v. Seymour, 289 N.Y.S.2d 515 (Fam. Ct. 1968), dismissed a petition for a civil protection order assuming that respondent had attempted to force petitioner's car off the road, because the statute at that time required a finding that respondent's actions had resulted in physical pain or injury. In *Stanzak v. Stanzak*, the Ohio Court of Appeals reversed the grant of a civil protection order issued following an incident where the respondent backed up a car near the petitioner. 1990 Ohio App. LEXIS 3958 (Ct. App., Sept. 10, 1990). The court found insufficient evidence to support a finding that the respondent attempted or threatened to injure the petitioner.

ance of the intent.[364]

In family violence cases, state legislatures, courts, and law enforcement officials need to address attempts to harm as strong indicators of a person's propensity for more serious and deadly violence in the future. Courts should issue civil protection orders based on attempts, whether such attempts are intentional or undertaken with reckless disregard for an intimate's safety. This approach is grounded in research documenting the escalating nature of domestic violence.[365] It is also supported by legal scholars who urge that, in criminal cases, recklessness should constitute sufficient mens rea for a conviction for an attempt to commit a crime.[366]

6. Harassing Behaviors

Harassment is another powerful ground for issuing a protection order. A swift and determined official response to harassment will often stave off later, more violent behavior. Batterers use a broad variety of harassing tactics to exert continued control over their intimate partners, including emotional abuse.[367] Some women have been followed and harassed for months, even years, after leaving an abusive partner.[368] The longer that violence continues in a relationship the more serious and dangerous it becomes.[369] Moreover, batterers feel less remorseful and more justified in their violence as the abuse continues.[370] If the police and courts respond swiftly, seriously punishing harassing behavior, they may often impede the cycle of violence from continuing further by undermining the batterer's growing sense of legitimacy in his violence.

Twelve state statutes issue protection orders based on harassment of the petitioner,[371] and courts in many states have interpreted a

364. LAFAVE & SCOTT, *supra* note 355, at 495.

365. *See supra* note 354.

366. LAFAVE & SCOTT, *supra* note 355, at 502.

367. Follingstad et al., *supra* note 317, at 113 (discussing six different types of emotional abuse and the resulting impact on the victims).

368. BROWNE, *supra* note 171, at 114. Women who fled their batterers have been forced back at gunpoint, forced to return when the batterer held a gun to their child's head, and tracked across state lines to get them to return and tracked down after many years. EWING, *supra* note 180, at 28.

369. GILLESPIE, *supra* note 124, at 129.

370. Angela Browne, Assault and Homicide at Home: When Battered Women Kill, Paper Presented at the National Family Violence Research Conference (Aug. 1984), *reprinted in* 3 ADVANCES IN APPLIED PSYCHOLOGY 68.

371. DEL. CODE ANN. tit. 10, § 945 (Supp. 1993) ("engaging in a course of alarming or distressing conduct in a manner which is likely to provoke a violent or disorderly response

wide range of behavior to constitute harassment sufficient to issue a civil protection order. Harassing behavior includes following the petitioner,[372] threatening the petitioner,[373] calling the petitioner a "bitch,"[374] preventing the petitioner from leaving a room,[375] pulling telephone cords out of the wall to prevent the petitioner from calling the police,[376] driving around the petitioner's home,[377] cutting up the parties' marriage certificate and leaving it with a threatening note on petitioner's doorstep,[378] initiating a high speed car chase,[379] interfering with petitioner's living,[380] calling the petitioner at work seventy-five times within a period of a month,[381] filing frivolous legal actions against the petitioner,[382] moving within two blocks of the petitioner's house,[383] loitering in front of the battered women's shelter where the petitioner stayed,[384] pounding nails into the petitioner's

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or which is likely to cause humiliation, degradation, or fear in another person"); IDAHO CODE § 39-6303 (1993); 725 ILCS 5/112A-3 (Supp. 1993); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MO. REV. STAT. § 455.010 (Vernon 1993); NEV. REV. STAT. ANN. § 33.018 (Michie 1986); N.J. STAT. ANN. § 2C:25-19 (West 1993); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993) (including telephone contact and repeatedly driving by residence or workplace); N.Y. FAM. CT. ACT Law § 812(1) (McKinney Supp. 1994); R.I. GEN. LAWS § 15-15-1 (1988) (criminal statute); W. VA. CODE § 48-2A-2 (Supp. 1993); WIS. STAT. ANN. § 813.122 (West Supp. 1993).

372. *In re* The Marriage of McCoy, 1993 WL 512877 (Ill. App. Ct. Dec. 9, 1993) (issuing protection order where husband followed and approached children in violation of a protection order); Banks v. Pelot, 460 N.W.2d 446 (Wis. Ct. App. 1990) (affirming issuance of issued protection order where respondent followed and threatened the petitioner); State v. Sarlund, 407 N.W.2d 544 (Wis. 1987) (affirming that defendant's acts, in constantly writing petitioner letters, confronting her friends and dates, contacting her parents and employers, and following her to and from school, constituted harassment sufficient to support a protection order).

373. *In re* Marriage of Hagaman, 462 N.E.2d 1276, 1278-79 (Ill. App. Ct. 1984); Roe v. Roe, 601 A.2d 1201, 1206-07 (N.J. Super. Ct. App. Div. 1992); Kilmer v. Kilmer, 486 N.Y.S.2d 483 (N.Y. App. Div. 1985); People v. Derisi, 442 N.Y.S.2d 908 (Sup. Ct. 1981); *Banks*, 460 N.W.2d at 446 (Wis. Ct. App. 1990).

374. Capps v. Capps, 715 S.W.2d 547, 549 (Mo. Ct. App. 1986).

375. *In re* Marriage of Blitstein, 569 N.E.2d 1357 (Ill. App. Ct. 1991).

376. *Id.*

377. Boniek v. Boniek, 443 N.W.2d 196, 198 (Minn. Ct. App. 1989).

378. *Id.*

379. Christenson v. Christenson, 472 N.W.2d 279, 280 (Iowa 1991).

380. *In re* Marriage of Hagaman, 462 N.E.2d 1276 (Ill. App. Ct. 1984); *see also* Rogers v. Rogers, 556 N.Y.S.2d 114 (App. Div. 1990).

381. Johnson v. Cegielski, 393 N.W.2d 547 (Wis. Ct. App. 1986).

382. *Id.*

383. Knuth v. Knuth, 1992 Minn. App. LEXIS 696 (Ct. App. June 19, 1992).

384. *Id.*

car tires,[385] opening the petitioner's mail,[386] making unwanted telephone calls to the petitioner,[387] constantly writing the petitioner letters,[388] meeting with the petitioner's friends and dates,[389] contacting the petitioner's parents and employers,[390] repeated calls and letters implying that force would be used in an effort to visit with the parties' child,[391] entering the petitioner's car,[392] entering the petitioner's home,[393] standing outside the petitioner's apartment three or four times a day screaming curses at her,[394] sending the petitioner unwanted pizza and service calls,[395] throwing things at the petitioner,[396] and pushing the petitioner down stairs and out the door.[397]

The court's decision in *Traiforos v. Mahoney*[398] illustrates the importance of issuing protection orders based on harassing behavior. In *Traiforos*, the petitioner filed for a protection order under the domestic violence statute based on harassment.[399] The trial court, applying its broad discretionary powers, converted an action for domes-

385. *Id.*

386. *Id.*

387. Thomas v. Maryland, 1993 Md. LEXIS 172 (Dec. 6, 1993) (holding 30 unsolicited phone calls in one month constituted harassment, despite petitioner's acceptance of collect calls); Cote v. Cote, 599 A.2d 869, 871 (Md. Ct. Spec. App. 1992); Anthony T. v. Anthony J., 510 N.Y.S.2d 810, 811 (Fam. Ct. 1986).

388. State v. Sarlund, 407 N.W.2d 544, 546 (Wis. 1987).

389. *Id.*

390. *Id.*; *see also* Delisser v. Hardy, 749 P.2d 1207, 1208 (Or. Ct. App. 1988) (affirming issuance of protection order where defendant forced his way into petitioner's apartment, physically abused her, threatened to get her fired from her job, and called her employer).

391. Tillman v. Snow, 571 N.E.2d 578, 579-580 (Ind. Ct. App. 1991) (affirming issuance of civil protection order against natural father and paternal aunts which prohibited contact with the parties' child where the natural father made repeated attempts to visit child through telephone calls and letters to mother and adoptive father stating that "I want to see my daughter and I will" and stating that the father would come to see the children and would not be stopped. These communications were held to constitute abuse and were sufficient to show mental abuse and harassment disturbing the petitioner's peace in light of the natural father's prior abuse of the mother). However, some courts have ignored real harassment of the petitioner. For example, in Grant v. Wright, 536 A.2d 319 (N.J. Super. Ct. App. Div. 1988), the court found no harassment sufficient to issue a permanent restraining order where there was no actual physical abuse but where respondent removed petitioner's belongings from their mutual residence, placed them in storage while the petitioner was away from the home and left the storage key in petitioner's car.

392. Cote v. Cote, 599 A.2d 869, 871 (Md. 1992).

393. *Id.*

394. Goldring v. Goldring, 424 N.Y.S.2d 270, 273 (App. Div. 1980).

395. Saliterman v. State, 443 N.W. 2d 841, 843 (Minn. Ct. App. 1989).

396. Holcomb v. Holcomb, 574 N.Y.S.2d 115 (App. Div. 1991).

397. *Id.*

398. 1992 Minn. App. LEXIS 633 (Ct. App. July 7, 1992).

399. *Id.*

tic abuse to one for harassment, and issued a no harassment order.[400] The appellate court, finding that the petitioner would have received a functionally similar order had she filed under the correct statute, upheld the no-harassment order.[401]

Courts have placed some reasonable limits on the issuance of civil protection orders based on harassment. For example, in *Didonna v. Didonna*,[402] the court held that the husband's constant and unrelenting discussions with his two teenage daughters about the impending break up of his marriage did not constitute harassment for purposes of issuing a civil protection order.[403] The court found these discussions to be the unfortunate, albeit annoying, result of the marriage break up.[404] In *Rouse v. Rouse*,[405] the Florida District Court held that a wife's faxed letters to the husband petitioner's business place politely requesting to schedule visitation with their children did not constitute harassment or frustrate the petitioner's business.[406]

7. Emotional Abuse

Thirteen innovative state statutes recognize some forms of emotional abuse as bases to issue a protection order.[407] The Immigration

400. *Id.* (noting that under the domestic violence statute, a protection order cannot issue based on harassment, and fashioned a response as appropriate for the situation).

401. *Id.* at *6.

402. 339 N.Y.S.2d 592 (Fam. Ct. 1972).

403. *Id.*; *see also* E.K. v. G.K., 575 A.2d 883 (N.J. Super. Ct. App. Div. 1990) (upholding refusal to issue a restraining order based on harassment when the mother disciplined child in manner which the father disapproved, even though the child was injured accidently, since no evidence existed that the mother acted to harass the father); Roofeh v. Roofeh, 525 N.Y.S.2d 765 (Sup. Ct. 1988) (refusing to issue a civil protection order prohibiting the respondent wife from smoking in the presence of her husband and children. However, the court ordered the wife to limit her smoking to the sitting room not in the presence of the children.).

404. *Didonna*, 339 N.Y.S.2d at 592.

405. 595 So. 2d 1013 (Fla. Dist. Ct. App. 1992).

406. *Id.* at 1014.

407. DEL. CODE ANN. tit. 10, § 945 (Supp. 1992) (insulting, taunting other conduct likely to cause humiliation, degradation or fear); HAW. REV. STAT. § 586-1 (Supp. 1993) (emotional distress); 725 ILCS 5/112-3A(6) (1993) (intimidation, such as creating a disturbance at petitioner's place of employment; repeatedly telephoning petitioner's place of employment, home, or residence; repeatedly following petitioner about in a public place; repeatedly keeping the petitioner under surveillance by remaining present outside of her home, school, place of employment, vehicle or other place occupied by the petitioner or by peering in the petitioner's window; repeatedly threatening to improperly remove a child of petitioner from the jurisdiction, improperly concealing that child from petitioner or making a single such threat following an attempted or actual improper removal or concealment; threatening physical force, confinement or restraint on one or more occasions); ME. REV. STAT. ANN. tit. 19,

and Naturalization Act's Battered Spouse Waiver provisions recognize that emotional abuse is a form of spousal abuse.[408] Under this law and the regulations promulgated pursuant thereto, battered spouse waivers are granted upon a showing of extreme cruelty, allowing battered spouses to move from conditional to permanent residency.[409]

Case law supports recognizing both mental and physical abuse. In *Lucke v. Lucke*,[410] the court held that adult abuse was not limited to physical abuse or the threat of imminent physical harm, but also included mental abuse.[411] In *Lucke*, the court issued a civil protection order against a father when he attempted to initiate an incestuous relationship with his eighteen year old daughter.[412] In *Boniek v. Boniek*,[413] the court considered evidence of mental abuse during twenty-five years of marriage to support the issuance of a civil protection order.[414] The defendant left the parties' mutilated marriage certificate on the petitioner's doorstep, drove around her home, and physically assaulted a salesperson in her home.[415] The court concluded that "[v]iewing the evidence in its totality, and in light of [respondent's] history of abusive behavior, sufficient evidence exists

§ 26 (West Supp. 1992) (tormenting); MO. REV. STAT. § 455.010 (Vernon Supp. 1993) ("Harassment [is] engag[ing] in purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to another person and serves no legitimate purpose. Conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner."); NEV. REV. STAT. ANN. § 33.018(5) (Michie 1986) (knowing, purposeful or reckless course of conduct to harass); N.H. REV. STAT. ANN. § 173-B:I (1990 & Supp. 1992) (intimidation); N.J. STAT. ANN. . § 2C:25-19 (West Supp. 1993) (intimidation); N.M. STAT. ANN. § 40-13-2(c)(2) (Michie Supp. 1993) (severe emotional distress); N.Y. FAM. CT. ACT. § 821-1(a) (McKinney Supp. 1994) (menacing); OHIO REV. CODE ANN. § 3113.31 (Anderson 1992); W. VA. CODE § 48-2A-2 (Michie Supp. 1993) (psychological abuse; intimidation); WIS. STAT. ANN. § 813-122 (West 1993) (intimidation).

408. *See* Immigration and Nationality Act, 8 U.S.C. § 1186 (Supp. IV 1992).

409. Immigration and Nationality Act, 8 U.S.C. § 1186(a) (Supp. IV 1992); 8 C.F.R. § 216.5(e)(3)(i) (1993) (defining "'was battered by or was the subject of extreme cruelty' as including, but [] not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence").

410. 300 N.W.2d 231 (N.D. 1980).

411. *Id.* at 234.

412. *Id.* at 233.

413. 443 N.W.2d 196 (Minn. Ct. App. 1989).

414. *Id.* at 198.

415. *Id.* at 196.

to infer present intent to inflict fear of imminent physical harm."[416] The court further noted that the history of abuse included both physical and mental abuse. In *Melora v. Melora*,[417] the court upheld issuance of a protection order without a finding of physical abuse where a family offense had been committed by the respondent, the petitioner was in fragile health due to a heart condition, and emotional abuse led petitioner to fear the respondent.[418] In *Tillman v. Snow*,[419] the court affirmed the issuance of a civil protection order against a natural father and paternal aunts. The court prohibited contact with the parties' child where the natural father made repeated attempts to visit the child through telephone calls and letters to the mother and adoptive father stating that "I want to see my daughter and I will."[420] The aunts called and stated that the father would come to see the children and would not be stopped.[421] The court held that these communications, in light of the natural father's prior abuse of the mother, constituted mental abuse and formed the basis for a no-contact order.[422] In *Gasaway v. Gasaway*,[423] the court issued a protection order based on harassment and emotional distress where the respondent attempted to improperly remove and conceal the parties' child.[424]

As in the case of civil protection orders based on harassment, the courts do place some limits on issuing civil protection orders based on emotional abuse. In *Didonna v. Didonna*,[425] the court refused to issue a civil protection order based on a husband's constant conversations with his two teenage daughters about the impending break up of his marriage, finding that such discussions did not constitute sufficient emotional distress to issue a civil protection order.[426]

Social science research indicates that battered women often suffer extreme psychological abuse, including forced isolation from

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416. *Id.* at 198.
417. 536 N.Y.S.2d 842 (App. Div. 1989).
418. *Id.*
419. 571 N.E.2d 578 (Ind. Ct. App. 1991).
420. *Id.* at 580.
421. *Id.*
422. *Id.*
423. 616 N.E.2d 610 (Ill. 1993).
424. *Id.*
425. 339 N.Y.S.2d 592 (Fam. Ct. 1972).
426. *Id.*; *see also* Murray v. Murray, 631 A.2d 984 (N.J. 1993) (reversing issuance of protection order, holding respondent's pre-divorce statements of an absence of sexual attraction insufficient to issue order).

friends[427] and actual confinement in their homes.[428] One survey reports that 72% of battered women indicate that the emotional abuse had a more severe impact on them than the physical abuse.[429] Escalating emotional abuse was an indicator of forthcoming physical abuse for 54% of battered women.[430] Women who suffered severe emotional abuse were more likely to believe that their batterer would carry out his threats or that his behavior or claims were somehow justified.[431] Among women who are physically abused, 98% report incidences of emotional abuse as well.[432] Further, verbal and emotional abuse often escalate into more violent behavior.[433]

Despite this evidence, some courts underestimate the seriousness of emotional abuse. In *Keith v. Keith*,[434] the court denied a protection order against a father who had previously sexually abused his minor daughters, even though his close proximity caused them stress, fear and emotional strain.[435] In dicta, a Connecticut superior court in *Pendleton v. Minichino*[436] concluded that verbal abuse or argument minus any present danger or likelihood of physical violence does not

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427. Batterers are able to psychologically control their victims using a combination of isolating tactics and disinformation tactics. Victims are isolated from social networks and support systems. Psychological control over the victims can increase to the point where the abuser literally determines reality for his victim. This often prevents discovery of the violence, while the allowing the abuser to avoid being held accountable for his behavior. Ganley, *supra* note 21, at 20.

This isolation works very effectively to the batterer's advantage. At least 43% of battered women who had been abused tell no one about the abuse. Where they do seek someone to talk to about the problem of the abuse, they most often turn to a family member (61%) or friend (49%). SCHULMAN, *supra* note 1, at 4; Angela Browne, Assault and Homicide at Home: When Battered Women Kill, Paper Presented at the National Conference for Family Violence Research (August 1984).

428. EWING, *supra* note 180, at 9-10. Nearly 50% of battered women were forbidden by their batterers to have personal friends or to have such friends in the home. Actual physical imprisonment was reported by 30%. These women reported having been locked in closets, locked in or physically confined to their homes, and tied to furniture. *Id.*

429. Follingstad et al., *supra* note 317, at 114.

430. *Id.* at 115.

431. *Id.* at 114-115. Ridicule was rated the "worst" form of emotional abuse by 45% of battered women. Ganley, *supra* note 21, at 22-23 (noting that physical and psychological abuse are closely interwoven by abusers. Their attacks are aimed at the victim's particular sensibilities and vulnerabilities. When victims learn from experience that verbal threats will be backed up with physical assaults, psychological battery becomes a very effective means to control the victim's behavior).

432. Follingstad et al., *supra* note 317, at 113.

433. TERRIFYING LOVE, *supra* note 4, at 44.

434. 28 Pa. D. & C.3d 462 (C.P. 1984).

435. *Id.* at 465.

436. 1992 Conn. Super. LEXIS 915 (Super. Ct. April 2, 1992).

constitute family violence for purposes of issuing a civil protection order.[437] These cases fail to recognize the interrelatedness of physical abuse and emotional abuse that most domestic violence victims suffer. Courts which adopt this approach ignore the preventative purpose of protection order proceedings, and opt instead to require that the victim suffer at least one actual beating.

8. Damage to Property

Batterers often damage property to terrorize, threaten, and exert control over a victim of domestic violence.[438] Consequently, nine progressive state statutes issue civil protection orders based on malicious property damage.[439] Recognizing that damage to property is a form of abuse, courts have found various kinds of property damage to be sufficient grounds to support issuance of civil protection orders. Protection orders have issued, in part, based on property damage which includes pulling telephone cords from a wall while the petitioner tried to call police,[440] destroying furniture, breaking a window and skylights, chopping holes in roof with an axe, and driving a truck through a garage wall,[441] damaging the petitioner's car,[442] and destroying jointly owned household property.[443] Other property damage which should serve as a basis for the issuance of a civil protection order includes injuring or killing a family pet,[444] damaging the

437. *Id.* at *21.

438. Ganley, *supra* note 21, at 23. Sentimental and personal property was damaged by 59% of batterers. Follingstad et al., *supra* note 317, at 113. Approximately 80% of batterers engage in violent behavior towards other targets, such as harming pets and destroying objects. Lenore E. Walker, Eliminating Sexism to End Battering Relationships, Paper Presented at the American Psychological Association (1984).

439. DEL. CODE ANN. tit. 10, § 945 (Supp. 1992); GA. CODE ANN. § 19-13-1 (Michie Supp. 1993); HAW. REV. STAT. § 586-1 (Supp. 1992); IND. CODE ANN. § 34-4-5.1 (West Supp. 1993); N.H. REV. STAT. ANN. § 173-B:1 (Supp. 1992); N.J. STAT. ANN. § 2C:25-19 (West 1992); N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993); TENN. CODE ANN. § 36-3-601 (1991); WASH. REV. CODE ANN. § 10.99.020 (West Supp. 1993).

440. *In re* Marriage of Blitstein, 569 N.E.2d 1357 (Ill. App. Ct. 1991).

441. Kreitz v. Kreitz, 750 S.W.2d 681 (Mo. Ct. App. 1988).

442. Pendleton v. Minichino, No. 506673, 1992 Conn. Supr. LEXIS 915 (Super. Ct. Apr. 2, 1992) (issuing an *ex parte* temporary protection order suspending visitation where respondent destroyed petitioner's car and jointly owned household property, including a shower curtain, pushed and shoved petitioner, struck petitioner and threatened that "[t]his time I'm not going alone. You better watch your back").

443. *Id.*; *see also* Iowa v. Zeien, 505 N.W.2d 498 (Iowa 1993) (holding criminal conviction for damaging contents of estranged wife's home proper even though property damaged was marital property).

444. There is a strong connection between family violence and animal abuse. In 83% to 88% of families where children are abused, animals in the home are also abused, usually by

petitioner's clothing, and destroying other items of sentimental value to the petitioner.

9. Stalking

Both state statutes and case law authorize issuance of civil protection orders based on stalking behavior intended to harass and intimidate the petitioner. States have begun to recognize stalking as a ground to issue a civil protection order.[445] Courts have issued civil protection orders on behalf of petitioners who are stalked by their intimates. Stalking includes following and threatening the petitioner,[446] cutting up the parties' marriage certificate and leaving it with a threatening note on the petitioner's doorstep,[447] driving around the petitioner's house,[448] moving within two blocks of the petitioner's house,[449] and loitering in front of the battered women's shelter where petitioner stayed.[450] Like harassing and threatening behavior, stalking often escalates into more violent conduct.[451] Courts and the police need to be authorized to address this behavior early to prevent further violence.

In recent years, forty-six states and the District of Columbia have enacted stalking statutes which criminalize stalking behavior.[452] A

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the abusive parents. WASHINGTON HUMANE SOCIETY, CHILD ABUSE AND CRUELTY TO ANIMALS.

445. N.M. STAT. ANN. § 40-13-2 (Michie Supp. 1993); N.J. STAT. ANN. § 2C:25-19 (West Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.1 (West 1992); R.I. GEN. LAWS §§ 11-59-2 to -3 (Supp. 1993).

446. Banks v. Pelot, 460 N.W.2d 446 (Wis. 1990) (holding that a court may issue a protection order based on the respondent following and threatening the petitioner); Knuth v. Knuth, No. C1-92-482, 1992 Minn. App. LEXIS 696 (Ct. App. June 19, 1992) (upholding court extension of civil protection order based on respondent moving within two blocks of the petitioner's home, loitering around the domestic violence shelter where the petitioner had stayed, following petitioner, opening the petitioner's mail and pounding nails into her car tires).

447. Boniek v. Boniek, 443 N.W.2d 196 (Minn. Ct. App. 1989) (upholding issuance of civil protection order based on former husband leaving the parties' shredded marriage license with a threatening note on the petitioner's door step, driving around the petitioner's home, and becoming aggressive with an insurance salesman in the petitioner's home).

448. *Id.*

449. *Knuth*, 1992 Minn. App. LEXIS at *696.

450. *Id.*

451. NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET 30 (1990).

452. *See* ALA. CODE § 13A-6-90 (Supp. 1993); ALASKA STAT. § 11.41.260 to .270 (Supp. 1993); ARK. CODE ANN. §§ 5-71-229, 5-13-301, & 5-71-208 to -209 (Supp. 1993); CAL. PENAL CODE § 646.9 (West Supp. 1993); COLO. REV. STAT. ANN. § 18-9-111 (1990 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 53a-181(c) & (d) (West Supp. 1993); DEL. CODE

federally funded task force on anti-stalking legislation, created by Congress in 1992, recommends that states amend their statutes to make stalking a felony.[453] The task force, operating under the auspices of the Department of Justice's Office of Justice Programs, is developing a model anti-stalking statute.[454] The task force's report notes that stalking contains an "element of escalation that raises what initially may be bothersome and annoying—but legal—behavior to the level of obsessive, dangerous and even violent acts. Stalking victims, therefore, need to be provided with appropriate means to protect themselves against potential violence before it occurs."[455] To achieve this preventive goal, the task force recommends that stalking victims receive civil protection orders.[456] The task force predicts that protection orders will provide early intervention in stalking cases and prevent later violence.[457]

The recently released National Institute of Justice Report "Project To Develop A Model Anti-Stalking Code For States" compiled by the federal task force provides a profile of the existing state stalking stat-

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ANN. tit. 11, § 1312(A) (Supp. 1992); D.C. CODE ANN. § 22-504 (1989); FLA. STAT. ANN. § 784.048 (West Supp. 1993); GA. CODE ANN. §§ 165-90 to -91 (Supp. 1993); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1993); 750 ILCS 5/12-7.3 to -7.4 (Supp. 1993); IND. CODE ANN. §§ 35-33-1-1, 35-45-10 (1986 & Supp. 1993); IOWA CODE ANN. § 708.11 (Supp. 1993); KY. REV. STAT. ANN. § 508.140 (Supp. 1992); LA. REV. STAT. ANN. § 14:40.2 (Supp. 1992); MASS. GEN. L. ANN. ch. 265, § 43 (Supp. 1993); MICH. COMP. LAWS ANN. § 750.411h-1 (Supp. 1993); MINN. STAT. ANN. § 609.746 (1993); MISS. CODE ANN. § 97-3-107 (1992); MO. REV. STAT. § 455.010 & 455.085 (Supp. 1993); MONT. CODE ANN. § 45-5-220 (1993); NEB. REV. STAT. § 28-311.02 to .05 (Supp. 1992); NEV. REV. STAT. ANN. § 200.575 (Supp. 1993); N.H. REV. STAT. ANN. § 173:1-7 (Supp. 1993); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993); N.M. STAT. ANN. § 30-3A-1 to -4 (Michie 1993); N.Y. PENAL LAW §§ 120.13-14 (McKinney Supp. 1994); N.C. GEN. STAT. § 14-277.3 (1993); N.D. CENT. CODE § 12.1-17 to -07.1 (Supp. 1993); OHIO REV. CODE ANN. § 2903.21 (Anderson 1992); OKLA. STAT. ANN. tit. 21, § 1173 (Supp. 1993); OR. REV. STAT. § 133.310 (Supp. 1993); 18 PA. CONS. STAT. ANN. § 2709 (1983); R.I. GEN. LAWS § 11-59-1 (Supp. 1993); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. 1992); S.D. CODIFIED LAWS ANN. § 22-19A-1 (Supp. 1993); TENN. CODE ANN. § 39-17 to -315 (Supp. 1993); TEX. PENAL CODE ANN. § 42.07 (West 1989); UTAH CODE ANN. § 76-5-106.5 (Supp. 1993); VT. STAT. ANN. tit. 13, §§ 1061-63 (Supp. 1993); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1993); WASH. REV. CODE ANN. § 9a.46.020 (West Supp. 1993); W. VA. CODE § 61-2-9a (West 1993); WIS. STAT. ANN. § 947.013 (West Supp. 1993); WYO. STAT. § 1-1-126 (Supp. 1993).

453. NATIONAL INSTITUTES OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR STATES (1993) [hereinafter MODEL ANTI-STALKING CODE].

454. *Id.*

455. *Id.*

456. *Id.*

457. George Lardner, Jr., *Federal Task Force Suggest States Make Stalking a Felony Offense*, WASH. POST, Sept. 12, 1993, at A19.

utes.[458] The report found that state statutes vary considerably in the definitional elements of stalking. Most typically define stalking as "wilful, malicious, and repeated following and harassing of another person."[459] However, most statutes require threatening behavior and criminal intent on the part of the defendant to find stalking. Thirty-four jurisdictions define stalking to include behavior which would cause a reasonable person to feel threatened even where there is not verbal threat.[460] State stalking statutes also consistently require a "course of conduct" which is typically defined as a series of acts over a period of time evidencing a continuity of purpose.[461] Many state codes also provide both misdemeanor and felony classifications for stalking.[462] For example, a recent amendment to California's stalking law now makes it a misdemeanor for an identified batterer to enter the property of a battered women's shelter without consent.[463] Six states provide for conditions for pre-trial release including no contact with the victim.[464] Commentators on the stalking laws have also urged the adoption by courts of a partially subjective "reasonable battered woman" standard which recognizes that acts not normally threatening to an average person may terrify an abuse victim.[465]

D. Jurisdiction and Venue/Choice of Forum

1. Subject Matter and Personal Jurisdiction[466]

Subject matter jurisdiction over requests for protection orders in family violence cases can be obtained when an incident of domestic violence has occurred in the state.[467] Personal jurisdiction over the

458. MODEL ANTI-STALKING CODE, *supra* note 453, at 13.

459. *Id.*

460. *Id.*

461. *Id.* at 21.

462. *Id.*

463. Daniel M. Weintraub, *Wilson Signs Get-Tough Bills Aimed at Stalking: Legislation: One Measure Widens Definition of Crime. Others Stiffen Criminal and Civil Penalties*, L.A. TIMES, Sept. 30, 1993, at 28.

464. MODEL ANTI-STALKING CODE, *supra* note 453, at 28.

465. Note, *Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1535 (1993).

466. *See generally* MODEL CODE, *supra* note 15, § 303.

467. *See* 750 ILCS 60/203 (Smith Hurd Supp. 1993); LA. REV. STAT. ANN. § 46:2133 (West Supp. 1993); MO. REV. STAT. § 455.510 (1986); MONT. CODE ANN. § 40-4-123 (1993); N.J. STAT. ANN. § 2C:25-28 (West Supp. 1993); UTAH CODE ANN. § 30-6-3 (1989 & Supp. 1993); W. VA. CODE § 48-2A-3 (Supp. 1993); WIS. STAT. ANN. § 801.50 (West Supp. 1993); *see, e.g.*, McDonald v. State, 487 A.2d 306 (Md. Ct. Spec. App. 1985) (holding that jurisdiction in a criminal action resides solely in the courts of the state where the crime

batterer is based on the fact that an act was committed which caused a tortious injury in the state. Jurisdiction lies in any state where any part of the act was committed,[468] whether or not any of the parties actually reside in the state where the act was committed. The presence of danger to a petitioner in the state may also serve as a basis for issuance of a civil protection order whether or not incidents of violence occurred within the jurisdiction.[469] New York has extended the family court's subject matter jurisdiction to include matters where the respondent was personally served with legal process in the state, notwithstanding the fact that all the incidents occurred outside the state.[470]

2. Service of Process

The respondent must be served with process providing notice of a civil protection order hearing in a particular court in order for that court to have personal jurisdiction over him. Many jurisdictions statutorily provide specific restrictions on serving respondents in civil protection order proceedings.

In some states that require "personal service," service may be achieved by serving either the respondent or a person of suitable age and discretion who resides at the respondent's home.[471] Nineteen states and the District of Columbia specifically require personal service upon the defendant.[472] Texas requires service to be made more

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is committed. The site of the crime can be established by circumstantial evidence which supports an inference that beating occurred in the state and the defendant did not supply any evidence that the crime was committed outside of the state); Anthony T. v. Anthony J., 510 N.Y.S.2d 810 (Fam. Ct. 1986) (holding that family court had subject matter jurisdiction because an oral or written statement made by means of telecommunication is considered to have taken place in the state or county the phone call was made and the state of county the call was received).

468. *Anthony T.*, 510 N.Y.S.2d 810 (holding that telephone harassment initiated outside state but received in state could serve as a basis for issuance of a protection order); *see also* Adair v. United States, 391 A.2d 288 (D.C. 1978); United States v. Baish, 460 A.2d 38 (D.C. 1983).

469. *See, e.g.*, Pierson v. Pierson, 555 N.Y.S.2d 227 (Fam. Ct. 1990) (holding respondent's presence in the state constituted a risk to petitioner and New York's interest in attempting to end the violence and in obtaining protection for the victim was compelling regardless of the fact that all of the predicate incidents occurred in Florida).

470. *Id. But see* Jane O.J. v. Peter L.J., 532 N.Y.S.2d 955 (Fam. Ct. 1988) (holding that long-arm out-of-state personal service is impermissible in family offense proceedings).

471. *See, e.g.*, N.Y. FAM. CT. ACT § 826(b) (McKinney Supp. 1994).

472. ARIZ. REV. STAT. ANN. § 13-3602 (Supp. 1993); ARK. CODE ANN. § 9-15-204 (Michie 1993); DEL. CODE ANN. tit. 10, § 947 (Supp. 1993); D.C. CODE ANN. § 16-1004 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); 750 ILCS 60/210 (Smith Hurd Supp.

than forty-eight hours before the hearing.[473] Ten states require at least five days notice[474] and Alaska requires at least ten days notice.[475] Three states condition effective service upon summons to the defendant issued by a clerk of the court.[476] Nineteen states authorize valid service by the police.[477] Illinois stipulates that service can be

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1993); KAN. STAT. ANN. § 60-3104 (Supp. 1992); KY. REV. STAT. ANN. § 403.745 (Baldwin Supp. 1992); MICH. COMP. LAWS ANN. § 93-21-3 (West 1992); MONT. CODE ANN. § 40-4-123 (1993); N.H. REV. STAT. ANN. § 173-B:1 (1990); N.J. STAT. ANN. § 2C:25-25 (West Supp. 1993); N.Y. FAM. CT. ACT § 826 (McKinney Supp. 1994); OHIO REV. CODE ANN. § 3113.31 (Baldwin Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.4 (West 1992); 23 PA. CONS. STAT. ANN. § 6112 (1993); S.D. CODIFIED LAWS ANN. § 25-10-4 (1984); VT. STAT. ANN. tit. 15, § 1105 (1989); WASH. REV. CODE ANN. § 26.50.050 (West Supp. 1993); WYO. STAT. § 35-21-106 (Supp. 1993).

473. TEX. FAM. CODE Ann. § 71.09 (West Supp. 1993).

474. ARK. CODE ANN. § 9-15-204 (Michie 1992); CONN. GEN. STAT. ANN. § 46b-15 (West 1992); IOWA CODE ANN. § 236.4 (1993); MINN. STAT. ANN. § 518B.01 (West 1992); MO. REV. STAT. § 455.040 (1993); N.D. CENT. CODE § 14-07.1-02 (1992); S.C. CODE ANN. § 20-4-50 (Law. Co-op. 1992); S.D. CODIFIED LAWS ANN. § 25-10-4 (1984); TENN. CODE ANN. § 36-3-605 (1992); UTAH CODE ANN. § 30-6-5 (1992); WASH. REV. CODE ANN. § 26.50.050 (West 1992).

Note that Missouri, by case law, has relaxed the five-day requirement when the petitioner is attempting to extend an existent civil protection order. In Jenkins v. Jenkins, 784 S.W.2d 640 (Mo. Ct. App. 1990), the court held that personal service upon the husband was not required for extension of the original order since the husband had been personally served with the original petitioner for order of protection, the motion to extend was filed prior to the expiration of the subsequent extensions and the husband had actual notice of wife's motion to extend and of the hearing. The court upheld the validity of one day's notice before the hearing as opposed to the five day's notice statutorily required. In jurisdictions that set minimum notice requirements, trial courts generally adopt the approach that the minimum days notice requirement does not affect the validity of the service of process upon the respondent. Instead, if notice is not served in sufficient time in advance of the hearing, respondent may, upon request, receive a brief continuance of the matter to a date that meets the notice requirements. If such a continuance is granted, courts generally issue a temporary protection order to protect the petitioner pre-trial. *See, e.g.*, N.Y. FAM. CT. ACT §§ 826(a), 828(3) (McKinney 1992) (providing when the hearing less than three days after service court may extend temporary protection order upon granting a continuance).

475. ALASKA STAT. § 25.35.010 (1991).

476. IND. CODE ANN. § 34-4-5.1-4(a) (Supp. 1993); KY. REV. STAT. ANN. § 403.730 (Baldwin Supp. 1992); N.C. GEN. STAT. § 50B-2 (1989).

477. *See* ALASKA STAT. § 25.35.040 (1991); ARIZ. REV. STAT. ANN. § 13-3602 (Supp. 1993); CAL. FAM. CODE § 540 (West Supp. 1993); FLA. STAT. ANN. § 741.30 (West Supp. 1993); IDAHO CODE § 39-6310 (1993); ME. REV. STAT. ANN. tit. 19, § 765.4 (1981 & Supp. 1992); MD. CODE ANN., FAM. LAW § 4-505 (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 7 (Supp. 1993); MINN. STAT. ANN. § 518B.01 (West 1990); MO. REV. STAT. § 455.040 (Supp. 1993); NEB. REV. STAT. § 42-926 (Supp. 1992); N.H. REV. STAT. ANN. § 173-B:7 (1990); N.M. STAT. ANN. § 40-13-6 (Michie Supp. 1993); N.C. GEN. STAT. § 50B-3 (1989); OKLA. STAT. ANN. tit. 22, § 60.4 (1992); 23 PA. CONS. STAT. ANN. § 6112 (1992); R.I. GEN. LAWS § 15-15-4.1 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1105 (1989); W. VA. CODE § 48-2A-4 (1992).

performed by a hired special process server[478] and Minnesota, West Virginia, and Washington authorize service by published notice.[479] Additionally, the new Delaware statute states that where an order recites that defendant appeared in person the need for further service is waived.[480]

In order to most effectively assure protection to victims of domestic abuse, restrictions on who can serve respondents with notice of a scheduled civil protection order hearing should be minimal. An ideal policy would have service of process by police as a primary form of service,[481] while authorizing service to be accomplished in the alternative by a private process server. In difficult cases where the respondent is effectively avoiding service, notice by publication may be appropriate. Only the petitioner, the petitioner's attorney, and anyone else who would receive protection under the terms of the protection order should be precluded from serving the respondent with process.[482] Since service upon the respondent of notice of either the court hearing date for issuance of a protection order or of notice of the existence of a protection order issued ex-parte is a prerequisite to enforcement of civil protection orders in all states, it is extremely important that service of process can be easily obtained over civil protection order defendants. Preventing only those with an interest in the action from effecting service substantially increases the chances of respondent receiving the required notice of the proceedings. This approach assures that protection order proceedings are free to commence and is thus crucial to preserving the victim's safety.

Some state statutes provide for obtaining jurisdiction over a nonresident respondent in a civil protection order case using the state's long arm statute.[483] Courts have also ruled that when the acts underlying the family violence offense occurred outside of the state, jurisdiction over the perpetrator may be obtained if the perpetrator has

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478. 750 ILCS 60/210 (Smith-Hurd Supp. 1993).

479. MINN. STAT. ANN. § 518B.01 (West Supp. 1993); WASH. REV. CODE ANN. § 26.50.050 (Supp. 1993) (providing for service by publication with court permission); W. VA. CODE § 48-2A-5 (Supp. 1993).

480. DEL. CODE ANN. tit. 10, § 974 (Supp. 1992).

481. *See* MODEL CODE, *supra* note 15, § 306.

482. *See, e.g.*, Caldwell v. Coppola, 268 Cal. Rptr. 453 (Ct. App. 1990) (holding that sister of petitioner who was named in and protected by a temporary restraining order under the Domestic Violence Protection Act was a party to the proceeding and, as such, could not validly effect personal service).

483. *See, e.g.*, D.C. CODE ANN. § 13-423 (Supp. 1993); 725 ILCS 5/112A-6 (Smith Hurd Supp. 1993).

minimum contacts with the state.[484]

In re Marriage of Lenhardt[485] illustrates another way in which a court can obtain personal jurisdiction over a party. In *Lenhardt*, the court held that any appearance at which the defendant/respondent argues the merits of the case is a general appearance and constitutes submission to personal jurisdiction.[486] It contrasted this to a limited appearance in which the defendant comes to court for the limited purpose of contesting jurisdiction.[487] The appellate court held such a limited appearance does not automatically provide a court with jurisdiction.[488]

3. Jurisdiction on Federal Land

Even where the petitioner for a protection order lives on federal land within a state's borders, the state has subject matter jurisdiction over the case.[489] Jurisdiction over the parties in a civil protection order action may be had even though the parties live in a federally owned installation; however, enforcement of the protection order must be carried out by military authorities.[490]

Where the petitioner lives on Indian lands, jurisdictional issues become more complex. This complexity arises from the fact that within the United States there are over 500 tribes and therefore an equal number of tribal customs, laws and codes.[491] Each tribe deter-

484. *See, e.g.*, Pierson v. Pierson, 555 N.Y.S.2d 227 (Fam. Ct. 1990) (upholding jurisdiction where non-resident perpetrator personally served in New York). *But see* Anthony T. v. Anthony J., 510 N.Y.S.2d 810 (Fam. Ct. 1986) (dismissing a petition for protection where the respondent was served out of state). In *State v. Medina*, the Supreme Court of Hawaii held that a respondent who had actual knowledge of a restraining order which provided that he could not contact the petitioner and who then proceeded to contact the petitioner could not be held in contempt of the order where he was never personally served with it. 824 P.2d 106 (Haw. 1992). The only exception to personal service is where the defendant was present at the hearing at which the order was issued. *But see* Jane O.J. v. Peter O.J., 532 N.Y.S.2d 955 (Fam. Ct. 1988) (petitioner sought an order of protection on the grounds that her husband was mentally harassing and physically abusing her, but the court held that out of state personal service of process was improper).

485. 531 N.E.2d 123 (Ill. App. Ct. 1988).

486. *Id.*; *see also* DEL. CODE ANN. tit. 10, § 974 (Supp. 1992); State v. Medina, 824 P.2d 106 (Haw. 1992).

487. *Id.*

488. *Id.*

489. *See, e.g.*, Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989) (holding wife's status as a member of the United States Armed Forces, residing and working at a military installation in an area ceded to the federal government, did not preclude the issuance of an abuse protection order. The protection order was effective in the ceded area, absent any indication that the order interfered with a federal function).

490. Tammy S. v. Albert S., 408 N.Y.S.2d 716 (Fam. Ct. 1978).

491. Conversation with Professor Nell J. Newton, The Washington College of Law, The

mines whether its tribal code allows for protection orders.[492] While theoretically state and tribal courts may respect and enforce the other's law and orders, they are not required to do so. In practice, state and tribal protection orders often operate independently. The Wisconsin Appellate Court, in considering a jurisdictional conflict between state and tribal governments, held that a state court lacked authority to enter an domestic abuse injunction prohibiting one tribal member from having contact with his former co-habitant, another tribal member.[493] The court explained that the State's jurisdictional exercise violated the tribe's right to tribal government, and held that the existence of a tribal domestic abuse ordinance nearly identical to the state statute gave the tribe exclusive jurisdiction.[494] Domestic violence advocates recommend that domestic violence victims who live or work on Native American reservations should seek both a state civil protection order, enforceable off the reservation, and a tribal civil protection order, which is effective on the reservation. Practically, however, there may be no cross enforcement and the victim should not expect that her tribal or state protection order will be enforced outside of the respective jurisdictions.[495] The full faith and credit provisions of the Violence Against Women Act[496] may help remedy this problem.

4. Conflicts Between Civil Protection Orders and Other Family Court Orders

In most states, civil protection orders may be issued in any divorce or family law proceeding or in a separate civil protection order action.[497] In addition to being available from a civil protection order court, civil protection orders are available upon the petitioner's filing for divorce,[498] when a divorce is pending in either the same or a

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American University, in Washington, D.C. (Sept. 1993).

492. *Id.*

493. St. Germaine v. Chapman, No. 93-0138 19 F.L.R. 1493 (Wis. Ct. App. Aug. 24, 1993) (reversing lower court's grant of injunction).

494. *Id.*

495. Interview with Charon Asetoyer, Director, Native American Women's Health Resource Center in Lake Andes, North Dakota (Oct. 5, 1993).

496. S. 11, 103d Cong., 1st Sess. § 221 (1993) (providing that any issued protection order that meets minimal requirements set forth in the bill "shall be accorded full faith and credit by the court of another State or Indian tribe . . . and enforced as if it were the order of the enforcing State or tribe"); H.R. 1133, 103d Cong., 1st Sess. § 211 (1993) (same).

497. *See, e.g.*, ARK. CODE ANN. § 9-15-201(f) (Michie 1993) (a protection order petition may be filed regardless of whether there is any pending litigation between the parties).

498. *See, e.g., In re* Marriage of Rodriguez, 545 N.E.2d 731, 732 (Ill. 1989) (affirming

distinct proceeding[499] or after a divorce has been finalized.[500] Protection orders can be made part of a divorce decree.[501] Further, civil

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grant of an *ex parte* domestic violence order of protection granting her temporary custody of the couple's minor child issued contemporaneously with her filing for dissolution of the marriage); Parkhurst v. Parkhurst, 793 S.W.2d 634, 635 (Mo. Ct. App. 1990) (allowing petition for divorce and for civil protection order to be filed simultaneously in divorce proceedings); Eichenberger v. Eichenberger, 1993 Ohio App. LEXIS 5282 (Ct. App. Nov. 2, 1993) (holding that petitioner does not forfeit the right to obtain a protection order simply because she has filed or is filing for divorce); Mallin v. Mallin, 541 N.E.2d 116 (Ohio Ct. App. 1988) (affirming grant of protection order by motion in a divorce proceeding); Strollo v. Strollo, 828 P.2d 532 (Utah Ct. App. 1992) (affirming issuance of protection order to wife who filed for divorce where there was a past history of abuse and husband threatened to kill wife if she filed for divorce). *But see* Walters v. Walters, 540 So. 2d 1026 (La. Ct. App. 1989) (noting that Louisiana state statute requires petition for protection order be filed with separation or divorce suit. Failure to timely file results in an order unenforceable by means of a later divorce action. Therefore, no contempt action exists where the temporary restraining order injunction was abated by a later issued divorce judgment containing no injunction).

499. *See, e.g.*, N.J. STAT. ANN. § 2C:25-25 (West 1992); N.D. CENT. CODE § 14.07.1-02 (Supp. 1993); UTAH CODE ANN. § 77-36-3 (1992); *In re* Marriage of Blitstein, 569 N.E.2d 1357 (Ill. App. Ct. 1991) (upholding grant of protection order while divorce action was pending. The wife filed for and renewed a protection order requiring her husband to vacate the marital residence after he had harassed her and damaged property); *In re* Marriage of Ingram, 531 N.E.2d 97, 98 (Ill. App. Ct. 1988) (during pendency of a dissolution proceeding, the husband obtained an interim order of protection in which he alleged that his wife and a male friend had physically and verbally abused and threatened him in the presence of their son); Hall v. Hall, 408 N.W.2d 626, 629 (Minn. Ct. App. 1987) (affirming decision that petition for a protection order was permissible even though there was a pending suit for dissolution of marriage before another judge); Todd v. Todd, 772 S.W.2d 14 (Mo. Ct. App. 1989) (affirming issuance of civil protection order in pending divorce action); Capps v. Capps, 715 S.W.2d 547, 549 (Mo. Ct. App. 1986) (holding remedies under Adult Abuse Act are available to petitioner regardless of whether dissolution of marriage proceedings have begun); Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986) (holding proper the entry of a civil protection order in a pending divorce proceeding); State v. Teynor, 414 N.W.2d 76, 79 (Wis. Ct. App. 1987) (affirming grant of domestic abuse injunction obtained during pending divorce action). *But see In re* McGraw, 359 S.E.2d 853, 856 (W.Va. 1987) (holding the magistrate acted properly in refusing to issue a domestic violence protection order since such orders are prohibited during the pendency of a divorce).

500. *See, e.g.*, Baldwin v. Moses, 386 S.E.2d 487, 488-89 (W. Va. 1989) (affirming jurisdiction to grant any relief pursuant to the Prevention of Domestic Violence Act to a petitioner who is being abused by her ex-husband, who is not presently a member of her household, where the parties are divorced and their final divorce order permanently enjoins each of them from molesting, interfering or annoying the other).

501. *See, e.g.*, Siggelkow v. State, 731 P.2d 57, 60-62 (Alaska 1987) (holding that even where the court has no specific authorization to issue no contact order as part of a divorce decree, the trial court hearing the divorce had the authority to impose the remedies pursuant to its equitable power); People v. Lucas, 524 N.E.2d 246 (Ill. App. Ct. 1988) (temporary protection order may be issued in a dissolution proceeding); Krietz v. Krietz, 750 S.W.2d 681, 685 (Mo. Ct. App. 1988) (upholding a determination that an injunction enjoining husband from entering the marital home at any time may be issued as part of a divorce decree); Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986) (allowing certain judges to issue a protection order and rule on divorce actions); Malin v. Malin, 541 N.E.2d 116 (Ohio 1988)

protection orders cannot be denied to a household member threatened with domestic violence based solely on the fact that there is a divorce action pending between the parties.[502] These policies, which address the relationship between divorce and civil protection orders ensure that a person suffering from spousal abuse who has elected divorce may choose to bring her request for court protection before the court hearing the divorce action. This approach reduces both the number of courts and court hearings, and promotes consistency of orders and better enforcement, since one judge will hear all aspects of the domestic violence case.

Case law sheds additional light on how various jurisdictions have approached the relationship between divorce and domestic violence proceedings and court orders in domestic violence cases involving the same parties and issues. Divorce and civil protection orders are often inextricably related, as the abuse may be the very reason for the divorce. As a result, courts have specifically held that evidence of domestic violence is admissible in a divorce action to prove cruelty,[503] constructive desertion,[504] to overturn a prenuptial agreement and to

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(holding that court hearing divorce action may order protection order remedies, including issuance of a "vacate" order without requiring the filing of a separate petition for a protection order).

502. *See, e.g.*, Arlyn T. v. Harold T., 435 N.Y.S.2d 651, 652 (Fam. Ct. 1981); Hrab v. Hrab, 332 N.Y.S.2d 91 (App. Div. 1972); Thomas v. Thomas, 540 N.E.2d 745 (Ohio Ct. App. 1988); *see also* MODEL CODE, *supra* note 15, § 304.

503. *See, e.g.*, Pomraning v. Pomraning, 682 S.W.2d 775 (Ark. 1985) (holding refusal to speak to spouse for days on end, public criticism of housekeeping and parenting, and physical abuse cruelty sufficient to support a divorce); *In re* Marriage of Reeder, 570 N.E.2d 876 (Ill. 1991) (defining "mental cruelty" as unprovoked, offensive conduct toward one's spouse which causes embarrassment, humiliation, and anguish, rendering the spouse's life miserable and unendurable); *In re* Marriage of Davenport, 416 N.E.2d 88 (Ill. 1988) (dousing spouse with kerosene while in bed and lighting the bed afire held to be cruelty); Devereaux v. Devereaux, 493 So. 2d 1310 (Miss. 1986) (holding cruelty existed where children observed father strike mother 15 to 20 times and verbally vilify her); Echevarria v. Echevarria, 386 N.Y.S.2d 653 (holding a single act of violence sufficient cruelty to grant divorce); Yaron v. Yaron, 378 N.Y.S.2d 285 (1975) (granting divorce on grounds of cruelty where husband physically assaulted wife, causing her to fear for her life, and insulted her judgment); Harwell v. Harwell, 612 S.W.2d 182 (Tenn. 1980) (granting divorce on grounds of cruelty where husband called wife a "bitch," embarrassed her in front of others, tried to push her down stairs in front of their children, physically assaulted her, and locked her out of the marital residence, forcing her to spend the night in her car); Newberry v. Newberry, 493 S.W.2d 99, 101 (Tenn. 1973) (granting divorce on grounds of cruelty where husband called wife vile names and denied that their child was his).

504. Merriken v. Merriken, 590 A.2d 566 (Md. 1991) (finding constructive desertion where husband locked wife out in snowstorm); *see also* Jeffrey v. Jeffrey, 569 N.Y.S.2d 107 (N.Y. 1991) (finding constructive eviction where wife forced to leave because of abuse).

establish fault for property distribution,[505] that the marriage has been irretrievably broken,[506] debt assignment,[507] award exclusive use of marital home to abused spouse,[508] and support.[509] A Minnesota

505. Domestic violence is a factor that should be considered in divorce cases where property is being divided. For a complete discussion of this issue, see Jill Davies, *Termination of Marriage, in* DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note 21, at 273-80; *see also* Doyle v. Doyle, 579 So. 2d 651 (Ala. 1991) (holding extreme cruelty to wife relevant to property division); Palombizio v. Palombizio, 1993 WL 451472 (Conn. Super. Ct. Oct. 25, 1993) (holding 25 year history of physical and emotional abuse relevant to property distribution); *In re* Marriage of Licak, 416 N.E.2d 701 (Ill. 1981) (awarding all marital property to wife's estate where husband killed wife, who was sole support of family for four to five years); Mount v. Mount, 476 A.2d 1175 (Md. 1984) (holding property division properly influenced by fact that husband beat wife, and hired men to rob and assault her); Handrahan v. Handrahan, 547 N.E.2d 1141 (Mass. 1989) (overturning award of 25% of marital assets to abusive husband); Burt v. Burt, 386 N.W.2d 797 (Minn. 1986) (holding that even where fault is not be considered in property distribution, court may consider wife's needs due to chronic health problems caused by husband's abuse); Manz v. Manz, 805 S.W.2d 183 (Mo. 1990) (holding evidence of abuse during marriage properly admissible on issue of property division); Buchert v. Buchert, 768 S.W.2d 641 (Mo. 1989) (awarding 75% of marital assets to wife based upon husband's abuse); *In re* Usreg, 781 S.W.2d 556 (Mo. 1989) (awarding wife 72% of all real estate holdings based upon husband extreme physical beatings of children); Kretiz v. Kreitz, 750 S.W.2d 681 (Mo. 1988) (awarding wife marital home where husband violated protection order by smashing windows and driving his truck in the garage wall); D'Arc v. D'Arc, 421 A.2d 602 (N.J. 1980) (holding husband's abuse relevant to property division); Brancoveanu v. Brancoveanu, 535 N.Y.S.2d 86 (N.Y. 1988) (holding husband's attempted murder of wife relevant to issue of property division); Behm v. Behm, 427 N.W.2d 332 (N.D. 1988) (allowing evidence of abuse to be admitted on issue of property division); *In re* Marriage of Clark, 538 P.2d 145 (Wa. 1975) (holding evidence of abusive husband's excessive drinking and dissipation of marital assets admissible on issue of property division); Leonard v. Leonard, 552 A.2d 394 (Vt. 1988) (holding sexual abuse of step-child relevant to property distribution).

506. Manz v. Manz, 805 S.W.2d 183 (Mo. 1990) (holding wife's testimony concerning mental and physical abuse admissible to prove marriage irretrievably broken).

507. Szensy v. Szensy, 557 N.E.2d 222 (Ill. 1990) (holding it proper to award marital debts to abusive husband).

508. *In re* Marriage of Hofstetter, 430 N.E.2d 79 (Ill. 1981) (awarding exclusive possession of marital residence to wife, where husband beat wife over head with gun, beat her with his fists, kicked her, pointed gun at her, and shot her twice); Grogg v. Grogg, 543 N.Y.S.2d 582 (1989) (awarding home to wife where husband broke into residence and removed wife's and son's belongings); Minnus v. Minnus, 405 N.Y.S.2d 504 (1978) (awarding exclusive rights in marital residence to wife who had received protection order against abusive husband); Florence v. Florence, 388 S.W.2d 220 (Tex. 1965) (awarding wife exclusive use of marital residence pendant lite when husband, who had been absent from the home for 18 months, threatened violent re-entry).

509. *In re* Marriage of Foran, 834 P.2d 1081, 1090-91 (Wash. Ct. App. 1992) (holding evidence that wife was abused during their marriage was properly admitted for the purpose of examining the procedural circumstances surrounding the execution of the prenuptial contract and with respect to the wife's need for spousal maintenance despite her husband's contention that the trial court erroneously considered fault in making its disposition of property and maintenance); *see also* Doyle v. Doyle, 579 So. 2d 651 (Ala. 1991) (holding extreme cruelty

court held that a court may address property issues in a civil protection order proceeding even if there have been previous property awards as part of a divorce action.[510] A Pennsylvania court held that separation under a civil protection order can count toward separation required for divorce.[511] A Missouri court ruled that a divorce court may take judicial notice of a civil protection order action.[512] Minnesota's protection order statute provides that the court issuing the protection order shall provide a copy to a court hearing a pending dissolution or separation proceeding.[513]

Civil protection orders can also be granted in conjunction with custody proceedings[514] and custody orders may be issued as part of a civil protection order.[515] In either of these proceedings, when a court hearing a domestic violence matter is made aware of a custody award issued in a prior proceeding, a finding that domestic violence has occurred since the last custody determination constitutes a finding of a change of circumstances for the purpose of modifying the custo-

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to wife and children relevant to alimony award); Palombizio v. Palombizio, 1993 WL 451472 (Conn. Super. Ct. Oct. 25, 1993) (upholding admissibility of 25 year history of abuse as relevant to determination of alimony); Barrett v. Barrett, 305 So. 2d 260 (Fla. 1974) (awarding rehabilitative alimony where husband's abuse reduced wife's earning capacity); Williams v. Williams, 375 S.E.2d 349 (S.C. 1988) (denying abusive husband alimony).

510. *See, e.g.*, Fitzgerald v. Fitzgerald, 406 N.W.2d 52 (Minn. Ct. App. 1987) (affirming trial court determination to address the petitioner's request for the return of appellant's belongings which she can identify with some degree of particularity even if the divorce decree had granted relief).

511. McBride v. McBride, 484 A.2d 141 (Pa. Super. Ct. 1984) (upholding that portion of the three year separation of the parties was due to an order entered under the Protection From Abuse Act); *see also* Nuss v. Nuss, 828 P.2d 627, 632-34 (Wash. Ct. App. 1992) (living arrangements under a civil protection order must meet the "separate and apart" requirement in order to count towards separation needed to receive a divorce; husband living in cabin attached to wife's home did not constitute such a separation).

512. Manz v. Manz, 805 S.W.2d 183 (Mo. Ct. App. 1990) (judicial notice could be taken of prior adult abuse proceedings in the context of a request for divorce).

513. MINN. STAT. ANN. § 518B:01.6(e) (West 1993).

514. *See, e.g.*, Spoto v. McCarroll, 593 A.2d 375 (N.J. Super. Ct. App. Div. 1991) (issuing temporary protection order issued in custody action). *But see* Danna v. Danna, 364 S.E.2d 694 (N.C. App. 1988) (holding no error when the judge, after having declined to exercise jurisdiction over a custody dispute between petitioner and her husband in Florida pursuant to the Uniform Child Custody Jurisdiction Act (the "UCCJA") did not err by failing to address petitioner's claims of domestic abuse in the custody case).

515. *See, e.g.*, Sweep v. Sweep, 358 N.W.2d 451 (Minn. Ct. App. 1984) (holding court did not abuse its discretion in awarding custody to the maternal grandparents under the child's stepmother's domestic abuse proceeding against the child's father); Rosenberg v. Rosenberg, 504 A.2d 350, 351 (Pa. Super. Ct. 1986) (awarding temporary custody to mother, after both spouses filed petitions under the Protection from Abuse Act, because custody was an immediate and pressing issue).

dy and/or visitation provisions of that pre-existing order.[516] The court in *Sparks v. Sparks*[517] confirmed that when a civil protection order custody award expires, custody does not automatically revert back to the parent who had lost custody.[518] In *Sparks*, the civil protection order provided that the father had custody, following the mother's attempts to kill him.[519] The court held that upon expiration of the protection order, custody did not revert to the mother.[520] Other courts have placed some limits on what additional claims the civil protection order court can hear. For example, in *Basile v. Basile*,[521] the court held that the respondent may not file a counterclaim in a protection order case to have child's name changed.[522]

When several court proceedings involving the same issues and parties occur simultaneously, and may potentially conflict, many states have provided guidance by statute. Four states provide that a civil protection order does not preclude other relief from the courts.[523] Twelve states provide that a subsequent domestic relations case supersedes portions of a prior civil protection order.[524] Wyoming is unique in that it specifically provides that if the subsequent action is a divorce action, rulings in the divorce action shall not supersede an order of protection.[525] In practice, however, most jurisdictions provide that a subsequent family court order may alter some forms of relief granted (i.e. visitation parameters or child support amounts) but will not overrule or negate protection order provisions which protect the victim from continued abuse (i.e. stay away provisions, no contact orders, police assistance, batterer's counseling). Nine of these states

516. *See* MODEL CODE, *supra* note 15, § 404.

517. 747 S.W.2d 191 (Mo. Ct. App. 1988).

518. *Id.* at 193.

519. *Id.*

520. *Id.*

521. 604 A.2d 693 (N.J. Super. Ct. Ch. Div. 1992).

522. *Id.* at 894-95.

523. 725 ILCS 5/112A-14 (Supp. 1993); MD. CODE ANN., FAM. LAW § 4-510 (Supp. 1993); MISS. CODE ANN. § 93-21-9(3) (Supp. 1993); N.M. STAT. ANN. § 40-13-5C (Michie 1993); *see also* MODEL CODE, *supra* note 15, § 304 (an order of protection is in addition to and not in lieu of any other available civil or criminal proceeding).

524. COLO. REV. STAT. ANN. § 14-4-102(12) (West Supp. 1993); FLA. STAT. ANN. § 741-30(2)(c) (West Supp. 1993); 725 ILCS 5/112A-14 (1993); KY. REV. STAT. ANN. § 403.765 (Michie/Bobbs-Merill Supp. 1992); LA. REV. STAT. ANN. § 46:2134(D) (West Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 3 (West Supp. 1993); MISS. CODE ANN. § 93-21-9(3) (Supp. 1992); MONT. CODE ANN. § 40-4-12(3)(a) (1992); N.M. STAT. ANN. § 40-13-5(c) (Michie Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.4(H) (West 1992); OR. REV. STAT. § 107.722 (1992); UTAH CODE ANN. § 30-6-6 (Supp. 1993).

525. WYO. STAT. § 35-21-106 (Supp. 1993).

authorize the superseding case to control on issues of child support;[526] ten of these states authorize the superseding domestic relations case to control issues of child custody;[527] and three authorize the superseding domestic relations case to control on issues of child visitation.[528]

Kansas and Nebraska alternatively provide that a civil protection order controls when in conflict with another court order.[529] Texas and Wyoming have a general provision that a civil protection order or temporary protection order prevails over domestic relations cases.[530] The Minnesota and Texas statutes specify that a prior civil protection order prevails over a subsequent domestic relations case on issues of domestic violence.[531] Minnesota adds that notice is required for a divorce order to modify a civil protection order and the court in a subsequent custody order may consider, but is not bound by, a civil protection order finding of domestic violence.[532] These states which give precedence to civil protection orders when they come into conflict with other proceedings and orders have preferable policies as they place paramount importance on the protection of the victim of domestic abuse. Custody, support, and visitation provisions of civil protection orders should supersede prior court orders regarding these matters as resolution of these volatile issues is directly related to successfully maintaining the safety of the family.

Only five minority jurisdictions provide that a civil protection

526. COLO. REV. STAT. ANN. § 14-4-102(12) (West Supp. 1993); FLA. STAT. ANN. § 741-30(2)(c) (West Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 3 (West Supp. 1993); MISS. CODE ANN. § 93-21-9(3) (Supp. 1993); MONT. CODE ANN. § 40-4-12(3)(b) (1993); N.M. STAT. ANN. § 40-13-5C (Michie Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4(H) (West 1992); OR. REV. STAT. § 107.730 (1992); UTAH CODE ANN. § 30-6-6 (Supp. 1993).

527. COLO. REV. STAT. ANN. § 14-4-102(12) (West Supp. 1993); FLA. STAT. ANN. § 741-30(2)(c) (West Supp. 1993); 725 ILCS 5/112A-14 (1993); MASS. GEN. L. ANN. ch. 209A, § 3 (West Supp. 1993); MISS. CODE ANN. § 93-21-9(3) (Supp. 1993); MONT. CODE ANN. § 40-4-12(3)(b) (1993); N.M. STAT. ANN. § 40-13-5C (Michie Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.4(H) (West 1992); OR. REV. STAT. § 107.730 (1992); UTAH CODE ANN. § 30-6-6 (Supp. 1993).

528. MONT. CODE ANN. § 40-4-121(3)(b) (1993); OKLA. STAT. ANN. tit. 22, § 60.4(H) (West 1992); UTAH CODE ANN. § 30-6-6 (Supp 1993).

529. KAN. STAT. ANN. § 60-3107(b) (Supp. 1993); NEB. REV. STAT. § 42-924(4) (Supp. 1992). Texas, however, does not allow the civil protection order any power where it conflicts with court orders other than domestic relations cases. TEX. FAM. CODE § 71.13(b) (West Supp. 1993).

530. TEX. FAM. CODE § 71.15(b) (West 1992); WYO. STAT. § 35-21-106(b) (1992).

531. MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); TEX. FAM. CODE ANN. § 71.13(c) (West Supp. 1993).

532. MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993).

order court is bound by a prior custody award[533] and only two preclude a civil protection order from superseding an order on child support.[534] New Hampshire alone bars a civil protection order from prevailing over an order concerning possession of a residence or furniture.[535] Statutes which limit a civil protection order court's ability to amend prior custody or child support awards or which bind a protection order court from offering relief that may be central to stopping the violence significantly undermine the protection order court's ability to provide effective relief. For this reason, this restrictive approach has been abandoned by most jurisdictions.

Courts have placed a premium on safety by assuring unrestricted access to civil protection order courts.[536] When faced with divorce cases and civil protection order actions which are brought separately but involve the same parties, courts have delineated the relationship between the two proceedings. For example, in *Steckler v. Steckler*,[537] the court held that a protection order which altered the pickup and delivery points of the children and suspended the respondent's contact with the mother on visitation issues did not amount to an impermissible modification of the divorce decree visitation rights since the substance of the divorce decree was preserved and the objective of the protection order in protecting the mother from further abuse could not be achieved absent the modification.[538] In *Campbell v. Campbell*,[539] the petitioner obtained a temporary injunction against her ex-husband prohibiting him from visiting their child because she feared additional violence.[540] She obtained the injunction pursuant to a Florida Rule of Civil Procedure.[541] Her ex-husband appealed the order on the ground that the rule was not intended for such use.[542] The court held that while the rule should not be used to file a domestic violence claim, the wife's petition substantially followed the form out-

533. MASS. GEN. L. ANN. ch. 209A, § 3 (West Supp. 1993); MO. REV. STAT. § 455.050.3(1) (Vernon 1993); N.H. REV. STAT. ANN. § 173-B:4II (1991); N.M. STAT. ANN. § 40-13-5(c) (Michie Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.4(H) (West 1992).

534. N.H. REV. STAT. ANN. § 173-B:4II (1991); N.M. STAT. ANN. § 40-13-5C (Michie Supp. 1993).

535. N.H. REV. STAT. ANN. § 173-B:4II (1991).

536. *See* MODEL CODE, *supra* note 15, § 304.

537. 492 N.W.2d 76 (N.D. 1992).

538. *Id.* at 81-82.

539. 584 So. 2d 125 (Fla. Dist. Ct. App. 1991)

540. *Id.* at 126.

541. *Id.*; Fla. R. Civ. Proc. 1.610.

542. *Campbell*, 584 So. 2d at 126.

lined in Florida's domestic violence statute and therefore considered it to be a petition filed under that statute.[543] The court added that "[s]urely fear that a custodial parent will be assaulted or battered by a non-custodial parent constitutes an act of domestic violence as to their child."[544] Although the Florida court expressly separated the domestic violence issue from the other civil issues procedurally, the holding reflects an enlightened court's efforts to tie the issues together and adjudicate them as one problem.

Courts have also placed some limitations on their own ability to address the issues raised before it. In *Ardis S. v. Sanford S.*,[545] the court held that a court with jurisdiction over a divorce proceeding may not stay a protection order issued by the court with exclusive original jurisdiction over domestic violence cases.[546] In *Duello v. Hoester*,[547] the appellate court held that the lower court judge exceeded his jurisdiction by entering an order relating to matters in the parties' dissolution case when the parties were before the court solely to hear the wife's petition under the Protection From Abuse Act and had never been given notice of nor consented to the court hearing matters in the dissolution case.[548] In *Story v. Story*,[549] the court held that an award of custody of a minor child in a divorce proceeding could not be based upon the state's domestic violence statute where the incidents of abuse alleged in the wife's pleadings in the divorce action took place prior to the enactment of the statute.[550]

In response to the complex problems that arise when cases and orders conflict, the growing trend in progressive jurisdictions is to consolidate family law actions before one court when domestic violence is present.[551] Judicial authorities recommend consolidation of separate actions such as civil protection order, divorce, child support

543. *Id.*
544. *Id.* at 127.
545. 389 N.Y.S.2d 529 (Fam. Ct. 1976).
546. *Id.* at 530-31.
547. 618 S.W.2d 242 (Mo. Ct. App. 1981).
548. *Id.* at 243-44.
549. 291 S.E.2d 923 (N.C. Ct. App. 1982).
550. *Id.* at 926; *see also* Hayes v. Hayes, 597 A.2d 567 (N.J. Super. Ct. Ch. Div. 1991) (holding wife was not entitled to enforce a child support order granted pursuant to domestic violence order in the divorce proceeding because such orders are only intended to bridge the emergent situation and wife failed to avail herself of other order processes for fixing support).
551. In a few states, such as Virginia and Hawaii, the courts have consolidated all criminal and family matters affecting the same family experiencing domestic violence before one judge.

and child custody before a single judge to the greatest extent possible.[552] This practice improves civil protection order effectiveness by encouraging consistent and expeditious enforcement of civil protection orders. Nine states authorize consolidation of a separate civil protection order action with other divorce, custody or family matters pending before the court.[553] Six of these jurisdictions provide that a civil protection order case may be consolidated with other civil actions.[554] In two of these jurisdictions, a civil protection order must be consolidated with divorce, legal separation, or annulment action.[555] One jurisdiction, North Dakota, allows the same judge presiding over civil protection order hearings to preside over divorce proceedings.[556]

The trend in case law parallels that found in these statutes.[557] This emerging trend creates a favorable policy responsive to the needs of domestic violence victims, recognizing that information generated in each separate cause of action is usually interdependent. To intervene effectively to prevent future violence, courts must be able to

552. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE PROJECT, *Family Violence: Improving Court Practice,* 41 JUV. FAM. CT. J. 31 (1990).

553. ARIZ. REV. STAT. ANN. § 13-3602N (Supp. 1993); D.C. CODE ANN. § 16-1004(a) (1993); 750 ILCS 60/202 (1993); LA. REV. STAT. ANN. § 46-2134(D) (West Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 768.2 (West 1992); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); NEV. REV. STAT. ANN. § 33.040.3 (1992); S.C. CODE ANN. § 20-4-40(d) (Law. Co-op. 1992); Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986).

554. D.C. CODE ANN. § 16-1004(a) (1993); 750 ILCS 60/202 (1993); LA. REV. STAT. ANN. § 46-2134 (West Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 768.2 (West 1993); MINN. STAT. ANN. § 518B.01.6 (West 1992); NEV. REV. STAT. ANN. § 33.040.3 (Michie 1992).

555. ARIZ. REV. STAT. ANN. § 13-3602N (Supp. 1993); S.C. CODE ANN. § 20-4-40(d) (Law. Co-op. 1992).

556. *See, e.g.*, Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986).

557. *See, e.g., In re* M.D., 602 A.2d 109 (D.C. Ct. App. 1992) (continuing the conditions of civil protection order in a child abuse and neglect proceeding that has been consolidated with the protection order case after the civil protection order has ended); People v. Williams, 582 N.E.2d 1158, 1160 (Ill. Ct. App. 1991) (affirming issuance of civil protection order while divorce proceeding pending); Vogt v. Vogt, 455 N.W.2d 471, 472-73 (Minn. 1990) (consolidating civil protection order with divorce action); Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986) (allowing same judge to hear divorce proceedings as issued civil protection order).

Note further that some jurisdictions have allowed women suffering from domestic abuse to join their interspousal tort claims with their dissolution proceedings. *See, e.g.*, Hutchings v. Hutchings, 1993 Conn. Super. LEXIS 498 (Super. Ct. Feb. 22, 1993) (allowing joinder of interspousal tort claim with divorce. Ironically, one argument against joinder which was considered by the court was that joining the tort claim would further enrage the abuser and subject the abused spouse to more harm. The court neglected to consider the counter argument that the benefit to the abused spouse was a contemporaneous resolution of all disputes, thereby reducing the number of confrontations between abuser and abused to one.).

understand the full history of the relationship between the parties as well as the parties' and their children's needs and concerns. If a prior divorce decree contains a child visitation provision which has proven unworkable or which has led to more violence, the judge considering a protection order should have this relevant information to be able to craft the most effective order in the domestic violence case.[558]

The same judge should hear interrelated cases not only because their outcomes are dependent upon each other, but also because it reduces the contact between the victim and her batterer. The majority of battered women seeking protection orders appear *pro se*.[559] This can compound an already terrifying experience for the victim who must face her abuser in court. Contact between the parties should be minimized and matters of conflict between them should be resolved efficiently through consolidating related proceedings. For many victims the court issuing the protection order can resolve most, if not all, of the outstanding issues between the parties including custody, child support and division of personal property. Particularly, in those cases where the parties are not married or do not for religious or other reasons intend to divorce, the civil protection order action may be the only action in which these parties need to be brought together before the court.

If the judge was authorized to issue child custody, visitation, and support provisions in civil protection orders that were to last until the children reach majority, the victim and batterer would not be required to return to court to file separate court actions for permanent child support and custody as is now required in the vast majority of jurisdictions. The recommended practice is to allow custody, visitation and child support and personal property division clauses in civil protection order orders to remain in effect until amended by a future court order. If either party wishes to request amendment or modification of these civil protection order provisions, or wishes to litigate issues of custody, child support, or visitation more fully, they may file an action in the appropriate court, serve notice, and fully litigate any

558. Leslye E. Orloff, *Issuance of Civil Protective Orders*, *in* DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note 21, at 75, 78-79.

559. For example, in the District of Columbia, 65.8% of battered women seek protection orders *pro se* and 15.6% are represented by the Office of Corporation Counsel. The remainder are represented by private (usually *pro bono*) counsel or law school clinics. D.C. TASK FORCE, *supra* note 213, at 143. In other jurisdictions, the rate of domestic violence victims who proceed with counsel is even lower. In Maryland, only 11% receive legal assistance. Czapanskiy, *supra* note 23, at 250 n.11.

contested matters. However, in all other cases in which the terms of the civil protection order are working effectually, the parties need not return to court for appearances in multiple court actions. This approach will minimize continued violence by reducing arenas of potential conflict and opportunities for contact between the parties at repeated court hearings.[560]

5. Requiring Petitioner to Notify Court of Other Pending Actions

Eleven states statutorily provide that the petitioner must notify the court of other pending actions at the time she files for a civil protection order.[561] Three states further assert that notification is a continuing duty throughout protection order proceedings,[562] while another three states specifically require disclosure when a divorce is pending.[563] Only two states require the petitioner who seeks child custody to meet UCCJA reporting requirements,[564] and Mississippi stipulates that if a child involved in the protection order proceeding is subject to other court actions, such as juvenile or neglect proceedings, the petitioner must inform the court of those actions and attach orders related to such actions.[565] These notification policies help courts identify existing court orders, and to better assess what types of provisions would best protect the petitioner. Once aware of other pending proceedings, the civil protection order court can make better informed decisions, can resolve conflicts with pre-existing orders, and can make changes appropriate in light of the violence. By learning the family's

560. This approach has been recommended by the District of Columbia Task Force. D.C. TASK FORCE, *supra* note 213, at 143. "[T]he Task Force sees no reason why parties who are often unrepresented should be required to file separate court actions for permanent custody, visitation and support if the issues have been resolved fully in the CPO proceeding." *Id.* at 155 n.278.

561. ARIZ. REV. STAT. ANN. § 13-3602B.4 (Supp. 1993); FLA. STAT. ANN. § 741.30(2)(b) (West Supp. 1993); HAW. REV. STAT. § 586-3 (1993); IDAHO CODE § 39-6304(4) (1993); 750 ILCS 60/203a (1993); MD. CODE ANN., FAM. LAW § 4-504(b)(1)(ii)(3) (Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 3 (West Supp. 1993); N.M. STAT. ANN. § 40-13-3.C (Michie Sup. 1993); OR. REV. STAT. § 107.710(3) (1992); R.I. GEN. LAWS § 15-15-2 (1993); UTAH CODE ANN. § 30-6-6(6) (Supp. 1993).

562. 750 ILCS 60/203(a) (Smith-Hurd Supp. 1994); MASS. GEN. LA. ANN. ch. 209A, § 3(1992); UTAH CODE ANN. § 30-6-6(5)(1992); *see also* MODEL CODE, *supra* note 15, § 304.

563. ARIZ. REV. STAT. ANN. § 13-3662(B)(4) (1992); LA. REV. STAT. ANN. § 46:2134(B) (West 1992); MISS. CODE ANN. § 93-21-9(2) (1992).

564. OR. REV. STAT. § 107.710(4) (1991); IDAHO CODE § 39-6304(5) (Supp. 1993).

565. MISS. CODE ANN. § 93-21-9(5) (1993).

legal history, both past and present, the court will have a more complete understanding of the dynamics of the parties' relationships.

a. Conflicts of Law

When city and state domestic laws conflict, state laws control. In *City of Columbus v. Patterson*,[566] the defendant was convicted of violating a temporary protection order.[567] He failed to vacate the residence he shared with his victim and under a city ordinance, such a violation was a misdemeanor.[568] The Ohio Court of Appeals remanded the case, finding that the city ordinance conflicted with state law, which classified such a violation as a civil contempt charge.[569]

6. Venue

Among various courts within a state, venue generally lies where the petitioner resides,[570] where she is currently living, either permanently or temporarily in a shelter,[571] where the respondent resides,[572] where either party resided at the time of the civil protec-

566. No. 82AP-47, 1982 WL 4556 (Ohio Ct. App. Dec. 9, 1982).

567. *Id.* at *1.

568. *Id.* at *1.

569. *Id.* at *3.

570. *See* ARK. CODE ANN. § 9-15-201 (Michie 1992); DEL. CODE ANN. tit. 10, § 946(c) (1993); HAW. REV. STAT. § 586-2 (1985); IDAHO CODE § 39-6304(6) (1993); 750 ILCS 60/209 (Smith Hurd Supp. 1993); IOWA CODE ANN. § 236.3 (West 1985 & Supp. 1993); KY. REV. STAT. ANN. § 403.725 (Michie/Bobbs-Merill 1992 & Supp. 1993); LA. REV. STAT. ANN. § 46:2133 (West 1993); MASS. GEN. L. ANN. ch. 209A, § 2 (1987); MINN. STAT. ANN. § 518B.01(3) (1990); MO. REV. STAT. § 455.503 (Supp. 1993); MONT. CODE ANN. § 40-4-123 (1992); N.J. STAT. ANN. § 2C:25-28(a) (West 1992); OKLA. STAT. ANN. tit. 22, § 60.2(A) (West 1992); S.C. CODE ANN. § 20-4-40 (Law. Co-op. 1992); TEX. FAM. CODE Ann. § 71.03 (West 1992); VT. STAT. ANN. tit. 14, § 1102 (1989); WASH. REV. CODE ANN. § 26.50.020(6) (West Supp. 1993); WIS. STAT. ANN. § 801.50(5r) (West Supp. 1993).

571. *See* DEL. CODE ANN. tit. 10, § 946(c) (1993); IDAHO CODE § 39-6304(6) (1992); 750 ILCS 60/209 (Smith Hurd Supp. 1993); KY. REV. STAT. ANN. § 403.725 (Michie 1992); LA. REV. STAT. ANN. § 46:2133 (West 1993); ME. REV. STAT. ANN. tit. 19, § 763 (West 1982); MASS. GEN. L. ANN. ch. 209A, § 2 (1987); N.H. REV. STAT. ANN. § 173-B:3 (1990); N.J. STAT. ANN. § 2C:25-28(6) (West 1993).

572. *See* ARK. CODE ANN. § 9-15-201 (Michie 1992); DEL. CODE ANN. tit. 10, § 946(c) (1993); GA. CODE ANN. § 19-13-2 (1992); IDAHO CODE § 39-6304(6) (Supp. 1993); 750 ILCS 60/209 Smith Hurd Supp. 1993); LA. REV. STAT. ANN. § 46:2133 (West 1992); MINN. STAT. § 518B:01(3) (1990); MO. REV. STAT. § 455-503 (Supp. 1993); MONT. CODE ANN. § 40-4-123 (1992); N.H. REV. STAT. ANN. § 173-B:13 (1990); N.J. STAT. ANN. § 2C:25-28(a) (West 1993); OKLA. STAT. ANN. tit. 22, § 60.(A) (West 1992); S.C. CODE ANN. § 20-4-30 (Law. Co-op. 1985); TEX. FAM. CODE Ann. § 71.03 (West 1992); WASH. REV. CODE ANN. § 26.50.020(6) (West Supp. 1993); W. VA. CODE § 48-2A-3(b) (Supp. 1993); WIS. STAT. ANN. § 801.50(5r) (West Supp. 1993); *see also* Forster v. Forster, 14 Cal. Rptr. 2d

tion order violation or incident giving rise to the request for a civil protection order, whether temporarily[573] or permanently,[574] and where a divorce action may be brought.[575] Twenty jurisdictions statutorily authorize the petitioner to file for a civil protection order in any general court;[576] six jurisdictions authorize filing in circuit court;[577] ten in district court;[578] six in family court;[579] and one in family or juvenile court.[580] When confronted with the question of which court, county, or district has original jurisdiction to issue protection orders, courts have held that original jurisdiction is concurrent.[581]

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258 (1993) (affirming trial court's transfer of case to county where defendant resided upon his motion. The wife had fled the county to escape abuse and filed in her new county of residence. The court held that a plaintiff's right to trial in a county other than the residence of the defendant is an exception rather than the general rule); Selland v. Selland, 494 N.W.2d 367 (N.D. 1992) (holding that court should have granted defendant's motion to transfer the trial).

573. *See* ARK. CODE ANN. § 9-15-201 (Michie 1992); DEL. CODE ANN. tit. 10, § 946(c) (1992); MINN. STAT. ANN. § 518B.01(3) (West 1990); N.H. REV. STAT. ANN. § 173-B:3 (1990).

574. *See* ARK. CODE ANN. § 9-15-201 (Michie 1992); DEL. CODE ANN. tit. 10, § 943 (1992); ME. REV. STAT. ANN. tit. § 763 (1992); S.D. CODIFIED LAWS ANN. § 25-10-2 (1984); UTAH CODE ANN. § 30-6-3 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.020(6) (West Supp. 1993).

575. *See* W. VA. CODE § 48-2A-3(b) (Supp. 1993).

576. *See* ARK. CODE ANN. § 9-15-201 (1992); ARIZ. REV. STAT. § 13-3602 (1992); COLO. REV. STAT. ANN. § 14-4-102 (1992); IND. CODE ANN. § 34-4-5.1-3 (Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 763 (1992); MASS. GEN. L. ANN. ch. 209A, § 2 (West 1987); MINN. STAT. ANN. § 518B.01(3) (West 1992); MISS. CODE ANN. § 93-21-3(c) (1973 & Supp. 1993); MONT. CODE ANN. § 40-4-123 (1992); NEB. REV. STAT. § 42-924 (Supp. 1992); N.H. REV. STAT. ANN. § 173-B:3 (1990); N.J. STAT. ANN. § 2C:25-28(a) (West 1993); N.C. GEN. STAT. § 50B-2 (1992); TENN. CODE ANN. § 36-3-601(3)(B) (1991); TEXAS FAM. CODE ANN. § 71.01; VT. STAT. ANN. tit. 15, § 1102 (1989); VA. CODE ANN. § 16.1-253.1 (Michie Supp. 1993); W. VA. CODE § 48-2A-3(a) (Supp. 1993).

577. ALA. CODE § 30-5-9 (1992); 750 ILCS 60/207 (Smith Hurd Supp. 1993); IOWA CODE ANN. § 236.3 (West 1984 & Supp. 1992); MO. REV. STAT. § 455.502 (Supp. 1993); OR. REV. STAT. § 107.710 (19912); W. VA. CODE § 48-2A-2 (1992).

578. ALA. CODE § 30-5-9 (1992); IOWA CODE ANN. § 236.3 (West 1992); KAN. STAT. ANN. § 60-3104(a) (1993); KY. REV. STAT. ANN. § 403.725 (Michie 1992); ME. REV. STAT. ANN. tit. 19, § 761-A (1992); NEB. REV. STAT. § 42-924 (Supp. 1992); N.D. CENT. CODE § 14-07.1-.02.1 (1991); OKLA. STAT. ANN. tit. 22, § 60.2(A) (1992); TEX. FAM. CODE § 71.111 (West 1992); VT. STAT. ANN. tit. 15, § 1102 (1989).

579. HAW. REV. STAT. § 586-2 (1985); N.J. STAT. ANN. § 2C:25-28(a) (West 1993); N.Y. FAM. CT. ANN. § 812 (McKinney 1992); OHIO REV. CODE ANN. § 3113.31(B) (Baldwin Supp. 1992); R.I. GEN. LAWS § 15-15-3 (Supp. 1993); S.C. CODE ANN. § 20-4-30 (Law. Co-op. 1993).

580. LA. REV. STAT. ANN. § 46:2134 (West 1992).

581. *See, e.g.*, Stuckey v. Stuckey, 768 P.2d 694 (Colo. 1989) (holding that county court has concurrent jurisdiction with the district court to issue protection order enjoining father

7. Election of Remedies

In nearly every jurisdiction, domestic violence victims may simultaneously seek protection as a petitioner in a civil protection action and as the victim in the state's criminal prosecution of the batterer for his crimes against the victim. To fully safeguard domestic violence victims, protection must be available in both forums. The civil protection order action is brought by the victim to secure her own protection; the criminal case is brought by the state to punish the batterer for his criminal actions.

Only New York denies domestic violence victims the protection of both the civil and criminal courts. It has adopted an extremely complex and confusing system in which the petitioner is required to elect whether criminal or family court will hear her claim.[582] She is barred from seeking relief in both courts. After three days, her election is permanent and may not be changed.[583] The procedural difficulties of this system have impeded speedy adjudication of issues of domestic violence. Respondents have often successfully used the New York system strategically in an attempt to have the charges against them dismissed. The problems with this system are evident by the great volume of litigation it has generated.[584] One New York court

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from contacting his minor child); *see also* Harman v. Frye, 425 S.E.2d 566, 575 (W. Va. 1992) (holding that the circuit and magistrates courts have concurrent jurisdiction over domestic violence proceeding under W. VA. CODE § 48-2A-3).

582. By way of an old line of cases, New York has specified that the Family Court has jurisdiction over harassment and assault charges and the criminal court has jurisdiction over trespassing, endangering the welfare of the child, and criminal contempt charges. *See, e.g.*, Clifford v. Krueger, 297 N.Y.S.2d 990 (Sup. Ct. 1969) (holding that to qualify as an assault under the domestic violence statute, the assault need not take place in the family home. Family Court, therefore, has jurisdiction over matters of assault that have occurred outside the home if the requisite parties are involved); People v. Singleton, 532 N.Y.S.2d 208 (Crim. Ct. 1988) (holding criminal court has exclusive jurisdiction over some offenses not enumerated as family offenses such as endangering the welfare of a child, criminal trespass in the second degree and criminal contempt in the second degree); People v. Hawkins, 268 N.Y.S.2d 482 (Cty. Ct. 1966) (holding that the family court has exclusive jurisdiction over case involving assault of one family member against another); Keller v. Keller, 234 N.Y.S.2d 469 (Dist. Ct. 1962) (holding that the family court has exclusive jurisdiction over cases of assault between members of the same family even if these members do not live in the same household).

583. N.Y. FAM. CT. ACT § 821(3)(b) (McKinney Supp. 1994).

584. *See, e.g.*, People v. Holdip, 541 N.Y.S.2d 595 (Sup. Ct. App. Div. 1989) (holding that defendant's plea of guilty functioned as a waiver of the trial court's failure to comply with procedures for family offense proceedings pursuant to Family Court Act § 812); People v. Williams, 551 N.Y.S.2d 442 (Crim. Ct. 1990) (holding that defendant's wife's initial filing of family court petition did not bar her from initiating a criminal proceeding within 72 hours); People v. Falzone, 537 N.Y.S.2d 773 (Crim. Ct. 1989) (holding that the complainant's petition in the Family Court charging her husband with assaulting and threatening her consti-

said in dicta that the present system of advising complainants on the best choice of forum does not always guarantee an informed or intelligent choice on the part of victims of domestic violence.[585] This restriction in New York should be eliminated.

8. Choice of Forum For Civil Protection Order Enforcement

Courts and legislatures have struggled with the effect the parallel systems of relief in criminal and civil courts have on civil protection order enforcement. One Pennsylvania court has held that only the juvenile court has jurisdiction in the matter of the enforcement of a civil protection order against petitioner's minor boyfriend.[586] Oklahoma

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tuted a final choice of forum and barred a subsequent criminal action against husband based on same incident. Complainant must be informed of the ramifications of election of forum between the family court and the criminal court when filing her petition alleging spousal abuse); People v. Singelton, 532 N.Y.S.2d 208 (Crim. Ct. 1988) (holding complainant's decision to pursue charges in Family Court precluded Criminal Court's jurisdiction over these charges despite complainant being uninformed); People v. Perez, 440 N.Y.S.2d 166 (Crim. Ct. 1981) (holding that where more than 72 hours had expired after the criminal complaint was filed in the criminal court, the victim had irrevocably elected to proceed in that forum and was barred from subsequently seeking an order of protection in the Family Court); Hawley v. Hawley, 355 N.Y.S.2d 962 (Fam. Ct. 1974) (transferring assault case from family court to criminal court, where husband assaulted wife and she subsequently died, making reconciliation impossible); People v. McGraw, 524 N.Y.S.2d 343 (Cty. Ct. 1988) (holding that the criminal court is not deprived of jurisdiction over criminal contempt count by virtue of a family court's action, as the state, not the petitioner, started the subsequent criminal action); People v. Bauman, 545 N.Y.S.2d 519 (Dist. Ct. 1989) (holding that under Section 812 of the Family Court Act, the filing of an accusatory instrument in criminal court or a petition in family court constituted a final choice of forum after 72 hours have elapsed from such filing and bars any subsequent proceeding in an alternative court based on the same offense); People v. Vaughn, 417 N.Y.S.2d 621 (Dist. Ct. 1979) (finding concurrent jurisdiction existed between the family court and the criminal court where the wife was charged with attempted murder of her husband); People v. Revell, 402 N.Y.S.2d 522 (Dist. Ct. 1978) (holding the statute granting the criminal court concurrent jurisdiction over family offenses is not unconstitutionally vague nor does it result in a deprivation of due process of equal protection); People v. Brady, 283 N.Y.S.2d 175 (Dist. Ct. 1967) (in vesting concurrent jurisdiction in family court and criminal court, the domestic violence statute did not intend that an act defined in penal law was to be considered a crime, merely because the parties involved were spouses); People v. Fisher, 580 N.Y.S.2d 625 (Just. Ct. 1991) (holding that where wife filed two claims, one in family court and one in criminal court, pursuant to the Criminal Procedure Law and the Family Court Act, that the family court had jurisdiction because it was the final choice of forum. The case can be returned to the criminal court if the interests of justice required, but the choice belongs to the family court with the petitioner's consent. Here, the petitioner contended that the Family Court advised her to move back into criminal court. The advice, however, must be in the form of an order. Petitioner had no order, and therefore defendant's motion was granted).

585. People v. Williams, 551 N.Y.S.2d 442 (Crim. Ct. 1990).

586. Diehl v. Drummond, 2 Pa. D. & C.4th 376 (C.P. 1989) (a minor can be named as a respondent and have protection orders issued against him but enforcement must be brought

has determined that, because a violator of a protection order is liable for criminal penalties, the Court of Criminal Appeals has exclusive and final jurisdiction to hear an appeal of a protection order to determine the legal sufficiency and efficacy of the criminal process triggered for the enforcement of an emergency protection order.[587] In Arkansas' unique system of chancery courts, the conflict between the roles of civil and criminal courts in cases of domestic violence resulted in denying jurisdiction over such cases to the civil courts, due to the availability of remedies in the criminal courts.[588] The state legislature, however, has subsequently resolved the issue by concluding that because injunctive relief was needed to combat the problem of domestic abuse and because injunctive relief is equitable in nature, the chancery courts, as courts of equity, did have subject matter jurisdiction over cases of domestic violence.[589]

There may also be conflicts in the relationship between civil and criminal courts when a civil protection order is violated. A state may enforce its civil and temporary protection orders either through civil or criminal contempt or as a misdemeanor. Thirty-one states and the District of Columbia enforce protection orders through contempt.[590]

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in juvenile court).

587. Flury v. Howard, 813 P.2d 1052, 1054 (Okla. 1991)

588. Bates v. Bates, 793 S.W.2d 788 (Ark. 1990). The Arkansas Supreme Court invalidated the Arkansas Domestic Abuse Act on the ground that it impermissible enlarged the chancery court's jurisdiction. The Court held that the legislature lacked power under the state's Constitution to expand the jurisdiction of the chancery courts beyond what they had at the time of the adoption of the Constitution. Since the circuit courts in Arkansas have original jurisdiction over all civil and criminal matters at law, petitioner in this case had an adequate remedy at law barring actual or threatened abuse, including obtaining a peace bond. Thus, the court held, equity would not enjoin the commission of a crime and infringe upon the abuser's right to trial by jury.

589. In 1991, the General Assembly rewrote the statute in accordance with the *Bates* decision. The statute now provides for injunctive relief which is equitable in nature and therefore is under the jurisdiction of the chancery courts. The state legislature explained:

> [t]he General Assembly of the State of Arkansas hereby finds that this chapter is necessary to secure important governmental interests in the protection of victims of abuse and the prevention of further abuse through the removal of offenders from the household and other injunctive relief for which there is no adequate remedy in current law. The General Assembly hereby finds that this chapter shall meet a compelling societal need and is necessary to correct the acute and pervasive problem of violence and abuse within households in this state. The equitable nature of this remedy requires the legislature to place proceedings contemplated by this chapter under the jurisdiction of the chancery courts.

ARK. CODE ANN. § 9-15-101 (Michie 1993).

590. *See* ALA. CODE ANN. § 30-5-10(b) (1989); ARIZ. REV. STAT. ANN. § 13-3602H (1992); ARK. CODE. ANN. § 9-15-210 (Michie 1992); COLO. REV. STAT. ANN. § 14-4-105

Twenty-four of those states enforce a civil protection order by civil or criminal contempt.[591] Three states will hold a respondent in civil contempt only,[592] and five states only enforce civil protection orders through criminal contempt.[593]

Thirty-seven states prosecute a violation of a protection order as a misdemeanor.[594] Twenty-four states enforce civil protection orders

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(1992); CONN. GEN. STAT. ANN. § 46b-15 (West 1986); D.C. CODE ANN. § 16-1005(f) (1989); FLA. STAT. ANN. § 741-30(9)(a) (West 1986 & Supp. 1991); GA. CODE ANN. § 19-13-6(a) (1991); 750 ILCS 60/223 (Smith Hurd Supp. 1993); IOWA CODE ANN. § 236.8 (West 1985 & Supp. 1992); KAN. STAT. ANN. § 60-3110 (1993); KY. REV. STAT. ANN. § 403.760 (Michie 1992); ME. REV. STAT. ANN. tit. 19, § 769 (1992); MD. CODE ANN., FAM LAW § 4-508 (1991 & Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 7 (West 1987); MICH. COMP. LAWS ANN. § 600.2950(6) (Supp. 1993); MINN. STAT. ANN. § 518B.01.14(c) (West 1990); MISS. CODE ANN. § 93-21-21 (1993); N.H. REV. STAT. ANN. § 173-B:8II (1990); N.J. STAT. ANN. § 2C:25-30 (West 1993); N.Y. FAM CT. ACT § 846-a (McKinney Supp. 1994); N.C. GEN. STAT. § 50B-4 (1987); N.D. CENT. CODE § 14-07.1-06 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(L)(1)(b) (Baldwin Supp. 1992); OR. REV. STAT. § 107.720(4) (1991); 23 PA. CONS. STAT. ANN. § 6114 (1991); R.I. GEN. LAWS § 8-8.1-3 (Supp. 1993); TENN. CODE ANN. § 36-3-610 (1992); VT. STAT. ANN. tit. 15, § 1108(b) (1989); VA. CODE ANN. § 16.-279.1C (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(3) (West 1986); W. VA. CODE § 48-2A-7 (Supp. 1993).

591. *See* ALA. CODE ANN. § 30-5-10(b) (1989); ARIZ. REV. STAT. ANN. § 13-3602H (1992); ARK. CODE. ANN. § 9-15-210 (Michie 1992); COLO. REV. STAT. ANN. § 14-4-105 (1992); CONN. GEN. STAT. ANN. § 46b-15 (West 1986); FLA. STAT. ANN. § 741-30(9)(a) (West 1986 & Supp. 1991); GA. CODE ANN. § 19-13-6(a) (1991); 750 ILCS 60/223 (Smith Hurd Supp. 1993); IOWA CODE ANN. § 236.8 (West 1985 & Supp. 1992); KAN. STAT. ANN. § 60-3110 (1993); KY. REV. STAT. ANN. § 403.760 (Michie 1992); ME. REV. STAT. ANN. tit. 19, § 769 (1992); MD. CODE ANN., FAM LAW § 4-508 (1991 & Supp. 1993); MICH. COMP. LAWS ANN. § 600.2950(6) (Supp. 1993); MINN. STAT. ANN. § 518B.01.14(c) (West 1990); MISS. CODE ANN. § 93-21-21 (1993); N.H. REV. STAT. ANN. § 173-B:8II (1990); N.J. STAT. ANN. § 2C:25-30 (West 1993); N.Y. FAM CT. ACT § 846-a (McKinney Supp. 1994); OHIO REV. CODE ANN. § 3113.31(L)(1)(b) (Baldwin Supp. 1992); OR. REV. STAT. § 107.720(4) (1991); 23 PA. CONS. STAT. ANN. § 6114 (1991); R.I. GEN. LAWS § 8-8.1-3 (Supp. 1993); TENN. CODE ANN. § 36-3-610 (1992); VA. CODE ANN. § 16.-279.1C (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(3) (West 1986); W. VA. CODE § 48-2A-7 (Supp. 1993).

592. DEL. CODE ANN. tit. 10, § 950(e) (1993); MASS. GEN. L. ANN. ch. 209A, § 7 (West 1992); N.C. GEN. STAT. ANN. § 50B-4 (1987).

593. LA. REV. STAT. ANN. § 46:2137(B) (West 1992); MICH. COMP. LAWS ANN. § 600.2950(6) (West 1992); N.D. CENT. CODE § 14.07.1-06 (1992); 23 PA. CONS. STAT. ANN. § 6114; VT. STAT. ANN. tit. 15, § 1108(b) (1989).

594. *See* ALA. CODE § 30-5A-3 (1992); ALASKA STAT. § 11.56.740 (Supp. 1993); ARK. CODE ANN. § 9-15-207 (Michie 1992); CAL. FAM. CODE §§ 2042 & 5807 (West 1992); COLO. REV. STAT. ANN. § 18-6-803.5 (West 1992); CONN. GEN. STAT. ANN. § 53a-107 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 950(e) (Supp. 1993); FLA. STAT. ANN. § 741-31 (West 1986 & Supp. 1992); GA. CODE ANN. § 19-13-6(b) (1991); HAW. REV. STAT. § 586-11 (1985); IDAHO CODE § 39-6312(i) (Supp. 1993);750 ILCS 60/223 (Smith Hurd Supp. 1993); IND. CODE ANN. § 34-4-6-3(h) (Supp. 1993); KAN. STAT. ANN. § 60-3107 (Supp. 1993); KY. REV. STAT. ANN. § 403.763(2) (Baldwin 1992); ME. REV. STAT. ANN. tit.

through either contempt proceedings or as a misdemeanor.[595] Texas', Missouri's, North Dakota's, Ohio's, and Washington's civil protection order statutes now prosecute some violations of a protection order as felonies.[596] The Supreme Court, in *United States v. Dixon*,[597] cleared the way for ensuring that a battered woman could enforce a civil protection order through criminal contempt without immunizing their batterers from criminal prosecution.[598]

19, § 769 (1992); MD. CODE ANN., FAM. LAW § 4-509 (1992 & Supp. 1993); MASS. GEN. L. ANN. CH. 209A, § 7 (West 1992); MICH. COMP. LAWS ANN. § 552.14(6) (West 1992); MINN. STAT. ANN. § 518B.01.14(a) (West 1990); MO. REV. STAT. § 455-085(8) (Supp. 1993); MONT. CODE ANN. § 45-5-626 (1992); NEB. REV. STAT § 42-924(3) (Supp. 1992); NEV. REV. STAT. ANN. § 33.100 (Michie Supp. 1992); N.H. REV. STAT. ANN. § 173-B:8 (1990); N.D. CENT. CODE § 14.07.1-06 (1992); OHIO REV. CODE ANN. § 3113.31(L)(1)(a) (Baldwin Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.6(A) (West 1992); R.I. GEN. LAWS § 15-15-3 (Supp. 1992); S.C. CODE ANN. § 16-25-50 (Law. Co-op. 1985); UTAH CODE ANN. § 30-6-6(5) (Supp. 1993); VT. STAT. ANN. tit. 15, § 1030 (1992); VA. CODE ANN. § 16.1-253.2 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(1) (West Supp. 1993); W. VA. CODE § 48-2A-10 (1992); WISC. STAT. ANN. § 813.12(8) (West Supp. 1993); WYO. STAT. § 35-21-106(i) (1988).

595. *See* ALA. CODE § 30-5A-3 (1992); ARK. CODE ANN. § 9-15-207 (Michie 1992); CAL. FAM. CODE §§ 2042 & 5807 (West 1992); COLO. REV. STAT. ANN. § 18-6-803.5 (West 1992); CONN. GEN. STAT. ANN. § 53a-107 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 950(e) (Supp. 1993); FLA. STAT. ANN. § 741-31 (West 1986 & Supp. 1992); GA. CODE ANN. § 19-13-6(b) (1991); 750 ILCS 60/223 (Smith Hurd Supp. 1993); KAN. STAT. ANN. § 60-3107 (Supp. 1993); KY. REV. STAT. ANN. § 403.763(2) (Baldwin 1992); ME. REV. STAT. ANN. tit. 19, § 769 (1992); MD. CODE ANN., FAM. LAW § 4-509 (1992 & Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 7 (West 1992); MICH. COMP. LAWS ANN. § 552.14(6) (West 1992); MINN. STAT. ANN. § 518B.01.14(a) (West 1990); N.H. REV. STAT. ANN. § 173-B:8 (1990); N.D. CENT. CODE § 14.07.1-06 (1992); OHIO REV. CODE ANN. § 3113.31(L)(1)(a) (Baldwin Supp. 1992); R.I. GEN. LAWS § 15-15-3 (Supp. 1992); VA. CODE ANN. § 16.1-253.2 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(1) (West Supp. 1993); W. VA. CODE §§ 48-2A-7 to -10 (1992).

596. MO. REV. STAT. § 455.085(7) (designating as a felony a civil protection order violation if evidence of prior violations within the last five years); N.D. CENT. CODE § 14.-07.1-06 (Supp. 1992) (designating second violation as a felony); OHIO REV. CODE. ANN. § 2919.27 (1992) (designating as a felony a temporary protection order violation if two or more violations of this or other protection order); TEX. FAM. CODE § 71.16 (West Supp. 1993) (designating separate acts of family violence as a felony); WASH. REV. CODE ANN. § 26.50.110 (Supp. 1993) (designating as assault).

597. 113 S. Ct. 2849 (1993).

598. The outcome of the U.S. Supreme Court decision in *Dixon*, 113 S. Ct. 2849, makes it incumbent for states to adopt procedures that will maximize communication between petitioners seeking to enforce civil protection orders and prosecutors in the criminal justice system. For a full discussion of the *Dixon* decision, see *infra* notes 2017-36 and accompanying text.

E. States Place No Time Limitations Within Which an Abused Party Must File For a Protection Order

1. Lack of Filing Deadlines

Due to the cyclical nature of domestic violence,[599] introduction of evidence of the relationship's history of abuse and patterns of power and control[600] is vital in allowing a court to fully comprehend the risk posed to a particular petitioner. Reports indicate that thirty-two percent of domestic violence victims will be abused again within six months and many are abused as often as once a week.[601] Since violence often escalates in a relationship[602] and increases in frequency and severity over time,[603] evidence of past abuse is rele-

599. BATTERED WOMAN, *supra* note 4. Battering is rarely an isolated event. National survey data indicates that two-thirds of women who have been beaten reported two or more violent incidents a year, with over half of the women being beaten five or more times a year. ADELE HARRELL, A GUIDE TO RESEARCH ON FAMILY VIOLENCE 12 (1993).

600. ORLOFF & KLEIN, *supra* note 26, at 21-26. Eighty percent of batterers engage in violent behaviors against multiple targets, including spouse, children, parents, and pets. Over 50 percent of batterers also abuse their children. Lenore E. Walker, *The Battered Woman Syndrome, in* FAMILY ABUSE AND ITS CONSEQUENCES 139-48 (G.T. Hotaling et al. eds., 1988); *see also* TERRIFYING LOVE, *supra* note 4, at 71. Men who batter their wives do not do so by accident, mistake or as a result of loss of control. Domestic battery is intentional violence directed at women partners in order to gain or maintain control over them. HARLOW, *supra* note 3.

601. KLAUS & RAND, *supra* note 3. According to one report, 47% of men who admit battering their wives report three or more assaults per year. MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 41 (1980). The cycle of violence may end in either death of the victim or separation. When violence ends in either of these ways, batterers often move on to a new victim. Violence may also be stopped following negative experiences which may include social and legal sanctions. Jeffery Fagan, *Cessation of Family Violence: Deterrence and Dissuasion, in* FAMILY VIOLENCE 377 (Lloyd Ohlin & Michael Tonry eds. 1989); HARRELL, *supra* note 599, at 23.

602. GILLESPIE, *supra* note 124, at 129.

603. BROWNE, *supra* note 171, at 68. Approximately 25% of the victims of spousal or ex-spousal attacks have been the victims within the previous six months of a series of at least three similar crimes. KLAUS & RAND, *supra* note 3, at 3. For about 25% of the victims, the battering will be regular and ongoing. Judge Richard Lee Price, Love and Violence: Victims and Perpetrators, Remarks at New York City Coalition for Women's Mental Health (January 1991). Approximately 50% of battered women in shelter reported violence occurring once a week and another 25% reported monthly beatings. ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, WOMAN ABUSE: FREQUENT AND SEVERE (1983). Forty-one percent (41%) of those assaulted are victimized again within 15 months. LQUISE BAUSCHARD, EXECUTIVE SUMMARY OF THE SECOND NATIONAL WORKSHOP ON FEMALE OFFENDERS 13 (1987). One national survey found that 57% of the most frequent perpetrators of severe violence during year one continued using severe violence on their wives in year two. Sharon Wofford et al., *Continuities in Marital Violence*, J. FAM. VIOLENCE, June 1992. For many battered women, each of the assaults is so similar that they can not remember them distinctly. HARLOW, *supra* note 3, at 2-3.

vant to a court's determination of both the need for a protection order and the type of remedies required to stop the violence.[604] Thus, courts should elicit evidence about the history of abuse, and use that information to guide their decisions.

Most state statutes recognize the relevance of a past abusive act to provide a context to evaluate present fear and danger. Forty-four states and the District of Columbia place no time limitations within which an abused party must file for a protection order.[605] Massachusetts specifically states that a court may not deny a civil protection order petition solely because it was not filed within a particular time period after the last incident of abuse.[606]

Courts regularly consider the history of violence in the parties' relationship and past abuse as evidence of the need for a current protection order. Protection orders are issued when the victim fears further violence based on abuse which may have occurred sometime

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604. Ganley, *supra* note 21, at 20. ("Domestic violence is a pattern of behavior that consists of multiple, often times daily behaviors, including both criminal and noncriminal acts. While the legal process tends to focus on individual behaviors, it is the entire pattern of abuse that shapes how the abuser and the abused party function in court and how each responds to interventions.").

605. All of the following state statutes are silent as to time restrictions: ALA. CODE § 30-5-2 (1992); ALASKA STAT. § 25.035.020 (1991); CAL. FAM. CODE § 2036.5 (West 1993); COLO. REV. STAT. ANN. § 14-14-102 (1992); CONN. GEN. STAT. ANN. § 46b-15 (West 1992); DEL. CODE ANN. tit. 10, § 921 (1975 & Supp. 1992); D.C. CODE ANN. § 16-1004 (1989); FLA. STAT. ANN. § 741.30 (West 1986 & Supp. 1992); GA. CODE ANN. § 19-13-3 (1991); IDAHO CODE § 39-6304 (Supp. 1993); 750 ILCS 60/214 (Smith Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-2 (Supp. 1993); IOWA CODE ANN. § 236.3 (West 1985 & Supp. 1992); KAN. STAT. ANn. § 60-3104 (Supp. 1993); KY. REV. STAT. ANN. § 403.725 (Michie 1992); LA. REV. STAT. ANN. § 46:2134 (West 1982); ME. REV. STAT. ANN. tit. 19, § 764.2 (Supp. 1992); MD. CODE ANN., FAM. LAW § 4-504 (1991 & Supp. 1993); MASS. GEN. L. ANN. ch. 209A, § 3 (West 1992); MICH. COMP. LAWS ANN. § 93-21-3 (West 1992); MINN. STAT. ANN. § 518B.01.4 (West 1990 & Supp. 1993); MISS. CODE ANN. § 93-21-9 (Supp. 1993); MO. REV. STAT. § 455.510 (Supp. 1993); MONT. CODE ANN. § 40-4-122 (1992); NEB. REV. STAT. § 42-924 (Supp. 1992); NEV. REV. STAT. § 33.050 (1986); N.H. REV. STAT. ANN. § 173-B:3 (1990); N.J. STAT. ANN. § 2C:25-28 (West Supp. 1993); N.M. STAT. ANN. § 40-13-3 (Michie 1993); N.Y. FAM. CT. ACT § 821 (McKinney Supp. 1994); N.C. GEN. STAT. § 50B-2 (1989); OHIO REV. CODE ANN. § 3113.31 (Baldwin 1992); OKLA. STAT. ANN. tit. 22, § 60.2 (West 1992); 23 PA. CONS. STAT. ANN. § 6106 (1991); R.I. GEN. LAWS § 15-15-3 (1992); S.C. CODE ANN. § 20-4-30 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-3 (1984); TENN. CODE ANN. § 36-3-605 (1992); TEX. FAM. CODE Ann. § 71.04 (West Supp. 1993); UTAH CODE ANN. § 30-6-2 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1104 (1989); WASH. REV. CODE ANN. § 26.50.030 (West Supp. 1993); W. VA. CODE § 48-2A-4 (Supp. 1993); WIS. STAT. ANN. § 813.12(5) (West Supp. 1993); WYO. STAT. § 35-21-103 (1988); *see also* MODEL CODE, *supra* note 15, § 309 (protection order shall not be denied solely based on lapse of time between an act of domestic violence and the filing of the petition).

606. MASS. GEN. L. ANN. ch. 209A, § 3 (West 1992).

in the past. Courts have considered evidence of past abuse when the petitioner has present fear of harm;[607] evidence of prior protection orders;[608] evidence of incidents of abuse which occurred prior to the domestic violence act's enactment, to show a trend toward the current violence;[609] the history of past altercations, to evaluate present threats;[610] evidence of a prior domestic violence conviction when it is an element of the aggravated crime charged;[611] evidence of a history of domestic violence to defeat an abuser's claim of self-defense;[612] and the history of abuse when deciding whether to extend a civil protection order.[613]

These courts recognize the importance of past abuse in determining the present need for a protection order. In *Boniek v. Boniek*,[614] the court issued a protection order after "[v]iewing the evidence in its totality, and in light of the [defendant]'s history of abusive behavior."[615] In *Strollo v. Strollo*, the court upheld a civil protection order

607. Boniek v. Boniek, 443 N.W.2d 196 (Minn. App. 1989) (holding evidence of past abuse admissible to show present intent to inflict fear of imminent physical harm, bodily injury, or assault); Parkhurst v. Parkhurst, 793 S.W.2d 634 (Mo. Ct. App. 1990) (holding that the last incident of abuse, which occurred two months prior to the civil protection order petition, was admissible when accompanied by present fear of violence from respondent husband when he was served with divorce papers); Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992) (evidence of prior acts of domestic violence was properly admitted into evidence, pursuant to the domestic violence act); Strollo v. Strollo, 828 P.2d 532 (Utah App. Ct. 1992) (holding court below properly admitted evidence of past abuse, coupled with present fear of future abuse, where defendant threatened to kill petitioner if she divorced him and he had beaten her for eight and a half years, most recently seven months before).

608. *Boniek*, 443 N.W.2d at 196.

609. *See* Smittle v. Smittle, 2 Pa. D. & C.3d 476 (C.P. 1979) (admitting evidence of an incident of violence which occurred prior to Protection From Abuse Act since the statute does not create a new category of prohibited acts but merely provides a new remedy. Such abuse is particularly relevant, since the petitioner still suffers from the injury).

610. Hall v. Hall, 408 N.W.2d 626 (Minn. App. 1987) (holding that verbal threats to kill the petitioner if she "jerks him around with custody" in the context of past physical abuse can inflict fear of imminent physical harm, bodily injury or assault and is sufficient to support civil protection order).

611. State v. Wendling, No. 12015, 1990 WL 197957 (Ohio Ct. App. Dec. 6, 1990) (holding that where the crime charged included a specification of a previous conviction, evidence of defendant's prior domestic violence conviction properly admitted).

612. Garibay v. United States, 1993 D.C. App. LEXIS 303 (D.C. Ct. App. Dec. 6, 1993) (holding where abusive defendant claims self-defense to defeat criminal domestic violence prosecution, evidence of history of abuse admissible to prove motive and intent as a state of mind exception to the hearsay rule).

613. Cruz-Foster v. Foster, 597 A.2d 927 (D.C. Ct. App. 1991) (holding that court should consider all episodes of violence during parties' marriage to determine appropriateness of extension of civil protection order beyond one year).

614. 443 N.W.2d 196 (Minn. App. 1989).

615. *Id.*

based in part on abuse which occurred seven months before, reasoning that "[t]he statute clearly protects those who are reasonably in fear of physical harm resulting from past conduct coupled with a present threat of future harm. Otherwise, the prophylactic purpose of the statute would be defeated."[616] In *Cruz-Foster v. Foster*,[617] the court stated that a trial court which evaluates the need to extend a protection order "must consider the entire history of [the petitioner's] relationship with [the batterer], as reflected in the record, in determining whether [the petitioner] has presented evidence sufficient to warrant the relief sought."[618] In *Steckler v. Steckler*,[619] the court upheld the issuance of a temporary protection order against a former husband, based in part on evidence of visitation violations, physical abuse after the divorce, and evidence of past verbal and physical abuse during the marriage. The court held that the past abuse is relevant, and can assist the court in determining imminent danger and predicting violence in the future.[620]

Specifically, in *Pendleton v. Minichino*,[621] the Connecticut Superior Court found present and immediate danger sufficient to issue a civil protection order, based in part on the respondent's remarks to petitioner that he was depressed and that "[t]his time I'm not going alone. You better watch your back."[622] The order was granted even though the petitioner waited seven hours to call the police and seven days to file for the *ex parte* order.[623] The court concluded that the fact that the petitioner's fear of present and immediate danger did not materialize within seven hours or seven days did not dismiss the probability that such danger continued unabated until the issuance of the *ex parte* order.[624]

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616. 828 P.2d 532, 535 (Utah App. Ct. 1992).
617. 597 A.2d 927.
618. *Id.* at 930 n.3.
619. 492 N.W.2d 76 (N.D. 1992).
620. *Id.* at 81.
621. No. 506673, 1992 Conn. Super. LEXIS 915 (Conn. Super. Ct. April 3, 1992).
622. *Id.* at *6-*7.
623. *Id.*
624. *Id.* at *7. *But see* Bjergum v. Bjergum, 392 N.W.2d 604, 606 (Minn. Ct. App. 1986) (denying protection order where substantiated abuse occurred 23 months and 20 months prior to the petition plus unsubstantiated allegations that the respondent abused the children as recently as three months before the petition and that the respondent made suicide threats as recently as the week prior to the petition); Kass v. Kass, 355 N.W.2d 335, 337 (Minn. Ct. App. 1984) (concluding that four-year old allegations of physical abuse did not provide a sufficient basis for a civil protection order where the petitioner escaped her ex-husband's abuse four years earlier and moved 124 miles away to secure her safety, and where petitioner

Evidence of a history of violence in the relationship is not only crucial to a court's determination of whether a civil protection order should be issued, but it is also extremely important for the determination of what remedies the civil protection order must contain to effectively stop the violence. Courts cannot issue effective civil protection orders in a vacuum. Although the remedies needed will vary from case to case, evidence of the history of violence in the relationship will help courts issue civil protection orders that will work best to stop the violence.

2. Retroactive Effect of the Act

When considering abusive acts which occurred before the enactment of a state's domestic violence statute, some jurisdictions have made the act retroactive.[625] In *Smittle*, the court held that because the Protection From Abuse Act[626] does not create any category of prohibited acts, but merely a new remedy, an action may properly be brought under the act after its effective date, particularly as here, where the plaintiff is still suffering from the injury.[627] In *Boyle v. Boyle*,[628] the court held that when a court considers incidents of abuse which occurred prior to enactment of the Protection From Abuse Act,[629] it does so to add weight to the possible development of a trend culminating in the recent acts which give rise to the petition.[630] The court explained that the Act seeks proscriptively to end the violence, not to punish the defendant for past conduct.[631] The *Boyle* court, in allowing courts to consider incidents that occurred before the statute was enacted, created a favorable policy which rec-

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could only testify that she thought she saw a car that she believed to be the respondent's car following her car on a public street); Yoba v. Yoba, 583 N.Y.S.2d 393 (N.Y. App. Div. 1992) (upholding the trial court's dismissal of a petition for a protection order where some of the information which the petitioner sought to include was not relatively contemporaneous with the order which was sought within seven weeks of abuse).

625. *See, e.g.*, Smittle v. Smittle, 2 Pa. D. & C.3d 476 (Pa. Ct. Comm. Pleas 1977).

626. Protection From Abuse Act of October 7, 1976, 1976 PA. LAWS 1090 (codified as amended at 23 PA. CONS. STAT. §§ 6101 to 6116 (1991)).

627. *Id. But see* Story v. Story, 291 S.E.2d 293 (N.C. Ct. App. 1982) (award of custody of minor child in divorce proceeding could not be based upon domestic violence statute where the incidents of domestic violence alleged in the wife's pleadings took place prior to the enactment of the civil protection order statute. Custody award to wife was sustained on other grounds).

628. 12 Pa. D. & C.3d 767 (C.P. Ct. of Pa. Cty. 1979).

629. 23 PA. CONS. STAT. §§ 6101-6116.

630. *Boyle*, 12 Pa. D. & C.3d at 778.

631. *Id.*

ognizes that prior acts of abuse are inextricably related to the most recent violent outbursts and are strong indications of the present danger to the victim. When a statute is amended, the amendments should apply retroactively in the same manner as the act itself.[632]

F. Constitutionality of Domestic Violence Statutes

1. Constitutionality of Domestic Violence Statutes Has Been Universally Upheld

State courts have consistently upheld the constitutionality of domestic violence statutes.[633] In *Johnson v. Cegielski*,[634] the court held that the state's domestic violence statute is presumed constitutional, and the party challenging the statute must put forward an affirmative case supported by argument or by citation to authority.[635] Furthermore, courts may not issue advisory opinions holding a state domestic violence statute unconstitutional.[636]

Courts have generally determined that the language in domestic violence statutes, civil protection orders, and harassment statutes is not unconstitutionally vague. In *Gilbert v. State*,[637] the court held that a protection order which ordered the defendant not to "visit" the victim and not to "otherwise interfere" with his wife was not unconstitutionally vague.[638] In *Kreitz v. Kreitz*,[639] the court held that a dissolution decree following an *ex parte* protection order which enjoined the husband from entering the marital residence at any time was not vague, overboard, or harsh in light of severe property damage committed by the husband.[640] In *State v. Tripp*,[641] the court

632. *Id.* at 777 ("This court does not believe the presenting of testimony on prior incidents of abuse vitiate the proceedings when there are also alleged the recent occurences happening almost immediately prior to the presenting of the petition.").

633. The only statute to be struck down on any constitutional basis was the Arkansas statute, which was found to be unconstitutional under the Arkansas state constitution and Arkansas' unique chancellory court system. Bates v. Bates, 793 S.W.2d 788 (Ark. 1990). In response, the Arkansas legislature clarified that the Chancellory courts have jurisdiction in equity and that protection orders are equitable relief. This clarification makes the Arkansas domestic violence statute consistent with the state constitution.

634. 393 N.W.2d 547 (Wis. Ct. App. 1986) (per curiam).

635. *Id.*

636. *See, e.g.*, Sabio v. Russell, 472 So. 2d 869 (Fla. Dist. Ct. App. 1985) (holding that the trial court has no authority to issue an advisory opinion finding the state domestic violence statute unconstitutional where the defendant was never served with process and was not before the trial court).

637. 765 P.2d 1208 (Okla. Crim. App. 1988).

638. *Id.* at 1210.

639. 750 S.W.2d 681 (Mo. Ct. App. 1988).

640. *Id.* at 685. Some courts have, however, been reticent to hold batterers in contempt

held that the domestic violence statute's definition of family and household members was not unconstitutionally vague where it included persons formerly residing in the same dwelling unit.[642] In that case the court upheld a protection order issued against the respondent since he and the victim lived together at her house, he kept clothes there, slept there, had meals there, and did laundry there on a continuous basis.[643] Finally, court decisions have also held that domestic violence statutes which proscribe physical abuse are not void for vagueness, since persons of ordinary intelligence would have reasonable opportunity to know that punching a person in the face or shoving them so that they fall against a wall is illegal behavior.[644]

Courts have also routinely upheld statutes which proscribe "harassing" behavior as not unconstitutionally vague.[645] Only orders containing the phrase "abstain from offensive conduct against" have been held to be unconstitutionally vague.[646] California courts have upheld the constitutionality of a penal statute which makes it a felony to impose corporal injury on a cohabitant of the opposite sex.[647]

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for willful violation of a protection order when the violation amounted to an erroneous but plausible interpretation of the terms of the protection order. Kuenen v. Kuenen, 504 N.Y.S.2d 937 (App. Div. 1986). The court overturned a contempt finding and five day jail sentence where the protection order did not give a clear and explicit directive as to the conduct that was proscribed. In that case the respondent removed personal property and furniture after the family court issued an order which permitted him to remove clothing and other personal items. The appeals court held that the removal of the furniture did not amount to a wilful violation of the protection order.

641. 795 P.2d 280 (Haw. 1990).

642. *Id.* at 282.

643. *Id.* at 283.

644. *See* State v. Kealoha, 753 P.2d 1250 (Haw. 1988) (upholding the domestic violence statute against a vagueness challenge to the term "physical abuse" since persons of ordinary intelligence would have reasonable opportunity to know that punching someone in the face, causing injury to a person's eye and lips would constitute physical abuse).

645. People v. Whitfield, 498 N.E.2d 262, 267 (Ill. App. Ct. 1986) (holding that defendant's behavior of following former wife in a car constituted harassment and that the statute proscribing "harassing" conduct was not unconstitutionally vague); State v. Sarlund, 407 N.W.2d 544 (Wis. 1987) (holding that the harassment injunction statute was neither unconstitutionally vague nor overbroad); Banks v. Pelot, No. 89-2106, 1990 Wisc. App. LEXIS 640 (Wis. Ct. App. July 3, 1990) (holding that the harassment statute was understandable and comprehensive).

646. People v. Forman, 546 N.Y.S.2d 755, 767 (Crim. Ct. 1989) (holding that the provision in the temporary protection order which required the defendant to "abstain from offensive conduct against" his wife could not support the charge of criminal contempt because the terms in the order were vague and indefinite and the order must spell out the specific "offensive" conduct prohibited).

647. *See, e.g.*, People v. Gutierrez, 217 Cal. Rptr. 616 (Ct. App. 1985) (upholding the constitutionality of a statute which prohibits either spouse from inflicting corporal punishment

They have specifically held that the term "cohabitating" in those statutes is not constitutionally infirm.[648]

Courts have consistently rejected a variety of specific constitutional challenges to state domestic violence statutes. They have held that civil protection order statutes rationally and reasonably effectuate the state interest in preventing domestic abuse,[649] do not deprive the respondent of liberty interests in his home,[650] do not deprive the respondent of his family[651] or his reputation,[652] do not inflict cruel and unusual punishment,[653] do not violate equal protection[654] and due process rights,[655] do not violate freedom of association rights,[656] and do not violate free speech.[657] In *Gilbert v. State*, the

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that results in a traumatic condition).

648. People v. Holifield, 252 Cal. Rptr. 729 (Ct. App. 1988) (holding that the statute which prohibited the infliction of corporal injury on a person of the opposite sex with whom the defendant is cohabitating was not void for vagueness on the grounds it did not comprehensively define what constitutes "cohabitating"); People v. Ballard, 249 Cal. Rptr. 806 (Ct. App. 1988) (holding that "cohabitating" as used in a felony statute proscribing infliction of corporal injury on a cohabitant was not unconstitutionally vague where the defendant lived with the victim although he had his own apartment).

649. Master v. Eisenbart, No. 90-2897, 1991 Wisc. App. LEXIS 1270 (Wis. Ct. App. Sept. 18, 1991) (dismissing respondent's constitutional challenge which was based on the argument that the civil protection order statute was irrational and unreasonable to effectuate a statutory purpose; deprives him of liberty interests in his home, family and reputation; results in cruel and unusual punishment and violates the fundamental rights implied in the Ninth Amendment).

650. *Id.*

651. *Id.*

652. *Id.*

653. *Id.*

654. Schramek v. Bohren, 429 N.W.2d 501, 502 (Wis. Ct. App. 1988) (holding that spousal abuse statute does not restrict the defendant's free speech rights or violate equal protection or due process rights); *see also* State v. Brockelman, 862 P.2d 1040 (Colo. Ct. App. 1993) (finding no equal protection violation where a higher penalty is imposed under criminal protection order statute than civil statute because they serve different purposes and the former protects witnesses in criminal prosecutions).

655. *Id.*

656. State v. Sutley, No. 90-A-1495, 1990 Ohio App. LEXIS 5520 (Ct. App. Dec. 14, 1990) (holding that a probation order which restricted the defendant from one quadrant of the city where petitioner resided and prevented him from interacting with the victim or the victim's family did not violate the defendant's right to free association).

657. People v. Blackwood, 476 N.E.2d 742 (Ill. App. Ct. 1985) (holding respondent in contempt of civil protection order for calling his ex-wife a "fucking whore" and a "dead bitch," and telling her he had a plot waiting for her did not violate the respondent's first amendment free speech rights); Gilbert v. State, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) (holding that a protection order issued under the domestic violence statute did not violate right to free speech where respondent was held in contempt for threatening the petitioner over the telephone because rights to free speech do not apply to threatening and abusive communications to persons who have demonstrated a need for protection from immediate

court held that the defendant's right to free speech was not violated when he was held in contempt for violating a protection order.[658] The right to free speech does not apply to threatening and abusive communications directed toward a person who has demonstrated a need for protection from immediate and present danger.[659] In *Commonwealth v. Rexach*,[660] the court held that the police could conduct warrantless searches and seizures of weapons consistent with the Fourth Amendment, since police officers are obligated to protect abuse victims and without such police action, the purpose of the domestic violence statute would be frustrated.[661]

Procedural aspects of civil protection order statutes have also been held constitutional. Courts have held that civil protection order statutes do not violate the defendant's right to a jury trial. In *Cooke v. Naylor*,[662] the Supreme Judicial Court of Maine held that the Protection From Abuse Act[663] is civil in nature and does not violate the constitutional right to jury trial in criminal cases, even though the court may later impose criminal sanctions for violations of the protection orders.[664] In *Eichenlaub v. Eichenlaub*,[665] the court held that the section of the Prevention From Abuse Act[666] providing for a jail sentence for contempt without a right to a jury trial enjoys a strong presumption of constitutionality, because it does not plainly violate the constitutional right to jury trial, where the maximum sentence was six months in jail plus a $1000 fine.[667]

Finally, courts have also held that provisions in civil protection order statutes which permit court clerks to assist petitioners in filing for protection orders are not unconstitutional. In *State v. Errington*,[668] the Supreme Court of Minnesota held that subsections of the Domestic Abuse Act[669] which required court employees to

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and present danger); *Schramek*, 429 N.W.2d at 501 (holding that spousal abuse statute does not restrict the defendant's free speech rights or violate equal protection or due process).

658. *Id.* at 1208.
659. *Id.* at 1210.
660. 478 N.E.2d 744 (Mass. App. Ct. 1985).
661. *Id.* at 746.
662. 573 A.2d 376 (Me. 1990).
663. ME. REV. STAT. ANN. tit. 19, §§ 761-770 (West Supp. 1992).
664. *Cooke*, 573 A.2d at 377-78.
665. 490 A.2d 918 (Pa. Super. Ct. 1985).
666. 23 PA. CONS. STAT. ANN. §§ 6113, 6114 (1992).
667. *Eichenlaub*, 490 A.2d at 920.
668. 310 N.W.2d 681 (Minn. 1981).
669. MINN. STAT. ANN. § 518B (West Supp. 1993).

assist petitioners with writing and filing petitions for protection orders do not violate the constitutional doctrine of separation of powers.[670]

Courts have also addressed the issue of the constitutionality of marriage license fees and divorce surcharges to fund domestic violence programs and victim services.[671] In *Browning v. Corbett*,[672] the court quite clearly saw the relationship between marriage and domestic violence. It held that a $12 surcharge fee on both parties in a marriage dissolution action does not violate equal protection or due process because the fees are rationally related to the state's legitimate interest in providing assistance to domestic violence victims.[673] The court explicitly found a rational relationship between domestic violence victims and fees on applicants for divorce and for marriage licenses.[674] The court concluded that the state legislature may reasonably and rationally determine that the majority of persons who will benefit from the domestic violence fund will be those who marry or divorce in the state.[675]

2. Standing

In order for a party to have standing in court, the party must have a sufficient stake in a controversy to obtain judgment on his or her behalf.[676] A plaintiff with standing has a protectable interest in the legal outcome of a case.[677] The court in *Sweep v. Sweep*[678] recognized that a non-adoptive step-parent who was a victim of domestic violence had standing to appeal a custody order involving her

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670. *Errington*, 310 N.W.2d at 682-83.

671. A number of states mandate such fees be paid to fund domestic violence programs. *See, e.g.*, CAL. CIV. CODE § 18305 (West Supp. 1993); FLA. STAT. ANN. § 741.01 (West 1993); IDAHO CODE § 39-5210 (1993); MISS. CODE ANN. § 25-7-13 (Supp. 1993); MONT. CODE ANN. § 52-6-105 (1993); NEV. REV. STAT. ANN. § 122.060 (Michie 1993); N.C. GEN. STAT. § 161-11.2 (1993); OHIO REV. CODE ANN. § 3113.34 (Baldwin 1992); S.D. CODIFIED LAWS ANN. § 25-1-10 (1993); W. VA. CODE § 48-2C-6 (1992).

672. 734 P.2d 1030 (Ariz. Ct. App. 1986).

673. *Id.* at 1032-33.

674. *Id.*

675. *Id.* However, an Illinois court struck down a marriage license fee which funded domestic violence programs. In Boynton v. Kusper, 494 N.E.2d 135 (Ill. 1986), the court held that a marriage license fee designated to fund domestic violence shelters and service programs was unconstitutionally levied on a narrow class of people who may or may not become eligible for domestic violence services. The court found the relationship between the purchase of a marriage license and domestic violence too remote to satisfy the constitutional rational basis test. *Id.*

676. Sierra Club v. Horton, 405 U.S. 727, 731-32 (1971).

677. Guidry v. Roberts, 331 So. 2d 44, 47 (La. Ct. App. 1976).

678. 358 N.W.2d 451 (Minn. Ct. App. 1984).

step-child in a domestic violence proceeding.[679] In this case, petitioner requested an order of protection from her husband on behalf of herself, their three children, and respondent's daughter, Tracy, who had been living with them.[680] At the domestic abuse hearing, custody of Tracy, whose biological mother was dead, was granted to her maternal grandparents.[681] Petitioner appealed the custody order, and her ability to appeal such an order was contested.[682] The court held that the petitioner, the non-adoptive step-parent in the domestic abuse case, has standing to appeal an order of protection granting custody of her husband's child to the child's mother's parents as she had a sufficient parental interest in the matter.[683]

This ruling is consistent with the Uniform Child Custody Jurisdiction Act (the "UCCJA"), adopted in most states, which provides that if the court learns from information furnished by the parties or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his or her joinder as a party.[684]

G. Remedies Available to Petitioners In Civil Protection Orders

1. The Court's Inherent Power to Award Any Constitutionally Defensible Relief

Each victim of domestic violence faces different dangers, and must be protected by the court in accordance with her individual needs. As the National Institute of Justice found in its Civil Protec-

679. *Id.* at 453.
680. *Id.* at 452.
681. *Id.*
682. *Id.*
683. *Id.* at 453.
684. *See, e.g.*, D.C. CODE ANN. § 16-4510(a) (1992).

tion Order Study, the vast majority of jurisdictions[685]

> explicitly grant judges the latitude to grant *any* constitutionally defensible relief that is warranted . . . . Such a provision means, for example, that the court does not need specific statutory authority to impound the victim's address (that is, to keep it secret) if this measure is considered necessary to protect her safety.[686]

The National Council of Juvenile and Family Court Judges recommends that judges employ any constitutionally defensible relief that is warranted.[687] By interpreting their statutory mandate broadly, courts have the power necessary to craft remedies that will counter the wide variety of perilous situations each victim of domestic violence faces. In *Powell v. Powell*,[688] the court articulated a philosophy embraced by enlightened courts and legislatures across the country. The *Powell* court held that the domestic violence statute must be interpreted broadly in light of its purpose, and explained that courts have broad discretion to fashion any remedy appropriate to stop violence and to effectively resolve the matter.[689]

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685. ALA. CODE § 30-5-7(a) (1993); ALASKA STAT. § 25.35.010 (1993); ARIZ. REV. STAT. ANN. § 13-3602(D)(4) (1993); ARK. CODE ANN. § 9-15-205(6) (Michie 1993); CAL. FAM. CODE § 2035 (West 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West 1992); DEL. CODE ANN. tit. 10, §§ 945, 948, 949(11) (1993); FLA. STAT. ANN. § 741.30 (West Supp. 1993); HAW. REV. STAT. § 586-5.5 (Supp. 1992); IDAHO CODE § 39-6306 (1993); 750 ILCS 60/214(b)(13) (1992); IND. CODE ANN. § 34-4-5.1-5 (Burns Supp. 1993); IOWA CODE ANN. § 236.4.2 (West Supp. 1993); KY. REV. STAT. ANN. § 403.750(1)(g) (Michie Supp. 1992); LA. REV. STAT. ANN. § 46:2136 (West Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766 (West 1993); MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); MASS. GEN. LAWS. ANN. ch. 209A, § 3 (West 1992); MICH. COMP. LAWS ANN. § 600.2950 (Supp. 1993); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MO. REV. STAT. § 455.050 (1993); MONT. CODE ANN. § 40-4-121 (1993); NEV. REV. STAT. ANN. § 33.030 (Michie 1993); N.H. REV. STAT. ANN. § 173-B:4 (1990); N.J. STAT. ANN. § 2C: 25-29(b) (West 1992); N.M. STAT. ANN. § 40-13-5 (Michie 1993); N.Y. FAM. CT. LAW § 842 (McKinney 1993); N.D. CENT. CODE § 14-07.1-02 (1992); OHIO REV. CODE ANN. § 3113.31(E)(1)(b) (Baldwin 1992); OKLA. STAT. ANN. tit. 22, § 60.4(C)-(D) (West 1992); 23 PA. CONS. STAT. ANN. § 6107(d) (1992); R.I. GEN. LAWS § 15-15-3 (1993); S.C. CODE ANN. § 20-4-60(c)(7) (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 25-10-5 (1992); TEX. FAM. CODE ANN. § 71.11 (West 1993); UTAH CODE ANN. § 30-6-6 (1993); VA. CODE ANN. § 16.1-279.l(A)(6) (Michie 1992); WASH. REV. CODE ANN. § 26.50.060 (West Supp. 1992); W. VA. CODE § 48-2A-6 (1993); WIS. STAT. ANN. § 813.12(4) (West 1993); WYO. STAT. § 35-21-105(a)(vi) (1993); D.C. CODE ANN. § 16-1005 (1992).

686. NIJ CPO STUDY, *supra* note 19, at 33.

687. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE PROJECT, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (1990), *reprinted in* 41 JUV. & FAM. CT. J. at 17-18 (1990) [hereinafter FAMILY VIOLENCE PROJECT].

688. 547 A.2d 973 (D.C. 1988).

689. *See also* Siggelkow v. State, 731 P.2d 57, 62 (Alaska 1987) (holding that a court

2. Catch-all Provisions[690]

Civil protection order statutes in thirty-six states, the District of Columbia, and Puerto Rico contain catch-all provisions that authorize courts to offer domestic violence a broad range of relief.[691] Statutory catch-all provisions which authorize all remedies needed to prevent future abuse have been interpreted broadly by the courts. Under these provisions, courts have ordered monetary relief and child support payments,[692] the permanent transfer of jointly owned real estate,[693] the removal of a family dog,[694] and compensatory and punitive damages.[695] The court in *Powell* confronts a situation in which it was nec-

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hearing a divorce action has the authority to hear a variety of causes and impose remedies it sees fit, including a no contact order).

690. *See generally* MODEL CODE, *supra* note 15, §§ 305, 306.

691. ALA. CODE § 30-5-7(a) (1989); ALASKA STAT. § 25.35.010(d) (1991); ARIZ. REV. STAT. ANN. § 13-3602(D)(4) (1989); ARK. STAT. ANN. § 9-15-205(a)(6) (1993); CAL. FAM. CODE § 2035 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); DEL. STAT. ANN. tit. 10, §§ 945(4), 948(b), 949(a)(11) (Supp. 1993); D.C. CODE ANN. § 16-1005(c)(10)(1989); FLA. STAT. ANN. § 741.30(4)(b)(g) (West 1986); HAW. REV. STAT. § 586-5(b) (1987 & Supp. 1993); IDAHO CODE § 39-6306(1)(e) (1993); 750 ILCS 60/214(b)(17) (Smith-Hurd 1992 & Supp. 1993); IOWA CODE ANN. § 236.5(2) (1985 & Supp. 1993); KY. REV. STAT. ANN. § 403.750(1)(h) (Michie/Bobbs-Merrill 1984 & Supp. 1992); LA. REV. STAT. ANN. § 46-2136 (West 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(K) (West 1981 & Supp. 1993); MD. CODE ANN., FAM. LAW § 4-506(d) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MINN. STAT. ANN. § 518B.01(6)(a)(11) (West 1990 & Supp. 1993); MO. ANN. STAT. § 455.050 (Vernon 1986 & Supp. 1993); NEV. REV. STAT. ANN. § 33.030(1)(e) (Michie 1986); N.H. REV. STAT. ANN. § 173B:4(I) (1990); N.J. STAT. ANN. § 2C: 25-29(b) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5(A)(5) (Michie 1989 & Supp. 1993); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994); N.D. CENT. CODE § 14-07.1-02.4 (1991 & Supp. 1993); OHIO REV. CODE ANN. § 3113.312(E)(1)(h) (Anderson 1989 & Supp. 1992)); OKLA. STAT. ANN. tit. 22, § 60.4C., D. (West 1992); PA. STAT. ANN. tit. 23, § 6108(a) (1991); R.I. GEN. LAWS § 15-15-3(1) (1988 & Supp. 1993); S.C. CODE ANN. § 20-4-60(c)(7) (Law. Co-op 1985); S.D. CODIFIED LAWS ANN. § 25-10-5(6) (1984); TEX. FAM. CODE ANN. § 71.11(a) (West 1986 & Supp. 1993); UTAH CODE ANN. § 30-6-6(1) (1989 & Supp. 1993); VA. CODE ANN. § 16.1-279.1.A(6) (Michie 1988 & Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(e) (West 1986 & Supp. 1993); W. VA. CODE § 48-2A-6(a) (1992 & Supp. 1993); WYO. STAT. § 35-21-105(a)(vi) (1988); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990).

692. *See, e.g.*, *Powell*, 547 A.2d at 975 (ordering respondent to pay monetary relief including child support and mortgage payments under domestic violence statute's catch-all provision although there was no explicit authorization for the remedies in the D.C. statute).

693. *See, e.g.*, Rayan v. Dykeman, 274 Cal. Rptr. 672, 675 (Ct. App. 1990) (holding that the court had the authority to enter and enforce the order in light of the nonexclusive remedies provision of the Domestic Violence Prevention Act and the stipulation of the parties that plaintiff would permanently transfer jointly owned real estate property to the defendant).

694. *See, e.g.*, Jane Y. v. Joseph Y., 474 N.Y.S.2d 681, 683 (Fam. Ct. 1984) (ordering the removal of the family dog where the dog was trained by the wife's husband to attack her and anyone who was the subject of his wrath).

695. *See, e.g.*, Sielski v. Sielski, 604 A.2d 206 (N.J. Super. Ct. Ch. Div. 1992) (holding

essary to utilize the catch-all provision, and demonstrates how and why these provisions work in the context of domestic violence.[696] The court held that the trial court has the authority to grant monetary relief in a civil protection order proceeding, although this remedy was not specially provided for by statute.[697] Petitioner argued that because her financial dependency on her husband was a major factor in the perpetuation of violence in the family, the only effective means of stopping the abuse and protecting the wife was for the husband to vacate the home and make it financially and physically secure for the wife.[698] The court recognized that the legislative intent in amending the statute to include a catch-all provision was to enable courts to find individualized and supremely effective resolutions for each case.[699] It found additional authority for awarding such relief in the fact that several provisions in the statute deal with temporary adjustment of property interests, which is a form of monetary relief.[700]

The case of *Anne B. v. State Board of Control*,[701] although not involving a civil protection order, illustrates the need for courts to at times go beyond powers specifically enumerated in statutes, and to fashion remedies which address the problems unique to individual victims of domestic abuse. Anne. B. was brutally raped by Percy B. Because of their previous relationship, however, the district attorney decided not to prosecute the case.[702] Anne B. was then approached

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that the award of compensatory damages of and punitive damages was supported by the intent of the legislation and was appropriate in order to deter the defendant from repeating violent behavior); Mugan v. Mugan, 555 A.2d 2, 3 (N.J. Super. Ct. App. Div. 1989) (upholding protection order and stating that punitive damages may be awarded in addition to compensatory damages for losses suffered as a result of the violence).

696. *Powell*, 547 A.2d at 975.

697. *Id.* at 975.

698. *Id.* at 974; *see generally* FAMILY VIOLENCE PROJECT, *supra* note 687, at 17-18 (urging judges to order child support and other financial support even in *ex parte* orders because "economic dependence is frequently the reason the victim returns to the offender").

699. *Id.*

700. *Powell*, 547 A.2d at 974; *see also* Maldonado v. Maldonado, 631 A.2d 40 (D.C. 1993). In order to best protect the victim of domestic violence the court included certain provisions in the civil protection order which were not specifically authorized by the District of Columbia's domestic abuse statute. The order stated that:

> [h]usband shall relinquish possession and/or use of the wife's pocketbook, wallet, working permit, ID card, bank card, Social Security card, passport, and any other items of the children's personal belongings, table, four chairs and dishes . . . the husband shall not withdraw the application for permanent residence that he had filed on behalf of the wife.

Id. at 41.

701. 209 Cal. Rptr. 83 (Ct. App. 1984).

702. *Id.* at 85.

by a state victim assistance program and was encouraged to seek therapy at the expense of the state.[703] The State Board, however, refused to pay and refused to hear her appeal.[704] The trial court denied issuance of a writ commanding the State Board to hear the appeal.[705] The appellate court, however, granted Anne B. a new hearing on the issue of therapy payment.[706] This court realized that therapy, although not a remedy specifically mentioned in the statute, may be found necessary to best protect this particular victim.[707]

While statutes and courts offer a broad variety of relief to domestic violence petitioners, some courts have limited the relief batterers can obtain at the civil protection order hearing. In *Basile v. Basile*,[708] the court held that the domestic violence statute was not broad enough to authorize the court to hear respondent's counterclaim for a change of the parties' daughter's surname.[709] Other courts have denied relief that was deemed unrelated to the protection of the victim.[710] Judicial authorities urge courts to gain an understanding of the characteristics of domestic abuse, and have recognized that "judges should provide all of the relief that the victim needs given the particular circumstances of the case."[711]

3. No Further Abuse Clauses

Forty-seven states, the District of Columbia, and Puerto Rico statutorily provide no further abuse clauses in civil protection orders.[712] Of the remaining states, South Carolina[713] and

703. *Id.*

704. *Id.* at 86.

705. *Id.*

706. *Id.* at 88.

707. *See id.* at 87.

708. 604 A.2d 693 (N.J. Super. Ct. Ch. Div. 1992).

709. *Id.* at 694.

710. *See, e.g.*, Leffingwell v. Leffingwell, 448 N.Y.S.2d 799, 800 (App. Div. 1982) (imposing a weekend curfew is not necessary to forestall offensive conduct where husband is ordered to vacate marital home).

711. FAMILY VIOLENCE PROJECT, *supra* note 687, at 17; *see also* Swenson v. Swenson, No. C4-92-816, 19 FLR 1022 (Minn. Ct. App. Oct. 20, 1992) (stating that although remedial legislation is generally accorded a liberal construction, such construction must be solely in favor of the injured party and not in favor of the abuser and holding that the court erred in excluding the abused wife from the marital residence).

712. ALA. CODE § 30-5-7(a)(1) (1992); ALASKA STAT. § 25.35.010(b)(1) (1993); ARIZ. REV. STAT. ANN. § 13-3602 D (1993); COLO. REV. STAT. ANN. § 14-4-102 (West 1993); CONN. GEN. STAT. ANN. § 46-15(b) (West 1993); DEL. CODE ANN. tit 10, § 949 (1993); D.C. CODE ANN. § 16-1005 (1992); FLA. STAT. ANN. § 741.30(4)(b) (West Supp. 1992); GA. CODE ANN. § 19-13-4 (Supp. 1993); HAW. REV. STAT. § 586-4 (Supp. 1993); IDAHO CODE

Wisconsin[714] have recognized no further abuse clauses in their case law, and Arkansas and New York can include no further abuse clauses by way of their statutory catch-all provisions.[715] These clauses effectively prohibit many actions that respondents direct toward petitioners,[716] petitioners' children,[717] and petitioner's other family[718]

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§ 39-6306 (1993); 750 ILCS 60/214 (1992); IND. CODE ANN. § 34-4-5.1(a)(1) (West Supp. 1992); IOWA CODE ANN. § 236.4.2(a) (West Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(1) (Supp. 1993); KY. REV. STAT. ANN. § 403.750(1) (Michie 1993); LA. REV. STAT. ANN. § 46:2135(A)(1) (West 1992); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); MASS. GEN. LAWS. ANN. ch. 209A, § 3 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600.2950 (West Supp. 1993); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MISS. CODE ANN. § 93-21-3 (Supp. 1993); MO. REV. STAT. § 455.050 (Supp. 1993); MONT. CODE ANN. § 40-4-121 (1993); NEB. REV. STAT. § 42-924(1) (1992); NEV. REV. STAT. ANN. § 33.030(a) (Michie 1993); N.H. REV. STAT. ANN. § 173-B1:(I) (1992); N.J. STAT. ANN. § 2C:25-29(b) (West 1992); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); N.C. GEN. STAT. § 50-B-1 (1993); N.D. CENT. CODE § 14-07.1-02(4)(a) (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(a) (Baldwin 1992); OKLA. STAT. ANN. tit. 22, § 60.4(C)-(D) (West 1992); OR. REV. STAT. § 107-716 (1992); 23 PA. CONS. STAT. ANN. § 6107(d) (1992); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990); R.I. GEN. LAWS § 15-15-3(1)(a) (Supp. 1993); S.D. CODIFIED LAWS ANN. § 28-10-5 (1992); TENN. CODE ANN. § 36-3-606 (1992); TEX. FAM. CODE ANN. §71.11 (1992); UTAH CODE ANN. § 30-6-6 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1103(a)(1) (1992); VA. CODE ANN. § 16.1-279.1.4.1 (Michie 1992); WASH. REV. CODE ANN. § 26.50.060 (West 1992); W. VA. CODE § 48-2A-6 (1993); WYO. STAT. § 35-21-105(a)(1) (1992); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

713. *See, e.g.*, Maldonado v. Maldonado, 631 A.2d 40, 41 (D.C. 1993) (involving civil protection order which barred husband from molesting, assaulting or in any manner threatening or physically abusing the petitioner); Turner v. City of North Charleston, 675 F. Supp. 314, 317 (D. S.C. 1987) (concerning civil protection order forbidding husband to follow, physically abuse, harass or harm petitioner).

714. Banks v. Pelot, No. 89-2106, 1990 Wisc. App. LEXIS 640 (Wis. Ct. App. July 3, 1990) (noting that the court may issue a protection order based on respondent following and threatening petitioner and may constitutionally enjoin harassment of individuals).

715. ARK. CODE ANN. § 9-15-206(6) (Michie 1993); N.Y. DOM. REL. LAW § 842 (McKinney 1992).

716. ALA. CODE § 30-5-7(a)(1) (1992); ARIZ. REV. STAT. ANN. § 13-3602 D (1993); DEL. CODE ANN. tit 10, § 949 (1993); HAW. REV. STAT. § 586-4 (Supp. 1993); 750 ILCS 60/214(b)(1) (1992); IND. CODE ANN. § 34-4-5.1(a)(1) (West Supp. 1992); IOWA CODE ANN. § 236.4.2(a) (West Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(1) (Supp. 1993); KY. REV. STAT. ANN. § 403.750(1) (Michie 1993); LA. REV. STAT. ANN. § 46:2135(A)(1) (West 1992); MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); NEV. REV. STAT. ANN. § 33.030(a) (Michie 1993); N.H. REV. STAT. ANN. § 173-B:1:(I) (1992); N.M. STAT. ANN. § 40-13-5 (Supp. 1993); N.C. GEN. STAT. § 50-B-1 (1993); N.D. CENT. CODE § 14-07.1-02(4)(a) (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(a) (Anderson 1992); R.I. GEN. LAWS § 15-15-3(1)(a) (Supp. 1993); UTAH CODE ANN. § 30-6-6 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1103(a)(1) (1992); VA. CODE ANN. § 16.1-279.1.4.1 (Michie 1992); W. VA. CODE § 48-2A-6 (1993); WYO. STAT. § 35-21-105(a)(1) (1992); *see Turner*, 675 F. Supp. at 314 (no further abuse of petitioner); *In re* Marriage of D'Attomo, 570 N.E.2d 796, 797-98 (Ill. App. Ct. 1991) (same); Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989) (same); Smart v. Smart, 297 S.E.2d 135 (N.C. Ct. App. 1982) (same); Wagner v. Wagner, 564 A.2d 162 (Pa. Super. Ct.

or household members.[719] They can command respondents not to act recklessly,[720] not to perform conduct intended to cause physical or emotional harm,[721] not to disturb the peace by telephone,[722] and not to threaten,[723] harass,[724] intimidate,[725] stalk,[726] attack or

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1989) (same); Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. Ct. 1985) (same); Cooper v. Merkel, 470 N.W.2d 253 (S.D. 1991) (same); *see also Maldonado*, 631 A.2d at 40 (involving civil protection order which barred husband from molesting, assaulting or in any manner threatening or physically abusing the petitioner); MODEL CODE, *supra* note 15, §§ 305, 306.

717. ALA. CODE § 30-3-7(a)(1) (1992); DEL. CODE ANN. tit. 10, § 949 (1993); KAN. STAT. ANN. § 60-3107(a)(1) (Supp. 1993); MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); NEV. REV. STAT. ANN. § 33.030(a) (1993); 23 PA. CONS. STAT. ANN. § 6107(d) (1992); UTAH CODE ANN. § 30-6-6 (1992); VT. STAT. ANN. tit. 15, § 1103(a)(1) (1992); W. VA. CODE § 48-2A-b (1993); Stuckey v. Stuckey, 768 P.2d 694 (Colo. 1989) (no further abuse of petitioner's children); *In re* Marriage of McCoy, 635 N.E.2d 883 (Ill. App. Ct. 1993) (same); *D'Attomo*, 570 N.E.2d at 796 (same); *Eichenlaub*, 490 A.2d at 918 (same); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

718. DEL. CODE ANN. tit. 10, § 949 (1993); N.H. REV. STAT. ANN. § 173-B:4(a)(4) (1992); 23 PA. CONS. STAT. ANN. § 6107(d) (1992); Caldwell v. Coppola, 268 Cal. Rptr. 453 (Ct. App. 1990) (no further abuse of petitioner's family); *Stuckey*, 768 P.2d at 694 (same); *D'Attomo*, 570 N.E.2d at 796 (same); *Eichenlaub*, 490 A.2d at 918; *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

719. CAL. FAM. CODE §§ 5505, 2035 (West 1993); N.H. REV. STAT. ANN. § 173-B:I.4(a)(4) (1990 & Supp. 1992); *Caldwell*, 268 Cal. Rptr. at 453 (no further abuse of petitioner's household members); *Stuckey*, 768 P.2d at 694 (same); *D'Attomo*, 570 N.E.2d at 796 (same); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

720. DEL. CODE ANN. tit. 10, § 949 (1993); N.H. REV. STAT. ANN. § 173-B:I.4(a)(4) (1990 & Supp. 1992).

721. DEL. CODE ANN. tit. 10, § 949 (1993); N.H. REV. STAT. ANN. § 173-B:I.4(a)(4) (1990 & Supp. 1992).

722. CAL. FAM. CODE §§ 5505, 2035 (West 1993); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

723. CAL. FAM. CODE §§ 5505, 2035 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(2)(a) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949 (1993); MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4I.(a)(4) (1990 & Supp. 1992); N.D. CENT. CODE § 14-07.1-02.4.a (1991); Wagner v. Wagner, 564 A.2d 162 (Pa. Super. Ct. 1989) (sentencing for violation of an order not to threaten); Banks v. Pelot, No. 89-2106, 1990 Wisc. App. LEXIS 640 (Wis. Ct. App. July 3, 1990) (no threats); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

724. CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949 (1993); 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993); LA. REV. STAT. ANN. § 46:2135A.(1) (West 1982); MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); N.H. REV. STAT. ANN. § 173B:4I.(a)(4) (1990 & Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.1(3) (West 1992 & Supp. 1993); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (1991); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990); Turner v. City of North Charleston, 675 F. Supp. 314 (D. S.C. 1987) (no harassment); Caldwell v. Coppola, 268 Cal. Rptr. 453 (Ct. App. 1990) (holding an order may enjoin harassment although void for improper service); State v. Brockelman, 862 P.2d 1040 (Colo. Ct. App. 1993) (same); *In re* D'Attomo, 570 N.E.2d 796 (Ill. App. Ct. 1991) (enjoining harassment); *Wagner*, 564 A.2d at 162 (sentencing from a violation of an order prohibiting harassment); *Banks*, 1990 Wisc. App. LEXIS at *640 (holding court may

strike,[727] contact,[728] approach,[729] molest,[730] interfere with,[731] infringe upon the personal liberty of,[732] follow,[733] assault,[734] sexually assault,[735] and/or physically abuse[736] protected persons.

No further abuse clauses have survived constitutional challenge. In *Banks v. Pelot*,[737] a respondent appealed a civil protection order enjoining him from harassing the petitioner, stating that the injunction was impermissibly broad under the terms of the statute and encroached upon his First Amendment right to freedom of speech.[738] The court held that the statute, which allows courts to issue injunc-

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constitutionally enjoin the harassment of individuals); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

725. DEL. CODE ANN. tit. 10, § 949 (1993); 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4I.(a)(4) (1990 & Supp. 1992); P.R. LAWS ANN. tit. 8, § 621 (1992); *Brockelman*, 862 P.2d at 1040.

726. 23 PA. CONS. STAT. ANN. § 6102(a)(2) (1991).

727. CAL. FAM. CODE §§ 5505, 2035 (West 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993).

728. *See, e.g.*, Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989); Stuckey v. Stuckey, 768 P.2d 694 (Colo. 1989); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

729. *Cobb*, 545 N.E.2d at 1161.

730. CAL. FAM. CODE §§ 5505, 2035 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(a) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(1) (1990 & Supp. 1992); N.D. CENT. CODE § 14.07.1-02.4.a (Supp. 1993); R.I. GEN. LAWS § 15-15-3(1)(a) (Supp. 1993); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990); *Brockelman*, 862 P.2d at 1040 (no intimidation); State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991).

731. *See, e.g.*, State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991).

732. CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4I(a)(1) (1990); VT. STAT. ANN. tit. 15, § 1103(a)(1) (1989).

733. *See, e.g.*, Turner v. City of North Charleston, 675 F. Supp. 314 (D. S.C. 1987) (no following); Banks v. Pelot, No. 89-2106, 1990 Wisc. App. LEXIS 640 (Wis. Ct. App. July 3,1990) (holding that a court may issue a protection order based on respondent following and threatening petitioner).

734. CAL. FAM. CODE §§ 5505, 2035 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(2)(a) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); R.I. GEN. LAWS § 15-15-3(1)(a) (Supp. 1993); Smart v. Smart, 297 S.E.2d 135 (N.C. Ct. App. 1982).

735. CAL. FAM. CODE §§ 5505, 2035 (West 1993); CONN. GEN. STAT. ANN. § 46b-15b (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949 (1993); N.H. REV. STAT. ANN. § 173-B:4I(a)(4) (1990 & Supp. 1992).

736. Turner v. City of North Charleston, 675 F. Supp. 314 (D. S.C. 1987); *In re* Marriage of D'Attomo, 570 N.E.2d 796 (Ill. App. Ct. 1991); Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989); Wagner v. Wagner, 564 A.2d 162 (Pa. Super. Ct. 1989); Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. Ct. 1985); Cooper v. Merkel, 470 N.W.2d 253 (S.D. 1991).

737. No. 89-2106, 1990 Wisc. App. LEXIS 640 (Wis. Ct. App. July 3, 1990).

738. *Id.* at *1.

tions against harassment of individuals, is understandable and comprehensive.[739] The court explained that "where the purpose of the injunction is clear, the injunction has little chance of infringing upon constitutionally protected speech."[740] In *Gilbert v. State*,[741] the defendant appealed from an order of the court which determined that he had violated protection orders by kicking down his wife's door, breaking out the rear window and damaging the grill of her car, and threatening her over the telephone. He based his challenge on the grounds that he was not notified of the prohibited conduct toward his wife due to the vagueness of the state's Protection From Abuse Statute.[742] The Criminal Court of Appeals held that the statute was not unconstitutionally vague and that the defendant was not denied due process in connection with the protection orders.[743]

4. Stay Away Provisions

Stay away provisions are standard in virtually every state's civil protection order statute.[744] The National Council of Juvenile and

739. *Id.* at *4.

740. *Id.*

741. 765 P.2d 1208 (Okla. Crim. App. 1988).

742. *Id.* at 1210.

743. *Id.* at 1210-11; *see also* State v. Sutley, No. 90-A-1495, 1990 Ohio App. LEXIS 5520 (Ohio Ct. App. Dec. 14, 1990) (holding that probation order which restricted the defendant from one quadrant of the city where petitioner resided and prevented him from interacting with the victim or victim's family did not violate the defendant's freedom of association rights); People v. Whitfield, 498 N.E.2d 262 (Ill. App. Ct. 1986) (finding defendant in violation of protection order where he followed his former wife in his car and holding that such behavior constituted harassment and the statute proscribing "harassing" conduct was not unconstitutionally vague); State v. Sarlund, 407 N.W.2d 544 (Wis. 1987) (holding that the harassment injunction statute was not unconstitutionally vague or overbroad); Master v. Eisenbart, No. 90-2897, 1991 Wisc. App. LEXIS 1270 (Wis. Ct. App. Sept. 18, 1991) (dismissing respondent's constitutional challenge which stated that the civil protection order statute was irrational and unreasonable to effectuate a statutory purpose; deprives him of liberty interests in his home, family and reputation; results in cruel and unusual punishment and violates the fundamental rights implied in the Ninth Amendment); State v. Kiser, No. 90-1192-CR, 1990 WL 250437 (Wis. Ct. App. Nov. 14, 1990) (holding that harassment injunction statute not unconstitutionally vague where defendant held in contempt for making five collect telephone calls to the petitioner within a thirty minute period); Banks v. Pelot, No. 89-2106, 1990 Wisc. App. LEXIS 640 (Wis. Ct. App. July 3, 1990) (holding that the harassment statute was understandable and comprehensive).

744. ARIZ. REV. STAT. ANN. § 13-3602 (Supp. 1993); CAL. FAM. CODE § 2035 (West 1993); COLO. REV. STAT. ANN. § 14-4-102 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); D.C. CODE ANN. § 16-1005 (1981); FLA. STAT. ANN. § 741.30(4)(b) (West 1993); GA. CODE ANN. § 19-13-4 (Supp. 1993); IDAHO CODE § 39-6306 (1993); LA. REV. STAT. ANN. § 46:2135 (West 1982); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); MASS. GEN.

Family Court Judges recommends: "civil protection orders should remove the offender from the home and allow the victim and children to remain with appropriate protection, safety plans, and support."[745] Courts and legislatures have ordered the respondent to stay away from the petitioner,[746] petitioner's children,[747] family members or

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LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600.2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MISS. CODE ANN. § 93-21-13 (Supp. 1993); MO. REV. STAT. § 455.050 (Supp. 1993); NEB. REV. STAT. § 42-924(1), (2) (Supp. 1992); NEV. REV. STAT. ANN. § 33.030 (Michie 1988); N.H. REV. STAT. ANN. § 173-B:I4 (1990 & Supp. 1992); N.J. STAT. ANN. § 2C:25-29.b.(6) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); N.D. CENT. CODE § 14-07.1-02.4.b (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4(C),(D) (West 1992); OR. REV. STAT. § 107.716 (1991); 23 PA. CONS. STAT. ANN. § 6108(d) (1991); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990); R.I. GEN. LAWS § 15-15-3 (Supp. 1993); TENN. CODE ANN. § 36-3-606 (1991); TEX. FAM. CODE ANN. § 71.11 (West Supp. 1993); UTAH CODE ANN. § 30-6-6 (Supp. 1993); VA. CODE ANN. § 16.1-279.1 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.060 (West Supp. 1993); W. VA. CODE § 48-2A-6 (Supp. 1993); WIS. STAT. ANN. § 813.12.(4) (West Supp. 1993); WYO. STAT. § 35-21-105.(a) (1977); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

745. FAMILY VIOLENCE PROJECT, *supra* note 687, at 10.

746. *See, e.g.*, N.J. STAT. ANN. § 2C:25-29 (West 1992); Turner v. City of North Charleston, 675 F. Supp. 314 (D. S.C. 1987) (involving permanent restraining order forbidding husband from following wife); Stuckey v. Stuckey, 768 P.2d 694 (Colo. 1989) (prohibiting respondent from contacting son and son's mother); Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989) (requiring respondent to stay away from petitioner); Mugan v. Mugan, 555 A.2d 2 (N.J. Super. Ct. App. Div. 1989) (holding that court may bar husband from marital home and order him to have no contact with his wife); Marquette v. Marquette, 686 P.2d 990 (Okla. Ct. App. 1984) (prohibiting husband from contacting wife); State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991) (restraining defendant from interfering with plaintiff); Harris v. Corley, No. 01-A-01-9012-CH-00446, 1991 Tenn. App. LEXIS 322 (Tenn. Ct. App. May 1, 1991) (prohibiting respondent from coming about petitioner); Lee v. State, No. 191-88, 1990 Tex Crim. App. LEXIS 195 (Tex. Crim. App. Nov. 28, 1990) (ordering respondent not to go within 200 yards of former wife's work place); State v. Kilponen, 737 P.2d 1024, 1028 (Wash. Ct. App. 1987) (requiring that respondent not approach petitioner and stay away from family residence); State v. Lewis, 508 N.W.2d 75 (Wis. Ct. App. 1993); State v. Hamilton, No. 90-2392-CR, 1991 Wisc. App. LEXIS 795 (Wis. Ct. App. May 2, 1991) (ordering respondent to stay away from petitioner's residence, the parking lot of her building, the hallways of her apartment and all areas of the apartment which she has the right to use with other tenants); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

747. *See, e.g.*, N.J. STAT. ANN. § 2C:25-29 (West 1992) (providing that a court can order respondent to stay away from petitioner's family); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994) (providing that a court can order respondent to stay away from petitioner's children); *Stuckey*, 768 P.2d at 694 (precluding defendant from approaching, threatening, molesting or injuring son and son's mother); *Andisha*, 805 P.2d at 718 (Or. Ct. App. 1991) (restraining the defendant from interfering with the plaintiff and the minor children in her custody and from entering her home, school, church and the children's day care center); Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. Ct. 1985) (excluding defendant from the marital home and prohibited him from abusing plaintiff and the children); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

household members,[748] the general location of the petitioner,[749] petitioner's property,[750] petitioner's residence,[751] the parking lot of petitioner's apartment building,[752] the hallways of petitioner's apart-

748. *See, e.g.*, N.J. STAT. ANN. § 2C:25-29.b.(6) (West Supp. 1993) (providing that a court can order respondent to stay away from petitioner's family and household members); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994) (providing that a court can order respondent to stay away from petitioner's spouse and child); State v. Sutley, No. 90-A-1495, 1990 Ohio App. LEXIS 5520 (Ohio Ct. App. Dec. 14, 1990) (involving a probation order which excluded defendant convicted of domestic violence from one quadrant of his home county and ordered to stay away from the victim and members of her family); City of Reynoldsburg v. Eichenberger, 490 A.2d 918 (Pa. Super. Ct. 1985) (prohibiting respondent from visiting or approaching family or household members including at their place of residence, employment, or school without the consent of the court); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

749. ARK. CODE ANN. § 9-15-205 (Michie 1993); *Lewis*, 508 N.W.2d at 75 (requiring respondent to stay away from any premises temporarily occupied by petitioner).

750. N.J. STAT. ANN. § 2C:25-29.b.(6) (West Supp. 1993).

751. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3602 (Supp. 1993); CAL. FAM. CODE § 2035 (West 1993); COLO. REV. STAT. ANN. § 14-4-102 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); D.C. CODE ANN. § 16-1005 (1981); FLA. STAT. ANN. § 741.30(4)(b) (West Supp. 1993); GA. CODE ANN. § 19-13-4 (Supp. 1993); IDAHO CODE § 39-6306 (1993); LA. REV. STAT. ANN. § 46:2135 (West 1982); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600.2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1993); MISS. CODE ANN. § 93-21-13 (Supp. 1993); MO. REV. STAT. § 455.050 (Supp. 1993); NEB. REV. STAT. § 42-924(1),(2) (Supp. 1992); NEV. REV. STAT. ANN. § 33.030 (Michie 1986); N.H. REV. STAT. ANN. § 173-B:4I (1990 & Supp. 1992); N.J. STAT. ANN. § 2C:25-29.b.(6) (West Supp. 1992); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); N.D. CENT. CODE § 14-07.1-02.4.b (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4(C),(D) (West 1992); OR. REV. STAT. § 107.716 (1991); 23 PA. CONS. STAT. ANN. § 6108 (1991); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990); R.I. GEN. LAWS § 15-15-3 (Supp. 1993); TENN. CODE ANN. § 36-3-606 (1991); TEX. FAM. CODE ANN. §71.11 (West Supp. 1993); UTAH CODE ANN. § 30-6-6 (1993); VA. CODE ANN. § 16.1-279.1 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.060 (West Supp. 1993); W. VA. CODE § 48-2A-6 (Supp. 1993); WIS. STAT. ANN. § 813.12.(4) (West Supp. 1993); WYO. STAT. § 35-21-105.(a) (1977); Maldonado v. Maldonado, No. 93-FM-199, 1993 D.C. App. LEXIS 227 (D.C. Sept. 13, 1993); State v. Wiltse, 386 N.W.2d 315 (Minn. Ct. App. 1986); Rogers v. Rogers, 556 N.Y.S.2d 114 (App. Div. 1990); State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991); State *ex rel.* Delisser v. Hardy, 749 P.2d 1207 (Or. Ct. App. 1988); Cooper v. Merkel, 470 N.W.2d 253 (S.D. 1991); Harris v. Corley, No. 01-A-01-9012-CH-00446, 1991 Tenn. App. LEXIS 322 (Tenn. Ct. App. May 1, 1991); Lee v. State, No. 191-88, 1990 Tex. Crim. App. LEXIS 195 (Tex. Crim. App. Nov. 28, 1990); State v. Gibson, No. 18624, 1989 W. Va. LEXIS 173 (W. Va. July 27, 1989); St. Germaine v. Chapman, 505 N.W.2d 450 (Wis. Ct. App. 1993); *Lewis*, 508 N.W.2d at 75; State v. Hamilton, No. 90-2392-CR, 1991 Wisc. App. LEXIS 795 (Wis. Ct. App. May 2, 1991); Johnson v. Miller, 459 N.W.2d 886 (Wis. Ct. App. 1990); State v. Teynor, 414 N.W.2d 76 (Wis. Ct. App. 1987); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

752. *Hamilton*, 1991 Wisc. App. LEXIS at 795.

ment,[753] the areas of petitioner's apartment that she has a right to use in common with other tenants,[754] the marital or family home,[755] petitioner's work-place,[756] petitioner's business,[757] petitioner's school,[758] petitioner's church,[759] the day care center where the petioner's children stay,[760] and the homes, schools, and work-places of other family or household members.[761] In *Johnson v.*

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753. *Id.*

754. *Id.*

755. *See, e.g.*, Kreitz v. Kreitz, 750 S.W.2d 681 (Mo. Ct. App. 1988) (ordering respondent to stay away from marital residence occupied by petitioner); Mugan v. Mugan, 555 A.2d 2 (N.J. 1989) (same); Merola v. Merola, 536 N.Y.S.2d 842 (App. Div. 1989) (amending order to require husband to stay away from family home); Kilmer v. Kilmer, 486 N.Y.S.2d 483 (App. Div. 1985) (ordering respondent to stay away from marital residence occupied by petitioner); Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. Ct. 1985) (ordering respondent to stay away from marital residence occupied by petitioner); State v. Kilponen, 737 P.2d 1024 (Wash. Ct. App. 1987) (excluding defendant from family home).

756. *See, e.g.*, ARK. CODE ANN. § 9-15-205 (Michie 1993) (providing for exclusion of abusing party from petitioner's place of employment); N.J. STAT. ANN. § 2C:25-29.b(6) (West Supp. 1993) (same); 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993) (same); W. VA. CODE § 48-2A-6 (Supp. 1993) (same); Maldonado v. Maldonado, No. 93-FM-199, 1993 D.C. App. LEXIS 227 (D.C. Sept. 13, 1993) (requiring respondent to stay away from wife's work place); Lee v. State, No. 191-88, 1990 Tex. Crim. App. LEXIS 195 (Tex. Crim. App. Nov. 28, 1990) (prohibiting respondent from going within 200 yards of former wife's home or work place). Harassment on the job by a batterer, combined with the burden of time spent waiting to appear in court and the need for multiple court appearances, reduce a battered women's ability to maintain or secure employment. *Women and Violence: Hearings on S. 2754 Before the Senate Comm. on the Judiciary*, 101st Cong., 2nd Sess. 58 (1990) (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

757. ARK. CODE ANN. § 9-15-205 (Michie 1993) (excluding abusing party from petitioner's place of business); W. VA. CODE § 48-2A-6 (Supp. 1993) (same); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

758. *See, e.g.*, ARK. CODE ANN. § 9-15-205 (Michie 1993) (exclude abusing party from petitioner's school); 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993) (same); N.J. STAT. ANN. § 2C:25-29 (West 1992) (same); W. VA. CODE § 48-2A-6 (1992) (same); State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991) (restraining defendant from entering the plaintiff's school); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

759. *See, e.g.*, State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991).

760. *See, e.g., id.*

761. *See, e.g.*, 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993) (providing that court can order respondent to stay away from other specified places); N.J. STAT. ANN. § 2C:25-29.b.(6) (West Supp. 1993) (providing that court can order respondent to stay away from specified places frequented by petitioner's family and household members); W. VA. CODE § 48-2A-6 (Supp. 1993) (providing that court can order respondent to stay away from school, business and place of employment of petitioner's family or household members); Maldonado v. Maldonado, No. 93-FM-199, 1993 D.C. App. LEXIS 227 (D.C. Sept. 13, 1993) (requiring petitioner to stay away from children's school); City of Reynoldsburg v. Eichenberger, No. CA-3492, 1990 Ohio App. LEXIS 1613 (Ohio Ct. App. Apr. 18, 1990) (prohibiting respondent from visiting or approaching petitioner's family or household members including at their

Miller,[762] the court upheld an order requiring the defendant to stay away from plaintiff's home, even where he owned the mobile home in which she lived and leased it to her.[763]

Detailed stay away provisions are crucial if civil protection orders are to be effective in offering the victim protection. Abusers are often diligent in finding ways in which to test and evade protection orders. One of the first ways batterers will attempt to test the strength of civil protection orders is by violating the order's stay away provisions.[764] Incomplete or ambiguous orders that are difficult to enforce send a message to batterers that the courts will not take violations of civil protection orders seriously.

Including forceful and all encompassing stay away provisions in protection orders and enforcing those provisions can help ensure that the beating which brought the petitioner to court to obtain the order is her last. In any case, where the history of domestic violence has included sexual abuse, enforcement of stay away provisions is particularly critical.[765] Battered women who are victims of sexual abuse by an intimate partner are at risk for contracting HIV infection from their batterers.[766] Domestic violence programs across the country are beginning to see growing numbers of battered women whose batterers have infected them with the HIV virus. For battered women who are being sexually abused by their batterers, strict and swift enforcement of stay away orders is absolutely essential to prevent HIV transmission.

When the addresses of petitioner's home, work-place, school, or

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place of residence, employment or school).

762. 459 N.W.2d 886 (Wis. App. 1990).

763. *Id.* at 886.

764. ORLOFF & KLEIN, *supra* note 26, at 15.

765. More than 1 in every 7 women who have ever been married have been raped by their spouse during the marriage. DIANA E.H. RUSSELL, RAPE IN MARRIAGE 87 (1990). At least 60% of battered women are sexually abused by their partners. WAC STATS, *supra* note 303, at 55.

766. Twenty-nine percent of women are infected with HIV through heterosexual contact. ACT UP, WOMEN, AIDS, AND ACTIVISM (1990). Heterosexual transmission outnumbers all other categories by which people acquire the HIV virus and may account for more than 80% of HIV transmission by the end of the 1990's. WAC STATS, *supra* note 303, at 12 (citing Dr. King Holmes, Director of Center for AIDS and Sexually Transmitted Diseases, Seattle, Washington). 98% of heterosexual transmission of the HIV virus is from men to women and only 2% of transmission is from women to men. *Id.* at 13 (citing UNITED AIDS COALITION, WOMEN, GET FACTS ABOUT AIDS (1992)). From 1987 to 1991 AIDS moved from being the 8th to the 5th leading cause of death form women of child-bearing age in the United States. *Id.* at 11 (citing THE WOMEN'S AIDS GROUP, WORLD (1992)).

child care provider are already known to the batterer at the time the civil protection order is entered, the order should list the specific addresses the respondent is to avoid. Listing locations known to the respondent may improve the order's enforceability. Many battered women, however, live, work, and have child care arrangements at locations unknown to the batterer. Civil protection orders must maintain the confidentiality of all undisclosed addresses, in order to avoid placing the victim in further jeopardy.[767] Where the petitioner is in hiding, the court should order the defendant to stay away from the petitioner's residence without revealing its location. The court should also order the defendant not to attempt to discover the location of the petitioner's home, and not to enlist the assistance of others in locating the petitioner.[768]

Several cases illustrate the type of stay away orders many victims need. These orders contain very specific descriptions of the places from which the respondent is barred. In *State v. Hamilton*,[769] the civil protection order required the respondent to stay away from petitioner's residence, including the hallways of her apartment building and all areas of her apartment building that the victim has the right to use in common with other tenants.[770]

The courts also regularly include minimum distances that the respondent must keep away from the petitioner. In *Lee v. State*,[771] the order prohibited respondent from going within 200 yards of his former wife's home or work-place.[772] In *Harris v. Corley*,[773] the

767. Sixteen state statutes specifically limit disclosure of the abused party's home address. ARIZ. REV. STAT. ANN. § 13-3602 (1989 & Supp. 1993); CAL. FAM. CODE § 5517 (West 1993); 750 ILCS 60/203 (Smith-Hurd Supp. 1993); KY. REV. STAT. ANN. § 403.770 (Michie Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 766-A (West 1964); MD. FAM. LAW CODE ANN. 4-504(b)(2) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 8 (West 1987); MISS. CODE ANN. § 93-21-9(7) (Supp. 1993); MO. REV. STAT. § 455.510(3) (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 173-B:3 (1991); N.J. STAT. ANN. § 2C:25-28(b) (West 1993); 23 PA. CONS. STAT. ANN. § 6112 (1991); R.I. GEN. LAWS § 15-15-3(1)(e) (Supp. 1993); TEX. FAM. CODE ANN. § 71.lll (West Supp. 1993); WASH. REV. CODE ANN. § 10.99.040(1)(c) (West Supp. 1993); WIS. STAT. ANN. § 813.125 (West Supp. 1993). The District of Columbia protects the confidentiality of the abused party's address through court rules. D.C. SUP. CT. 1F R. 6(c).

The California statute prevents disclosure not only of petitioner's home address, but also the address of petitioner's school, job, children and child care service. CAL. FAM. CODE § 5517 (West 1993).

768. Leslye Orloff, *Issuance of Civil Protection Orders, in* DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note 21, at 75, 101.

769. No. 90-2392-CR, 1991 Wisc. App. LEXIS 795 (Wisc. Ct. App. May 2, 1991).

770. *Id.* at *11-*12.

771. 799 S.W.2d 750, (Tex. Crim. App. 1990).

772. *Id.* at 751.

order restrained respondent from parking his car or any car which he was driving or in which he was a passenger within 100 yards of the residence of the petitioner.[774] The Texas statute has a provision for specifying the minimum distance that respondent must stay away from petitioner.[775]

In light of the crimes which underlie the issuance of civil protection orders, stay away provisions in civil protection order statutes should be interpreted to be coextensive with the type of stay away orders issued against domestic violence perpetrators in criminal court cases. In *State v. Sutley*,[776] as part of the defendant batterer's probation order, the court ordered the defendant to remain outside the northwest quadrant of his home county, and to stay away from the victim and members of her family.[777] This probation restriction was found to be proper in a criminal domestic violence prosecution, since it was related to the crime. It also helped to insure that the defendant would remain law abiding by keeping him away from the victim, the area where she resided, and where the crime took place.[778] The *Sutley* approach should be adopted in civil domestic violence actions. Domestic violence presents the same dangers to the victim whether the case is brought to the courts as a criminal or civil action, since both actions grow out of violent conduct perpetrated by a batterer against a family member. Stay away orders issued to protection order petitioners in civil cases should be as restrictive as stay away orders issued in criminal domestic violence actions.[779]

Research reveals that violence often escalates when the victim attempts to leave the relationship. A National Institute of Justice study concluded that the victim is especially vulnerable to retaliation and threats by the defendant during the pre-trial period.[780] "In a study of domestic homicides committed in Chicago and Philadelphia, researchers found that over twenty-eight percent of women killed by their

773. No. 01-A-01-9012-CH-00446, 1991 Tenn. App. LEXIS 322 (Tenn. Ct. App. May 1, 1991).

774. *Id.* at *3-*4.

775. TEX. FAM. CODE ANN. § 71.11(b) (West Supp. 1993).

776. No. 90-A-1492, 1990 Ohio App. LEXIS 5520 (Ohio Ct. App. Dec. 14, 1990).

777. *Id.* at *2-*3.

778. *Id.* at *9-*10.

779. The National Institute of Justice found that "[o]ffenders who understand that they will likely be punished for violating an order will not view the approach as 'soft,' whether the setting is a criminal court or a civil one." NIJ CPO STUDY, *supra* note 19, at 3.

780. GAIL A. GOOLKASIAN, U.S. DEP'T OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: THE ROLE OF CRIMINAL COURT JUDGES 4 (1986).

male partners were attempting to end the relationship at the time of their murder."[781] As a result of these findings, the Family Violence Prevention Fund in its State Justice Institute funded national curriculum on domestic violence concludes that judges need to be aware "that a history of domestic violence may be a reliable indicator that further violence will occur, particularly during the pre-trial period."[782]

5. No Contact Provisions

Thirty-seven states and the District of Columbia statutorily provide that no contact orders are a standard provision in civil protection orders.[783] Some states have made their statutes more detailed: fifteen states specify no contact with petitioner;[784] twelve states specify no

781. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 73.

782. *Id.* at 74.

783. ALASKA STAT. § 25.35.010(b) (1991); ARIZ. REV. STAT. ANN. § 13-3602(f)(3) (Supp. 1993); CAL. FAM. CODE § 5505 (West 1993); COLO. REV. STAT. ANN. § 14-4-102 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(3) (Supp. 1993); D.C. CODE ANN. §16-1005(c) (1989); FLA. STAT. ANN. § 741.30(7)(a) (West Supp. 1993); GA. CODE ANN. § 19-13-4 (Supp. 1993); HAW. REV. STAT. § 586-4 (1985); IDAHO CODE § 39-6306(3) (1993); 750 ILCS 60/214 (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.5(2)(c) (West 1985 & Supp. 1993); KY. REV. STAT. ANN. § 403.750(a) (Michie Supp. 1993); LA. REV. STAT. ANN. § 46:2135(A)(1) (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. FAM. LAW CODE ANN. § 4-506(d)(2) (Supp. 1993); MASS. GEN. LAWS. ANN. ch. 209A, § 3(b) (West Supp. 1993); MISS. CODE ANN. § 93-21-15 (Supp. 1993); MO. REV. STAT. § 455.050 (Vernon 1986 & Supp. 1993); NEB. REV. STAT. § 42-924 (1992); NEV. REV. STAT. § 33.030 (1986); N.H. REV. STAT. ANN. § 173-B:4(a)(3) (1991); N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1993); N.M. STAT. ANN. § 40-13-5(A)(3) (Michie Supp. 1993); N.D. CENT. CODE § 14.07.1-02(4)(a) (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4 (West 1992); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (1991); R.I. GEN. LAWS § 15-15-3(1)(a) (Supp. 1993); TENN. CODE ANN. § 36-3-606 (1991); TEX. FAM. CODE ANN. §71.11(b) (West Supp. 1993); UTAH CODE ANN. § 30-6-6(2)(b) (Supp. 1993); VA. CODE ANN. § 16.1-279.1(A)(2) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(g) (West Supp. 1993); W. VA. CODE § 48-2A-6(a) (Supp. 1993); WIS. STAT. ANN. § 813.12(4) (West Supp. 1993); WYO. STAT. § 35-21-105(a)(iii) (1988); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

784. ARIZ. REV. STAT. ANN. § 13-3602(f)(3) (Supp. 1992); CAL FAM. CODE § 2035 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(2)(a) (West Supp. 1993); 750 ILCS 60/214(b)(3) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.5(2)(c) (West 1985 & Supp. 1993); MD. FAM. LAW CODE ANN. § 4-506(d)(2) (Supp. 1993); NEV. REV. STAT. § 33.030(1)(c) (1985); N.H. REV. STAT. ANN. § 173-B:4(a)(3) (1991); N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson Supp. 1992); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (1991); TEX. FAM. CODE ANN. § 71.11(b) (West Supp. 1993); UTAH CODE ANN. § 30-6-6(2)(b) (Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(g) (West Supp. 1993); W. VA. CODE § 48-2A-6(a) (Supp. 1993); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

contact with petitioner's children;[785] seven states provide for no contact with petitioner's household members;[786] and six states require no contact with petitioner's family.[787]

Nevada and New Jersey statutes adopt a very enlightened approach by also requiring no contact with petitioner's employer, employees, or coworkers.[788] Nationally, worker absenteeism due to domestic violence costs employers three to five billion dollars annually.[789] Harrassment on the job by batterers, as well as the burden of time spent waiting to appear in court, reduce a battered woman's ability to maintain secure employment.[790] One study, conducted by the Victim's Service Agency in New York, found that harassment causes sixty-four percent of battered women to be late for work.[791] Among battered women, 9.3% reported taking time off from their jobs because of domestic violence, with nineteen percent of those who were severely assaulted spending time away from work.[792] In the end, twenty percent of battered women lose their jobs due to the effect their batterers and the violence have on their work environment.[793]

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785. COLO. REV. STAT. ANN. § 14-4-102(2)(a) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); D.C. CODE ANN. § 16-1005 (1989); IDAHO CODE § 39-6306(3)(g) (1993); ME. REV. STAT. ANN. tit. 19, § 766(1)(A) (West Supp. 1992); MD. FAM. LAW CODE ANN. § 4-506(d)(7) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 1992); NEV. REV. STAT. § 33.030(1)(c) (1985); N.H. REV. STAT. ANN. § 173-B:4 (1991); N.J. STAT. ANN. § 2C:25-29(b) (West 1993); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (1991); VA. CODE ANN. § 16.1-279.1(A)(6) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(g) (West Supp. 1993).

786. CAL. FAM. CODE § 2035 (West 1993); MD. FAM. LAW CODE ANN. § 4-506(d) (Supp. 1993); N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson Supp. 1992); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (1991); WASH. REV. CODE ANN. § 26.50.060(1)(e) (West Supp. 1993); W. VA. CODE § 48-2A-6(a)(6) (Supp. 1993).

787. CAL. FAM. CODE § 2035 (West 1993); N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1993); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (1991); TEX. FAM. CODE ANN. § 71.11(b) (West Supp. 1992); WASH. REV. CODE ANN. § 26.50.060(1)(e) (West Supp. 1993); W. VA. CODE § 48-2A-6(a)(6) (Supp. 1993).

788. NEV. REV. STAT. § 33.030(1)(c) (1992); N.J. STAT. ANN. § 2C:25-29(b)(7) (West 1993).

789. *Women and Violence: Hearings on S. 2754 Before the Senate Comm. on the Judiciary*, 101st Cong., 2nd Sess., pt. 2, at 128 (1990) [hereinafter *Women and Violence*] (statement of Helen R. Neuborne).

790. *Id.*

791. Milt Freudenheim, *Employers Act to Stop Family Violence*, N.Y. TIMES, Aug. 23, 1988, at A1.

792. *Women and Violence*, *supra* note 789, at 68-69 (statement of the NOW Legal Defense Fund).

793. SCHECTER & GRAY, *Abuse Victimization Across the Life Span*, *in* A FRAMEWORK

Courts have generally granted no contact provisions in civil protection orders,[794] and have uniformly upheld no contact orders with a spouse,[795] former spouse,[796] the co-parent of respondent's children,[797] petitioner's children,[798] and members of the petitioner's household.[799] Clearly, courts have recognized that those in relationships with the petitioner and those that are near the petitioner are also at risk of harm perpetrated by the respondent.[800]

FOR UNDERSTANDING AND EMPOWERING BATTERED WOMEN 242 (Martha Strauss ed., 1988).

794. *See, e.g.*, Stuckey v. Stuckey, 768 P.2d 694 (Colo. 1989) (upholding order which precluded defendant from approaching, threatening, calling, molesting or injuring son and son's mother); Ellibee v. Ellibee, 826 P.2d 462 (Idaho 1992) (holding that the entry of an order against father which prevented him from having contact with his children was supported by evidence that he had administered a severe spanking to his son which left several visible bruises); Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989) (granting abuse prevention order against husband which barred him from approaching, contacting or abusing wife); State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991) (entering restraining order under the Family Abuse Prevention Act against defendant); Commonwealth v. Zerphy, 481 A.2d 670 (Pa. Super. Ct. 1984) (issuing civil protection order which provided that respondent could not telephone or have further contact in any way with the petitioner); Dunkelberger v. Pennsylvania Bd. of Probation and Parole, 593 A.2d 8 (Pa. Commw. Ct. 1991) (holding that respondent's contact with petitioner and her daughter in violation of protection order constitutes criminal contempt); St. Germaine v. Chapman, 505 N.W.2d 450 (Wis. Ct. App. 1993).

795. *See, e.g.*, Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989); Marquette v. Marquette, 686 P.2d 990 (Okla. Ct. App. 1984); State v. Moore, No. 89-0553-CR, 1989 Wisc. App. LEXIS 915 (Wis. Ct. App. Sept. 1, 1989); State v. Teynor, 414 N.W.2d 76 (Wis. Ct. App. 1987).

796. *See, e.g.*, Siggelkow v. State, 731 P.2d 57 (Alaska 1987) (upholding order which prohibited respondent from contacting former spouse).

797. *See, e.g.*, *Andisha*, 805 P.2d at 718 (upholding order which prohibited respondent from contacting his child's mother); *Dunkelberger*, 593 A.2d at 8 (same).

798. *See, e.g.*, *Stuckey*, 768 P.2d at 699-70; *Ellibee*, 826 P.2d at 467-68; Tillman v. Snow, 571 N.E.2d 578 (Ind. Ct. App. 1991); *Andisha*, 805 P.2d at 719; *Dunkelberger*, 593 A.2d at 8.

799. Saliterman v. State, 443 N.W.2d 841, 842-43 (Minn. Ct. App. 1989) (finding violation of protection order which forbade respondent from having personal or third party contact with the plaintiff after petitioner and her parents received phone calls and hang ups, unwanted pizza, flowers and service calls).

800. Eighty percent of batterers engage in violent behaviors against multiple targets, including spouse, children, parents, and pets. BATTERED WOMAN, *supra* note 4, at 35.

The most serious cases of child abuse resulting in emergency room treatment are often extensions of the battering rampages launched against the child's mother, with 70% of the serious injuries to children. *Women and Violence: Hearings on S. 2754 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 142 (1990); Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 162 (Kersti Yllo & Michele Bogard eds., 1988); Lenore E. Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 1 (1982); STRAUS ET AL., NATIONAL WOMAN ABUSE PREVENTION PROJECT, UNDERSTANDING DOMESTIC VIOLENCE: FACT SHEETS 3 (1980). Children in homes where domestic violence occurs are physically abused or neglected at a rate 1500% higher than the national average. Sherry Ford, *Domestic Violence: The Great*

Statutes and case law show that the courts can enjoin the respondent from communicating with the petitioner,[801] and from contacting the petitioner generally,[802] verbally,[803] by phone,[804] through third parties,[805] and in writing.[806] No contact provisions have been prop-

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American Spectator Sport, OKLA. COALITION ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, July-Aug. 1991, at 3.

Many fathers inadvertently injure children while throwing about furniture or other household objects when abusing the woman. The youngest children sustain the most serious injuries, such as concussions and broken shoulders and ribs. MARIA ROY, CHILDREN IN THE CROSSFIRE 89-90 (1988). Very young children, held by their mothers in an attempt to protect them, are hurt when the men continue to beat the mothers without any regard for the children's safety. PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 26 (1990).

801. *See, e.g.*, ALASKA STAT. § 25.35.010(b)(3) (1991); CAL. FAM. CODE § 2035 (West 1993); KY. REV. STAT. ANN. § 403.750(a) (Michie Supp. 1992); N.J. STAT. ANN. § 2C:25-29(b)(7) (West 1993); TEX. FAM. CODE ANN. § 71.11(b) (West Supp. 1993); W.VA. CODE § 48-2A-6(a)(8) (Supp. 1993); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

802. ALASKA STAT. § 25.35.010(b) (1991); ARIZ. REV. STAT. ANN. § 13-3602(F)(3) (Supp. 1993); CAL. FAM. CODE § 5505 (West 1993); COLO. REV. STAT. ANN. § 14-4-102 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); D.C. CODE ANN. §16-1005 (1989); HAW. REV. STAT. § 586-4 (1985); IDAHO CODE § 39-6306(3) (1993); 750 ILCS 60/214(b)(3) (1992); IOWA CODE ANN. § 236.5.2.c (West 1992); KY. REV. STAT. ANN. § 403.750(a) (Baldwin 1992); LA. REV. STAT. ANN. § 46:2135(A)(1) (West 1992); ME. REV. STAT. ANN. tit. 19, § 766 (1992); MD. FAM. LAW CODE ANN. § 4-506 (1992); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 1992); MISS. CODE ANN. § 93-21-13 (1992); MO. REV. STAT. § 455.050 (1992); NEB. REV. STAT. § 42-924(1)&(2) (1992); NEV. REV. STAT. § 33.030(c) (1992); N.H. REV. STAT. ANN. § 173B:4(a)(3) (1992); N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1992); N.M. STAT. ANN. § 40-13-5A(3) (1992); N.D. CENT. CODE § 14.07.1-02.4.a (1992); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson 1992); OKLA. STAT. ANN. tit. 22, § 60.4(C&D); 23 PA. CONS. STAT. ANN. §6108(a)(6) (1992); R.I. GEN. LAWS § 15-15-3 (1992); TENN. CODE ANN. § 36-3-606 (1992); TEX. FAM. CODE ANN. §71.11(b) (Vernon 1992); UTAH CODE ANN. § 30-6-6-3 (1992); VA. CODE ANN. § 16.1-279 (1992); WASH. REV. CODE ANN. § 26.50.060(1)(g) (1992); W. VA. CODE § 48-2A-6(a)(6) (1992); WIS. STAT. ANN. § 813.12(4) (West 1992); WYO. STAT. § 35-21-105(a)(iii) (1992); Stuckey v. Stuckey, 768 P.2d 694 (Colo. 1989); Ellibee v. Ellibee, 826 P.2d 462 (Idaho 1992); Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989); Saliterman v. State, 443 N.W.2d 841 (Minn. Ct. App. 1989); State v. Canitia, 1993 Ohio App. LEXIS 3119 (Ohio Ct. App. June 17, 1993); Deacon v. Landers, 587 N.E.2d 395 (Ohio Ct. App. 1990); Marquette v. Marquette, 686 P.2d 990 (Okla. Ct. App. 1984); State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991); Commonwealth v. Zerphy, 481 A.2d 670 (Pa. Super. Ct. 1984); Dunkelberger v. Pennsylvania Bd. of Probation and Parole, 593 A.2d 8 (Pa. Commw. Ct. 1991); State v. Teynor, 414 N.W.2d 76 (Wis. Ct. App. 1987).

803. *See, e.g.*, Rosenbaum v. Rosenbaum, 541 N.E.2d 872 (Ill. App. Ct. 1989).

804. *See, e.g.*, CAL. FAM. CODE § 5505 (West 1993); 750 ILCS 60/214 (Smith-Hurd Supp. 1992); N.J. STAT. ANN. § 2C:25-29(b)(7) (West 1993); W. VA. CODE § 48-2A-6(8) (Supp. 1993); *Stuckey*, 768 P.2d at 695; Maldonado v. Maldonado, No. 93-FM-199, 1993 D.C. App. LEXIS 227 (D.C. Sept. 13, 1993); *Zerphy*, 481 A.2d at 671; *Rosenbaum*, 541 N.E.2d at 873; State v. Williams, 1993 Wisc. App. LEXIS 1247 (Wisc. Ct. App. Sept. 30, 1993).

805. *See, e.g.*, HAW. REV. STAT. § 586-4 (1985); 750 ILCS 60/214 (Smith-Hurd Supp. 1993); S.C. CODE ANN. § 20-4-20(e) (Law. Co-op. 1985); NEV. REV. STAT. ANN.

erly included in divorce decrees.[807] Those jurisdictions which have barred respondents from third party contact with petitioners[808] are sensitive to the victim's fear, and acknowledge that indirect contact can be as likely to terrorize the victim as direct contact by the batterer. A Texas statute allows communication only through petitioner's attorney or a court appointed person.[809]

The court in *State v. Moore*[810] provided further detail in a civil protection order by stating that contact includes contact at work, school, and in public places.[811] Combining stay away and no contact provisions can improve enforcement of a protection order by making it clear that the respondent is not allowed to communicate in any manner with the petitioner. If the order leaves open any avenue for contact and/or communication, a respondent will often use it to avoid compliance with the order. Routinely including specific terms such as those in *Moore* in civil protection orders can impede the respondent from reaching the petitioner. If an avenue remains open, the respondent may try to communicate in a manner that he can later claim protects him from legal action. No contact provisions protect petitioners from continued threats and harassment, while instructing respondents that they may best avoid future court proceedings for contempt if they have absolutely no contact with the petitioner.

Many states have recognized the need for specificity, and have included a list of places where respondent is not allowed to contact protected persons.[812] Statutory provisions include no contact at

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§ 33.030(1) (1986) (prohibiting respondent from communication with the petitioner or her children directly or though an agent); TEX. FAM. CODE ANN. § 71.11(b)(2) (West Supp. 1993) (prohibiting respondent from communicating a threat through any person to the petitioner, her family or household members); Saliterman v. State, 443 N.W.2d 841 (Minn. Ct. App. 1989) (involving protection order which forbade petitioner from personal contact or communication or third party contact with the petitioner); State v. Moore, No. 89-0553-CR, 1989 Wisc. App. LEXIS 915 (Wis. Ct. App. Sept. 1, 1989) (ordering respondent not to contact or cause any person other than his attorney to contact his wife unless she consented in writing).

806. *See, e.g.*, N.J. STAT. ANN. § 2C:25-29(b)(7) (West 1992); *Moore*, 1989 Wisc. App. LEXIS 915.

807. *See, e.g.*, Siggelkow v. State, 731 P.2d 57, 59 (Alaska 1987).

808. *See* MODEL CODE, *supra* note 15, §§ 305, 306.

809. TEX. FAM. CODE ANN. § 71.11(b)(2)(c) (West Supp. 1993).

810. *Moore*, 1989 Wisc. App. LEXIS 915.

811. *Id.* at *1.

812. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3602(F)(3) (Supp. 1993) (including contact at petitioner's home, work and school); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson Supp. 1992) (same); 750 ILCS 60/214(b)(3) (Smith-Hurd Supp. 1992) (including contact at petitioner's home or work); IOWA CODE ANN. § 236.5(2)(c) (West 1985 & Supp. 1993)

petitioner's home,[813] work,[814] school,[815] children's school,[816] or other specified or regularly visited places.[817] This approach offers the petitioner the best protection because it clearly and explicitly precludes all communication between the parties. Provisions which bar all forms of communication with the petitioner, her family members, and household members close off the primary means most batterers use to continue exerting control over battered women and children after civil protection orders are in place. No contact orders that fail to block communication can empower the batterer by giving him unprohibited means to maintain access to the victim, causing her to live in fear of future violence. Solid wording of civil protection orders helps to assure that the respondent, the police, a future judge, and any other reader of the order will correctly interpret the its meaning.[818]

(same); MD. FAM. LAW CODE ANN. § 4-506(d) (Supp. 1993) (including contact at petitioner's home, work, school, children's school or other specified places); MINN. STAT. ANN. § 518B.01(6) (West Supp. 1993) (including contact at petitioner's work); N.H. REV. STAT. ANN. § 173-B:4(a)(3) (1992) (including contact at petitioner's work or school); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (1991) (same); N.J. STAT. ANN. § 2C:25-29(b)(6)(West 1993) (including contact at petitioner's home, work, school or at any other regularly visited places by petitioner and petitioner's family); TEX. FAM. CODE ANN. § 71.11(b) (West Supp. 1993) (including contact at petitioner's home, work, school or at children's school); W. VA. CODE § 48-2A-6(a)(6) (Supp. 1993) (same); UTAH CODE ANN. § 30-6-6(2)(e) (Supp. 1993) (including contact at petitioner's home, work or at other specified places).

813. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3602(F)(3) (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson Supp. 1992); 750 ILCS 60/214(b)(3) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.5(2)(c) (West 1985 & Supp. 1993); MD. FAM. LAW CODE ANN. § 4-506(d)(3) (Supp. 1993); N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1993); TEX. FAM. CODE ANN. § 71.11(b)(3) (West Supp. 1993); UTAH CODE ANN. § 30-6-6(2)(e) (Supp. 1993).

814. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3602(F)(3) (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson Supp. 1992); 750 ILCS 60/214(b)(3) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.5(2)(c) (West 1985 & Supp. 1993); MD. FAM. LAW CODE ANN. § 4-506(d)(5) (Supp. 1993); MINN. STAT. ANN. § 518B.01(6)(8) (West Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(a)(3) (1991); 23 PA. CONS. STAT. ANN. §6108(a)(6) (1991); N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1993); TEX. FAM. CODE ANN. § 71.11(b)(3) (West Supp. 1993); W. VA. CODE § 48-2A-6(a)(6) (Supp. 1993); UTAH CODE ANN. § 30-6-6(2)(e) (Supp. 1993).

815. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3602(F)(3) (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson 1992); IOWA CODE ANN. § 236.5(2)(c) (West 1985 & Supp. 1992); MD. FAM. LAW CODE ANN. § 4-506(d)(5) (Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(a)(3) (1991); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (1991); N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1993); W. VA. CODE § 48-2A-6(a)(6) (Supp. 1993).

816. *See, e.g.*, MD. FAM. LAW CODE ANN. § 4-506(d)(5) (Supp. 1993); TEX. FAM. CODE ANN. § 71.11(b)(4) (West Supp. 1993); W. VA. CODE § 48-2A-6(a)(6) (Supp. 1993).

817. N.J. STAT. ANN. § 2C:25-29(b)(6) (West 1993); UTAH CODE ANN. § 30-6-6(2)(3) (Supp. 1993).

818. The civil protection order study conducted by the National Institute of Justice provides an example of when lack of specification in protection orders concerning contact proves

No contact orders, even those issued *ex parte*, have survived constitutional challenges. In *Marquette v. Marquette*,[819] the court held that an *ex parte* order cutting off batterer's visitation rights for ten days does not violate due process.[820] The court, relying on *Matthews v. Eldrige*,[821] reasoned that the respondent's due process rights are not violated where the *ex parte* order is issued as part of a civil protection order system which includes the procedural safeguard of a hearing within a short time after the issuance of the order, particularly in light of the state's interest in providing immediate protection for abused parties.[822]

6. Vacate Orders

If the perpetrator of violence has access to the victim, abuse is likely to continue. Therefore, vacate orders, which evict respondent from his residence, have been regarded by many judges as one of the most effective ways of terminating domestic abuse.[823] Vacate orders should issue whenever a court finds abuse, the victim wishes to separate from her abuser, and the victim has not chosen to seek shelter in an undisclosed location.[824] Responding to the victim's need for protection, forty-eight states, the District of Columbia, and Puerto Rico have statutorily provided for the inclusion of a vacate order in a civil protection order.[825] The two states without such statutes, Michigan

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harmful to the victim of abuse. It relays a story of one batterer who "terrified his wife by repeatedly parking across the street from where she worked so she could see him from her desk. Her supervisor became angry as her work began to deteriorate." When the victim asked for assistance, "the police reported [that] there was nothing they could do because this behavior was not specifically prohibited in the [existing] protection order. NIJ CPO STUDY, *supra* note 19, at 42.

819. 686 P.2d 990 (Okla. Ct. App. 1984).

820. *Id.* at 995-96.

821. 424 U.S. 319 (1976).

822. *Marquette*, 686 P.2d at 995-96.

823. NIJ CPO STUDY, *supra* note 19, at 41-42.

824. The National Council of Juvenile and Family Court Judges recommends that vacate orders be available to all upon request whenever violence has occurred or is threatened. FAMILY VIOLENCE PROJECT, *supra* note 687, at 21.

825. ALA. CODE § 30-5-7(a)(2) (1988); ALASKA STAT. § 25.5.010(a)(2) (1991); ARIZ. REV. STAT. ANN. § 13-3602(F) (Supp. 1993); ARK. CODE ANN. § 9-15-205(a)(1) (Michie 1993); CAL. FAM. CODE §§ 5751, 2035(c) (West 1993); COLO. REV. STAT. ANN. § 14-4-102(2)(B) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(a) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(3) (Supp. 1993); D.C. CODE ANN. § 16-1005(c)(4) (1989); FLA. STAT. ANN. § 741.30(4)(b) (West 1986 & Supp. 1993); GA. CODE ANN. §19-13-4(a) (1993); HAW. REV. STAT. § 586-4(b) (Supp. 1992); IDAHO CODE § 39-6306(1)(c) (1993); 750 ILCS 60/214(b)(2) (Smith-Hurd Supp. 1992); IND. CODE ANN. § 34-4-5.1-5(a)(3)(a) (Supp. 1993);

and New York, issue vacate orders under the authority of their catch-all provisions or case law.[826] Some statutes list the places from which respondent can be ordered to vacate, and include the household,[827] multi-family dwelling,[828] petitioner's work place,[829] petitioner's school,[830] jointly owned property, and leased property.[831]

IOWA CODE ANN. § 236.5.2(b) (West 1985 & Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(2) (1985); KY. REV. STAT. ANN. § 403.750(1)(b) (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2135(A) (West 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(C) (West Supp. 1992); MD. FAM. LAW CODE ANN. § 4-506(d)(4) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3(c) (West Supp. 1993); MINN. STAT. ANN. § 518B.01.6(a)(2) (West Supp. 1993); MISS. CODE ANN. § 93-21-13 (Supp. 1993); MO. ANN. STAT. § 455.050.1(2) (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-121(2)(c) (1993); NEB. REV. STAT. § 42-924(2) (Supp. 1992); NEV. REV. STAT. ANN. § 33.030(1)(b) (Michie 1992); N.H. REV. STAT. ANN. § 173-B:4(I)(a)(2) (1990); N.J. STAT. ANN. § 2C:25-29(b)(2) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); N.C. GEN. STAT. § 50B-3(a) (1989); N.D. CENT. CODE § 14-07.1-02.4.b (1993); OHIO REV. CODE ANN. § 3113.31(E)(1) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4(C), (D) (West 1992); OR. REV. STAT. § 107.716(2)(b) (1991); 23 PA. CONS. STAT. ANN. § 6108(a)(2) (1991); P.R. LAWS ANN. tit. § 2.1(b) (Supp. 1990); R.I. GEN. LAWS § 15-15-3(1)(b) (Supp. 1993); S.C. CODE ANN. § 20-4-60(c)(3) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-5 (1984); TENN. CODE ANN. § 36-3-606 (1991); TEX. FAM. CODE ANN. §71.11(a)(2) (West Supp. 1993); UTAH CODE ANN. § 30-6-6 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1103(a)(2) (1989); VA. CODE ANN. § 16.1-279.1A3 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(b) (West Supp. 1993); W. VA. CODE § 48-2A-6(a)(1) (Supp. 1993); WIS. STAT. ANN. § 813.12(4); WYO. STAT. § 35-21-105(a)(i) (1988); *see also* MODEL CODE, *supra* note 15, § 305(3)(c) (allowing a court-ordered law enforcement officer to "[r]emove and exclude the respondent from the residence of the petitioner, regardless of ownership of the residence").

826. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2950 (West 1986); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994); Merola v. Merola, 536 N.Y.S.2d 842 (N.Y. App. Div. 1989) (holding that upon determination that husband had committed family offenses, including harassment and disorderly conduct, lower court should have directed defendant to vacate and stay away from the family home and that court erred in permitting husband to return to the home on the condition that he would comply with the terms of the protection order).

827. *See, e.g.*, MD. FAM. LAW CODE ANN. § 4-506 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3(c) (West Supp. 1993).

828. MASS. GEN. LAWS ANN. ch. 209A, §§ 1, 3(c) (West Supp. 1993).

829. ARK. CODE ANN. § 9-15-205(a)(2) (Michie 1993); MASS. GEN. LAWS ANN. ch. 209A, §§ 1, 3(c) (West Supp. 1993); MINN. STAT. ANN. § 518B.01.6(a)(8) (West Supp. 1993).

830. ARK. CODE ANN. § 9-15-205(a)(2) (Michie 1993).

831. ALA. CODE § 30-5-7(a)(2) (1989); CAL. FAM. CODE § 2035(c) (West 1994); D.C. CODE ANN. § 16-1005(c)(4) (1989); 750 ILCS 60/214(b)(2) (Smith-Hurd Supp. 1992); LA. REV. STAT. ANN. § 46:2135(A) (West 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(C) (West Supp. 1992); MO. ANN. STAT. § 455.050.1(2) (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(I)(a)(2) (1990); N.J. STAT. ANN. § 2C:25-29(b)(2) (West Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1) (Anderson Supp. 1992); 23 PA. CONS. STAT. ANN. § 6108(a)(2) (1991); S.C. CODE ANN. § 20-4-60(c)(3) (Law. Co-op. 1985); TEX. FAM. CODE

Courts consistently have upheld the issuance of a civil protection order with a vacate order.[832] In *Merola v. Merola*,[833] the court held that upon determining that the husband had committed family offenses, including harassment and disorderly conduct, the lower court should have directed defendant to vacate and stay away from the family home.[834] The trial court erred in permitting the husband to return to the home on the condition that he would comply with the terms of the protection order.[835] Even where a perpetrator of violence had a serious medical condition and the home was deemed to be the best place for him, the court found that the victim's need to be protected necessitated him leaving the home.[836]

In *Jane Y. v. Joseph Y.*,[837] the court ordered not only the husband who perpetrated the violence but also the family dog to vacate the parties' home.[838] Vacating the dog from the home was necessary to protect the victim from abuse because the dog was trained by the husband to attack anything which angered him, and was therefore a source of continuing, imminent danger to his wife and their chil-

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ANN. § 71.11(a)(2) (West Supp. 1993).

832. *See, e.g.*, State v. Syriani, 428 S.E.2d 118 (N.C. Ct. App. 1993); Wright v. Wright, 583 N.E.2d 97 (Ill. App. Ct. 1991); *In re* Marriage of Blitstein, 569 N.E.2d 1357 (Ill. App. Ct. 1991); *In re* Marriage of Hagaman, 462 N.E.2d 1276 (Ill. App. Ct. 1984); Anders v. Anders, 618 So. 2d 452 (La. 1993); Cote v. Cote, 599 A.2d 869 (Md. Ct. Spec. App. 1992); Commonwealth v. Gordon, 553 N.E.2d 915 (Mass. 1990); State *ex rel.* Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982); Kreitz v. Kreitz, 750 S.W.2d 681 (Mo. Ct. App. 1988); Jane Y. v. Joseph Y., 474 N.Y.S.2d 681 (Fam. Ct. 1984); Bryant v. Burnett, 624 A.2d 584 (N.J. 1993); Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992); Maksuta v. Higson, 577 A.2d 185 (N.J. Super. Ct. App. Div. 1990); Mugan v. Mugan, 555 A.2d 2 (N.J. Super. Ct. App. Div. 1989); Merola v. Merola, 536 N.Y.S.2d 842 (App. Div. 1989); Smart v. Smart, 297 S.E.2d 135 (N.C. Ct. App. 1982); Eichenberg v. Eichenberg, 1993 Ohio App. LEXIS 5282 (Ohio Ct. App. Nov. 2, 1993); Mallin v. Mallin, 541 N.E.2d 116 (Ohio Ct. App. 1988); Tanagho v. Tanagho, No. 92AP-1190, 1993 Ohio App. LEXIS 120 (Feb. 23, 1993) (reversing order to vacate home that defendant, who was convicted of domestic violence, shared with victim); Synder v. Synder, 629 A.2d 977 (Pa. Super. Ct. 1993); Boyle v. Boyle, 12 Pa. D. & C.3d 767 (Pa. Ct. Comm. Pleas 1979); Nuss v. Nuss, 828 P.2d 627 (Wash. Ct. App. 1992). *But see* Rigwald v. Rigwald, 423 N.W.2d 701 (Minn. Ct. App. 1988) (upholding order which granted respondent use of the home in a temporary protection order); Bjergum v. Bjergum, 392 N.W.2d 604 (Minn. Ct. App. 1986) (holding that evidence that the husband had previously abused his wife and unsubstantiated allegations that he had abused their children was insufficient to establish the husband's present intention to do harm or inflict fear of harm and thus did not warrant a protection order excluding him from the parties' home).

833. 536 N.Y.S.2d 842 (App. Div. 1989).

834. *Id.* at 842-43.

835. *Id.*

836. Kilmer v. Kilmer, 486 N.Y.S.2d 483 (App. Div. 1985).

837. 474 N.Y.S.2d 681 (Fam. Ct. 1984).

838. *Id.*

dren.[839] As the court itself surmised,

> [the dog's] sense of loyalty has been perverted by the respondent to such a degree as to make the dog an unwitting instrument for perpetrating family offenses. As such it is quite reasonable that [he] be required to leave the family home in order to "stop the violence, end the family disruption and obtain protection."[840]

The *Jane Y.* case reflects the use of vacate orders to establish meaningful relief for victims of domestic violence.

One 1984 case poses an alternative approach, which has been rejected by all other courts and statutes to date. In *Cunningham v. Cunningham*,[841] the lower court entered an order excluding the petitioner wife from the residence and awarding her $300 per week maintenance, although she was the party who brought the suit under the Adult Abuse Act. Such an approach raises serious due process questions, in that it makes a battered woman, against whom the court has not made a finding of any wrongdoing, subject to a court order that should properly be enforced between her batterer and the court.[842] For this and other public policy reasons, this approach has not been favored by other courts, as it punishes and burdens the domestic violence victims by forcing them to leave their homes and find alternate shelter.

Finding alternative shelter is difficult for battered women, who are often isolated from their communities due to the control their batterers have exerted over them.[843] For many who are willing to seek shelter, there are no shelter beds available.[844] If they have chil-

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839. *Id.* at 682-83.

840. *Id.* at 683.

841. 673 S.W.2d 478 (Mo. Ct. App. 1984).

842. *See also* Swenson v. Swenson, 490 N.W.2d 668 (Minn. Ct. App. 1992) (holding that the trial court erred when it granted a protection order which required the abuse victim to vacate the marital home because the purpose of the domestic violence statute is to authorize the court to order the abuser to vacate the parties' dwelling); Lucke v. Lucke, 300 N.W.2d 231 (N.D. 1980) (voiding an order against oldest daughter who had been sexually abused by father which forbade her presence in the family residence where she was never brought in as a defendant or an involuntary plaintiff).

843. For many battered women whose batterers have isolated them from friends and family to maintain power and control in the relationship, leaving the home to secure shelter is exceptionally difficult. EWING, *supra* note 180, at 13; SCHULMAN, *supra* note 1, at 5.

844. *Women and Violence*, *supra* note 789, at 128. In Boston, for every two women and children that have access to shelter, there are 5 battered women and 8 children turned away. *Women and Violence*, *supra* note 789, at 128; OLGA DWYER & EILEEN TULLY, N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, HOUSING FOR BATTERED WOMEN 9

dren, finding alternative shelter becomes even more difficult.[845] Finally, getting into a shelter is no guarantee of escaping abuse; most shelters only allow short stays.[846] After being shelte,red thirty-one percent of abused women return to their batterers, primarily because they could not locate permanent housing.[847]

When vacate orders are entered, it is important that the civil protection order also specifies how it will be implemented. *Smart v. Smart*[848] demonstrates a safe means of accomplishing a vacate order. In *Smart*, the court upheld a temporary protection order which gave the wife exclusive use of the marital home, and the husband was ordered to remove his personal effects and turn over his keys to the police.[849] Twenty-eight states and the District of Columbia require the police to assist a petitioner in removing the respondent and gaining possession of the residence.[850] Eleven states and Puerto Rico re-

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(1989). Research indicates that only 42% of women who had been struck once in a marriage sought some type of intervention. RICHARD GELLES, FAMILY VIOLENCE 112 (2d ed. 1987). If greater numbers of battered women seek help, shelters will be less able to meet the ever growing need.

845. The majority of abused women who use shelter services bring their children. In one study, 72% of the women brought children to the shelter; 21% were accompanied by three or more children. NATIONAL WOMAN ABUSE PREVENTION PROJECT, EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN DOMESTIC VIOLENCE FACT SHEETS 2 (1987).

846. The average stay at a battered women's shelter is less than two weeks. Jean Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives*, FAM. REL., Apr. 1985, at 205-06.

847. DWYER & TULLY, *supra* note 844, at 9. "If, in leaving a violent mate, she lacks adequate financial resources and must live in an unsafe dwelling in a crime-ridden community, a survivor may have changed only the type of danger to be braved and may have added the risk of assaults by strangers to the risk of her partner's reprisals." Browne, *supra* note 10, at 1080-81. Further, many battered women do not perceive shelters as a viable option since it means leaving one's home and family unit. JUDY GROSSMAN, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, DOMESTIC VIOLENCE AND INCARCERATED WOMEN: SURVEY RESULTS 8. This is particularly true for battered immigrant and refugee women, who often turn instead to friends and relatives for shelter.

848. 297 S.E.2d 135 (N.C. Ct. App. 1982).

849. *Id.* at 136.

850. ALASKA STAT. § 25.35.050 (1991); ARK. CODE ANN. § 9-15-208 (Michie 1993); COLO. REV. STAT. ANN. § 14-4-104 (West Supp. 1993); D.C. CODE ANN. § 16-1005(c)(9) (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-4 (Supp. 1993); HAW. REV. STAT. § 586-7 (1985); IDAHO CODE § 39-6309 (1993); 750 ILCS 60/214 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 34-4-5.1-7 (West Supp. 1993); IOWA CODE ANN. § 236.11 (West Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(5) (Supp. 1992); KY. REV. STAT. ANN. § 403.755 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2135(c) (West 1989); MINN. STAT. ANN. § 518B.01.9 (West 1990 & Supp. 1992); NEB. REV. STAT. § 42-928 (Supp. 1992); N.H. REV. STAT. ANN. § 173-B:8 (1990); N.J. STAT. ANN. § 2C:25 (West Supp. 1993); N.M. STAT. ANN. § 40-13-7(B)(4) (Michie 1989); N.C. GEN. STAT. § 50B-4 (1989); N.D. CENT. CODE § 14-07.1-04 (1991); OHIO REV. CODE ANN.

quire the police to accompany a domestic violence victim to retrieve her personal property.[851] When the order to vacate is issued, courts should follow through with these additional safeguards to better insure the victim's safety. An ideal order would require respondent to vacate immediately, and would order the police to accompany the petitioner to the residence, serve the respondent with a copy of the vacate order, stand by while the respondent removes personal belongings,[852] obtain all keys to the home from the respondent, test the keys, and turn them over to the petitioner.

Courts faced with constitutional challenges to vacate orders have consistently found them not to violate due process rights.[853] State courts rely on the line of decisions handed down by the United States Supreme Court on *ex parte* relief,[854] and apply the *Matthews v. Eldridge*[855] test which recognizes that uninterrupted possession of one's home is a significant private interest, but can be outweighed by the governmental interest in preventing domestic violence.[856]

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§ 3113.31(F)(3) (Anderson Supp. 1992); OR. REV. STAT. § 107.718(1)(c) (1991); R.I. GEN. LAWS § 15-15-5 (Supp. 1993); S.C. CODE ANN. § 20-4-90(c)(5) (Law. Co-op. 1985); TEX. FAM. CODE ANN. § 71.15 (West Supp. 1993); VT. STAT. ANN. tit. 15, § 1108 (1989); WASH. REV. CODE ANN. § 26-50-080 (West 1986); WIS. STAT. ANN. § 813.12(6)(a) (West Supp. 1993).

851. CAL. PENAL CODE § 13701(g) (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-102(7.5)(a) (West Supp. 1993); GA. CODE ANN. § 19-13-4(a)(5) (Supp. 1993); 750 ILCS 60/304 (Smith-Hurd Supp. 1992); KAN. STAT. ANN. § 60-3107(a)(8) (Supp. 1992); LA. REV. STAT. ANN. § 46:2135(c) (West Supp. 1993); N.J. STAT. ANN. § 2C-25-13(b) (West Supp. 1993); N.M. STAT. ANN. § 40-13-7(B)(3) (Michie 1989); N.C. GEN. STAT. § 50B-5(a) (1989); OR. REV. STAT. §§ 107.718(c), 107.719 (1991); S.C. CODE ANN. § 20-4-100 (Law. Co-op. 1985); P.R. LAWS ANN. tit. 8, § 3.10 (1992).

852. Removal of belongings is generally limited to clothing and personal affects. It is important to assure that respondent takes with him sufficient clothing so that he will not have any excuse to return to petitioner's residence prior to the next court hearing or, in the case of a full (not temporary) civil protection order, all his clothes so that he need not return at any time in the future.

853. Cote v. Cote, 599 A.2d 869 (Md. Ct. Spec. App. 1992) (holding that protection order which requires respondent to vacate and bars him from the marital home does not constitute a taking because respondent was not deprived of all beneficial use of the property); State *ex rel.* Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (upholding constitutionality of *ex parte* temporary protection order which evicted respondent from family home); Boyle v. Boyle, 12 Pa. D. & C.3d 767 (Pa. Ct. Comm. Pleas 1979) (holding that an *ex parte* eviction of a batterer is not a due process violation where any deprivation of the use of property is temporary, title to real estate is not affected, exclusion is the last resort, and all exclusion orders are modifiable).

854. Mathews v. Eldridge, 424 U.S. 319 (1976); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).

855. 424 U.S. at 319.

856. The *Mathews* court developed a test that *ex parte* relief is constitutional when the

7. Property

a. Rights to Use of Personal Property

If rights to personal property are not specifically established as part of the civil protection order, these items of property can present an arena for continuing conflict.[857] Twenty-six state statutes specifically state that the issuance of a civil protection order does not affect title to personal property,[858] a notion upheld in case law.[859] Seventeen state statutes stipulate that the court can grant exclusive possession of personal property in the protection order,[860] and eighteen states and the District of Columbia provide that the order can determine who has the right to use certain property.[861] Some statutes delineate clearly that checkbooks,[862] keys and personal effects,[863] household furniture,[864] and cars[865] are among the items of personal

respondent's private interest is outweighed by the governmental interest, taking into consideration the risk of erroneous deprivation of the private interest through procedures used and the probable value of additional or substitute procedural safeguards. *Id.*

857. ORLOFF & KLEIN, *supra* note 26, at 87; Browne, *supra* note 10, at 1080-81.

858. *See, e.g.*, DEL. CODE ANN. tit. 10, § 949 (Supp. 1993); 750 ILCS 60/214(b)(9) (Smith-Hurd Supp. 1992); N.H. REV. STAT. ANN. § 173-B:4(II) (1990); N.J. STAT. ANN. § 2C:25-29b(9) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5(D) (Michie Supp. 1993); VA. CODE ANN. § 16.1-253.1A (Michie Supp. 1993); WYO. STAT. § 35-21-105(d) (1988).

859. *See, e.g.*, Jane Y. v. Joseph Y., 474 N.Y.S.2d 681 (Fam. Ct. 1984); Boyle v. Boyle, 12 Pa. D. & C.3d 767 (Pa. Ct. Comm. Pleas 1979).

860. CAL. FAM. CODE § 2035 (West 1994); DEL. CODE ANN. tit. 10, § 949(a)(4) (Supp. 1993); GA. CODE ANN. § 19-13-4 (Supp. 1993); 750 ILCS 60/214(b)(2) (Smith-Hurd Supp. 1992); KAN. STAT. ANN. § 60-3107(a)(9) (Supp. 1992); LA. REV. STAT. ANN. § 46:2135(A)(2), (4) (West 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(D) (West Supp. 1992); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MO. ANN. STAT. § 455.050.3(6) (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4I(b)(1) (1990); N.J. STAT. ANN. § 2C:25-29(b)(9) (West 1992); N.C. GEN. STAT. § 50B-3(a)(8) (1989); N.D. CENT. CODE § 14-07.1-02.4.f (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(h) (Anderson Supp. 1992); S.C. CODE ANN. § 20-4-60(c)(5) (Law. Co-op. 1985); TEX. FAM. CODE ANN. §71.11(a)(6) (West Supp. 1992); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

861. CAL. FAM. CODE § 2035 (West 1994); D.C. CODE ANN. § 16-1005(c) (1989), ME. REV. STAT. ANN. tit. 19, § 766(1) (West Supp. 1992); MINN. STAT. ANN. § 518B.01.6(a) (West Supp. 1993); MO. ANN. STAT. § 455.050 (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4I(a)(5) (1990); N.J. STAT. ANN. § 2C:25-29b (West Supp. 1993); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); N.C. GEN. STAT. § 50B-3(a) (1989); N.D. CENT. CODE § 14-07.1-02.4f (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E) (Anderson Supp. 1992); TEX. FAM. CODE ANN. §71.11(d) (West Supp. 1993); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

862. *See, e.g.*, DEL. CODE ANN. tit. 10, § 949(a)(4) (Supp. 1993); MO. ANN. STAT. § 455.050.3(6) (Vernon Supp. 1993); N.J. STAT. ANN. § 2C:25-29(b) (West Supp. 1993).

863. *See, e.g.*, DEL. CODE ANN. tit. 10, § 949(a)(4) (Supp. 1993); MO. ANN. STAT. § 455.050.3(6) (Vernon Supp. 1993); N.J. STAT. ANN. § 2C:25-29(b) (West Supp. 1993).

864. *See, e.g.*, ME. REV. STAT. ANN. tit. 19, § 766.1.D (West Supp. 1992); N.H. REV. STAT. ANN. § 173-B:4(I)(b)(1) (1990).

865. *See, e.g.*, ALASKA STAT. § 25.35.010(8) (restraining a defendant from entering

property which can be disposed of in the order. Case law consistently supports this approach.[866] The court in *Fitzgerald v. Fitzgerald*[867] ruled that the petitioner may obtain personal property from respondent, even if a divorce decree has already addressed property issues.[868] The majority of jurisdictions have realized that enabling the courts to resolve questions about usage of personal property in a civil protection order removes arenas of potential conflict by preventing the parties from having to contact each other in order to retrieve their belongings, or to discuss an unresolved and controversial property matter. Reduction in contact between the parties combined with resolution of issues that could become controversial can help prevent future violence.

b. Restraining Respondent From Taking, Converting, Selling, Damaging, Or Destroying Property

Seventeen states and Puerto Rico statutorily recognize that a civil protection order may order that certain property of parties in a domestic abuse proceeding be protected.[869] These provisions have de-

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plaintiff's car or propelled vehicle); LA. REV. STAT. ANN. § 46:2135(A)(2) (West 1982); MD. FAM. LAW CODE ANN. § 4-506(d)(9) (Supp. 1993); MO. ANN. STAT. § 455.050.3(6) (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(I)(b)(1) (1990); N.J. STAT. ANN. § 2C:25-29(b)(9) (West 1992); N.D. CENT. CODE § 14-07.1-02.4.f (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(h) (Anderson Supp. 1992); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

866. *See, e.g.*, Fitzgerald v. Fitzgerald, 406 N.W.2d 52, 54 (Minn. Ct. App. 1987) (holding that trial court in the domestic abuse proceeding was not precluded from addressing the request for the return of wife's belongings, even if the divorce decree had granted relief); Parkhurst v. Parkhurst, 793 S.W.2d 634, 635 (Mo. Ct. App. 1990) (involving protection order which divided personal property between the parties); Jane Y. v. Joseph Y., 474 N.Y.S.2d 681, 682 (Fam. Ct. 1984) (holding that court could order the removal of family dog where the dog was trained to attack the wife); Smart v. Smart, 297 S.E.2d 135, 136 (N.C. Ct. App. 1982) (holding that temporary protection order can give wife exclusive use of marital home and order husband to remove his personal effects from the home and turn over his key to the police); Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986) (involving divorce action where lower court entered an order in adult abuse proceeding which divided property). *But see* Cooley v. Cooley, Ohio App. LEXIS 4996 (Ohio Ct. App. Oct. 12, 1993) (stating that permanent property division is not allowed in a protection order).

867. 406 N.W.2d at 52.

868. *Id.* at 54.

869. CAL. FAM. CODE § 2035 (West 1994); DEL. CODE ANN. tit. 10, § 949 (Supp. 1993); 750 ILCS 60/214(b)(10) (Smith-Hurd Supp. 1992); IND. CODE ANN. § 34-4-5.1-5 (West Supp. 1993); KY. REV. STAT. ANN. § 403.750(6) (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 46:2135(A)(4) (West 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(D) (West Supp. 1992); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MISS. CODE ANN. § 93-21-13(2)(d) (Supp. 1993); MO. ANN. STAT. § 455-050.3(7) (Vernon Supp. 1993); MONT.

veloped due to the realization that batterers are often destructive, not only of their victims, but of things associated with their victims, including pets.[870] Destroying a victim's possessions is another method of gaining and maintaining control over her.[871] Some states specify that the order can stipulate no disposing,[872] no taking,[873] no transferring,[874] no encumbering,[875] no concealing,[876] and no damaging or destroying real[877] or personal property.[878] Some stat-

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CODE ANN. § 40-4-121(2)(a) (West Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4I(a)(5) (1990); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1992); OHIO REV. CODE ANN. § 3113.31(E) (Anderson Supp. 1992); P.R. LAWS ANN. tit. 8, § 2.1(g) (1992); S.C. CODE ANN. § 20-4-60(c)(4),(5) (Law. Co-op. 1985); TEX. FAM. CODE ANN. §71.11(a)(1)(B) (West Supp. 1993); WYO. STAT. § 35-21-105(a)(v) (1988).

870. BATTERED WOMAN, *supra* note 4; FAMILY ABUSE AND ITS CONSEQUENCES 139-48 (Gerald T. Hotaling et al. eds., 1988); LENORE E. WALKER, ELIMINATING SEXISM TO END BATTERING RELATIONSHIPS 2 (1984).

871. Fifty-nine percent of batterers destroyed or damaged sentimental and personal effects of their victims. Follingstad et al., *supra* note 317, at 113.

872. CAL. FAM. CODE § 2035 (West 1994); DEL. CODE ANN. tit. 10, § 949(a)(9) (Supp. 1993); 750 ILCS 60/214(b)(10) (Smith-Hurd 1992); KY. REV. STAT. ANN. § 403.750(c) (Michie/Bobbs Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2135(A)(4) (West 1988); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1992); MISS. CODE ANN. § 93-21-13(2)(d) (Supp. 1993); MO. ANN. STAT. § 455.050.3(7) (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-121(2)(a) (1993); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); P.R. LAWS ANN. tit. 8, § 2.1(g) (1992); TEX. FAM. CODE ANN. §71.11(a)(1)(B) (West Supp. 1993); WYO. STAT. § 35-21-105(a)(v) (1988).

873. DEL. CODE ANN. tit. 10, § 949(a)(7) (Supp. 1993); 750 ILCS 60/214(b)(10) (Smith-Hurd Supp. 1992); N.H. REV. STAT. ANN. § 173-B:4I(a)(5) (1990).

874. CAL. FAM. CODE § 2035 (West 1994); DEL. CODE ANN. tit. 10, § 949(a)(9) (Supp. 1993); 750 ILCS 60/214(b)(10) (Smith-Hurd Supp. 1992); LA. REV. STAT. ANN. § 46:2135(A)(4) (West 1982); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MISS. CODE ANN. § 93-21-13(2)(d) (Supp. 1993); MO. ANN. STAT. § 455.050.3(7) (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-121(2)(a) (1993); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); TEX. FAM. CODE ANN. § 71.11(a)(1)(B) (West Supp. 1993); WYO. STAT. § 35-21-105(a)(v) (1988).

875. CAL. FAM. CODE § 2035 (West 1994); DEL. CODE ANN. tit. 10, § 949(a)(9) (Supp. 1993); 750 ILCS 60/214(b)(10) (Smith-Hurd Supp. 1992); LA. REV. STAT. ANN. § 46:2135(A)(4) (West 1982); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MISS. CODE ANN. § 93-21-13(2)(d) (Supp. 1993); MO. ANN. STAT. § 455.050.3(7) (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-121(2)(a) (1993); N.M. STAT. ANN. § 40-13-5 (Michie Supp. 1993); TEX. FAM. CODE ANN. § 71.11(a)(1)(B) (West Supp. 1993); WYO. STAT. § 35-21-105(a)(v) (1988).

876. CAL. FAM. CODE § 2035(a) (West 1993); 750 ILCS 60/214(b)(10) (Smith-Hurd Supp. 1992); MINN. STAT. ANN. § 518B.01.6(a)(7) (West Supp. 1993); MONT. CODE ANN. § 40-4-121(2)(a) (1993); N.M. STAT. ANN. § 40-13-5(A)(4) (Michie Supp. 1993); WYO. STAT. § 35-21-105(a)(v) (1988).

877. DEL. CODE ANN. tit. 10, § 949(a)(3),(7) (Supp. 1993); 750 ILCS 60/214(b)(10) (Smith-Hurd Supp. 1992); IND. CODE ANN. § 34-4-5 (West Supp. 1992); KY. REV. STAT. ANN. § 403.750(c) (Michie/Bobbs-Merrill 1992); N.H. REV. STAT. ANN. § 173-B:4(I)(a)(5) (1990).

878. CAL. FAM. CODE § 2045 (West 1993); DEL. CODE ANN. tit. 10, § 949 (1993); 750

utes make an exception to these rules where tampering with property is in the ordinary course of business,[879] for expenses of a minor child,[880] or for necessities of life.[881] The trend in case law parallels the statutes, and has acknowledged the ability of civil protection orders to restrain respondents from removing, damaging, or converting items from the family home.[882]

c. Exchange of Personal Property

The trend in state statutes and case law provides for the exchange of personal property between the parties in a civil protection order.[883] Resolving contentious property issues in the civil protection order helps avoid future conflict over these items. The safest way to accomplish such an exchange is to establish a specific time, date, and list of the exact items to be exchanged in the civil protection order. During the exchange, a police officer should be present to ensure the victim's safety.[884] In cases where the parties should have no contact

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ILCS 60/214 (Smith-Hurd 1993).

879. CAL. FAM. CODE § 2045 (West 1992); LA. REV. STAT. ANN. § 46:2135(A)(4) (West 1982); MINN. STAT. § 518B.01.6 (1993); MISS. CODE ANN. § 93-21-13(2)(d) (1992); MONT. CODE ANN. § 40-4-12(2)(a) (1993); N.M. STAT. ANN. § 40-13-5 (Michie 1993); TEX. FAM. CODE ANN. § 71.11(a)(1)(B) (West 1993); P.R. LAWS ANN. tit. 8, § 621 (1990).

880. LA. REV. STAT. ANN. § 46:2135(A)(4) (West 1982).

881. CAL. FAM. CODE § 2045 (West 1993); LA. REV. STAT. ANN. § 46:2135(A)(4) (West 1982); MINN. STAT. § 518B.01.6 (1993); MONT. CODE ANN. § 40-4-121(2)(a) (1993); N.M. STAT. ANN. § 40-13-5 (Michie 1993).

882. *See, e.g.*, Rayan v. Dykeman, 274 Cal. Rptr. 672 (Ct. App. 1990) (holding that the court had authority to enter and enforce the order in light of the nonexclusive remedies provision of the domestic violence act and the stipulation that the plaintiff would permanently transfer jointly owned real estate property to defendant); Thomas v. Thomas, 477 A.2d 728 (D.C. 1984) (refusing to dissolve a civil protection order which precluded son from removing any items from father's home); Parkhurst v. Parkhurst, 793 S.W.2d 634 (Mo. Ct. App. 1990) (holding that the civil order of protection which restricted respondent from transferring or encumbering the parties' property was properly issued).

883. *See, e.g.*, State v. Wiltse, 386 N.W.2d 315 (Minn. App. 1986) (reviewing a conviction for violation of a civil protection order which restrained respondent from entering petitioner's home and required petitioner to turn over defendant's belongings still in her possession); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

884. Eleven states and Puerto Rico require the police to accompany a domestic violence victim to retrieve her personal property. CAL. PENAL CODE § 13701 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(7.5)(a) (West 1993); GA. CODE ANN. § 19-13-4(5) (1993); 750 ILCS 60/304 (Smith-Hurd 1993); KAN. STAT. ANN. § 60-3107(a)(8) (1993); LA. REV. STAT. ANN. § 46: 2135(C) (West 1993); N.J. STAT. ANN. § 2C:25-28(k) (West 1993); N.M. STAT. ANN. § 40-13-7B(3) (Michie 1992); N.C. GEN. STAT. § 50B-5 (1992); OR. REV. STAT. § 107.718(c) (1991); P.R. LAWS ANN. tit. 8, § 3.10 (1990); S.C. CODE ANN. § 20-4-100 (Law. co-op. 1991). The District of Columbia and Illinois have provided specifically in their statutes that the police or other adult third party may accompany defendant to retrieve his

or the petitioner lives at an undisclosed address, the order should provide that the petitioner deliver the specified items to a neutral third party. The court in *Smart v. Smart*[885] dismissed the appeal of an order which required a safe exchange where the husband had to remove his belongings from the home and then turn his keys over to the police.[886]

8. Orders Concerning Weapons

Each year, over 1.7 million Americans face a spouse wielding a knife or a gun.[887] Forty percent of the domestic violence calls received by the San Francisco Police Department each year involve the use of weapons.[888] Weapons are used in twenty-six percent of violence crimes committed by spouses.[889] Although over thirty-three percent of assaults by intimates involved the use of guns, bludgeons, or other weapons,[890] in only forty-one percent of these cases is the batterer arrested.[891] Even where the batterer is arrested, these cases are prosecuted as misdemeanors rather than felonies.[892]

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personal belongings. D.C. CODE § 16-1005 (1981); 750 ILCS 60/214(b) (Smith-Hurd 1993); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

Twenty-six states and the District of Columbia require the police to assist a petitioner to remove the respondent and gain possession of her residence. ALASKA STAT. § 25.35.050 (1992); ARK. CODE ANN. § 9-15-208 (Michie 1993); CAL. PENAL CODE § 13701(h) (West 1993); COLO. REV. STAT. ANN. § 14-4-103 (West 1993); D.C. CODE ANN. § 16-1031 (1992); FLA. STAT. ANN. § 741.30 (West 1993); GA. CODE ANN. § 19-13-4 (1991); HAW. REV. STAT. § 586-7 (1985); IDAHO CODE § 39-6309 (1993); IOWA CODE ANN. § 236.12 (West 1992); KAN. STAT. ANN. § 60-3107(a)(5) (1992); KY. REV. STAT. ANN. § 403.785(3)(a) (Michie 1992); MINN. STAT. ANN. § 518B.01 (West 1992); NEB. REV. STAT. § 42-928 (Supp. 1992); N.H. REV. STAT. ANN. § 173-B:43 (1992); N.J. STAT. ANN. § 2C:28 (West 1993); N.M. STAT. ANN. § 40-13-7B(4) (Michie 1992); N.C. GEN. STAT. § 50B-3 (1992); N.D. CENT. CODE § 14-07.1-04 (1991); OHIO REV. CODE ANN. § 3113.31F(3) (Anderson 1992); OR. REV. STAT. § 107.718(c) (1991); R.I. GEN. LAWS § 15-15-5 (1992); S.C. CODE ANN. § 20-4-6O(c)(5) (Law. Co-op. 1992); TEX. FAM. CODE ANN. § 71.15O (West 1993); VT. STAT. ANN. tit. 15, § 1108 (1991); WASH. REV. CODE ANN. § 26.50.080 (West 1992); WIS. STAT. ANN. § 813.12(6)(a) (West 1992).

885. 297 S.E.2d 135 (N.C. Ct. App. 1982).

886. *Id.* at 137-38; *see also* State v. Lewis, 508 N.W.2d 75 (Wis. Ct. App. 1993) (upholding order requiring defendant to stay away from plaintiff's residence subject to the condition that he could retrieve personal property if accompanied by a police officer).

887. GOOLKASIAN, *supra* note 780, at 2.

888. In 1991 and 1992, 59% of female homicide victims were killed by a husband, boyfriend or family member. *Family Violence Leads Cause of San Francisco Women's Death*, CALIF. PHYSICIAN, Dec. 1993, at 23.

889. KLAUS & RAND, *supra* note 3, at 4.

890. *Id.* Weapons used include chains, clubs, chairs, lamps, wrenches, hammers, gold clubs, knives, razors, broken bottles, belts, and buckles. EWING, *supra* note 180, at 8-9.

891. *Id.*

892. Barbara Smith, *Non-Stranger Violence: The Criminal Courts Response*, *in* 7 RE-

In light of the severe danger weapons pose in an abusive relationship, judicial authorities recommend that law enforcement officers be given authority to seize weapons when they make arrests in domestic violence cases, and that batterers be precluded from the use and possession of firearms and other specified weapons.[893] Further, when the respondent keeps a licensed or unlicensed gun in a commonly held area of the parties' residence, the petitioner can request that the court order the police to search the residence for that weapon and confiscate it.[894] A judge can order the police to perform this search in the temporary or civil protection order.[895] The court issuing a civil protection order may also prohibit the respondent's possession of weapons,[896] order the revocation of respondent's weapons license,[897] or order the respondent to turn over or surrender all weapons,[898] or prohibit the respondent from purchasing or receiving additional firearms for the duration of the order.[899] California prohibits a respondent who has a protection order issued against him from purchasing, receiving, or attempting to purchase a firearm.[900] New Hampshire and New Jersey additionally provide that after an arrest for a civil protection order violation, the police may seize defendant's weapons.[901] North Dakota authorizes the court to order a surrender of weapons following an arrest for domestic violence if it appears likely the respondent will use them.[902] This relief is available to victims in all states either by specific statute, or through the catch-all provisions in the states' civil protection order statute.

SPONSE TO VIOLENCE IN THE FAMILY AND SEXUAL ASSAULT, 2 (1983).

893. MODEL CODE, *supra* note 15, §§ 207, 306.

894. *See infra* notes 1333-43 & 2186-202 and accompanying text.

895. N.H. REV. STAT. ANN. § 173-B:8(I)(b) (1990).

896. DEL. CODE ANN. tit. 10, § 949 (1993); N.J. STAT. ANN. § 2C:25-28(j) (West 1994).

897. N.J. STAT. ANN. 2C:25-21(d) (West 1994).

898. DEL. CODE ANN. tit. 10, § 949 (1993); D.C. CODE ANN. § 16-1005 (1981); N.H. REV. STAT. ANN. § 173-B:10(g) (1990); N.J. STAT. ANN. § 2C:25-21(d) (West 1994); 23 PA. CONS. STAT. ANN. § 6108(a)(7) (1992); S.D. CODIFIED LAWS ANN. § 25-10-24 (1992).

899. DEL CODE ANN. tit. 10, § 949 (1993).

900. CAL. FAM. CODE § 5516 (West 1992).

901. N.H. REV. STAT. ANN. § 173-B:8(I)(b) (1990) ("Subsequent to an arrest, the peace officer shall seize any deadly weapons in the control, ownership or possession of the defendant which may have been used or threatened to be used, during the violation of the protection order."); N.J. STAT. ANN. § 2C:25-21(d) (West 1994) ("[A] law enforcement officer who has probable cause to believe that an act of domestic violence has been committed may: (a) question persons present to determine whether there are weapons on the premises; and (b) upon observing or learning that a weapon is present on the premises, seize any weapon that the officer reasonably believe would expose the victim to a risk of serious bodily injury.").

902. N.D. CENT. CODE § 14-07.1-13(2) (1991).

Case law expands upon these statutory provisions. The court in *Hoffman v. Union County Prosecutor*[903] held that the police properly took possession of the husband's rifles, shotguns, and a Japanese saber after a domestic incident at the wife's request, in order to protect her from further abuse.[904] The court explained that continuation of the husband's firearms purchaser ID card would not be in the interest of the public health, safety, or welfare, based on his habitual drinking and his pattern of domestic and other violence.[905]

Both criminal and civil courts should routinely inquire whether perpetrators in domestic violence cases own weapons, and should order their confiscation by police in the protection order. Domestic violence advocates and attorneys representing battered women should request this relief whenever the victim raises concerns about weapons. Research data on batterers who ultimately kill their victims highlight the importance of retrieving weapons.[906] The National Coalition Against Domestic Violence reports that forty-one percent of all female homicide victims are murdered by their own mates, and most serious injuries and deaths occur when the battered woman attempts to flee.[907] A Pennsylvania study reveals that a woman or child is murdered every three days by husbands or male partners in that state.[908] In light of this research, the National Council of Juvenile and Family Court Judges recommends that civil protection orders specifically

903. 572 A.2d 1200 (N.J. Super. Ct. Law Div. 1990).

904. *Id.* at 1204.

905. *Id.* at 1205; *see also* State v. Solomon, 621 A.2d 559 (N.J. Super. Ct. 1993) (holding that where a defendant's weapons were seized pursuant to the domestic violence statute, these weapons would not be returned until the domestic violence complaint was dismissed and the threat had passed, not simply when the criminal prosecution was dismissed because any other interpretation of the statute would undermine its purpose to release the seized weapons when the violent situation no longer existed). In a 1988 study, researchers empirically derived three types of men who batter. The most violent men were those who were severely abused or witnessed abuse in childhood, who abuse alcohol and other drugs, and who are violent outside as well as inside the home. Daniel G. Sanders & Angela Browne, *Domestic Homicide, in* CASE STUDIES IN FAMILY VIOLENCE 379 (Robert Ammerman & Michel Hersen eds., 1991). Given this study, the great importance of removing the weapons in the *Hoffman* case is evident where the defendant was a severe abuser, used alcohol regularly, and was violent outside as well as inside the home. *Hoffman*, 572 A.2d at 1200.

906. Sanders & Browne, *supra* note 905, at 381.

907. NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET 11 (1990).

908. *Behind Closed Doors: Family Violence in the Home: Hearings Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 61 (1991) (statement of Barbara Hart).

address weapons in the home or in the possession of the abuser.[909]

9. Treatment and Counseling

a. Authority to Order Treatment for Domestic Violence Perpetrators[910]

The National Institute of Justice's civil protection order study found that mandatory counseling that is specifically designed to treat domestic violence can teach some batterers non-abusive ways of relating to their partners.[911] Thirty-three jurisdictions statutorily authorize the court to order counseling and treatment for domestic violence perpetrators in protection orders.[912] Progressive jurisdictions order the defendant into a certified batterers program.[913] California, Illinois, and Massachusetts explicitly provide for the inclusion of substance abuse treatment in the treatment order,[914] and courts in other states order substance abuse treatment under the catch-all provisions of their statute. Wyoming is the only state which requires that the

909. FAMILY VIOLENCE PROJECT, *supra* note 687, at 21.

910. *See generally* MODEL CODE, *supra* note 15, § 102.

911. NIJ CPO STUDY, *supra* note 19, at 44.

912. ALASKA STAT. § 25.35.010(b)(7) (1992); CAL. FAM. CODE § 5754 (West 1992); DEL. CODE ANN. tit. 10, § 949 (1993); D.C. CODE ANN. § 16-1005 (1992); FLA. STAT. ANN. § 741.30(7)(a) (West 1993); GA. CODE ANN. § 19-13-4(11) (Michie 1992); HAW. REV. STAT. § 586-5.5 (1992); IDAHO CODE § 39-6306 (1993); 750 ILCS 60/214 (Smith-Hurd 1993); IND. CODE ANN. § 34-4-5.1-5(a)(6) (1993); IOWA CODE ANN. § 236.5.1 (West 1993); KAN. STAT. ANN. § 60-3107(a)(9) (Vernon 1993); KY. REV. STAT. ANN. § 403.750(1)(g) (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 46:2136(A)(4) (West 1982); MD. FAM. LAW CODE ANN. § 4-506(d)(10) (1993); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 1993); MINN. STAT. ANN. § 518B.01.6 (West 1992); MISS. CODE ANN. § 93-21.15(f) (1992); MO. ANN. STAT. § 455.050(3)(8) (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(b)(5) (1990); N.J. STAT. ANN. § 2C:25-29(b) (West 1992); N.M. STAT. ANN. § 40-13-6(F) (Michie 1993); N.D. CENT. CODE § 14-07.1-02.4d (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(f) (Anderson 1992); OKLA. STAT. ANN. tit. 22, § 60.4 (West 1992); P.R. LAWS ANN. tit. 8, § 602 (1990); UTAH CODE ANN. § 77-36-5 (1993); VA. CODE ANN. § 16.1-279.1(A)(5) (Michie 1993); WASH. REV. CODE ANN. § 26.50.060(1)(d) (West 1992); W. VA. CODE § 48-2A-6 (1992); WYO. STAT. § 35-21-105(a)(vii) (1993).

913. *See, e.g.*, CAL. FAM. CODE § 5754 (West 1992); MISS. CODE ANN. § 93-21-15(f) (1992); MO. REV. STAT. § 450.050(3)(8) (1993); N.H. REV. STAT. ANN. § 173-B:4(1)(b)(5) (1992); N.J. STAT. ANN. § 2C:25-29(5) (West 1993); UTAH CODE ANN. § 77-36-5 (1993); *see also* MODEL CODE, *supra* note 15, § 508 (requiring the appropriate state agency to "promulgate rules or regulations for programs of intervention for perpetrators of domestic or family violence").

914. CAL. FAM. CODE § 5754 (West 1992); 750 ILCS 60/214 (Smith-Hurd 1993); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 1993). However, domestic violence experts have recommended separate treatment of domestic violence and substance abuse because they are separate problems that must be treated independently. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 154.

treatment not exceed ninety days.[915] Case law reflects a trend toward courts ordering batterers into treatment. Courts have held batterers for psychiatric examinations,[916] risk assessment,[917] and domestic abuse counseling.[918] Where domestic violence is an issue, the batterer husband can be ordered to undergo psychiatric examination in a custody case.[919]

It is important to be aware that little is really known about the effectiveness of various treatment programs in preventing future domestic violence. In ordering or requesting counseling, courts and attorneys should be mindful that experts argue that spousal battering represents a complex, long-term behavior pattern that is not readily changed.[920]

Generally, counseling programs for abusers have a thirty-three to fifty percent dropout rate.[921] At least half of the men who complete court ordered treatment programs are nonviolent during the following year.[922] Even these limited results must be evaluated in light of re-

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915. WYO. STAT. § 35-21-105(a)(vii) (1993). There is a growing consensus among domestic violence experts that a minimum of one year is required for treatment to be effective. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 154.

916. *See, e.g.*, Agnew v. Campbell, No. C3-90-1130, 1990 WL 188723 (Minn. Ct. App. Dec. 4, 1990) (affirming the dismissal of plaintiff's action against the judge who assessed attorney's fees and had the plaintiff held for psychiatric examination after the plaintiff violated a civil protection order).

917. Cosme v. Figueroa, 609 A.2d 523, 525 (N.J. Super. Ct. Ch. Div. 1992) (holding that a requested risk assessment should be ordered unless defendant can show that the request is arbitrary and capricious).

918. *See, e.g., id.* at 523 (ordering defendant to undergo domestic violence counseling).

919. Katz v. Katz, 467 N.Y.S.2d 223, 224 (N.Y. App. Div. 1983) (ordering abusive husband to undergo psychiatric examination in custody case).

920. A.R. KLEIN, PROBATION/PAROLE SUPERVISION PROTOCOL FOR SPOUSAL ABUSERS 86 (1989). The National Clearinghouse for the Defense of Battered Women has reported that clinicians claim that the majority of the few abusive men who receive treatment continue the abuse with new partners. Lenore E. Walker & Angela Browne, *Gender and Victimization by Intimates*, 53 J. PERSONALITY 179, 192 (1988). Dr. Anne Ganley has also found that the batterers she treats often go on to batter another woman in their next relationship. TERRIFYING LOVE, *supra* note 4, at 72.

921. Edward Gondolf, *Evaluating Programs for Men Who Batter: Problems and Prospects*, 2 J. FAM. VIOLENCE 95, 98 (1987). The drop out rate has reached 75% in some programs. *Id.* Men who drop out of treatment are significantly more likely to continue violence than those who complete treatment. WILLIAM A. STACEY & ANSON SHUPE, UNIVERSITY OF TEXAS AT ARLINGTON, AN EVALUATION OF THREE PROGRAMS FOR ABUSIVE MEN IN TEXAS 68 (Monograph No. 29, 1984); Jeffrey L. Edleson & Roger J. Gruszynski, *Treating Men Who Batter: Four Years of Outcome Data From the Domestic Abuse Project*, 12 J. SOC. SERV. RES. 3, 4 (1988); L. Kevin Hamberger & James. E. Hastings, *Characteristics of Spouse Abuse: Predictors of Treatment Acceptance*, 1 J. INTERPERSONAL VIOLENCE 363-73 (1986); HARRELL, *supra* note 599, at 32.

922. Carann S. Feazell et al., *Services for Men Who Batter: Implications for Programs*

search which demonstrates a decline in violence following court intervention even when treatment is not sought or ordered.[923] Studies of court intervention based on victim interviews have found that sixty percent of batterers who experienced court intervention remained non-violent for six months.[924] Although treated offenders were *more* likely to commit less serious acts of physical violence against their victims, it appears that overall, treated batterers reduced their psychological abuse more than untreated offenders under court supervision.[925] Therefore, leading researchers have concluded that court intervention is the best deterrent to continued domestic abuse.[926]

Many batterers attempt to excuse their violence against family members by blaming it on their alcohol or drug use.[927] Research indicates, however, that substance use or abuse does not cause domestic violence.[928] There are many substance abusers who do not batter their partners.[929] There are abusers who batter when they are under

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and Policies, 33 FAM. REL. 217-23 (1984). Studies on the percentage remaining non-violent varies dramatically, with lower rates of non-violence reported in studies that relied on victim interviews for data rather than on police reports. *Id*; Richard M. Tolman & Larry W. Bennett, *A Review of Quantative Research on Men Who Batter*, 5 J. INTERPERSONAL VIOLENCE 87, 104 (1990); Gondolf, *supra* note 921, at 98.

923. Jeffrey Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, *in* FAMILY VIOLENCE 377, 413-14 (L. Ohlin and M. Tonry eds., 1989); Peter Jaffee et al., *The Impact of Police Laying Charges in Cases of Wife Assault*, 1 J. FAM. VIOLENCE 37-50 (1986); HARRELL, *supra* note 599, at 32.

924. PATRICK A. LANGAN & CHRISTOPHER A. INNES, U.S. DEP'T OF JUSTICE, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 1 (1986). This percentage of non-violent batterers is 82% if police reports are relied on as the test of recidivism. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 267 (1984). Other studies have found that at least half of the small percentage of abusive men who receive treatment continue their violent behavior with new partners. H.M. HUGHES, IMPACT OF SPOUSE ABUSE ON CHILDREN OF BATTERED WOMEN IN VIOLENCE UPDATE 1-11 (1992). Ninety-five percent of men who sought treatment for battering behavior have admitted to battering more than one woman. TERRIFYING LOVE, *supra* note 4, at 72. This abusive behavior stems from the male batterer himself, not from any particular relationship. *Id.*

925. Forty-three percent of treated batterers reduced their psychological abuse compared to 12% of non-treated batterers. ADELE HARRELL, THE URBAN INSTITUTE, EVALUATION OF COURT ORDERED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS 62 (1991).

926. Jeffrey L. Edleson & Maryann Syers, *The Relative Long-term Effects of Group Treatments for Men Who Batter*, *in* MINNEAPOLIS: THE DOMESTIC ABUSE PROJECT (1990); Jeffrey L. Edleson & Maryann Syers, *The Relative Effectiveness of Group Treatments for Men Who Batter*, 26 SOC. WORK 10, 16-17 (1990); HARRELL, *supra* note 599, at 32.

927. Ganley, *supra* note 21, at 32.

928. *Id.*

929. *Id.*

the influence and batter when they are sober.[930] The fact that a batterer was using substances at the time of a particular incident of abuse does not alter the fact that the abuse took place. Instead, substance use or abuse increases lethality in domestic violence cases and should be a factor considered by courts when assessing a victim's need for protection and the safety of the children during visitation.[931] When a batterer also abuses substances, any treatment plan must include treatment of the substance abuse problem prior to treatment for domestic violence.[932]

Courts and counsel should be careful to consider the particularities of each batterer when ordering batterers to undergo treatment for domestic violence and/or substance abuse. Experienced domestic violence counselors recommend that counseling should only be ordered when specific criteria are met.[933] The court should:

> 1) Assess the respondent's suitability for domestic violence treatment.[934] Factors to consider in determining the respondent's suitability include: respondent's dangerous propensities, his motivation for change and the safety needs of the victim, other family members and children.[935]
> 2) Ensure that the victim's safety is addressed by developing a safety plan, including issuance of civil protection orders when the batterer is ordered into treatment.[936]
> 3) Determine whether an appropriate batterer's treatment program exists in the community, i.e. one that will specifically address the violent behavior.[937]
> 4) Ensure that there will be adequate monitoring of defendant's progress in the counseling program by court probation.[938]
> 5) Assure that criminal contempt proceedings are promptly instituted if the court learns that a new incident of domestic abuse has been committed or that the batterer is not satisfactorily performing in the batterers' counseling program.[939]

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930. *Id.*
931. *Id.*
932. *Id.*
933. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 151-52.
934. *Id.*
935. Anne L. Ganley, *Perpetrators of Domestic Violence: An Overview of Counseling the Court Mandated Client*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 173-93 (D. Sonkin ed., 1986).
936. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 151.
937. *Id.*
938. *Id.* at 152.
939. *Id.* at 151; Ganley, *supra* note 935, at 173-93.

State v. Sutley[940] is an example of a case in which the court struck down the substance abuse treatment ordered as a condition of bail, because the court believed that it was only "remotely related" to the domestic violence crime with which the defendant was charged and therefore would not be effective in the rehabilitation of the defendant. Courts should carefully assess the respondent's need to have domestic violence counseling and only order batterers into programs that meet appropriate criteria. The National Council of Juvenile and Family Court Judges recommends that standards for batterers' treatment and education programs be established in each jurisdiction and that court referrals be limited to those providers who meet the standards.[941] The Council further states: "[i]t is paramount that these programs ensure the ongoing safety of the victim and other family members."[942]

b. Treatment for the Abused Party[943]

Victims of domestic violence should never be ordered into treatment programs against their wishes. The National Institute of Justice civil protection order study states:

> Requiring the victim to enter counseling may put her in increased jeopardy by suggesting to the batterer that he is not responsible for his violence and thereby giving him an excuse to continue his abuse. Couples' counseling improperly conducted may have the same effect; furthermore, it may create a setting in which the victim is at an inherent disadvantage given her fear of the batterer.[944]

Ordering victims into counseling programs confirms the batterer's belief that the victim, rather than he, caused, and is responsible for, the violence.[945] Alaska provides for family counseling if it will not result in more domestic violence.[946] The D.C. Gender Bias Task Force Civil Protection Order Survey revealed a civil protection order contempt rate that was twice as high when the parties were ordered into family counseling as opposed to individual counseling for the

940. No. 90-A-1495, 1990 Ohio App. LEXIS 5520 (Ohio Ct. App. Dec. 14, 1990).
941. FAMILY VIOLENCE PROJECT, *supra* note 687, at 50.
942. *Id.*
943. *See generally* MODEL CODE, *supra* note 15, § 102.
944. NIJ CPO STUDY, *supra* note 19, at 44.
945. ORLOFF & KLEIN, *supra* note 26, at 105.
946. *See* ALASKA STAT. § 25.35.010(b)(7) (1993).

batterer.[947]

Case law supports the position that the court can appropriately refuse to order a mental examination of the petitioner who received the protection order.[948] The best type of treatment program must focus only on the batterer and not on the victim or the relationship. The victim can be encouraged to seek treatment and support if this is done outside of the courtroom and away from the batterer. Several state statutes authorize court orders that allow or assist petitioners in obtaining counseling or treatment through a civil protection order.[949] Treatment in these cases is not mandatory for the petitioner; instead, the civil protection order provides a mechanism that assists the victim in accessing free or low-cost counselling programs.[950]

10. Custody and Visitation Issues

Custody questions arise in a variety of domestic violence contexts and court cases. An overview of policy concerns, research findings, and court cases which link custody and domestic violence is relevant in all domestic violence cases whether questions arise in a civil protection order, divorce, custody, or criminal case. Case law decided in the divorce context regarding domestic violence and custody can be useful in a civil protection order proceeding. Similarly, court decisions in civil protection order and custody cases can be instructive to criminal court judges fashioning pre-trial release orders.

The D.C. Gender Bias Task Force found that dramatic change is needed in the way judges view custody, visitation, and support issues in domestic violence and civil protection order cases:

> Issues of custody, visitation and support are not viewed as

947. D.C. TASK FORCE, *supra* note 213, app. H at 20.

948. *See, e.g.*, Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986) (refusing to order mental examination of civil protection order petitioner).

949. *See, e.g.*, CAL. FAM. CODE § 5754 (West 1993); DEL. CODE ANN. tit. 10, § 949(a)(10) (Supp. 1993); HAW. REV. STAT. § 586-5.5 (1985 & Supp. 1992); IND. CODE ANN. § 34-4-5.1-5(a)(4) (Supp. 1993); IOWA CODE ANN. § 236.5.1 (West 1985 & Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(9) (Supp. 1993); KY. REV. STAT. ANN. § 403.750(1)(g) (Michie Supp. 1992); LA. REV. STAT. ANN. § 46:2136.A(4) (West 1982); MD. FAM. LAW CODE ANN. § 4-506(d)(10) (Supp. 1993); MINN. STAT. § 518B.01.6(6) (West 1990 & Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(f) (Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(b)(5) (1990); N.D. CENT. CODE § 14-07.1-02.4d (1991 & Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(f) (Anderson 1989 & Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.4(E) (West 1992); VA. CODE ANN. § 16.1-279.1.A.5 (Michie 1992).

950. Judicial authorities recommend that communications between shelter workers, domestic violence counselors, victim advocates, and battered women be afforded privilege. *See* MODEL CODE, *supra* note 15, § 216.

> peripheral to resolving domestic violence. Their resolution may be as important as traditional "stay away" orders, since disputes over custody and visitation can trigger violence, and lack of financial resources may lead a victim of violence to return to the batterer. Therefore, the Task Force recommends that the Superior Court evaluate its practices to address this apparent failure of the system to utilize regularly critical provisions in the Intrafamily Act.[951]

Congress demonstrated widespread bi-partisan support for court recognition of the strong link between spouse abuse and child abuse in making child custody determinations when both houses unanimously passed House Concurrent Resolution 172 in October of 1990.[952] This concurrent resolution calls on all jurisdictions to require that judges take testimony about violence in the home in all custody cases, and to adopt a presumption against awarding custody of minor children to batterers.[953] This bill incorporates the sense of Congress that batterers should not be rewarded for their behavior by awarding them custody of their children, and recognizes the interrelated nature of domestic violence and child custody.[954] The bill's sponsor, Congresswoman Constance Morella from Maryland, who has taken the lead on many issues affecting battered women, explained:

> Battering is socially learned behavior. Witnessing domestic violence, as a child, has been identified as the most common risk factor for becoming a batterer in adulthood . . . . But, this cycle can only be broken when there is a recognized consequence for these actions.[955]

The text of House Concurrent Resolution 172 includes the following recommendations:

> Now, therefore, be it Resolved by the House of Representatives (the Senate concurring) it is the sense of the Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.[956]

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951. D.C. TASK FORCE, *supra* note 213, at 143.

952. H.R. Con. Res. 172, 101st Cong., 2d Sess., 104 Stat. 5183 (1990).

953. *Id.*

954. *Id.*

955. 135 CONG. REC. H4030 (daily ed. July 20, 1990) (statement of Rep. Morella).

956. H.R. Con. Res. 172, 101st Cong., 2d Sess., 104 Stat. 5183 (1990). The remainder of the text summarizes conclusions about domestic violence and custody:

> Whereas State courts have often failed to recognize the detrimental effects of having as a custodial parent an individual who physically abuses his or her spouse,

The findings and recommendations of the National Council of Juvenile and Family Court Judges also emphasize the need for judges hearing custody and visitation cases to take evidence of domestic violence in custody cases and weigh that evidence in favor of the non-abusive parent:

> [F]amily violence is a factor the court must consider in all legal decisions relating to the family and especially custody and visitation.[957]
>
> If victims of family violence have children in common with their batterers, courts often must adjudicate the matter of custody and visitation when issuing protection orders and dissolutions. Courts have sometimes failed to evaluate and provide for children who have lived in abusive homes, and such failure can have tragic

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insofar as the courts do not hear or weigh evidence of domestic violence in child custody litigation;
Whereas there is an alarming bias against battered spouses in contemporary child custody trends such as joint custody and mandatory mediation;
Whereas joint custody guarantees the batterer continued access and control over the battered spouse's life through their children;
Whereas joint custody forced upon hostile parents can create a dangerous psychological environment for a child;
Whereas a batterer's violence toward an estranged spouse often escalates during or after a divorce, placing both the abused spouse and children at risk through shared custody arrangements and unsupervised visitation;
Whereas physical abuse of a spouse is relevant to child abuse in child custody disputes;
Whereas the effects of physical abuse of a spouse on children include actual and potential emotional and physical harm, the negative effects of exposure to an inappropriate role model, and the potential for future harm where contact with the batterer continues;
Whereas children are emotionally traumatized by witnessing physical abuse of a parent;
Whereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent;
Whereas even children who do not directly witness spousal abuse are affected by the climate of violence in their homes and experience shock, fear, guilt, longlasting impairment of self-esteem, and impairment of developmental and socialization skills;
Whereas research into the intergenerational aspects of domestic violence reveals that violent tendencies may be passed on from one generation to the next;
Whereas witnessing an aggressive parent as a role model may communicate to children that violence is an acceptable tool for resolving marital conflict; and
Whereas few States have recognized the interrelated nature of child custody and battering and have enacted legislation that allows or requires courts to consider evidence of physical abuse of a spouse in child custody cases.

Id.; *see also* MODEL CODE, *supra* note 15, § 401.

957. FAMILY VIOLENCE PROJECT, *supra* note 687, at 9.

consequences for those children. If they have not been, state statutes should be amended to require that spouse abuse be a significant factor in consideration of custody awards. Where joint custody or unsupervised visitation is sought and there is evidence of family violence, the statute should require investigation of the violence and forensic custody evaluations by professionals specially skilled in such assessments. State legislators and judges must understand the propensity for continued violence and the impact of the violence on the children. If there is a recent history of violence, offenders should be ordered to successfully complete treatment specifically for the violence, and for substance abuse if necessary, before custody or unsupervised visitation is awarded.[958]

. . . Civil protective orders should remove the offender from the home and allow the victim and children to remain with appropriate protection, safety plans, and support.[959]

It is extremely important that children not be removed from their home . . . . Judges should ensure that necessary services are provided, and that adequate safety plans are in place for both the victimized spouse and the children . . . .[960]

. . . When the issue of family violence is found to exist in the context of a dissolution of marriage, domestic relations case of any kind, or in a juvenile case:

a) The violent conduct should be weighed and considered in making custody and visitation orders;

b) Judges should be aware that there may be an unequal balance of power or bargaining capability between the parties which calls for a more careful review of the custody and financial agreem [sic] before they are approved by the court;

c) Judges should not presume that joint custody is in the best interest of the children.[961]

Family violence is a significant factor which must be considered when deciding custody and visitation matters. Without treatment, the propensity for continued violence remains after the divorce or separation and frequently recurs during unsupervised visitation or joint custody. Court orders which force victims to share custody with their abusers place both victims and children in danger. Further, there is near unanimity that violence in the home has a powerful negative effect on children. Continued aggression and violence between divorced spouses with joint custody has the most

958. *Id.* (citations omitted).
959. *Id.* at 24.
960. *Id.*
961. *Id.* at 26.

adverse consequences for children of any custody option. The long-term effect is intergenerational transmission of abuse, with such children becoming either victims of abuse or abusers as adults. In the shorter term, emotional and physical problems will frequently lead to poor school performance, running away and juvenile delinquency.[962]

. . . Recent studies have found a 60-70% correlation between spouse and child abuse.[963] Growing up in a home where family violence is occurring is in itself a form of child abuse. Children in these homes suffer from low self-esteem, poor school attendance, poor social skills, delinquency, hyperactivity, nightmares, bed-wetting, violent behaviors and drug/alcohol abuse. They are far more likely to have serious emotional and psychological problems and to become abusers and victims of violence as adults.[964]

Supervised visitation programs, which can ensure the safety of victims of spousal abuse and their children, should be available to all persons, regardless of their income.[965] If, after a thorough investigation and forensic custody evaluation, the court does order . . . unsupervised visitation, then there is an obligation to ensure measures are taken to protect those at risk.[966]

Determination of custody and visitation of children are ways in which batterers frequently continue their harassment and other abuse. Because of his control and her fear, the battered spouse may agree to custody provisions which are not really desirable for herself or the children. Alternatively, the battered spouse may trade financial support or equitable distribution of assets for more protective custody or visitation. Judges should be sensitive to these dynamics and carefully review custody agreements when there is evidence of family violence.[967]

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962. *Id.* "Known family violence should also receive significant consideration in delinquency hearings." *Id.* at 53 n.47. Children from abusive homes are at a higher risk to become adjudicated as delinquent. Lenore E. Walker, Eliminating Sexism to End Battering Relationships, Paper Presented at the American Psychological Association 2-3 (1984).

963. *Id.* at 49 (citations omitted).

964. *Id.*

965. FAMILY VIOLENCE PROJECT, *supra* note 687, at 26. "The Creative Visitation Program designed by the YWCA of San Diego is a successful example of such a program." *Id.* at 53 n.48.

966. *Id.* at 26.

967. *Id.*

a. Custody

i. Statutory Trend Towards Creating a Presumption Against Awarding Custody to Batterers

Forty-two states, the District of Columbia, and Puerto Rico authorize an award of temporary custody of the children in a civil protection order.[968] Social science research clearly supports a presumption against awarding custody to batterers. Studies consistently reveal that there is a high coincidence of spousal and child abuse.[969] The U.S. Senate Judiciary Committee found that the most serious child abuse cases which result in emergency room treatment are merely extensions of assaults directed against the child's mother.[970] Another

968. ALA. CODE § 30-5-7(a)(4) (1989); ALASKA STAT. § 25:35.010(b)(5) (1991); ARK. CODE ANN. § 9-15-205(a)(3) (Michie 1993); CAL. FAM. CODE § 5650(b) (West 1993); COLO. REV. STAT. ANN. § 14-4-102(2)(d) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(5) (Supp. 1993); D.C. CODE ANN. § 16-1005(c)(6) (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-4(a)(4) (1991 & Supp. 1993); HAW. REV. STAT. § 586-5 (1985 & Supp. 1993); IDAHO CODE § 39-6306(1)(a) (1993); 750 ILCS 60/214(b)(6) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.5(2)(d) (West Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(4) (Supp. 1993); KY. REV. STAT ANN. § 403.750(1) (Michie Supp. 1992); LA. REV. STAT. ANN. § 46:2136(A)(3) (West 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(E) (West 1981 & Supp. 1992); MD. CODE ANN., FAM. LAW § 4-506 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3(d) (West Supp. 1993); MICH. COMP. LAWS ANN. § 600-2950(1)(c) (West 1986); MINN. STAT ANN. § 518B:.01.6(a)(3) (West 1990 & Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(d) (Supp. 1993); MO. REV. STAT. § 455-050.3(1) (1992); NEV. REV. STAT. ANN. § 33.030.1(d) (Michie 1986); N.H. REV. STAT. ANN. § 173-B:4(b)(2) (1990); N.J. STAT. ANN. § 2C:25-29(b)(11) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5A(2) (Michie 1989 & Supp. 1993); N.C. GEN. STAT. 50B-3(a)(4) (1989); N.D. CENT. CODE § 14-07.1-02.4.C (1981 & Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(d) (Anderson 1993); OR. REV. STAT. § 107-716(2)(a) (1991); 23 PA. CONS. STAT. ANN. § 6108(4) (1991); P.R. LAWS ANN. tit. 8, § 621(a) (1990); R.I. GEN. LAWS § 15-15-3(1)(c) (1988 & Supp. 1993); S.C. CODE ANN. § 20-4-60(c)(1) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-5 (1984); TENN. CODE ANN. §36-3-606(4) (1991); TEX. FAM. CODE ANN. § 71.11(a) (West 1986 & Supp. 1993); UTAH CODE ANN. § 30-6-6 (1993); VT. STAT. ANN. tit. 15, § 1103(a)(3) (1989); WASH. REV. CODE ANN. § 26.50.060(1)(c) (West Supp. 1993); W. VA. CODE § 48-2A-6 (1992 & Supp. 1993); WYO. STAT. § 35-21-105(b)(1) (1988); *see also* MODEL CODE, *supra* note 15, § 306(2)(g) (authorizing a court to "[g]rant temporary custody of any minor children to the petitioner" without notice and a hearing in a protection order). *But see* Polin v. Cosio, 20 Cal. Rptr. 2d 714 (Ct. App. 1993) (stating that the court has no jurisdiction under the Domestic Violence Prevention Act to award temporary custody where the parties to the protection order are two sisters and where the minor is not the child of both parties to the protection order).

969. Studies have found that wife beaters abused children in 70% of abusive homes where children are present. NATIONAL WOMAN ABUSE PREVENTION PROJECT, UNDERSTANDING DOMESTIC VIOLENCE: FACT SHEETS 3 (1989); Bowker et al., *supra* note 800, at 162; Walker et al., *supra* note 800, at 1.

970. *Women and Violence*, *supra* note 789, at 142.

study by the Boston Children's Hospital Child abuse program reveals that seventy percent of severely abused children in their program also had mothers who are battered.[971] Several other national studies found that in seventy percent of families where the woman is battered, children are battered as well.[972] Where there is child abuse concurrent with spouse abuse, seventy percent of the child abuse is committed by men.[973] Many batterers use abuse of children as a weapon to control battered women.[974] "Children in homes where domestic violence occurs are physically abused or seriously neglected at a rate of 1500% higher that the national average in the general population."[975] Batterers, in addition to being more likely to purposefully injure their children, also frequently inadvertently injure children while throwing furniture or other household objects at the battered spouse.[976] Children of abused women are also often injured accidentally when they intervene to try to protect their mothers.[977]

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971. WILLIAM M. HOLMES, POLICE RESPONSE TO DOMESTIC VIOLENCE: FINAL REPORT FOR BUREAU OF JUSTICE STATISTICS 16 (1988).

972. *See* FAMILY VIOLENCE COALITION, BROKEN BODIES AND BROKEN SPIRITS: FAMILY VIOLENCE IN MARYLAND AND RECOMMENDATIONS FOR CHANGE 2 (1991); NATIONAL WOMAN ABUSE PREVENTION PROJECT, *supra* note 969, at 3. Boston City Hospital found a 60% correlation between abused children and battered women. Linda McKibben, et al., *Victimization of Mothers of Abused Children: A Controlled Study*, 84 PEDIATRICS 531 (1989); *see also* FREDERIC J. COWAN, ATTORNEY GENERAL, ADULT ABUSE, NEGLECT, AND EXPLOITATION: A MEDICAL PROTOCOL FOR HEALTH CARE PROVIDERS AND COMMUNITY AGENCIES 39 (1991) (stating that between 45-60% of all spouse abuse cases eventually involve physical and/or sexual abuse to children as well); Barbara Hart, Remarks from the Task Force on Child Abuse and Neglect (1992).

973. THE BATTERED WOMAN, *supra* note 4, at 27-28 (based on data from the National Center for Child Abuse and Neglect). "The most serious cases of child abuse resulting in emergency room treatment are merely extensions of battering rampages launched against the child's mother, with 70% of the serious injuries to children and 80% of fatal injuries are inflicted by men." *Women and Violence*, *supra* note 789, at 142.

974. Physical assaults on the children may be one of the weapons used by the batterer against the victim (e.g., child physically injured when thrown in the vehicle, child abused as a way to coerce the victim to do certain things). Thirty-three percent of battered women in a Seattle shelter cite physical attacks against the children as the reason for fleeing to the shelter. Sometimes the children are injured accidentally when the batterer is assaulting the victim (e.g., infant injured when mother was thrown while holding the child, small child injured when attempting to stop the batterer's attack on the victim). FINAL REPORT OF THE WASHINGTON STATE DOMESTIC VIOLENCE TASK FORCE 7 (1991); *see also* Ganley, *supra* note 21, at 48-50.

975. NATIONAL WOMEN ABUSE PREVENTION PROJECT, *supra* note 969, at 1 (1987); Ford, *supra* note 800, at 3.

976. ROY, *supra* note 800, at 89-90.

977. Ganley, *supra* note 21, at 49; *see, e.g.*, State v. Sallet, 1993 Minn. App. LEXIS 787 (Minn. Ct. App. Aug. 3, 1993).

Social science research strongly confirms that spousal abuse has profoundly negative affects on a child's mental and physical well-being.[978] Children who witness violence between parents often suffer emotional trauma,[979] which results in behavioral and emotional problems ranging from depression and withdrawal to violence toward others and suicide.[980] Studies also reveal that children from abusive homes repeat patterns of abuse.[981] One study showed that eighty-one percent of abusive husbands and thirty-three percent of abused wives came from violent families.[982] Another study reveals that "sons of the most violent parents have a rate of wife-beating 1,000% greater than that of sons from non-violent parents."[983] Moreover, the devastating effect of family abuse on young persons' lives is clearly revealed in a study which found that sixty-three percent of young men between the ages of eleven and twenty serving time in prison for homicide in this country are doing so for killing their mother's batterer.[984]

Consequently, state civil protection order statutes and custody statutes have been moving toward supporting a presumption against awarding custody to a batterer where there is evidence of abuse. Illinois, Missouri, and New Jersey's civil protection order statutes, adopting a view preferred by Congress[985] and the National Council of Juvenile and Family Court Judges,[986] create a presumption of awarding custody to the non-abusive parent.[987] Pennsylvania's civil

978. MURRAY A. STRAUSS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 112-14 (1980) [hereinafter BEHIND CLOSED DOORS]; *see also* MODEL CODE, *supra* note 15, § 402.

979. *Id.* at 102.

980. JAFFE ET AL., *supra* note 800, at 49; Goodman & Rosenberg, *The Child Witness to Family Violence: Clinical and Legal Considerations*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 100, 102 (Daniel J. Sonkin ed., 1987); Alan Rosenbaum & K. Daniel O'Leary, *Children: The Unintended Victims of Marital Violence*, 51 AM. J. ORTHOPSYCHIATRY 692, 693 (1981).

981. BEHIND CLOSED DOORS, *supra* note 978, at 112-14.

982. Rosenbaum & O'Leary, *supra* note 980, at 693.

983. BEHIND CLOSED DOORS, *supra* note 978, at 101.

984. *Battered Women and Child Custody Litigation: Hearings on H.R. 89 Before the House Judiciary Subcomm. on Intellectual Property and Judicial Administration*, 102d Cong., 2d Sess. 164 (1992) (testimony of Judge Rosalyn Bell, Maryland Court of Special Appeals).

985. H.R. Con. Res. 172, 101st Cong., 2d Sess., 104 Stat. 5183 (1990).

986. FAMILY VIOLENCE PROJECT, *supra* note 687, at 8 (suggesting that state statutes should be amended to require that family violence be a factor in consideration of custody awards).

987. 750 ILCS 5/602(a)(7) (Smith-Hurd Supp. 1993); MO. REV. STAT. § 455.050(5) (Supp. 1993); N.J. STAT. ANN. § 2C:25-29(b)(11) (West 1992).

protection order statute specifically provides that the respondent may not receive custody if he abused the children.[988] A Pennsylvania court may also impose conditions on a custody award necessary to assure the safety of the petitioner and child.[989] In Minnesota and New Mexico, the civil protection order statute gives primary consideration to the victim and the children's safety in the placement decision.[990]

State custody statutes, independent of domestic violence codes, also address abuse issues.[991] Nine state custody codes articulate a rebuttable presumption against joint or sole custody to, or unsupervised visitation with, an abusive parent.[992]

The newly enacted Louisiana statute[993] is particularly specific and innovative. The statute not only creates a rebuttable presumption against joint or sole custody to a batterer, it also awards only supervised visitation, and then only on the condition that the abusive parent participates in a treatment program specifically designed for domestic violence offenders.[994] Other state custody statutes make domestic violence a factor that must be considered as a factor in the best interest of the child determination when courts make custody awards.[995]

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988. 23 PA. CONS. STAT. ANN. § 6108(4) (1991).

989. *Id.*

990. MINN. STAT. ANN. § 518B.01(6)(a)(3) (West Supp. 1993) ("[A]ward temporary custody or establish temporary visitation with regard to minor children of the parties on a basis which gives primary consideration to the safety of the victim and the children."); N.M. STAT. ANN. § 40-13-5A(2) (Michie 1978 & Supp. 1993) ("[A]ward temporary custody of any children involved when appropriate and provide for visitation rights . . . on a basis that gives primary consideration to the safety of the victim and the children.").

991. *See* Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 17 (1992).

992. COLO. REV. STAT. ANN. § 14-10-124(1.5)(m) (West 1989); FLA. STAT. ANN. § 61.13(2) (West 1985 & Supp. 1993); LA. REV. STAT. ANN. § 9:364(A), (C) (West Supp. 1993); MINN. STAT. ANN. § 518.17(2)(d) (West 1990 & Supp. 1993); N.D. CENT. CODE § 14-05-22.3 (1992); OKLA. STAT. ANN. tit. 43, § 112.2 (West Supp. 1994); TEX. FAM. CODE ANN. § 14.021(h) (West 1986 & Supp. 1993); WASH. REV. CODE ANN. § 26.09.191(2) & (3) (West 1986 & Supp. 1993); WIS. STAT. ANN. § 767.24(2)(b) (West 1993); WYO. STAT. § 20-2-113(b) (1977); *see also* MODEL CODE, *supra* note 15, § 401.

993. LA. REV. STAT. ANN. 9:364(A), (C).

994. *Id.*

995. ALASKA STAT. § 25.24.150(c)(7) (1991); ARIZ. REV. STAT. ANN. § 25-332-B (1991 & Supp. 1993); CAL. CIV. CODE § 4608(b) (West 1988 & Supp. 1993); COLO. REV. STAT. ANN. § 14-10-124(1.5)(m) (West 1989); HAW. REV. STAT. § 571-46(9) (1986 & Supp. 1992); IDAHO CODE § 32-717 (Supp. 1993); 750 ILCS 5/602(a)(7) (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 214.5K-1 (West Supp. 1992); MINN. STAT. ANN. § 257.025(a)(12) (West 1992); MO. ANN. STAT. § 455.050.5 (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-

As the study undertaken by the National Council of Juvenile and Family Court Judges concludes: "collectively the codes appear to create a new legal principle; to wit, the existence of domestic violence in a family militates against an award of joint legal or physical custody and against an award of sole custody or unsupervised visitation to the abusive parent."[996]

These statutes recognize that domestic abuse poses a danger for children, and attempt to counter an alarming trend—fifty-nine percent of abusive men and fathers who use violence to gain custody are successful in court.[997] Gender bias reports from states across the country are consistently finding that judges routinely ignore the issue of domestic violence in custody disputes, or dismiss as insubstantial the impact of parental violence on children in the household.[998] This is partially due to the lack of judicial education about domestic issues that would allow judges to better recognize power and control tactics and the cycles of violence.[999] In some cases, these results are also due to bad lawyering by attorneys who are not schooled in the dynamics of domestic violence and who encourage clients to trade pro-

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212(1)(f) (1993); NEV. REV. STAT. ANN. § 125.480.4(c) (Michie 1992); N.H. REV. STAT. ANN. § 458:17(II)(c) (1992); N.J. STAT. ANN. § 9:2-4(c) (West 1993); N.D. CENT. CODE § 14-09-06.2(1)(j) (1991 & Supp. 1993); 23 PA. CONS. STAT. ANN. § 5303(a) (1991); R.I. GEN. LAWS § 15-5-16(g) (Supp. 1993); VA. CODE ANN. § 20-107.2 (Michie Supp. 1993); WIS. STAT. ANN. § 767.24(5)(i) (West 1993).

996. Hart, *supra* note 991, at 31; *see also* MODEL CODE, *supra* note 15, §§ 401, 403.

997. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 45 (1991); *Gender Bias in Court-Determined Custody*, MICH. COALITION AGAINST DOMESTIC VIOLENCE NEWSL. (Mich. Coalition Against Domestic Violence), Feb. 1989, at 4.

998. Czapanskiy, *supra* note 23, at 247, 255-57. The Maryland Gender Bias Report found that only 50% of judicial officers are willing to take into account domestic violence when making custody determinations. MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, GENDER BIAS IN THE COURTS 33 (1989). The Gender Bias Task Force in the District of Columbia found that less than half of all judges take into account violence by the father against the mother when making custody determinations. D.C. TASK FORCE, *supra* note 213, at 183.

999. Persons who are not trained to recognize the dynamics of domestic violence may be easily lulled by men who batter their wives who often do not come across to those outside the family as abusive individuals. Often, the abusive man maintains a public image as a friendly, caring person who is a devoted "family man." David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON B.J. 23, 23 (1989). Many batterers effectively use this suave exterior to maintain continued control over their victims and children by successful manipulation of the court process. As a result, batterers' rates of success in obtaining custody of their children at a contested custody trial may be somewhat higher than non-batterers, whose success rates ranges from 38%-63%. *See* Nancy D. Polikoff, *Child Custody Decisions: Exploring the Myth That Mothers Always Win*, 7 WOMEN'S RTS. L. REP. 235, 236-37 (1982).

tection for money or accept settlements that include some protection if the battered woman agrees not to present testimony about the violence in the divorce proceeding.[1000]

North Dakota case law addresses the issue of what evidence is sufficient to overcome a statutory presumption against awarding custody to a batterer. In *Schestler v. Schestler*,[1001] the court ruled that the statutory presumption against custody to an abusive parent was rebutted and awarded custody to the father, who had physically abused the mother during the marriage.[1002] The court found that an adverse relationship existed between the children and their step siblings, and therefore questioned the children's safety in the mother's home.[1003] Additionally, the court found that the father never directed violence toward the children, the father had a more stable home environment, the children felt more affection toward the father than toward the mother, and the father's relatives would assist in child care.[1004]

ii. Importance of Addressing Custody in Civil Protection Order Cases

The D.C. Gender Bias Task Force studied judicial behavior, bias, and outcome in all civil protection order cases in the District of Columbia in 1989.[1005] The findings were shocking. Specifically, in cases where the parties had a child in common, custody was ordered in less than half (47.9%) the cases,[1006] and child support was ordered in only 4.9% of the cases with a custody order.[1007] In the most severely violent cases, when a civil protection order was issued, the

1000. Such agreements effectively bar the presentation of evidence about violence on the issue of custody and the best interests of the child. To avoid these problems, it is very important that battered women secure representation by counsel that is familiar with and has handled domestic violence cases. This domestic violence counsel may be retained in addition to traditional family law counsel that may have more expertise in handling monetary and property issues. One way to locate experienced domestic violence counsel is to call the local battered women's shelter or crisis line and ask for the names of attorneys who provide pro bono assistance to women at low-income levels. These attorneys usually have extensive domestic violence experience.

1001. 486 N.W.2d 509 (N.D. 1992).

1002. *Id.*

1003. *Id.* at 512.

1004. *Id.* at 512.

1005. D.C. TASK FORCE, *supra* note 213.

1006. *Id.* at 147.

1007. *Id.* at 148.

likelihood that judges would order custody was even less.[1008] Custody was not determined in 70.8% of the assault cases, 73.7% of cases of assault with a deadly weapon, nor was it determined in 81.8% of the cases involving rape or a sexual offense.[1009] In addition, judges were most likely to order reasonable rights of visitation, which requires unsupervised communication between the abuser and his victim, where the underlying offense was assault with a deadly weapon.[1010] The report also reveals that there is a high correlation between ineffective custody and visitation provisions and contempt of the court order.[1011] Even in cases where custody *is* awarded, contempt of court orders involving visitation provisions which allow contact between the parties invariably occur at a *higher* rate than any other form of contempt violation.[1012] In most cases where the abuser was found in contempt, the court amended reasonable visitation provisions to provide for structured or supervised visitation.[1013]

Appellate courts consistently uphold awards of temporary custody to a petitioner in protection order proceedings.[1014] The reason for

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1008. *Id.* at 11 app. H.

1009. *Id.* at 10-11 app. H.

1010. *Id.* at 11 app. H.

1011. *Id.*

1012. *Id.*

1013. *Id.* at 153; *Battered Women and Child Custody Litigation: Hearings on H.R. 89 Before the House Judiciary Subcomm. on Intellectual Property and Judicial Administration*, 102d Cong., 2d Sess. 164 (1992) (testimony of Leslye E. Orloff).

1014. Kavolkowski v. Capps, 1993 Conn. Super. LEXIS 2681 (Conn. Super. Ct. Oct. 13, 1993) (granting plaintiff mother *ex parte* restraining order and temporary child custody order against defendant father in proceeding where mother alleged father had physically abused her and her children); Crippen v. Crippen, 610 So. 2d 686 (Fla. Ct. App. 1992) (granting wife temporary sole custody of children in domestic violence injunction where temporary injunction was later extended with custody provision in place); *In re* Marriage of Rodriguez, 545 N.E.2d 731 (Ill. 1989); *In re* Marriage of Alexander, 623 N.E.2d 921 (Ill. App. Ct. 1993) (awarding petitioner temporary custody of couple's minor child in *ex parte* protection order issued when the petitioner filed for divorce); Rigwald v. Rigwald, 423 N.W.2d 701 (Minn. Ct. App. 1988) (awarding temporary custody to petitioner in a temporary protection order where judicial authorities assured the court that an adjudication of child custody in another proceeding was imminent); Sweep v. Sweep, 358 N.W.2d 451 (Minn. Ct. App. 1984) (awarding custody of the child to the parents of the deceased natural mother in the stepmother's domestic abuse proceeding against the father where the maternal grandparents were likely to prevail in a subsequent custody action); Capps v. Capps, 715 S.W.2d 547 (Mo. Ct. App. 1986) (awarding custody to petitioner in a renewed civil protection order); Smart v. Smart, 297 S.E.2d 135 (N.C. Ct. App. 1982) (upholding temporary custody for petitioner in temporary protection order). *But see* Rosenberg v. Rosenberg, 504 A.2d 350 (Pa. Super. Ct. 1986) (reversing a permanent custody and visitation order against respondent because the court stated that the Protection from Abuse Act was not meant to establish procedures for awarding permanent custody, but rather only temporary custody and visitation rights).

this approach was articulated in *Campbell v. Campbell*,[1015] a visitation case where the court noted the harmful impact spousal abuse has on the children.[1016] The *Campbell* court concluded that the children "like their mother, had reasonable cause to believe that they were about to become the victims of an act of domestic violence. Surely, fear that a custodial parent will be assaulted or battered by a non-custodial parent constitutes an act of domestic violence as to their child."[1017]

Case law also confirms that custody does not revert to the prior abusive custodian when the civil protection order expires, but rather should remain with the petitioner unless and until the court issues a new order modifying the original civil protection order custody award. In *Sparks v. Sparks*,[1018] the court held that custody awarded to the husband petitioner in a civil protection order, issued after his wife attempted to kill him, did not automatically revert back to the wife under the prior custody provisions contained in the parties' divorce decree.[1019] The court based its decision on the fact that the wife never alleged her fitness or her husband's unfitness to have custody, even though the civil protection order had expired.[1020]

iii. Domestic Violence as a Factor in Custody Decisions

A number of state custody statutes make domestic violence a factor in the best interest of the child determination for the purpose of making custody awards.[1021] In the vast majority of reported decisions, courts consider domestic violence to be a significant factor in

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1015. 584 So. 2d 125 (Fla. App. 1991).
1016. *Id.* at 126.
1017. *Id.* at 126-27 (citation omitted).
1018. 747 S.W.2d 191 (Mo. Ct. App. 1984).
1019. *Id.* at 193.
1020. *Id.*
1021. ALASKA STAT. § 25.24.150(c)(7) (1991); ARIZ. REV. STAT. ANN. § 25-332-B (1991 & Supp. 1993); CAL. CIV. CODE § 4608(b) (West 1988 & Supp. 1993); COLO. REV. STAT. ANN. § 14-10-124(1.5)(m) (West 1989); HAW. REV. STAT. § 571-46(9) (1986 & Supp. 1992); IDAHO CODE § 32-717 (Supp. 1993); 750 ILCS 5/602(a)(7) (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 214.5K-1 (West Supp. 1992); MINN. STAT. ANN. § 257.025(a)(12) (West 1992); MO. ANN. STAT. § 455.050.5 (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-212(1)(f) (1993); NEV. REV. STAT. ANN. § 125.480.4(c) (Michie 1992); N.H. REV. STAT. ANN. § 458:17(II)(c) (1992); N.J. STAT. ANN. § 9:2-4(c) (West 1993); N.D. CENT. CODE § 14-09-06.2(1)(j) (1991 & Supp. 1993); 23 PA. CONS. STAT. ANN. § 5303(a) (1991); R.I. GEN. LAWS § 15-5-16(g) (Supp. 1993); VA. CODE ANN. § 20-107.2 (Michie Supp. 1993); WIS. STAT. ANN. § 767.24(5)(i) (West 1993); *see also* MODEL CODE, *supra* note 15, §§ 402, 404.

custody determinations. Courts have held that spousal abuse is very relevant to the best interests of the child determination,[1022] and that domestic violence is a factor in determining parental fitness.[1023]

1022. Kim v. Kim, 256 Cal. Rptr. 217 (Cal. Ct. App. 1989) (finding that trial court did not abuse its discretion when it determined that child's best interests were served by awarding custody to mother where father admitted to physically and sexually abusing child, and shot mother three times and left her paralyzed); Williams v. Williams, 432 N.E.2d 375 (Ill. App. 1982) (awarding custody to mother where the father's brutal beating of mother was relevant to the best interest of the child determination, regardless of the child's knowledge of the violence, and holding that violence or the threat of violence directed against the child or another is a factor in the best interests of the child determination, even if the child did not witness the violence); Bruscato v. Bruscato, 593 So. 2d 838 (La. Ct. App. 1992) (reversing award of sole custody to a batterer where the trial court failed to consider domestic violence in its best interest of the child determination); *In re* Marriage of Houtchens, 760 P.2d 71 (Mont. 1988) (awarding sole custody to the mother based on evidence that the father had physically abused the mother because evidence of abuse of a parent is relevant when determining the best interests of the child); Malcolm v. Malcolm, 640 P.2d 450 (Mont. 1982) (upholding determination that it would not be in children's best interests for the father to have custody, even though the father was found a fit and loving parent, where the children were afraid of the father after witnessing his abuse of the mother); Reynolds v. Green, 439 N.W.2d 486 (Neb. 1989) (affirming trial court's order of custody to mother because the best interest of the child would not be served if custody was awarded to the father where the father battered the mother and used marijuana); Marchant v. Marchant, 743 P.2d 199 (Utah Ct. App. 1987) (reversing and remanding custody award to husband in part because the trial court impermissibly attempted to justify the husband's rape and battery of wife which left her unconscious, and where the appellate court held that all of these findings of fact were relevant to the best interests of the child); Venable v. Venable, 342 S.E.2d 646 (Va. Ct. App. 1986) (upholding trial court's order awarding custody to the mother because the best interest of the child would not be served by awarding custody to the father where the father was violent toward the mother); Bertram v. Kilian, 394 N.W.2d 773 (Wis. Ct. App. 1986) (holding that the trial court abused its discretion when it awarded custody to the father after refusing to hear evidence of the father's violence towards his wife, because evidence of domestic violence affects the best interests of the child).

1023. Odom v. Odom, 606 So. 2d 862 (La. Ct. App. 1992) (awarding sole custody to the mother and finding the father an unfit parent in light of his long history of domestic abuse against his former wife); Crabtree v. Crabtree, 802 S.W.2d 567 (Mo. Ct. App. 1991) (upholding an award of custody to mother, noting that the father's physical abuse of the mother was one factor which reflected negatively on his ability to serve as a custodial parent); Sparks v. Sparks, 747 S.W.2d 191 (Mo. Ct. App. 1988) (awarding custody of children to husband in civil protection order where wife attempted to murder husband); Campbell v. Campbell, 685 S.W.2d 280 (Mo. Ct. App. 1985) (upholding trial court's finding that the father was an unfit parent where he had adulterous relationship of which the child was aware, had an uncontrollable temper, and admitted to physically abusing the mother); Hamilton v. Hamilton, 379 S.E.2d 93 (N.C. Ct. App. 1989) (reversing custody from natural father to natural mother based on changed circumstances, where the father's second wife testified that the father was violent toward her and the child); Hansen v. Hansen, 736 P.2d 1055 (Utah Ct. App. 1987) (considering father's six physical assaults on the mother in finding him unfit, and awarding custody to the mother); Kenneth B. v. Elmer Jimmy S., 399 S.E.2d 192 (W. Va. 1990) (terminating the parental rights of a father who beat and then murdered the mother because spousal abuse is a factor in determining parental fitness); Nancy Viola R. v. Randolph W.,

Higher courts have reversed custody awards to batterers where the trial court refused to hear or made light of evidence of spousal abuse.[1024] In *Bertram v. Kilian*,[1025] the appeals court held that the trial court abused its discretion in awarding custody to the father when it refused to hear evidence of the father's abuse of the mother. The court concluded that the state custody statute:

> [R]equires the trial court to consider evidence tending to show that a spouse seeking custody has a violent character or has abused the other, whether or not it has been shown that their children have been affected. Parental violence and abuse affect "the interaction and interrelationship of the child" with the parent and may affect the mental and physical health of the children. The violent and abusive spouse may have the same potential as a parent. Weighing the risk of actual future violence or abuse may be difficult but it is necessary to the custody determination. Because the trial court failed to consider evidence bearing on [the interaction and interrelationship between parent and child] it abused its discretion.[1026]

In *Marchant v. Marchant*,[1027] the appeals court reversed a custody award to a batterer where the trial court tried to justify the husband's rape and battery of his wife.[1028] The court held that such violent acts were clearly relevant to a best interests of the child determination.[1029] The court noted that evidence that the defendant beat the plaintiff to unconsciousness and forced her to have sex shortly after she had surgery supported a finding of the defendant's cruelty.[1030] The court concluded that, "[w]hile the findings attempt to excuse or justify defendant's assault on plaintiff, neither this Court nor any other court can excuse or justify or approve intrafamily violence or spouse abuse. An assault is equally serious and equally criminal whether committed between family members or between strang-

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356 S.E.2d 464 (W. Va. 1987) (holding that batterer's murder of wife renders him an unfit parent because spousal abuse is a recognized factor in determining parental fitness). *But see In re* Welfare of P.L.C., 384 N.W.2d 222 (Minn. Ct. App. 1986) (reversing custody award to maternal grandparents, and according a presumption of parental fitness to father in child custody dispute against grandparents, even though trial court established that the father physically abused children's mother).

1024. *See, e.g.*, Moore v. Trevino, 612 So. 2d 604 (Fla. Dist. Ct. App. 1992).

1025. 394 N.W.2d 773 (Wis. Ct. App. 1986).

1026. *Id.* at 774.

1027. 743 P.2d 199 (Utah Ct. App. 1987).

1028. *Id.* at 203-04.

1029. *Id.*

1030. *Id.* at 203.

ers."[1031] The court further noted that the "most serious aspect of this problem is the proven tendency of family violence to be passed down to successive generations. While children may not be immediate victims, they certainly are the victims and perpetrators of such violence in the future."[1032]

Courts should also consider evidence of spousal abuse even where abuse was not directed against the children.[1033] In the case of *In re Marriage of Wiley*,[1034] the court held that the trial court may consider the husband's verbal and physical abuse of the mother in its custody determination even though there was no evidence that he abused the children.[1035] In *Williams v. Williams*,[1036] the court ruled that even where a child was too young to comprehend the father's brutal attack on the mother, the trial court properly considered the violence in its custody decision.[1037] Finally, in *A.F. v. A.F.*,[1038] the court specifically held that domestic violence, when it occurs in the presence of the child, directly relates to the parties' parenting and custodial abilities.[1039]

Domestic violence may also be a factor in permitting a battered woman to move out of the jurisdiction with her children.[1040] In *Gruber v. Gruber*,[1041] the court held that a battered woman could move away from the state to escape her isolation and poor standard of living to be with her family in Illinois.

A few cases have granted custody to a batterer, but these decisions fly in the face of the analysis in the majority of cases. For example, in *Lutgen v. Lutgen*,[1042] the court refused to reverse, as an abuse of discretion, the trial court's award of custody to a batterer who choked his wife to death while their children were present in the house.[1043] This decision, however, is contrary to a line of cases in

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1031. *Id.* at 203-04.

1032. *Id.* at 204.

1033. Zuccaro v. Zuccaro, 1993 Conn. Super. LEXIS 1750 (Conn. Super. Ct. July 16, 1993) (awarding abused spouse sole custody with supervised visitation where batterer's violence led to break-up of the marriage).

1034. 556 N.E.2d 809 (Ill. App. Ct. 1990).

1035. *Id.* at 813-14.

1036. 432 N.E.2d 375 (Ill. App. Ct. 1982).

1037. *Id.* at 377.

1038. 549 N.Y.S.2d 511 (N.Y. App. Div. 1989).

1039. *Id.* at 514.

1040. *See* MODEL CODE, *supra* note 15, § 402.

1041. 583 A.2d 434 (Pa. Super. Ct. 1990).

1042. 532 N.E.2d 976 (Ill. App. Ct. 1988).

1043. *Id.* at 986. *But see* Dschaak v. Dschaak, 479 N.W.2d 484 (N.D. 1992) (awarding

other jurisdictions which have terminated parental rights where one parent murdered the child's other parent.[1044]

iv. Domestic Violence Victims Are not Unfit Parents

Case law rejects the notion that formerly battered spouses are unfit parents. Indeed, in *Lewelling v. Lewelling*,[1045] the court held that "evidence that a parent is a victim of spousal abuse, by itself, is no evidence that awarding custody to that parent would significantly impair the child."[1046] The court concluded that a contrary holding "could only deter battered spouses from reporting their suffering lest they lose their children."[1047] The court further noted that its ruling was consistent with the state's recently enacted custody code provision, which creates a custody preference for the non-abusive parent.[1048] The court emphasized that in a custody dispute:

> [E]vidence of spousal abuse [is] to be considered only as a factor that weighs heavily against the abusive parent; such evidence does not weigh against the abused. As the abuser cannot take advantage of his acts of abuse in a custody battle with the abused, so the abuser's parents also may not benefit from that abuse. While expressing continued concern for the best interest of the child, the Legislature has also determined that removing a child from a parent simply because she has suffered physical abuse at the hands of her spouse is not in the best interest of our state.[1049]

The court in *Rapp v. Dimino*,[1050] where the battered woman's child was put in the custody of the batterer father amidst a relief

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custody to the father after minimizing the abuse against the mother, which the court described as only controlling and verbally abusive).

1044. T.V.N. v. State Dep't of Human Resources, 586 So. 2d 227 (Ala. Civ. App. 1991) (terminating parental rights where child firmly believed his father murdered his mother and testified as such, even though the father was acquitted); *In re* Sean H., 586 A.2d 1171 (Conn. App. Ct. 1991) (terminating parental rights where batterer stabbed mother to death in front of the children); Kenneth B. v. Elmer James S., 399 S.E.2d 192 (W. Va. 1990) (upholding termination of parental rights of father who murdered the children's mother); Nancy Viola R. v. Randolph W., 356 S.E.2d 464 (W. Va. 1987) (terminating parental rights where batterer plead guilty to murdering mother). For further discussion, see *infra* notes 2295-301 and accompanying text.

1045. 796 S.W.2d 164 (Tex. 1990).

1046. *Id.* at 167.

1047. *Id.*

1048. *Id.* at 168.

1049. *Id.*

1050. 19 Fam. L. Rep. (BNA) 1459-60 (Vt. July 2, 1993).

from abuse hearing, held that the trial court had overreached its authority. The court also stated that a non-abusive spouse should not have to risk losing custody to seek relief under the act, and that holding otherwise would deter victims from seeking the court's protection.[1051]

v. Dangers of Joint Custody Where Domestic Violence Exists

Judicial authorities strongly urge against the award of joint custody in custody disputes where domestic violence is an issue. A Joint Resolution unanimously passed by the United States House of Representatives and the Senate noted that "joint custody guarantees the batterer continued access and control over the battered spouse's life through their children . . . ."[1052] The National Council of Juvenile and Family Court Judges further points out that continued access is the batterer's opportunity to harass and otherwise abuse the other parent,[1053] and warns that "[c]ourt orders which force victims to share custody with their abusers place both victims and children in danger."[1054]

Consequently, in order to protect the abused party, a number of courts have refused to award joint custody to batterers in both civil protection order and custody cases. In *Ellibee v. Ellibee*,[1055] the court awarded sole custody in a protection order to the petitioner mother after the father severely spanked his son, leaving visible bruises, even though the father previously had joint custody.[1056] A series of custody cases also reflect the courts' growing realization that joint custody is inappropriate in domestic violence cases. In *In re Marriage of Houtchens*,[1057] the Supreme Court of Montana awarded sole custody to the mother based on evidence that the father had physically

1051. *Id.* The court relied upon the expedited nature of the relief from abuse hearings and the lack of procedural safeguards that made such hearings unsuitable places for custody determinations. As previously demonstrated, however, when abuse of a parent becomes apparent in an abuse hearing, the great likelihood is that the children are in danger of abuse. Placing the children in the custody of the non-abusive parent during such hearings is therefore advisable.

1052. H. Con. Res. 172, 101st Cong., 2d Sess. (1990).

1053. FAMILY VIOLENCE PROJECT, *supra* note 687, at 25; *see also* MODEL CODE, *supra* note 15, § 401.

1054. *Id.*

1055. 826 P.2d 462 (Idaho 1991).

1056. *Id.* at 467-68.

1057. 760 P.2d 71 (Mont. 1988).

abused her.[1058] The court held that evidence that a child's parent is abused is relevant to the best interests of that child.[1059] Therefore, the court would consider such evidence in awarding sole custody in a divorce proceeding.[1060] The court further found that the mother's fear of the father, which in turn interfered with her ability to communicate with him was sufficient to overcome the presumption in favor of joint custody.[1061] In several custody cases, courts have ruled against joint custody in light of significant antagonism between the parties which included allegations of physical abuse.[1062]

1058. *Id.* at 72-73.

1059. *Id.*

1060. *Id.*

1061. *Id.*; *see also* Jon N. v. Fred N., 224 Cal. Rptr. 319 (Cal. Ct. App. 1986) (placing child with social services due to violence between parents, and later placing child in the home of mother in a different county from father, since social services believed that increased distance was in the child and parent's best interests).

1062. Ouellette v. Ouellette, 1993 Conn. Super. LEXIS 2339 (Conn. Super. Ct. Sept. 9, 1993) (holding that joint custody is not a viable solution in divorce agreement where the marriage had a history of violence, restraining orders, calls to the police, and loud arguments); *In re* Marriage of Heilmann, 771 P.2d 948 (Kan. Ct. App. 1989) (holding that the trial court did not abuse its discretion when it denied the father's request for joint custody and awarded custody to the mother where there was a history of violence by the father and threats to take the mother's life); Rolde v. Rolde, 425 N.E.2d 388, 405 (Mass. App. Ct. 1981) (upholding the trial court's award of sole custody of children to the mother even though the father requested joint custody because "joint custody or shared responsibility is an invitation to continued warfare and conflict"); *In re* Marriage of Goostree, 790 S.W.2d 266 (Mo. Ct. App. 1990) (holding that the trial court did not abuse its discretion in denying joint custody where joint custody requires that parents "agree to agree" and evidence that parents are prepared to deal with each other as equal partners, and where there was evidence of disagreements, strained relations, and different attitudes about child rearing); Brisco v. Brisco, 713 S.W.2d 586 (Mo. Ct. App. 1986) (considering mother's claims of physical abuse by her husband as one of many factors weighing against an award of joint custody); Blake v. Blake, 483 N.Y.S.2d 879 (N.Y. App. Div. 1984) (finding joint custody inappropriate given history of antagonism between the parties, which included mother taking refuge in a battered woman's shelter); Bolick v. Bolick, 376 S.E.2d 785 (S.C. Ct. App. 1989) (holding that given the parties attitudes towards each other and the mother's claim of physical abuse, joint custody is clearly inappropriate). *But see* Dempster v. Dempster, 809 S.W.2d 450 (Mo. Ct. App. 1991) (awarding joint custody despite evidence of domestic violence by the father where the children expressed considerable preference for the father, and the court found that the parties could agree on several major decisions about the children); Garner v. Garner, 773 S.W.2d 245 (Tenn. Ct. App. 1989) (upholding trial court's award of joint custody even though both parties alleged cruel and inhuman treatment).

vi. Remarrying Abuser and Battered Women Who Are Substance Abusers

Case law reveals that when a domestic violence victim returns to or becomes newly involved with a batterer, she risks losing custody of her children. Her relationship with the batterer may constitute a change of circumstances which is sufficient for the court to reverse a custody award. In *Kimmel v. Kimmel*,[1063] the court awarded a child protective services agency custody of a battered woman's son for ultimate placement with the child's natural father where the mother ignored a civil protection order, allowed the batterer back into her house, and left her son alone in his care, thereby placing the child's health in jeopardy.[1064] In *Wenzel v. Wenzel*,[1065] the court reversed a divorce custody award to the mother, based on changed circumstances where the child had a very real and understandable fear of his mother's boyfriend, who had severely beaten the mother.[1066] Additionally, in *Giesler v. Giesler*,[1067] the court upheld a custody award to a paternal aunt and uncle, where the mother demonstrated an inability to cope with the demands of parenthood, and where she married a physically abusive boyfriend who the court described as destructive, hostile, and morally unfit to be a step-parent.[1068] The court noted that the boyfriend's visitation with his children from prior relationships was subject to supervised visitation.[1069]

While an abuse victim may lose custody of her child because of

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1063. 392 N.W.2d 904 (Minn. Ct. App. 1986).

1064. *Id.* at 906-07.

1065. 469 N.W.2d 156 (N.D. 1991).

1066. *Id.* at 157; *see also* Grigley v. Department of Health and Rehabilitative Serv., 625 So. 2d 132 (Fla. Dist. Ct. App. 1993) (awarding custody to child services instead of the battered woman because of domestic violence); Bier v. Sherrard, 623 P.2d 550 (Mont. 1981) (reversing custody from the mother to the father where the mother moved in with her ex-brother-in-law, who beat her, and where trial court found that father was a better parent and provided a more stable environment); J.M. v. D.M., 1993 Neb. App. LEXIS 371 (Neb. Ct. App. Sept. 7, 1993) (terminating battered woman's parental rights because she would not leave her batterer and would not protect her children). *But see* Burdette v. Adkins, 406 S.E.2d 454 (W. Va. 1991) (reversing trial court's decision to award custody to father where mother moved back in with her abusive second husband because the court had found that the child was well adjusted, happy, and bonded to her mother).

1067. 800 S.W.2d 59 (Mo. Ct. App. 1990).

1068. *Id.* at 61; *see also In re* J.E.B., 854 P.2d 1372 (Colo. Ct. App. 1993) (terminating mother's parental rights where she was involved in domestic violence and where evidence showed that counseling was ineffective in helping her avoid domestic violence). See *infra* notes 2279-303 and accompanying text for further discussion of termination of parental rights cases.

1069. *Id.*

her involvement with a batterer, courts will often return custody once she terminates the relationship. For example, in *Wanamaker v. Scott*,[1070] the court returned custody of the parties' daughter to the mother, who had initially lost custody because of her second marriage to a batterer, after she divorced her abusive second husband.[1071]

It is difficult for battered women who are also substance abusers to secure custody of their children in domestic violence proceedings. Many women who abuse substances suffer abuse at the hands of their intimate partners.[1072] This group of women need protection from domestic abuse as much as any other battered women. However, for this group of women, it may be advisable to first seek non-legal assistance, including shelter and benefits.[1073] At the same time, she should be immediately referred to a substance abuse treatment program.

If battered women who are substance abusers go to court to seek protection before they have begun to address their problem of substance abuse, they are at grave risk of losing custody of their children in civil protection order, custody, or divorce proceedings. Courts have been reticent to award custody to battered women who are also substance abusers.[1074]

1070. 788 P.2d 712 (Alaska 1990).

1071. *Id.* at 713; *see also* Dillard v. Dillard, 859 S.W.2d 134 (Ky. Ct. App. 1993) (returning custody to mother when she married a non-abusive spouse and left boyfriend who abused son).

1072. Thirty-two percent of women who abuse substances also have a history of abusive or violent relationships. Surveys of substance abuse programs reveal that two-thirds of substance abuse programs also offer counseling for domestic violence and sexual abuse. However, in many programs these services are not helpful to women because they are delivered in groups where men are present. SHELLY GEHSHAN, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN 2, 13, 16 (1993).

1073. It is important for attorneys and domestic violence advocates to incorporate questions about substance abuse into intake interviews so as to identify clients who need special help with substance abuse issues. Advocates should explain the reasons why this information is being asked to all persons interviewed, to encourage clients to be honest about these problems.

1074. *See* M.B.P. v. State Dep't of Human Resources, 586 So. 2d 24 (Ala. Civ. App. 1991) (terminating parental rights of mother who had a history of abusive relationships and substance abuse); Jennifer R. v. Shannon M., 17 Cal. Rptr. 2d 759 (Cal. Ct. App. 1993) (awarding custody of children to father rather than battered woman with substance abuse problem); *In re* J.E.B., 854 P.2d 1372 (Colo. Ct. App. 1993) (terminating parental rights of mother who had a history of abusive relationships and substance abuse); D.J.S. v. Department of Health and Rehabilitative Serv., 563 So. 2d 655 (Fla. Dist. Ct. App. 1990) (terminating parental rights of father who had a history of domestic violence and substance abuse); *In re* J.W.D., 458 N.W.2d 8 (Iowa Ct. App. 1990) (terminating both parents' rights where father

vii. Custody and Visitation Requests from Domestic Violence Perpetrator's Parents, Other Relatives, and Abusive Step Parents

Courts sensitive to the intricacies of domestic violence have not allowed the batterer's parents or other relatives to seek custody or visitation of the children against the wishes of the abused party. There are different rationales behind disallowing relatives of the batterer custody visitation. In *Lewelling v. Lewelling*,[1075] the court held that evidence that the mother was a victim of spousal abuse did not justify awarding custody to paternal grandparents.[1076] Men who abuse their wives were often abused or witnessed domestic violence as children.[1077] In *Hughes v. Hughes*,[1078] the court denied visitation to a paternal grandmother where the court found that the grandmother's visitation request did not arise from a "bona fide interest in maintaining a beneficial relationship with the child but rather from an effort to disrupt the mother's relationship with the child."[1079] Finally, arrangements which encourage frequent contact with the batterer's family members, who may be closely connected to the batterer, could subject the victim to continued physical or mental abuse. This contact cannot only lead to contact with the abuser him-

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had a substance abuse problem and the couple had a history of separation and reunification); C.D.C. v. J.R.C., 455 N.W.2d 801 (Neb. 1990) (terminating parental rights of both parents where father abused substances and mother stayed in relationship with him); West Virginia Dep't of Human Serv. v. Tammy B., 376 S.E.2d 309 (W. Va. 1988) (terminating parental rights of mother who had a history of abusive relationships and abusing substances). Mentally ill women who are battered by their husbands run the same risk of losing custody as those who abuse substances, and their cases should be treated similarly. *See, e.g.*, McCarty v. McCarty, 1993 Neb. App. LEXIS 282 (Neb. Ct. App. June 15, 1993).

1075. 796 S.W.2d 164 (Tex. 1990).

1076. *Id.* at 167.

1077. Since violence is a learned behavior, witnessing violence in the home as a child can have profound effects on the child's adult life. In one study, battering was reported to have been present in 67% of battered women's childhood homes, 81% of batterers', and only 24% of non-batterers' homes. This finding supports the conclusion that violence is learned behavior. TERRIFYING LOVE, *supra* note 4, at 19 (stating that child and adult victims of abuse are more likely to commit violent acts outside the family that those not abused); Gerald T. Hotaling et al., *Intrafamily Violence and Crime and Violence Outside the Family, in* FAMILY VIOLENCE 315-76 (Lloyd Ohlin and Michael Tonry eds., 1989). Abused children are arrested by the police four times as often than non-abused children. R. GELLES & M.A. STRAUS, INTIMATE VIOLENCE (1988).

1078. 463 A.2d 478 (Pa. Super. Ct. 1983).

1079. *Id.* at 480; *see also* Cavanaugh v. McCourt, 1993 Conn. Super. LEXIS 106 (Conn. Super. Ct. Jan. 5, 1993) (denying visitation to maternal grandmother and aunt because visitation was not in the child's best interests, based on evidence of a family history which included substance abuse and domestic violence).

self, but can be a traumatizing and constant reminder of the abuser.

Courts have also denied visitation to a non-parent batterer in a civil protection order case. In *Cooper v. Merkel*,[1080] the court denied an appeal of a protection order which failed to grant visitation to a batterer who had lived with the mother for seven years, but who had never adopted her child.[1081] The court held that at common law, a non-parent has no right to visitation with a minor child, and therefore, absent statutory authorization, the court lacked authority to order a non-parent visitation.[1082]

viii. U.C.C.J.A./P.K.P.A. and Interstate Flight to Avoid Continued Abuse

The Uniform Child Custody Jurisdiction Act (the "U.C.C.J.A.") provides a set of rules regarding jurisdiction over custody matters that has been adopted in all fifty states and the District of Columbia.[1083] The Parental Kidnapping Prevention Act (the "P.K.P.A.") was established by Congress to address the problem of parental kidnapping, and provides, most importantly, that a parent who has lost custody or who has snatched the children and fled out of state cannot obtain a conflicting custody order based on the child's presence in the new state.[1084] The purpose of both acts is to limit forum-shopping in child custody cases, and to encourage states to respect, defer to, and enforce custody orders issued by other states.[1085] In determining whether and when a certain state may exercise jurisdiction in custody cases, the U.C.C.J.A. looks at the child's home state, the child's connections with a state, whether the child is in an emergency situation, and whether the state for some reason is the only forum available.[1086] In passing the P.K.P.A., Congress determined that home state jurisdiction must take precedence over all other jurisdictional bases set out in the U.C.C.J.A., including significant connection with the jurisdiction.[1087] Thus, given that the P.K.P.A. is a federal

1080. 470 N.W.2d 253 (S.D. 1991).

1081. *Id.* at 254.

1082. *Id.*

1083. Unif. Child Custody Jurisdiction Act §§ 1-28, 9 U.L.A. 123-331 (1988).

1084. Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1988).

1085. *See* Brenda v. Brenda, 565 A.2d 1121, 1123 (N.J. Super. Ct. App. Div. 1989).

1086. Unif. Child Custody Jurisdiction Act § 3, 9 U.L.A. 266 (1988).

1087. Specifically, one problem which arises in domestic violence cases involving interstate custody issues is the U.C.C.J.A.'s pleading requirements, which require disclosure of the parties' addresses. This requirement may expose victims of abuse to further violence. To

statute and the U.C.C.J.A. is a state statute, home state custody decrees are supreme over other decrees issued under the authority of other jurisdictions.

The emergency provisions of the P.K.P.A. and the U.C.C.J.A. are especially important in custody cases in which domestic violence is an issue. Child abduction occurs at alarming rates. More than forty children are abducted every hour in the United States.[1088] Fully forty-one percent of all abductions by family members occur between the parents' separation and divorce.[1089] Another forty-one percent occur when the parents have been separated or divorced for longer than two years.[1090] Authorities often fail to recognize the strong connection between domestic violence and child abduction. One study found that when a child was abducted, over 50% of the underlying relationships had a history of domestic violence.[1091] Over seventy percent of all child kidnappers are fathers or their agents.[1092] Research further reveals that over half of abductions occur in the context of domestic violence,[1093] and seventy-seven percent of the abductors snatched the children out of a desire to hurt the other parent.[1094] It is important for courts to be made aware of the connection between spousal abuse and child abduction so that court orders in civil protection order, divorce, child custody, and criminal cases can help deter the ongoing risk of child snatching in families with a history of domestic violence.

The level of child abduction among batterers also requires that courts carefully scrutinize compliance with the U.C.C.J.A. notice

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address this concern, trial courts often allow domestic violence victims to plead generally the county or general area of residence. This provides sufficient information so that the court may determine whether jurisdiction is proper under the U.C.C.J.A. An exact address is not necessary or required. When the court requires disclosure of the exact address, petitioners are allowed to provide the court with such information under seal. In such cases, the information is available only to the judge, and is not available to the opposing party or the opposing party's attorney.

1088. *See* Stephanie Mann & M.C. Blakeman, *Protect Your Child From Abduction*, CONSUMERS' RESEARCH MAGAZINE, Feb. 1994, at 33.

1089. DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, MISSING, ABDUCTED, RUNAWAY, AND THROWNAWAY CHILDREN IN AMERICA: FIRST REPORT: NUMBERS AND CHARACTERISTICS: NATIONAL INCIDENCE STUDIES 104-05 (1990).

1090. *Id.*

1091. *Child Abduction Studied; Domestic Violence Implicated in Child Abductions*, THE WOMEN'S ADVOCATE, May 1992, at 3.

1092. FINKELHOR ET AL., *supra* note 1089, at 103.

1093. Barbara Hart, Remarks from The Task Force on Child Abuse and Neglect (1992).

1094. *Child Abduction Studied; Domestic Violence Implicated in Child Abductions*, *supra* note 1091, at 3.

requirements in all cases where custody determinations are requested without the presence of both parents. When batterers come to court seeking custody and the victim is not present at the hearing, courts should not routinely award custody to the batterer. Instead, the courts should make efforts to locate the absent abused party, notify her of the proceedings, and determine her interest in the action. This protection is important because it helps prevent children from being used by batterers to control their victims, a practice that often occurs when other avenues of control are closed off.[1095] This approach will help prevent abducting batterers from obtaining legal custody orders against victims who have escaped to a shelter in order to flee the violence.

1095. Battering men use custodial access to children as a tool to terrorize battered women or to retaliate for separation. 54% of child abductions in the United States related to short term manipulations around custody orders. 46% involve concealing the whereabouts of the child or taking the child out of state. Hart, *supra* note 1093.

Dr. Anne Ganley describes how batterers will use children to continue control over battered women. Perpetrators will sometimes physically or sexually abuse children in addition to abusing their intimate partners. They will often intentionally or unintentionally physically injure children during their attacks on the adult victim. They will assault the abused adult in front of the children. Others will use children to coercively control the adult victim. Other tactics include:

a. Isolating the child along with the abused parent . . .

b. Engaging the children in the abuse of the other parent (making the child participate in the physical or emotional assaults against the adult).

c. Threats of violence against children, pets or other loved objects . . .

d. Interrogating the children about the mother's activities; forcing the abused parent to always be accompanied by a child or children; taking the child away after each violent episode to ensure that the abused party will not flee the abuser; etc.

e. Forcing children to watch the abuse against the victim.

Some perpetrators use the children as pawns to control the abused party after the abused party and the perpetrator are separated.

a. . . . the intent is to continue the abuse of the victims, with little regard for the damage of this controlling behavior to the children . . .

b. Using lengthy custody battles as a way to continue abusing the other parent.

c. Holding children hostage or abducting the children in efforts to punish the abused party or to gain the abused party's compliance.

d. Some visitation periods become nightmares for the children either because of physical abuse by the perpetrator or because of the psychological abuse that results from the abuser interrogating the children about the activities of the victim . . .

e. Insisting that the children take care of all perpetrators' emotional needs or expecting unlimited visitation or access by telephone in order to avoid being alone.

DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 48-50.

In addition, there may be situations in which a battered woman must flee her home state because she feels that she and/or her child are in danger of being severely harmed. By fleeing with the child, she may violate her home state's custody order which gives the batterer visitation rights with respect to the child.[1096] Fleeing the state where the violence continues to occur may be the only way in which a victim of abuse can survive the violence to which she is being subjected in her home. Flight, which often occurs when all other attempts at stopping the abuse have failed, should not be punished in these circumstances. Courts should be sensitive to the reasons for the flight and should not punish the victim by denying her custody. The National Council of Juvenile and Family Court Judges recommends that "[i]f a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation."[1097]

Some courts have refused to modify prior custody awards to an abused party when that party flees from domestic abuse while taking the children in violation of a pre-existing court order. In *Desmond v. Desmond*,[1098] the court held that the father was not entitled to custody of the children based on the mother's flight from the state with the children where he had repeatedly and severely beaten her, and where her out of state home was the only place which provided her with a strong familial support system.[1099] In *A.F. v. N.F.*,[1100] the court denied an award of sole custody to a batterer after the mother interfered with the father's visitation when she moved from New York to Massachusetts.[1101] The court held that a party's interference with visitation does not always mean that party is an unfit custodial parent where, as here, the mother moved shortly after the father broke into her residence and assaulted her, and where she had obtained a protection order, and where the Massachusetts Department of Social Services substantiated the child's allegations of sexual abuse against

1096. In order to avoid being criminally charged under state law for parental kidnapping, a battered woman should follow required procedures when fleeing with her children. 28 U.S.C.A. § 1738A (West Supp. 1993). Many states specify situations in which action that would otherwise be prohibited will not be subject to parental kidnappping charges. *See, e.g.*, D.C. CODE ANN. § 16-1023(a) (Supp. 1988).

1097. MODEL CODE, *supra* note 15, § 402(3).

1098. 509 N.Y.S.2d 979 (Fam. Ct. 1986).

1099. *Id.* at 982-83.

1100. 549 N.Y.S.2d 511 (Sup. Ct. 1989).

1101. *Id.* at 512.

her father.[1102] Moreover, where a battered spouse flees in violation of an existing court custody order, the flight state may exercise emergency jurisdiction and award temporary custody to an abused spouse pending a permanent order.[1103]

In cases where battered women flee prior to the entry of any custody determination, courts routinely reverse custody awards made to their batterers in the battered woman's absence. In *Odom v. Odom*,[1104] a case in which a battered woman fled from her home with her children, the court invalidated an *ex parte* custody order to the batterer when there was no notice to the battered woman, who had fled to a shelter.[1105] In *Desmond v. Desmond*,[1106] the court held that the mother's one out-of-state move with the children did not by itself entitle the father to custody of the children, where the mother had been repeatedly and severely abused by the father, and where her selection of an out-of-state city as a new home for her and her children was the only site which provided her with a strong, familial support network to assist her in creating a new and tranquil environment for the children and herself.[1107] The court concluded that the mother

> was completely justified in escaping from the marital home with the children to protect their respective safety and best interests, that [the

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1102. *Id.* at 514-15.

1103. Hanke v. Hanke, 615 A.2d 1205, 1209 (Md. Ct. Spec. App. 1992). The court reversed the trial court's transfer of custody from the mother to the father, apparently to punish the mother for moving to Kentucky after which no visitation took place, finding that:

> Where the evidence is such that a parent is justified in believing that the other parent is sexually abusing the child, it is inconceivable that the parent will surrender the child to the abusing parent without stringent safeguards. The fact that the judge does not agree with the parent's fear is immaterial. This is not a case in which there is no basis for the mother's belief. Past behavior is the best predictor of future behavior.

Id.; Garza v. Harney, 726 S.W.2d 198 (Tex. Ct. App. 1987) (holding that the trial court properly exercised temporary emergency jurisdiction over the daughter where mother fled from Mexico to Texas with her children in violation of a Mexican court custody order because her husband abused her and her daughter, but not over the son since no abuse against him was alleged); *In re* Custody of Thorensen, 730 P.2d 1380 (Wash. Ct. App. 1987) (finding that the trial court properly refused to enforce the out-of-state order where the mother did not receive notice and thus was denied the opportunity to be heard, and that the trial court properly maintained jurisdiction where the child had lived in the state for the past two years and where the mother fled the father's home state out of fear for her safety).

1104. 606 So. 2d 862 (La. Ct. App. 1992).

1105. *Id.* at 869.

1106. 509 N.Y.S.2d 979 (Fam. Ct. 1986).

1107. *Id.* at 982-83.

> mother] had more than reasonable cause to be frightened by taking up residence locally after the proven history of [the husband's] abuse; and that [the father's] abusive acts substantially worsened the strife to which the children—to their detriment—were repeatedly exposed . . . .[1108]

The court further stated that its holding is intended "to signal the acceptance by this court of the view that severely and/or repeatedly abused parents ought not to be penalized, in the context of a custody-visitation case, for seeking refuge out of the easy reach of their oppressors."[1109] In *Bruscato v. Avant*,[1110] a case in which a battered woman fled to a shelter with her child and lost custody to her batterer because she could not be located to be informed about the hearing, the court reversed and remanded the custody case, noting that escaping domestic violence may mitigate the flight by the abused parent.[1111]

Pursuant to the emergency provisions of the U.C.C.J.A., courts in the state to which a domestic violence victim flees may exercise emergency jurisdiction over a child custody matter.[1112] These states

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1108. *Id.* at 982.

1109. *Id.* at 982-83.

1110. 593 So. 2d 838 (La. Ct. App. 1992).

1111. *Id.* at 838; *see also* Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984) (holding that the U.C.C.J.A. is extended to the international sphere, and that the trial court properly assumed jurisdiction based on the best interests of the child where the mother fled with the children from Ireland to Michigan away from her abusive husband because the U.C.C.J.A. does not require the court to respect the Ireland court's award of custody to the batterer where the Irish court did not provide the mother with reasonable notice and opportunity to be heard). *But see Ex parte* Lee, 445 So. 2d 287 (Ala. Ct. App. 1983) (holding that where mother fled with children from Texas to Alabama to escape abuse, the P.K.P.A. requires the Alabama court to respect the Texas court's custody award to the batterer where that suit was filed first and the abuse victim was given reasonable notice and opportunity to be heard); People v. Griffith, 620 N.E.2d 1130 (Ill. App. Ct. 1993) (holding that the domestic violence was too remote in time to serve as a defense to criminal child abduction charges).

1112. *See, e.g.*, Kimmel v. Kimmel, 392 N.W.2d 904 (Minn. Ct. App. 1986) (holding that the trial court did not abuse its discretion in acting quickly to protect the child when faced with an emergency situation which placed the child's health, safety, and welfare in jeopardy even though the court might not have strictly adhered to statutory procedure); Curtis v. Curtis, 574 So. 2d 24 (Miss. 1990) (holding that Mississippi has no power under the Protection from Abuse Act to issue a custody order that is inconsistent with the U.C.C.J.A. and the P.K.P.A., and that the chancery court could exercise temporary emergency jurisdiction only as long as an emergency lasted where petitioner father kidnapped his children and brought them to Mississippi from Utah and sought permanent custody, alleging that his wife substantially abused and neglected them); Benda v. Benda, 565 A.2d 1121 (N.J. Super. Ct. App. Div. 1989) (stating that where prior custody litigation was pending in another jurisdiction, the state to which the custodial mother fled could assume emergency jurisdiction under the U.C.C.J.A.

can be asked to temporarily amend existing custody orders which give the batterer visitation rights, so that the victim can remain in the state of refuge with her children until she is out of danger.[1113]

In *Cole v. Superior Court*,[1114] the court reversed the trial court's denial of emergency jurisdiction under the U.C.C.J.A. where the mother fled with the couple's children and her daughter from Arizona to California, alleging that the father physically and emotionally abused her and the older step-daughter.[1115] The appeals court specifically held that where a father's violence against the mother and his step-child forces the mother to flee with all the couple's children, an emergency exists as to all the couple's children, sufficient to trigger the U.C.C.J.A. emergency jurisdiction.[1116] The court noted that

> when the mother of two young children is forced from the family home because the husband abuses her and her daughter of another marriage, the situation may also have great potential for the abuse and serious traumatization of her younger children by him. Not only are they deprived, by his conduct, of their mother's care and love, but they are left in the care of one demonstrably capable of abusive

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to issue temporary custody under a civil protection order to preserve the status quo; but if after conferring with the judge in the original state the courts determined that permanent litigation should occur there, permanent custody could not be awarded in the domestic violence action); Zappitello v. Moses, 458 N.W.2d 784 (S.D. 1990) (holding that in cases involving allegations of domestic abuse in interstate custody disputes, the U.C.C.J.A. jurisdictional requirements must be satisfied before South Dakota courts may exercise jurisdiction over the custody issues including visitation rights); Garza v. Harney, 726 S.W.2d 198 (Tex. Ct. App. 1987) (holding that the trial court properly exercised temporary emergency jurisdiction over the daughter where mother fled from Mexico to Texas with her children in violation of a Mexican court's custody order because her husband abused her and her daughter, but jurisdiction was not proper over the son since no abuse was alleged against him). *But see Ex parte* Lee, 445 So. 2d 287 (Ala. Ct. App. 1983) (holding that, where battered woman fled with her children from Texas to Alabama, under the P.K.P.A. the Alabama court must respect the Texas court's custody award to the batterer since that suit was filed first and the abuse victim was given reasonable notice and opportunity to be heard); Archambault v. Archambault, 555 N.E.2d 201 (Mass. 1990) (determining that when a child is in one state and is danger of sexual abuse in another, if the state where the danger exists has jurisdiction under the P.K.P.A., the other state may not assume jurisdiction under the U.C.C.J.A. but may communicate its concerns to the state that has jurisdiction); Danna v. Danna, 364 S.E.2d 694 (N.C. Ct. App. 1988) (holding that the lower court correctly declined to exercise jurisdiction pursuant to the U.C.C.J.A., as there was insufficient evidence of an emergency where the wife fled from Florida to North Carolina with children to escape domestic violence, and suit was brought regarding a visitation dispute and attempted modification of the custody decree).

1113. *See, e.g.*, *Kimmel*, 392 N.W.2d at 908; *Benda*, 565 A.2d at 1124.

1114. 218 Cal. Rptr. 905 (Ct. App. 1985).

1115. *Id.*

1116. *Id.* at 908.

behavior in some familial situations.[1117]

The court concluded that "the situation . . . is tantamount to an emergency respecting the younger children also, possibly justifying [the mother's] removal of them and certainly negating any finding that she has 'unclean hands' because she took them away."[1118] In *Coleman v. Coleman*,[1119] the court held that Nebraska, the state to which a battered woman fled to be in a "safe haven" with her family, could exercise emergency jurisdiction under the U.C.C.J.A., even though Minnesota was the children's home state.[1120]

Permanent modifications of the custody order, however, must occur in the original state, unless after the state courts confer, the original state declines jurisdiction, passing it to the flight state.[1121] However, where the home state's decision awarding a batterer custody does not comport with the U.C.C.J.A.'s requirement of a best interest of the child analysis, the flight state need not recognize, defer to, or enforce the home state's order.[1122]

These courts have recognized that domestic abuse can leave a victim with no other choice but to flee the home with the children and take up residency alone or with family members or friends in another state.[1123] They have realized that an order which gives a batterer custody and visitation rights must not be used to keep the victim in the vicinity of the batterer and subject to continuing danger. In evaluating a batterer's objections to a petitioner's move, it is im-

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1117. *Id.*

1118. *Id.*; *see also* Crippen v. Crippen, 610 So. 2d 686 (Fla. Dist. Ct. App. 1992) (stating that the U.C.C.J.A. permits courts to decide custody matters when necessary to protect the child, and here, since the wife alleged domestic violence, the court was able to decide the issue).

1119. 493 N.W.2d 133 (Minn. Ct. App. 1992).

1120. *Id.*

1121. *See, e.g., In re* Marriage of Cline, 433 N.E.2d 51 (Ind. Ct. App. 1982); Curtis v. Curtis, 574 So. 2d 24 (Miss. 1990); Benda v. Benda, 565 A.2d 1121 (N.J. Super. Ct. App. Div. 1989); Garza v. Harney, 726 S.W.2d 198 (Tex. Ct. App. 1987).

1122. *See, e.g.*, Bull v. Bull, 311 N.W.2d 768 (Mich. Ct. App. 1981) (holding that the trial court was not required to recognize and enforce a Georgia custody award to batterer where the Georgia court's award was based solely on mother's denial of father's visitation rights, and gave no consideration of the best interests of the child as required under the U.C.C.J.A.). *But see* Hernandez v. Collura, 493 N.Y.S.2d 343 (App. Div. 1985) (refusing to exercise emergency jurisdiction over the mother who had moved to New York from Connecticut, and finding that she gained actual custody through deception and made only vague and insufficient allegations of abuse where she called father and asked him to bring the child for a visit and then initiated a temporary protection order against father on behalf of herself and child in the New York court).

1123. *See, e.g., Benda*, 565 A.2d at 1124.

portant that courts attempt to discern whether the respondent may be objecting to the move because he wants continued access to his victim.[1124] The U.C.C.J.A. and the P.K.P.A. must be interpreted by courts in a manner that will protect abused women and their children by allowing emergency jurisdiction in the flight state. To determine the most appropriate forum to enter the permanent custody order, competing courts should confer with each other and determine which court should make the final custody award based on the facts of each particular case. Such a conference should include a discussion of which state will provide the safest jurisdiction for the child.

b. Custody Orders and Child Abduction

i. In the United States

Child abduction is not an uncommon action that batterer's may take in retaliation when their victim turns to the court for protection.[1125] In *In re Marriage of D'Attomo*,[1126] a non-custodial batterer attempted to punish his victim for separating from him and going to court to obtain a protection order, by abducting their child.[1127] The husband violated an order of protection—which barred him from removing the parties' child from the jurisdiction of the court or from concealing him—by absconding with his son during the course of divorce proceedings and concealing the child for more than two years.[1128] The husband was found in indirect criminal contempt of court by the circuit court.[1129] This case illustrates the critical need for custody orders, within and separate from protection orders, to address the issue of child abduction.

Some state statutes respond to this need and specifically authorize courts to add provisions to their *ex parte* custody orders aimed at preventing the type of child abduction that occurred in the *D'Attomo* case.[1130] Including custody provisions in all temporary and civil pro-

1124. ORLOFF & KLEIN, *supra* note 26, at 43.

1125. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 43, 50.

1126. 570 N.E.2d 796 (Ill. App. Ct. 1991).

1127. *Id.* at 798.

1128. *Id.* at 797.

1129. The appellate court held that removing and concealing a child in violation of a custody order constitutes the same offense as child abduction for which the father had been prosecuted; thus, holding the father in criminal contempt constituted double jeopardy. *Id.* at 800-02.

1130. CAL. FAM. CODE § 2030 (West 1992) (providing that a court can order parties not to remove children from the jurisdiction); IDAHO CODE § 39-360-8(1)(c) (1993) (same); 750

tection orders can help deter child abduction. It also triggers a more effective police response to child snatching. When a child is snatched in violation of a court order, the abducting parent can be more easily prosecuted under state parental kidnapping statutes. Such provisions also serve to hold violating parties accountable for their criminal actions.

ii. International Child Abduction

There is no clear established policy regarding jurisdiction when a victim of domestic violence flees with her children to the United States in order to escape the abuse in another country.[1131] American courts have held that where a victim of abuse flees from a foreign country to a jurisdiction in the United States, the U.C.C.J.A. provisions apply.[1132] In international child abduction cases, courts will employ the same analysis used in interstate custody cases.[1133] They will generally assume emergency jurisdiction and will then determine the validity of the original court order from the foreign country to see if it meets U.C.C.J.A. notice and hearing requirements.[1134] The court with the temporary jurisdiction should assume the burden of protecting the family until danger in the state or country from which they have fled has ended.[1135] If the court order issued in the country from which the victim fled does not meet U.C.C.J.A. standards, the U.S. court need not recognize and enforce it and may proceed if it has U.C.C.J.A. jurisdiction to issue its own permanent custody order.[1136] This approach ensures that the victim not be penalized for

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ILCS 60/214(b)(8) (Smith-Hurd Supp. 1993) (preventing concealment of the child); MONT. CODE ANN. § 40-4-121(2)(d) (1993) (providing that a court can order parties not to remove children from the jurisdiction); WASH. REV. CODE ANN. § 26.50.070(1)(c) (West Supp. 1993) (same).

1131. *See, e.g.*, Sheikh v. Cahill, 546 N.Y.S.2d 517 (Sup. Ct. 1989) (stating that emergency jurisdiction is alleged but not found under Hague Convention standards).

1132. *See, e.g.*, Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984); Garza v. Harney, 726 S.W.2d 198 (Tex. Ct. App. 1987).

1133. *See, e.g.*, *Farrell*, 351 N.W.2d at 219 (assuming jurisdiction under the U.C.C.J.A. where mother left abusive father in Ireland and brought the children to Michigan); *Garza*, 726 S.W.2d at 198 (holding that, in cases of domestic abuse and child abuse, Texas is bound by U.C.C.J.A. to uphold Mexico decree, but can grant short term emergency relief until steps can be taken to protect the child).

1134. *See, e.g.*, *Garza*, 726 S.W.2d at 200-01.

1135. *See, e.g.*, *id.* at 200-02.

1136. *See, e.g.*, Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984) (holding that the U.C.C.J.A. is extended to the international sphere, and that the trial court properly assumed jurisdiction based on the best interests of the child where the mother fled with the

the step she may have been forced to take to protect herself and her children.

Domestic violence cases also lead to international child abduction and removal of children of battered women from the United States. Among children abducted in the United States, 31.8% are known or believed to have been taken outside of the United States, most frequently to Germany, Mexico, the United Kingdom, and Italy.[1137] Civil protection orders can be used to help prevent this. Under the catch all provisions in state civil protection order statutes, courts can order batterers to sign a statement, which is also signed by the victim and the judge, that asks the embassies in relevant countries not to issue a visa to the parties' U.S. citizen children absent a court order.[1138]

On July 1, 1988, the United States became a member country of the Hague Convention on the Civil Aspects of International Child Abduction which acts as a weapon against problems of international child abductions. The Federal International Child Abduction Remedy Act[1139] sets forth the requirements for bringing a convention case in the United States. It addresses questions of jurisdiction, burden of proof, costs, fees, admissibility of documents, and locating and assisting an abducted child in the United States. Judges and advocates must be familiar with the convention and its procedures which take precedence in cases where they are applicable. In these instances, the convention's procedures do not preclude use of the U.C.C.J.A. and the P.K.P.A., both of which may provide additional or complimentary remedies.[1140]

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children from Ireland to Michigan away from her abusive husband, because the U.C.C.J.A. does not require the court to respect the Ireland court's award of custody to the batterer where the Irish court did not provide the mother with reasonable notice and an opportunity to be heard).

1137. *Child Abduction Studied; Domestic Violence Implicated in Child Abductions*, *supra* note 1091, at 3.

1138. For discussion, a sample letter, and court order, see ORLOFF & KLEIN, *supra* note 26, at 8.

1139. 42 U.S.C. § 11601.

1140. For a detailed discussion, see AMERICAN BAR ASSOCIATION, INTERNATIONAL CHILD ABDUCTIONS: A GUIDE TO APPLYING THE HAGUE CONVENTION, FAMILY LAW SECTION I-2 (G. Hart ed., 1993).

c. Visitation

i. Supervised Visitation

Thirty-seven states and the District of Columbia authorize courts to include temporary visitation provisions in a civil protection order.[1141] Many state civil protection order statutes and the courts have sought to address the risks posed to abuse victims and their children by unsupervised visitation in domestic violence cases.[1142] Consequently, ten state civil protection order statutes authorize a court to order supervised or otherwise restricted visitation if more liberal visitation poses a danger to the petitioner or the children.[1143] Six states and the District of Columbia mandate that courts must give primary consideration to the safety of the victim and children when awarding visitation in a protection order.[1144] The District of Colum-

1141. ALA. CODE § 30-5-7(a)(4) (1989); ARK. STAT. CODE § 9-15-205(3) (Michie 1993); CAL. FAM. CODE § 5513 (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-102(2)(d)(II) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949 (Supp. 1993); D.C. CODE ANN. § 16-1005(c)(7) (1989); FLA. STAT. ANN. § 741.30(7)(a)(3) (Supp. 1993); GA. CODE ANN. § 19-13-4(a)(4) (Supp. 1993); HAW. REV. STAT. § 586-5.5 (Supp. 1992); 750 ILCS 60/214(b)(7) (Smith-Hurd Supp. 1993) IOWA CODE ANN. § 236.5.2.d (West Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(4) (Supp. 1992); LA. REV. STAT. ANN. § 46:2136(A)(3) (West 1982); ME. REV. STAT. ANN. tit 19, § 766.1.E (Supp. 1992); MD. CODE ANN., FAM. LAW § 4-506(d)(7) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209C, § 15 (West 1987); MINN. STAT ANN. § 518B:01(6)(a)(3) (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(d) (Supp. 1993); MO. ANN. STAT. § 455.050(3)(1) (Supp. 1993); NEV. REV. STAT. ANN. § 33.030(2)(a) (Michie 1986); N.H. REV. STAT. ANN. § 173-B:4(I)(b)(3) (1990); N.J. STAT. ANN. § 2C:25-29(b)(3) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5A(2) (Supp. 1993); N.Y. JUD. LAW § 1056.1(b) (McKinney Supp. 1994); N.C. GEN. STAT. 50B-3(a)(4) (1993); N.D. CENT. CODE § 14-07.1-02(4)(c) (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(d) (Anderson Supp. 1993); OR. REV. STAT. § 107-718(1)(a) (1991); 23 PA. CONS. STAT. ANN. § 6108(a)(4) (1991); S.C. CODE ANN. § 20-4-60(c)(1) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 25-10-5(3) (1984); TENN. CODE ANN. § 36-3-606(a)(4) (1991); TEX. FAM. CODE ANN. § 71.11(a)(3) (West 1992); UTAH CODE ANN. § 30-6-6(2)(g)(ii) (Supp. 1993); VT. STAT. ANN. tit. 15, § 1103(d) (1989); W. VA. CODE § 48-2A-6(a)(3) (Supp. 1993); WYO. STAT. § 35-21-105(b)(i) (1988); *see also* MODEL CODE, *supra* note 15, § 306.

1142. *See generally* MODEL CODE, *supra* note 15, §§ 405, 406 (requiring the creation of visitation centers "to allow court ordered visitation in a manner that protects the safety of all family members," and setting out what they must provide).

1143. CAL. FAM. CODE § 5513 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(5) (Supp. 1993); 750 ILCS 60/214(b)(7) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.5.2.d (West Supp. 1993); MD. CODE ANN., FAM. LAW § 4-506(d)(7) (Supp. 1993); MINN. STAT. ANN. § 518B.01.6(a)(3) (West Supp. 1993); NEV. REV. STAT. ANN. § 33.030.2(a) (Michie 1986); N.J. STAT. ANN. § 2C:25-29(b)(3) (West Supp. 1993); VT. STAT. ANN. tit. 15, § 1103(d) (1989); W. VA. CODE § 48-2A-6(a)(3) (Supp. 1993); *see also* MODEL CODE, *supra* note 15, §§ 306, 402.

1144. D.C. CODE ANN. § 16-1005(c)(7) (1992); IOWA CODE ANN. § 236.5.2.d (West Supp.

bia statute states that a court may "provide for visitation rights with appropriate restrictions to protect the safety of the complainant."[1145] Six state civil protection order statutes allow visitation in accordance with the best interests of the child.[1146] Illinois mandates a rebuttable presumption of supervised visitation when the court finds abuse.[1147] The Iowa civil protection order statute states that a court may affirmatively investigate the need to modify an existing custody or visitation order.[1148]

The National Council of Juvenile and Family Court Judges strongly urges that in cases where domestic violence exists, the court should weigh and consider the violent conduct when entering both custody and visitation orders.[1149] The Council found "the propensity for continued violence remains after the divorce or separation and frequently recurs during unsupervised visitation or joint custody."[1150] Similarly, the National Institute of Justice study concluded that "nowhere is the potential for renewed violence greater than during visitation."[1151]

Judicial authorities strongly support supervised visitation as the preferred method of visitation in domestic violence cases, to reduce the risk of further violence between the parties.[1152] The National Council of Juvenile and Family Court Judges recommend that unsupervised visitation should not be allowed where there is evidence of family violence until after professionals have fully completed a forensic custody evaluation, and the batterer has successfully completed a domestic violence treatment program and, if warranted, a substance

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1993); MD. CODE ANN., FAM. LAW § 4-506(d)(7) (Supp. 1993); MINN. STAT. ANN. § 518B.01.6(a)(3) (West Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(I)(b)(3) (1990); N.J. STAT. ANN. § 2C:25-29(b)(3) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5(A)(2) (Michie Supp. 1993); *see also* MODEL CODE, *supra* note 15, § 402.

1145. D.C. CODE ANN. § 16-1005(c)(7) (1989).

1146. CAL. FAM. CODE § 5513 (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-102(2)(d)(III) (West Supp. 1993); 750 ILCS 60/214(b)(7) (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766.1.E (West Supp. 1992); MINN. STAT. ANN. § 518B.01.6(a)(3) (West Supp. 1993); MO. REV. STAT. § 455.050(3)(1) (Supp. 1993).

1147. 750 ILCS 60/214(b)(5) (Smith-Hurd Supp. 1993) ("If a court finds, after a hearing, that respondent has committed abuse of a minor child . . . there shall be a rebuttable presumption that awarding physical care to respondent would not be in the child's best interest.").

1148. IOWA CODE ANN. § 236.5.2.d (West Supp. 1993).

1149. FAMILY VIOLENCE PROJECT, *supra* note 687, at 25.

1150. *Id.*

1151. NIJ CPO STUDY, *supra* note 19, at 43.

1152. FAMILY VIOLENCE PROJECT, *supra* note 687, at 19-20; *see also* MODEL CODE, *supra* note 15, § 306.

abuse program.[1153]

The National Council of Juvenile and Family Court Judges strongly urges the establishment of supervised visitation programs in every jurisdiction to ensure the safety of the domestic violence victim and her children, which would be available to persons regardless of income.[1154] The Minnesota Legislature has approved state funding for children's safety centers to offer visitation with a batterer at a neutral site.[1155]

Despite these recommendations, many trial courts are still unwilling to enter orders providing for supervised visitation in civil protection order cases.[1156] Some courts have, however, appropriately restricted visitation.[1157] In *Campbell v. Campbell*,[1158] the court in a civil protection order case awarded a protection order to a wife who petitioned to stay her husband's visitation rights with the children because of her fear of domestic violence based on the husband's prior violent behavior and arrest for sexual battery of the parties' three year old daughter.[1159] The court concluded that "[s]urely, fear that a custodial parent will be assaulted or battered by a noncustodial parent constitutes an act of domestic violence as to their child."[1160] In *Desmond v. Desmond*,[1161] in considering emergency jurisdiction under the U.C.C.J.A., the court similarly concluded "[i]t can hardly be convincingly argued that repeated acts of physical terror and forced sex over a number of years, commingled with emotional abuse (much of which was seen or heard by the children) are to be disregarded when contemplating the degree and quality of [the abuser's] future access to his children."[1162]

1153. *Id.*; ORLOFF & KLEIN, *supra* note 26, at 51; *see also* NIJ CPO STUDY, *supra* note 19, at 43-44.

1154. FAMILY VIOLENCE PROJECT, *supra* note 687, at 19-20.

1155. MINN. STAT. ANN. § 256F.09(1) (West 1992); *cf.* H.R. 3355, 103d Cong., 1st Sess., title XL (1993).

1156. For example, in Minnesota, less than half of all judges report that they are willing to order supervised visitation of children in civil protection order cases. MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, GENDER FAIRNESS REPORT, *reprinted in* 15 WM. MITCHELL L. REV. 825, 879 (1989); *see also* Czapanskiy, *supra* note 23, at 256.

1157. *See, e.g., In re* Marriage of McCoy, 625 N.E.2d 883 (Ill. App. Ct. 1993) (finding that abuse of custodial parent provides sufficient basis to restrict visitation with children).

1158. 584 So. 2d 125 (Fla. Dist. Ct. App. 1991).

1159. *Id.*

1160. *Id.* at 127.

1161. 509 N.Y.S.2d 979, 983 (Fam. Ct. 1986).

1162. *Id.*; *see also In re* Marriage of Klister, 777 P.2d 272 (Kan. 1989) (allowing the

Courts that have a clear understanding of the danger posed by unsupervised visitation when domestic violence is an issue award supervised visitation in both civil protection order and custody cases. Courts will impose supervised visitation as part of a protection order.[1163] The court in *Hall v. Hall* held that a court may suspend visitation in a protection order even where the petitioner does not allege abuse directed toward the children.[1164] In that case, the court suspended visitation where the husband made verbal threats in the context of past abuse, and where a social worker recommended supervised visitation in light of the respondent's volatile behavior and chemical dependency.[1165] The court reasoned that the petitioner's fear of imminent physical harm or assault was sufficient to warrant supervised visitation to avoid the risk of further violence.[1166] In *Cosme v. Figueroa*,[1167] the court ordered that a father have supervised visitation as part of a temporary protection order pending the outcome of a risk assessment.[1168] The court concluded that the defendant's admission to the assault on the petitioner and "the presence of their child in the middle of this dispute, warrants the order of a risk assessment."[1169] In *Eichenberg v. Eichenberg*,[1170] the court upheld the trial court's suspension of the respondent's visitation rights until a guardian ad litem had an opportunity to investigate and make

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mother to present evidence of the father's alleged alcohol abuse, violent temper, sexual abuse of another daughter, and physical abuse of second wife where father sought unsupervised, overnight visitation with daughters).

1163. *See, e.g.*, Hall v. Hall, 408 N.W.2d 626 (Minn. Ct. App. 1987).

1164. *Id.* at 629.

1165. *Id.*

1166. *Id.* at 628-29; *see also In re* M.D., 602 A.2d 109. However, some courts have been unwilling to totally suspend visitation rights. In Katz v. Katz, 467 N.Y.S.2d 223 (App. Div. 1983), the court held that denial of visitation rights to a natural parent is a drastic remedy which courts should only order for compelling reasons and with substantial evidence that such visitation is "inimical to the welfare of the children." *Id.* at 224.

1167. 609 A.2d 523 (N.J. Super. Ct. Ch. Div. 1992).

1168. *Id.* at 528.

1169. *Id.* at 527. *But see* Tung v. Oshima, No. C2-90-387, 1990 WL 146595 (Minn. Ct. App. Oct. 9, 1990) (refusing to overturn as a clear abuse of discretion the trial court's decision to issue a civil protection order without the petitioner's requested supervised visitation); Comas v. Comas, 608 A.2d 1005 (N.J. Super. Ct. Ch. Div. 1992) (holding that respondent may have visitation with his child in his home because the petitioner failed to meet her burden by a preponderance of the evidence to show that such visitation was not in the child's best interests, where she only claimed that the defendant's new wife hated the child, but provided no evidence to support her claim).

1170. No. 93AP-840, 1993 Ohio App. LEXIS 5282 (Ohio Ct. App. 1993).

a recommendation as to appropriate visitation.[1171] In *Hopkins v. Hopkins*,[1172] the court upheld the entry of a restraining order preventing the respondent from interfering with the petitioner's possession of the child and awarding the respondent only limited access and possession of children in light of his physical abuse of the mother and oldest child.[1173]

Courts will also impose supervised visitation in custody cases where domestic violence exists. In *Katz v. Katz*,[1174] the court, while refusing to entirely suspend the defendant's visitation rights, ordered limited and supervised visitation under carefully controlled circumstances, where the defendant had abused his wife in the presence of the child.[1175] In *Commonwealth v. Rozanski*,[1176] the court limited a father's visitation with his son to take place outside the mother's home and presence where the court found that the strained meetings between the parties, which in the past included the father slapping the mother, were inappropriate for the child to witness.

Courts have responded with resolve to violations of visitation restrictions in protection orders. Courts have conditioned further visitation on the respondent providing a bond where the respondent has failed to comply with visitation rules in the past. In *In Re Marriage of Rodriguez*,[1177] the court held that the lower court rightly conditioned limited visitation in a protection order on the respondent posting a $10,000 bond where the respondent father had violated the visitation provision in the past.[1178] The court further held that the mother had standing to execute the bond when the father failed to

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1171. *Id.* at *9-*10.

1172. 853 S.W.2d 134 (Tex. Ct. App. 1993).

1173. *Id.* at 138.

1174. 467 N.Y.S.2d 223 (Sup. Ct. 1983).

1175. *Id.*; *see also* Zuccaro v. Zuccaro, 1993 Conn. Super. LEXIS 1750 (Conn. Super. Ct. July 16, 1993) (ordering supervised visitation in dissolution action where there was a history of violence against the custodial parent); Carter v. Carter, 1993 Minn. App. LEXIS 672 (Minn. Ct. App. July 13, 1993) (restricting father's visitation where he was suspected of abusing children); *In re* Brandon "UU," 597 N.Y.S.2d 525 (App. Div. 1993) (ordering supervised visitation); Lufft v. Lufft, 424 S.E.2d 266, 270 (W. Va. 1992) (remanding case so that father's violent tendencies could be evaluated, and amending visitation order to extend supervised visitation until father could demonstrate that he is no longer violent). *But see In re* Whaley, 620 N.E.2d 954 (Ohio Ct. App. 1993) (finding no abuse of discretion when trial court granted father unsupervised visitation with child where there was evidence of violence against two girlfriends, but no evidence that it occurred in the child's presence and allegations of child abuse were unsubstantiated).

1176. 213 A.2d 155 (Pa. Super. Ct. 1965).

1177. 545 N.E.2d 731 (Ill. 1989).

1178. *Id.* at 734-35.

return the child in accordance with the order.[1179] In *Leonetti v. Riehl*,[1180] the court held respondent in contempt and sentenced him to fifteen days in jail for violating a civil protection order which ordered him to stay away from the petitioner's residence except on designated visitation days where he went to the mother's house on a non-visitation day, engaged in disruptive behavior, and kicked over garbage cans.[1181]

Courts have also considered expert opinions on the issue of visitation. In *Hall v. Hall*,[1182] the court relied, in part, on a social worker's recommendation of supervised visitation to support its order.[1183] In *In re Penny R.*,[1184] the court held that in order to vacate sua sponte a preexisting order permitting visitation, based on an unsolicited letter from the director of a mental health center stating that such visitation is adverse to the child's best interests, the court must subsequently hold a review hearing to determine the correctness of the order within the time the court would have to hold a hearing following the issuance of a temporary protection order.[1185] In *Vogt v. Vogt*,[1186] the court reversed the temporary visiting arrangements established in a protection order when the court found that the court services representative went beyond consulting the parties and instead overrode the misgivings of the petitioner and exacted a signed written agreement from the parties in violation of state statutory law.[1187] The *Vogt* court held that only when there is no probable cause of domestic violence may the court order or refer parties to mediation.[1188]

1179. *Id.* at 734.
1180. 546 N.Y.S.2d 875 (App. Div. 1989).
1181. *Id.*
1182. 408 N.W.2d 626 (Minn. Ct. App. 1987).
1183. *But see In re* M.D., 602 A.2d 109 (D.C. 1992) (reversing a denial of visitation in a civil protection order where the trial judge failed to read relevant psychiatric evaluations and underlying findings before making his decision).
1184. 509 A.2d 338 (Pa. Super. Ct. 1986).
1185. *Id.* at 340.
1186. 455 N.W.2d 471 (Minn. 1990).
1187. *Id.* at 474-75.
1188. *Id.*

ii. Visitation Suspended Altogether Due to Domestic Violence

State statutes and case law both recognize that under some circumstances, the court may entirely suspend a batterer's visitation rights. Several states empower courts to suspend visitation to protect the safety of the victim and her children.[1189] For example, the Minnesota statute states that courts will entirely suspend visitation "as needed to guard the safety of the victim and the children."[1190] Courts have specifically held that denial of visitation rights in an *ex parte* temporary protection order does not violate due process where deprivation is only for a limited period of time until a full hearing.[1191]

Appellate courts who have reached this question[1192] have been generally willing to suspend or limit visitation in protection order cases to protect the petitioner or her children from abuse.[1193] In *Campbell v. Campbell*,[1194] the court granted a stay of respondent's visitation rights because of petitioner's fear of domestic violence and the husband's prior arrest for sexual battery of their three year old daughter.[1195] The court found that the children "like their mother,

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1189. 750 ILCS 60/214(b)(7) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.5.2.d (West Supp. 1993); MD. CODE ANN., FAM. LAW § 4-506(d)(7) (Supp. 1993); MINN. STAT. ANN. § 518B.01.6(a)(3) (West Supp. 1993); *see also* MODEL CODE, *supra* note 15, § 306.

1190. MINN. STAT. ANN. § 518B.01.6(a)(3) (West Supp. 1993).

1191. *See, e.g.*, Marquette v. Marquette, 686 P.2d 990 (Okla. Ct. App. 1984) (holding that an *ex parte* order which effectively denied batterer's visitation for 10 days did not violate due process).

1192. Reviewing gender bias reports from across the country, it becomes clear that trial level courts are issuing many more decisions unfavorable to civil protection order petitioners than we see when we review appellate court cases. To understand this phenomenon, we need only return to the dynamics at work in domestic violence relationships. When battered women turn to the courts seeking protection and they lose custody of their children, they receive orders that are unworkable, or protection is denied, many victims do not appeal the court's decision, even when their chances of winning on appeal are high. They instead return to their batterers, having learned that the justice system will not offer them effective relief. This reinforces their batterers' control over their lives. As attorneys representing hundreds of battered women, we have observed that only a small fraction of battered women who have valid grounds for appeal actually appeal their cases.

1193. Ellibee v. Ellibee, 826 P.2d 462 (Idaho 1992) (entering a 90 day order giving respondent only supervised visitation rights and telephone contact with his children based on evidence that he had administered a severe spanking to his son which left several visible bruises); People v. Hazelwonder, 485 N.E.2d 1211 (Ill. App. Ct. 1985) (determining that a protection order may prohibit visitation where the court finds that visitation would seriously endanger the physical, mental, or emotional health of a minor child).

1194. 584 So. 2d 125 (Fla. Dist. Ct. App. 1991).

1195. *Id.* at 126.

had reasonable cause to believe that they were about to become the victims of an act of domestic violence.[1196] Surely, fear that a custodial parent will be assaulted or battered by a non-custodial parent constitutes an act of domestic violence as to their child."[1197]

In *Pendleton v. Minichino*,[1198] the court issued an *ex parte* temporary protection order suspending visitation where petitioner alleged present and immediate danger in an affidavit under oath.[1199] The court concluded that the respondent's statements to the petitioner "that he was depressed and, 'this time I'm not going alone. You better watch your back,' are at the least menacing and disturbing and it was not unreasonable to find that the words constituted an immediate and present physical danger to the applicant and/or the children."[1200] The court further noted that concern as to the children was especially appropriate since the respondent "had 'sole' custody of the children in his own home at the times of his visitation."[1201]

In *Hughes v. Hughes*,[1202] the court found the father's history of violence toward the mother, which included holding the mother and child hostage for eight hours while threatening to kill the mother and himself, and later breaking into the mother's home and shooting her while she held the child, was so egregious that the court entirely suspended visitation, finding contact with the father to be against the child's best interests.[1203] The court held that, while parents should seldom lose visitation, in this case the father's reckless endangerment of the child and abuse of the mother confirms a moral deficiency which threatens the child.[1204]

Courts have also suspended visitation in custody and divorce proceedings due to domestic violence. In *Goldring v. Goldring*,[1205] the court upheld an order in a divorce settlement which suspended the husband's visitation rights with the children until he underwent a psychiatric evaluation based on evidence that he had continually harassed his former wife, and physically abused her on two occa-

1196. *Id.*
1197. *Id.* at 127; *see also* Daniel R. v. Noel R., 600 N.Y.S.2d 314 (App. Div. 1993) (denying father visitation rights where he sexually abused his child).
1198. 1992 Conn. Super. LEXIS 915 (Conn. Super. Ct. 1992).
1199. *Id.* at *20.
1200. *Id.*
1201. *Id.*
1202. 463 A.2d 478 (Pa. Super. Ct. 1983).
1203. *Id.* at 478-79.
1204. *Id.* at 479.
1205. 424 N.Y.S.2d 270 (App. Div. 1980).

sions.[1206] The respondent ex-husband "torment[ed] his ex-wife three or four times a day, from early morning to late evening, by standing outside her apartment and screaming curses at her."[1207] The court further noted that the defendant had physically abused his wife on two occasions since the divorce, and "the children fear their father, often hid when he comes to take them for a visit, and are literally dragged down the street by him when they do not want to go."[1208]

11. Monetary Relief, Including Child and Spousal Support

a. Availability of Broad Economic Relief

Aside from fear, economic dependence is possibly the single most common reason why abuse victims remain with or return to a batterer.[1209] Unless courts order financial assistance for the victim

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1206. *Id.*

1207. *Id.* at 273.

1208. *Id.*; *see also* Bender v. Kramer, 1992 WL 435693 (Del. Fam. Ct. Nov. 12, 1992) (declining to enter visitation order based on allegations of acts of physical and/or sexual abuse by petitioner).

1209. Victims of abuse often stay with their batters because they lack viable employment opportunities, secure financial assistance, or safe affordable housing where they can live with their children. Ganley, *supra* note 21, at 44.

One of the major findings of the D.C. Gender Bias Task Force Report was that D.C. judges routinely issue civil protection order orders without resolving questions of custody, visitation, and child support:

> Issues of custody, visitation and support are not viewed as peripheral to resolving domestic violence. Their resolution may be as important as traditional "stay away" orders, since disputes over custody and visitation can trigger violence, and lack of financial resources may lead a victim of violence to return to the batterer. Therefore, the Task Force recommends that the Superior Court evaluate its practices to address this apparent failure of the system to utilize regularly critical provisions in the Intrafamily Act.

D.C. TASK FORCE, *supra* note 213, at 143, 147-50, 158-59.

> Like other victims of interpersonal violence, women assaulted by male intimates learn to weigh all alternatives against their perception of the assailant's ability to control or to harm . . . . For women whose assailant is their husband or other intimate partner predictable effects of attack are further compounded by the fact that the assailant is someone . . . on whom they may depend for shelter and other components of survival . . . women at risk from male partners may become even more frightened by the lack of viable alternatives for safety and well-being. Especially for women who are married to their assailants, decisions about their relationships are complicated by legal and financial ties . . . . Living in hiding is incompatible with maintaining faithful employment, raising and educating children, and other components of normal life. Economic circumstances also play a major role in the choices facing a woman who is experiencing violence at home. If, in leaving a violent mate, she lacks adequate financial resources and must live in an unsafe dwelling in a crime-ridden community, a survivor may have changed only the type of danger to be braved and may have added the risk of assaults by strangers to

and her family, she cannot be entirely protected from abuse.[1210] Battered women are often financially isolated.[1211] Social science studies reveal the severe financial stress on abused women which so often forces them to return to a batterer.[1212] When a battered woman leaves her abuser, there is a fifty percent chance that her standard of living will drop below the poverty line.[1213] Domestic violence is a leading contributor of homelessness for women and children in this country.[1214] A Senate Judiciary Report reveals that over fifty percent

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the risk of her partner's reprisals.

Browne, *supra* note 10, at 1077, 1080-81.

For battered women to be successful in their attempts to leave, courts must

> provide for economic and other necessities related to the adequate care of children. Orders that contain economic resources such as property possession (e.g. house, car, and household items), child support, and assistance with medical or other necessary expenses can make the difference between a woman's remaining separated from an abusive partner and returning to him to avoid impoverishing her family. Such orders need to be accompanied by mechanisms for enforcing child support and other economic payments.

Id. at 1084.

1210. FAMILY VIOLENCE PROJECT, *supra* note 687, at 22 ("Judges may be uncomfortable issuing *ex parte* orders which . . . require the payment of child or spousal support . . . Without such provisions however, the victim cannot be protected. Economic dependence is frequently the reason the victim returns to the offender. Such *ex parte* relief is strongly supported by both case law and statute."); *see also* Mugan v. Mugan, 555 A.2d 2 (N.J. Super. Ct. App. Div. 1989) (citing NEW JERSEY ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, BATTERED WOMEN IN NEW JERSEY 26 (1981)).

1211. Follingstad et al., *supra* note 317, at 113. Thirty-four percent of battered women had no access to checking accounts, 51% had no access to charge accounts, and 21% had no access to cash. Even battered women who are employed outside the home are often denied access to financial resources by their batterers. EWING, *supra* note 180, at 10.

1212. DEL MARTIN, BATTERED WIVES 232 (1977) (stating that battered women who returned were married longer, had less work experience, and were mostly unskilled); Lewis Okun, *Termination or Resumption of Cohabitation in Woman Battering Relationships: A Statistical Study*, *in* COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 107, 116 (Gerald Hotaling et al. eds., 1988) (finding that couples in which the battered woman was unquestionably the main income producer were twice as likely to breakup immediately); Ganley, *supra* note 21, at 44 (stating that the reasons for staying with or returning to a batterer often include: 1) lack of real alternatives for employment or financial assistance when the batterer controls the finances; 2) lack of financial resources to pay for an attorney; and 3) lack of safe and affordable housing for the abused party and her children); Daniel G. Saunders & Patricia B. Size, *Attitudes About Woman Abuse Among Police Officers, Victims, and Victim Advocates*, 1 JOURNAL OF INTERPERSONAL VIOLENCE 25, 35 (1986) (stating that 48% of victims report that having "no place to go" forced them to return to batterers).

1213. *Women and Violence*, *supra* note 789, at 95.

1214. *See, e.g.*, Ellen L. Bassuk, *Homeless Families*, SCIENTIFIC AMERICAN, Dec. 1991, at 66 (Eighty-nine percent of homeless mothers have been physically or sexually abused. Thirty-four percent of the nation's homeless are families with children—disproportionately single-mother families—and are the single fastest growing segment of America's homeless population). In 1987 the New York State Office for the Prevention of Domestic Violence found that

of homeless women are fleeing domestic abuse.[1215] The power of this economic stress is evident. A study of battered women in New York City shelters discovered that thirty-one percent of the victims returned to their batterers, citing an inability to obtain long-term separate housing.[1216] Financial assistance and support for abuse victims as part of a protection order is clearly needed to alleviate the financial stress on victims which often forces them to return to their abusive partners and to further violence.[1217]

To address abuse victims' financial vulnerability, judicial experts, courts, and the majority of state statutes urge the inclusion of monetary relief as part of a civil protection order. The National Council of Juvenile and Family Court Judges enunciated the position that:

> Civil restraining order should be available to all, and issued *ex parte* on request when family violence has occurred or is threatened. Such orders should be clear and specific and should address . . . [f]inancial support and maintenance for the victim and family members . . . Judges may be uncomfortable issuing *ex parte* orders which evict the offender from the family home, require the payment of spousal or child support or award custody of the children to the petitioner. Without such provisions, however, the victim cannot be protected. Economic dependence is frequently the reason the victim returns to the offender. Such *ex parte* relief is strongly supported by both case law and statute.[1218]

However, reports on gender bias in the courts consistently find that, despite the courts' authority to offer financial relief when issuing protection orders, and judicial experts' recommendations that courts adopt this practice, judges across the country routinely deny requests for financial relief in civil protection order proceedings.[1219]

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a full 40% of individuals in the state's homeless shelters were battered women and their children. DWYER & TULLY, *supra* note 844, at 7. Domestic violence was the main reason for homelessness in Oregon in 1988. KAY STOHL, HOMELESS CHILDREN AND YOUTH IN OREGON 6 (Oregon Shelter Network ed., 1988).

1215. *Women and Violence*, *supra* note 789, at 95; Kay Morgan, *Reassessing the Battery of Women: A Social and Economic Perspective*, *in* FEMINIST JURISPRUDENCE (1992).

1216. DWYER & TULLY, *supra* note 844, at 9.

1217. *See, e.g.*, Elis v. North Carolina Crime Victim's Compensation Comm'n, 432 S.E.2d 160 (N.C. Ct. App. 1993) (holding that victim's refusal to prosecute batterer does not disqualify victim from right to receive victim's compensation and that refusal to prosecute is distinct from failure to cooperate with prosecution).

1218. FAMILY VIOLENCE PROJECT, *supra* note 687, at 22.

1219. Czapanskiy, *supra* note 23, at 247, 253; GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM (1991), *reprinted in* 8 GA. ST. U. L. REV. 539, 588 (1992); Ricki Lewis

Forty-one states, the District of Columbia, and Puerto Rico authorize some form of economic relief in a protection order.[1220] The protection order statutes of thirty-eight jurisdictions contain catch-all provisions under which a court may award financial relief to a victim.[1221] Twenty states specifically authorize the payment of general

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Tannen, *Report of the Florida Gender Bias Study Commission*, 42 FLA. L. REV. 803, 867 (1990); Lynn Hecht Schafran, *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 129, 150 (1986).

1220. ALA. CODE § 30-5-7(a)(5) (1989); ALASKA STAT. § 25:35.010(b)(4) (1991); ARIZ. REV. STAT. ANN. § 13-3602 (1992); CAL. FAM. CODE § 5752 (West Supp. 1993) (includes putative father); DEL. CODE ANN. tit. 10, § 949(a) (Supp. 1993); D.C. CODE ANN. § 16-1005(c) (1989); FLA. STAT. ANN. § 741.30(4)(g) (West 1986); GA. CODE ANN. § 19-13-4 (1991 & Supp. 1993); IDAHO CODE § 39-6306 (1993); 725 ILCS 5/112A-14(b) (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-5(a)(3) (West Supp. 1993); IOWA CODE ANN. § 236.5.2 (West 1985 & Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(6) (Supp. 1993); KY. REV. STAT. ANN. § 403.750(1)(f) (Michie 1984 & Supp. 1992); LA. REV. STAT. ANN. § 46:2136 (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-506(d) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MISS. CODE ANN. § 93-21-13(1) (Supp. 1993); MO. ANN. STAT. § 455-050 (Supp. 1993); MONT. CODE ANN. § 40-4-121(2) (1993); NEV. REV. STAT. ANN. § 33.030.2(b)(2) (Michie 1986 & Supp. 1992); N.H. REV. STAT. ANN. § 173-B:4(I)(a) (1990); N.J. STAT. ANN. § 2C:25-29(b) (West 1993); N.M. STAT. ANN. § 40-13-5(A)(2) (1993); N.Y. FAM. CT. ACT § 842 (McKinney 1983); N.C. GEN. STAT. § 50B-3(a) (Michie 1993); N.D. CENT. CODE § 14-07.1-02.4.e (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4(E) (West 1992); OR. REV. STAT. § 107.716(2) (1991); 23 PA. CONS. STAT. ANN. § 6108(a)(8) (1991); P.R. LAWS ANN. tit. 8, § 664 (Supp. 1993); R.I. GEN. LAWS § 15-15-3 (Supp. 1993); S.C. CODE ANN. § 20-4-60(c)(7) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-5 (1984); TENN. CODE ANN. § 36-3-606(a) (1991); TEX. FAM. CODE ANN. § 71.11(a)(2)(c) (West Supp. 1993); UTAH CODE ANN. § 30-6-6 (Supp. 1993); VA. CODE ANN. § 16.1-279.1 (Supp. 1993); WASH. REV. CODE ANN. § 26.50.060 (West Supp. 1993); W. VA. CODE § 48-2A-6(a) (Supp. 1993); WIS. STAT. ANN. § 813.12 (West Supp. 1993); WYO. STAT. § 35-21-105(b) (1988); *see also* MODEL CODE, *supra* note 15, § 306.

1221. ALA. CODE § 30-5-7(a) (1989); ALASKA STAT. § 25.35.010(d) (1991); ARIZ. REV. STAT. ANN. § 13-3602(D)(4) (1989); ARK. STAT. ANN. § 9-15-205(a)(6) (1993); CAL. FAM. CODE § 2035 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); DEL. STAT. ANN. tit. 10, §§ 945(4), 948(b), 949(a)(11) (Supp. 1993); D.C. CODE ANN. § 16-1005(c)(10)(1989); FLA. STAT. ANN. § 741.30(4)(b)(g) (West 1986); HAW. REV. STAT. § 586-5(b) (1987 & Supp. 1993); IDAHO CODE § 39-6306(1)(e) (1993); 750 ILCS 60/214(b)(17) (Smith-Hurd 1992 & Supp. 1993); IOWA CODE ANN. § 236.5(2) (1985 & Supp. 1993); KY. REV. STAT. ANN. § 403.750(1)(h) (Michie/Bobbs-Merrill 1984 & Supp. 1992); LA. REV. STAT. ANN. § 46-2136 (West 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(K) (West 1981 & Supp. 1993); MD. CODE ANN., FAM. LAW § 4-506(d) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MINN. STAT. ANN. § 518B.01(6)(a)(11) (West 1990 & Supp. 1993); MO. ANN. STAT. § 455.050 (Vernon 1986 & Supp. 1993); NEV. REV. STAT. ANN. § 33.030(1)(e) (Michie 1986); N.H. REV. STAT. ANN. § 173B:4(I) (1990); N.J. STAT. ANN. § 2C: 25-29(b) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5(A)(5) (Michie 1989 & Supp. 1993); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994); N.D. CENT. CODE § 14-07.1-02.4 (1991 & Supp. 1993); OHIO REV. CODE ANN. § 3113.312(E)(1)(h) (Anderson

monetary relief in a protection order.[1222]

The New Jersey statute enumerates the most comprehensive protection for abuse victims. In addition to offering financial support for petitioner and her children, which is typically available in civil protection order proceedings, it specifically authorizes the payment of punitive damages and compensation for pain and suffering.[1223] In *Sielski v. Sielski*,[1224] the court awarded $6000 in punitive damages to the petitioner, after the court found that the respondent acted viciously and sadistically when he yanked petitioner out of bed by her hair, slapped her about the face and neck, attempted to push her face in the toilet, and yanked at her pubic hair.[1225] Innovative state statutes also authorize payment for economic losses stemming from abuse including medical costs,[1226] lost earnings,[1227] repair and replace-

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1989 & Supp. 1992)); OKLA. STAT. ANN. tit. 22, § 60.4C., D. (West 1992); PA. STAT. ANN. tit. 23, § 6108(a) (1991); R.I. GEN. LAWS § 15-15-3(1) (1988 & Supp. 1993); S.C. CODE ANN. § 20-4-60(c)(7) (Law. Co-op 1985); S.D. CODIFIED LAWS ANN. § 25-10-5(6) (1984); TEX. FAM. CODE ANN. § 71.11(a) (West 1986 & Supp. 1993); UTAH CODE ANN. § 30-6-6(1) (1989 & Supp. 1993); VA. CODE ANN. § 16.1-279.1.A(6) (Michie 1988 & Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(e) (West 1986 & Supp. 1993); W. VA. CODE § 48-2A-6(a) (1992 & Supp. 1993); WYO. STAT. § 35-21-105(a)(vi) (1988); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990).

1222. ALASKA STAT. 25.35.010(b)(4) (1991); CAL. FAM. CODE § 5753 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(6), (7) (Supp. 1993); IDAHO CODE § 39-6306 (Supp. 1993); 725 ILCS 5/112A-14(b) (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MISS. CODE ANN. § 93-21-15 (Supp. 1993); MO. ANN. STAT. § 455-050 (Supp. 1993); NEV. REV. STAT. ANN. § 33.030.2 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(I) (1990); N.J. STAT. ANN. § 2C:25-29(b) (West 1993); N.M. STAT. ANN. § 40-13-5 (West Supp. 1993); N.Y. FAM. CT. ACT § 842 (McKinney 1983); N.C. GEN. STAT. § 50B-3(a) (1989); OHIO REV. CODE ANN. § 3113.31(E) (Anderson Supp. 1992); 23 PA. CONS. STAT. ANN. § 6108 (1991); S.C. CODE ANN. § 20-4-60(c) (Law. Co-op. 1985); UTAH CODE ANN. § 30-6-6 (Supp. 1993); WYO. STAT. § 35-21-105(b) (1988).

1223. N.J. STAT. ANN. § 2C:25-29(b)(4); *see also* Mugan v. Mugan, 555 A.2d 2 (N.J. Super. Ct. App. Div. 1989) (noting that the New Jersey statute authorizes the payment of punitive damages and compensation for pain and suffering in addition to compensatory damages and awarding petitioner monetary relief of $120).

1224. 604 A.2d 206 (N.J. Super. Ct. Ch. Div. 1990).

1225. *Id.* at 207; *see also* Reeves v. Reeves, 625 A.2d 589 (N.J. Super. Ct. App. Div. 1993) (holding that a trial court may decide whether to assess punative damages in domestic violence cases).

1226. ALASKA STAT. § 25.25.010(b)(6) (1991); CAL. FAM. CODE § 5753(a) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(7) (Supp. 1993); 725 ILCS 5/112-14(b) (Smith-Hurd Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(f) (Supp. 1993); N.H. REV. STAT. ANN. § 173-B4:(I)(a)(6) (1990); N.Y. FAM. CT. ACT § 842(h) (McKinney 1983); 23 PA. CONS. STAT. ANN. § 6108(a)(8) (1991); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990); UTAH CODE ANN. § 30-6-6; WYO. STAT. § 35-21-105(b)(iii) (1992); *see also* MODEL CODE,

ment of damaged property,[1228] alternative housing costs,[1229] meals,[1230] out of pocket expenses for injuries,[1231] relocation and travel expenses,[1232] replacement costs for locks,[1233] and counseling costs.[1234] Domestic violence victims may also file civil damage suits against their batterers under a variety of legal theories including torts, negligence, and intentional infliction of emotional distress.[1235]

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supra note 15, § 306.

1227. CAL. FAM. CODE § 5753(a) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949 (Supp. 1993); 725 ILCS 5/112A-14(b) (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766(1)(c) (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(f) (Supp. 1993); N.H. REV. STAT. ANN. § 173-B4:(I)(a)(6) (1990); N.J. STAT. ANN. § 2C:25-29(b)(4) (West 1992); 23 PA. CONS. STAT. ANN. § 6108(a)(8) (1991).

1228. DEL. CODE ANN. tit. 10, § 949(a)(7) (Supp. 1993); 725 ILCS 112A-14(b)(2) (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766(I) (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993); N.J. STAT. ANN. § 2C:25-29(b)(4) (West 1992); P.R. LAWS ANN. tit. 8, § 621(i) (Supp. 1990); *see also* MODEL CODE, *supra* note 15, § 306.

1229. CAL. FAM. CODE § 5753(a) (West Supp. 1993); GA. CODE ANN. § 19-13-4(a)(3) (Supp. 1993); 725 ILCS 5/112A-14(b)(2) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.5.2.b (West 1985); KAN. STAT. ANN. § 60-3107(a)(3) (Supp. 1993); LA. REV. STAT. ANN. § 46:2136(A)(2) (West 1982); MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(c) (Supp. 1993); MO. ANN. STAT. § 455.050(5) (Supp. 1992); N.H. REV. STAT. ANN. § 173-B:10(h) (1990); N.J. STAT. ANN. § 2C:25-29B(2) (West 1992); N.M. STAT. ANN. § 40-13-5(A) (Michie Supp. 1993); N.C. GEN. STAT. § 50B-3(a)(3) (1989); N.D. CENT. CODE § 14-07.1 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E) (Anderson Supp. 1992); 23 PA. CONS. STAT. ANN. § 6108(a) (1991); P.R. LAWS ANN. tit. 8, § 621(i) (1992); TENN. CODE ANN. § 36-3-606(3) (1991); VA. CODE ANN. § 16:1-279.1(A)(4) (Michie Supp. 1993); WYO. STAT. § 35-21-105(a)(i) (1988); *see also* MODEL CODE, *supra* note 15, § 306.

1230. 725 ILCS 5/112A-14(b) (Smith-Hurd Supp. 1993).

1231. CAL. FAM. CODE § 5753(a) (West Supp. 1993); 725 ILCS 5/112A-14(b) (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766(I) (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(f) (Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(I)(a)(6) (1990); N.J. STAT. ANN. § 2C:25-29(b)(4) (West 1992); 23 PA. CONS. STAT. ANN. § 6108(a)(8) (1991); P.R. LAWS ANN. tit. 8, § 621(i) (Supp. 1990); WYO. STAT. § 35-21-105(b)(iii) (1988).

1232. DEL. CODE ANN. tit. 10, § 949(a)(7) (Supp. 1993); 725 ILCS 5/112A-14(b) (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766.I (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(f) (Supp. 1993); N.H. REV. STAT. ANN. § 173-B:4(I)(a)(6) (1990); N.J. STAT. ANN. § 2C:25-29b(4) (West 1993); 23 PA. CONS. STAT. ANN. § 6108(a)(8) (1991); P.R. LAWS ANN. tit. 8, § 621(i) (1992).

1233. MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993).

1234. DEL. CODE ANN. tit. 10, § 949(a)(7) (Supp. 1993); MISS. CODE ANN. 93-21-15(1)(f) (Supp. 1993); N.J. STAT. ANN. 2C:25-29b(4) (West 1993); 23 PA. CONS. STAT. ANN. § 6108(a)(8) (1991); P.R. LAWS ANN. tit. 8, § 621(i) (Supp. 1992); UTAH CODE ANN. § 77-36-5 (Supp. 1993); *see also* MODEL CODE, *supra* note 15, § 306.

1235. For a full discussion, see DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note

Courts have specifically recognized the vital role that monetary relief plays in alleviating financial pressures on an abuse victim, which too often force her to return to her batterer. In light of the legislative intent of civil protection order statutes to prevent continued violence, courts have interpreted statutes to extend economic relief to battered women. In *Powell v. Powell*,[1236] the court held that the catch-all remedy provision of the D.C. Intrafamily Offenses Act[1237] authorizes courts to order monetary relief as part of a civil protection order if the court determines such relief would appropriately resolve the domestic abuse crisis often exacerbated by the victim's economic dependence.[1238] The court concluded that the court has broad judicial discretion to fashion effective remedies to end domestic violence.[1239] The court found that the clear legislative intent of the domestic violence statute was to provide an effective tool and powerful remedies to bring an end to domestic violence, justifying an expansive reading of the Act even where the statute does not specifically authorize monetary relief.[1240] In *Mugan v. Mugan*,[1241] the court also construed that state's domestic violence act broadly to advance the legislative purpose of ending violence.[1242] The court awarded the petitioner monetary relief, based on the legislative intent to protect abuse victims from the threat of financial distress caused by the removal of the respondent from the home.[1243]

Courts award a broad variety of economic relief in civil protection orders including palimony, rent and mortgage payments, utilities, and medical bills. A primary form of economic relief awarded in civil protection order cases is spousal and child support, which the follow-

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21, at 293-327; *see also* Waite v. Waite, 618 So. 2d 1360 (Fla. 1993) (holding that wife may sue for damages under husband's homeowner's policy where husband was convicted of crimes against spouse, including attempted murder, and suit was not barred by the doctrine of interspousal immunity).

1236. 547 A.2d 973 (D.C. 1988).

1237. D.C. CODE ANN. § 16-1005(c)(10) (1981).

1238. *Powell*, 547 A.2d at 974-75.

1239. *Id.* at 975.

1240. *Id.*

1241. 555 A.2d 2 (N.J. Super Ct. App. Div. 1989).

1242. *Id.*

1243. *Id.* at 3; *see also* Parkhurst v. Parkhurst, 793 S.W.2d 634 (Mo. Ct. App. 1990) (ordering batterer to pay certain bills, as well as attorney's fees and costs, as part of a civil protection order). *But see* Maksuta v. Higson, 577 A.2d 185 (N.J. Super. Ct. App. Div. 1990) (ordering the male respondent to pay $1000 per month for the female petitioner's separate housing and maintenance after she was ordered to vacate their home, upon a finding that both parties had committed acts of domestic violence against the other).

ing sections of this Article address.

b. Support for Petitioner

Spousal support is often needed to relieve the financial stress placed on abuse victims and their families when they escape their batterers. Consequently, thirty-five states authorize the payment of spousal support as part of a civil protection order.[1244] Case law supports this positive trend of awarding maintenance in protection orders,[1245] even in jurisdictions where the catch-all provisions are used in the absence of a specific statutory authorization for support.[1246]

The parties, moreover, do not necessarily need to be married for courts to award the petitioner temporary maintenance in a civil protection order. In *Maksuta v. Higson*,[1247] the court awarded temporary maintenance to the woman pending resolution of a palimony claim, even though the parties where unmarried but had cohabitated for twenty-eight years.[1248] In *Brookhart v. Brookhart*,[1249] the court also acted affirmatively to protect a domestic violence victim when it

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1244. ALA. CODE § 30-5-7(a)(5) (1989); ALASKA STAT. § 25:35.010(b)(4) (1991); ARK. CODE ANN. 9-15-205(a)(5) (Michie Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(6) (Supp. 1993); FLA. STAT. ANN. § 741.30(4) (West 1993); GA. CODE ANN. § 19-13-4(a)(7) (Supp. 1993); 735 ILCS 5/112A-14 (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-5(a)(3)(d) (West Supp. 1993); IOWA CODE ANN. § 236.5.2(e) (West 1985); KAN. STAT. ANN. § 60-3107(a)(6) (Supp. 1993); KY. REV. STAT. ANN. § 403.750(1)(f) (Michie Supp. 1992); LA. REV. STAT. ANN. § 46:2136.A(2) (West 1982); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-506(d) (1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(e) (Supp. 1993); MO. ANN. STAT. § 455-050 (Supp. 1993); MONT. CODE ANN. § 40-4-121(2) (1993); NEV. REV. STAT. ANN. § 33.030.2(b)(2) (Michie Supp. 1993); N.H. REV. STAT. ANN. § 178-B:4I(b)(4) (1990); N.J. STAT. ANN. § 2C:25-29(b) (West 1993); N.M. STAT. ANN. § 40-13-5.A(2) (Michie Supp. 1993); N.C. GEN. STAT. § 50B-3(a)(7) (1989); N.D. CENT. CODE § 14-07.1-02.4.e (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Anderson Supp. 1992); 23 PA. CONS. STAT. ANN. § 6108(a)(3) (1991); S.C. CODE ANN. § 20-4-60(c)(2) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-5(4) (1984); TENN. CODE ANN. § 36-3-606(5) (1991); TEX. FAM. CODE ANN. § 71.11(a)(2)(c) (West Supp. 1993); UTAH CODE ANN. § 30-6-6(1)(b) (Supp. 1993); W. VA. CODE § 48-2A-6(a)(5) (Supp. 1993); WYO. STAT. § 35-21-105(b)(ii) (1988); *see also* MODEL CODE, *supra* note 15, § 306.

1245. *See, e.g.*, Mugan v. Mugan, 55 A.2d 2 (N.J. Super. Ct. App. Div. 1989) (ordering respondent to pay petitioner $120 per week in maintenance as part of a civil protection order); Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. Ct. App. 1986) (ordering interim child and spousal support of $1,200 per month).

1246. *E.g.*, Powell v. Powell, 547 A.2d 973 (D.C. 1988).

1247. 577 A.2d 185 (N.J. Super. Ct. App. Div. 1990).

1248. *Id.*

1249. 17 D. & C.3d 795 (Pa. 1991).

granted temporary support to the petitioner at an evidentiary hearing without requiring the petitioner to specifically request it in her civil protection order petition.[1250] The court found that the support order was temporary, respondent and counsel were present, and the award was warranted under the circumstances.[1251] In awarding spousal support in civil protection order cases, courts require petitioners to prove their entitlement to spousal support under the spousal support laws of the jurisdiction. If necessary under state law, petitioners have been required to show that they lack sufficient property or other means to provide for their reasonable needs.[1252]

c. Support for Children

Like spousal support, child support payments in a protection order are often vital to the financial, mental, and physical well being of an abuse victim and her family. Both state legislatures and judicial authorities overwhelmingly encourage the inclusion of child support as a civil protection order remedy. The National Council of Juvenile and Family Court Judges strongly urges *ex parte* monetary relief in the form of child and spousal support to address the economic dependence which frequently forces abuse victims to return to their batterers.[1253] Thirty-seven jurisdictions authorize the payment of child support as part of civil protection order remedies.[1254] The

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1250. *Id.* at 796.

1251. *Id.*

1252. Capps v. Capps, 715 S.W.2d 547 (Mo. Ct. App. 1986) (holding it improper to grant continued maintenance to petitioner in renewed civil protection order without evidence that she lacked sufficient means to provide for her reasonable needs); Cunningham v. Cunningham, 673 S.W.2d 478 (Mo. Ct. App. 1984) (denying spousal support in civil protection order where petitioner did not show that she lacked sufficient property to provide for her reasonable needs).

1253. FAMILY VIOLENCE PROJECT, *supra* note 687, at 21-22.

1254. ALA. CODE § 30-5-7(a)(5) (1989); ARK. CODE ANN. § 9-15-205(4) (Michie Supp. 1993); ALASKA STAT. § 25:35.010(b)(4) (1991); CAL. FAM. CODE § 5752 (West Supp. 1993) (includes putative father); DEL. CODE ANN. tit. 10, § 949(a)(6) (Supp. 1993); FLA. STAT. ANN. § 741.30(4) (West Supp. 1993); GA. CODE ANN. § 19-13-4(a)(6) (Supp. 1993); 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-5(a)(3)(C) (West Supp. 1993); IOWA CODE ANN. § 236.5.2(e) (West 1985); KAN. STAT. ANN. § 60-3107(a)(6) (Supp. 1993); KY. REV. STAT. ANN. § 403.750(4) (Michie Supp. 1992); LA. REV. STAT. ANN. § 46:2136.A(2) (West 1982); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-506(d)(8) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993); MINN. STAT. ANN. § 518B.01.6(4) (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(e) (Supp. 1993); MO. ANN. STAT. § 455-050(2) (Supp. 1993); NEV. REV. STAT. ANN. § 33.030.2(b)(2) (1986); N.H. REV. STAT. ANN. § 178-B:4(I)(b)(4) (1990); N.J. STAT. ANN. § 2C:25-29(b)(10) (West 1993); N.M. STAT. ANN. § 40-13-5(A)(2)

courts also demonstrate considerable willingness to award child support as a civil protection order remedy.[1255]

The institution of child support guidelines in practically every jurisdiction resulted from the federal requirements under 42 U.S.C. § 666,[1256] which makes determination of child support awards in civil protection order cases a relatively simple process. It provides the courts and litigants with an objective standard upon which to calculate an equitable child support award.[1257] Child support guidelines protect petitioners from bargaining away child support in exchange for protection from abuse.[1258] Battered women who come to court seeking civil protection orders are extremely vulnerable and frightened. They are often seeing their abusers for the first time since the most recent beating, and are often unable to adequately advocate for their own needs and those of their children. Judges and advocates should ensure that a child support award is entered in every civil protection order case where the parties are separated and petitioner is awarded custody.

Courts should employ child support guidelines in civil protection order cases to ensure that support awards adequately provide for children's needs. An example of how the use of guidelines in civil protection order cases can better protect domestic violence petitioners is illustrated in the problem that might have been avoided in *Casey v. Shy*.[1259] In *Casey*, the court reversed a modification of a civil protection order to increase the weekly child support award from twenty to fifty dollars despite the mother's claims that the expenses were

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(Michie Supp. 1993); N.C. GEN. STAT. § 50B-3(a)(6) (Michie 1993); N.D. CENT. CODE § 14-07.1-02.4(e) (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(10)(e) (Anderson Supp. 1992); 23 PA. CONS. STAT. ANN. § 6108(a)(5) (1991); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1993); R.I. GEN. LAWS § 15-15-3(1)(d) (Supp. 1993); S.C. CODE ANN. § 20-4-60(c)(2) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-5(4) (1984); TENN. CODE ANN. § 36-3-606(5) (1991); TEX. FAM. CODE ANN. § 71.11(a)(4) (West Supp. 1993); UTAH CODE ANN. § 30-6-6(1)(b) (Supp. 1993); W. VA. CODE § 48-2A-6(a)(4) (Supp. 1993); WYO. STAT. § 35-21-105(b)(ii) (1988); *see also* MODEL CODE, *supra* note 15, § 306.

1255. *See, e.g.*, Powell v. Powell, 547 A.2d 973 (D.C. 1988) (court overruled trial court determination that it lacked authority to award child support and other monetary relief under the Intrafamily Offenses Act); Capps v. Capps, 715 S.W.2d 547 (Mo. Ct. App. 1986) (court ordered continued child support in a renewed civil protection order).

1256. 42 U.S.C. § 666(b)(1) (1988).

1257. *Id.*

1258. Child support guidelines are beneficial to abused parties because they reduce opportunities for abusers and their lawyers to negotiate unfairly from a position of unwarranted strength. Czapanskiy, *supra* note 23, at 273.

1259. 712 S.W.2d 461 (Mo. App. 1986).

greater than she anticipated and the child's needs were neglected.[1260] The court ruled that since the mother had agreed to the support award six weeks earlier in a consent agreement and the respondent's income had not changed, she had not established the sufficient "change of circumstances" to warrant a modification.[1261] Child support guidelines in that case would have identified the parent's respective financial abilities, rather than resting the support award on the mother's initial erroneous estimate of the child's needs and expenses. The guidelines would have avoided the need to show "change of circumstances" to modify a support award that was insufficient to begin with.

Finally, state legislatures should follow the lead of Illinois, Minnesota, and Missouri which authorize wage withholding to enforce child support awards.[1262] Beginning in January 1994, under Federal law, all child support awards are required to be paid through wage withholding.[1263] Child support awards in civil protection order cases should be handled in the same manner as other child support actions. Wage withholding is the safest form of child support enforcement in domestic violence cases, because it reduces contact between the batterer and the abuse victim. Since the employer automatically collects the support payment, the batterer's ability to coerce the abuse victim, control the victim's life through late payments, or create pretenses for contact are significantly undermined. Further, enforcement through wage withholding reduces the need for civil contempt hearings to collect child support, at which both petitioner and respondent would be present.

d. Rent, Mortgage, and Housing Costs

Economic dependence is a common reason that abuse victims return to an abusive partner. A victim cannot be entirely protected from abuse unless courts order financial support and maintenance for the victim and her family.[1264] The court in *Mugan v. Mugan*,[1265]

1260. *Id.* at 463.

1261. *Id.* We should note that the respondent, not the petitioner, was represented in the earlier consent agreement. The power imbalance may have been significant in her earlier agreement to accept an insufficient child support award. *See id.*

1262. 725 ILCS 5/112A-14 (Smith-Hurd Supp. 1993); MINN. STAT. ANN. § 518B.01.6 (West Supp. 1993); MO. ANN. STAT. § 455.526 (Supp. 1993).

1263. 42 U.S.C. § 666.

1264. FAMILY VIOLENCE PROJECT, *supra* note 687, at 22.

1265. 555 A.2d 2 (N.J. Super. Ct. App. Div. 1989).

specifically recognized the direct relationship between economic dependence and domestic violence.[1266] The court concluded that "the Legislature did not intend victims of domestic violence to be discouraged by a threat of financial distress," and quoted the legislative history for the Prevention of Domestic Violence Act, which stated "[o]ther than fear, economic dependence may be the single most important reason why women stay in battering situations. Thus financial assistance must be readily available if an abused woman is to have the option of leaving her husband."[1267]

Five state statutes authorize the payment of mortgage or rent costs as part of a civil protection order.[1268] Case law in New Jersey, Ohio, and the District of Columbia authorizes rent and mortgage payments as part of a civil protection order.[1269] Other courts have spoken on related issues. In *Nuss v. Nuss*,[1270] the court held that a trial court could not order the petitioner to pay rent to the respondent to occupy their community property after a civil protection order ordered respondent to vacate the marital residence.[1271] Similarly, in *Rigwald v. Rigwald*,[1272] the court held that a vacate order against the batterer did not mandate a decision in the same proceedings concerning mortgage payments where the batterer sought to shift mortgage payment responsibility to the victim spouse.[1273]

e. Utilities

Only the Massachusetts statute explicitly authorizes utility payments as part of civil protection order remedies.[1274] However, using

1266. *Id.*

1267. *Id.* at 2-3.

1268. CAL. FAM. CODE § 2035 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(6) (Supp. 1993); MO. ANN. STAT. § 455.050(4) (Supp. 1993); NEV. REV. STAT. ANN. § 33.030.2(b)(2) (Michie 1986); N.J. STAT. ANN. § 2C:25-29(b)(4) (West 1993); *see also* MODEL CODE, *supra* note 15, § 306.

1269. *See, e.g.*, Powell v. Powell, 547 A.2d 973 (D.C. 1988) (holding that in a civil protection order proceeding, a court may order respondent to pay child support, rent, and mortgage costs, as well as other monetary payments which will help end the violence); Ruedele v. Kiefer, 1993 Ohio App. LEXIS 5167 (Ohio Ct. App. 1993) (awarding mortgage payments to petitioner for property jointly owned by unmarried couple); *Mugan*, 555 A.2d 2 (upholding order requiring husband to pay wife $120 per week in maintenance and other household, medical, dental, mortgage, and utility expenses).

1270. 828 P.2d 627 (Wash. Ct. App. 1992).

1271. *Id.*

1272. 423 N.W.2d 701 (Minn. App. 1988).

1273. *Id.*

1274. MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993) ("Compensatory loss-

their power to order any constitutionally defensible remedy, courts in other jurisdictions have ordered respondents to pay utilities as part of a civil protection order.[1275] In *Mugan v. Mugan*,[1276] the court awarded monetary relief which included utility payments, reasoning that "the Legislature did not intend victims of domestic violence to be discouraged by a threat of financial distress . . . ."[1277] Court orders which require the respondent to make utility payments serve to insulate the victim of abuse from financial pressures which may make her vulnerable to continued contact with the batterer, or hesitant to seek the batterer's removal from the residence in the first place.

f. Medical, Dental, and Counseling Bills

Eleven states and Puerto Rico specifically authorize medical payments as part of civil protection order remedies.[1278] While the New Jersey statute does not explicitly authorize payment of medical costs as part of a civil protection order, New Jersey case law has ordered a respondent to pay medical and dental bills as part of the

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es shall include, but not limited to, loss of earnings or support, costs for restoring utilities, out-of-pocket expenses for injuries sustained, replacement of locks or personal property removed or destroyed, medical and moving expenses, and reasonable attorney's fees.").

1275. *See, e.g.*, Mugan v. Mugan, 555 A.2d 2 (N.J. Super. Ct. App. Div. 1989); Drake v. Drake, No. CA-9114, 1984 WL 7861, at *1 (Ohio Ct. App. March 19, 1985) (ordering defendant to pay utilities).

1276. 555 A.2d 2 (N.J. Super. Ct. App. Div. 1989).

1277. *Id.* at 3.

1278. ALASKA STAT. § 25.35.010(b)(6) (1991) (medical expenses incurred as a result of domestic violence); CAL. FAM. CODE § 5753(c) (West Supp. 1993) (expenses for medical care incurred as a direct result of the abuse or any actual physical injuries which were sustained due to abuse); DEL. CODE ANN. tit. 10, § 949(a)(7) (Supp. 1993) (medical, dental and counseling expenses); 750 ILCS 60/214(b)(13) (Smith-Hurd 1992 & Supp. 1993) (medical expenses which are the direct result of the abuse); MASS. GEN. LAWS ANN. ch. 209A, § (3)(f) (West Supp. 1993) (medical expenses and out of pocket losses for injuries sustained); MISS. CODE ANN. § 93-21-15(1)(f) (Supp. 1993) (medical expenses resulting from abuse and out-of-pocket losses for injuries sustained); N.H. REV. STAT. ANN. § 173-B:4.I.(b)(6) (1990) (losses suffered as a direct result of abuse including medical and dental expenses and out-of-pocket losses for injuries sustained); N.Y. FAM. CT. ACT § 842(h) (McKinney 1983) (respondent provides by means of medical and health insurance for expenses incurred for medical care and treatment arising form the incident or incidents forming the basis or the issuance of the protection order); PA. STAT. ANN. tit. 23, § 6108(a)(8) (1991) (defendant pays reasonable losses suffered as a result of abuse including medical and dental costs and other out-of-pocket losses or injuries sustained); UTAH CODE ANN. § 30-6-6(2)(g)(ii) (Supp. 1993) (payment of medical expenses other damages suffered as a result of the abuse); WYO. STAT. § 35-21-105(b)(iii) (1988) (medical costs incurred as a result of the abuse); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990) (medical, psychiatric, and psychological expenses); *see also* MODEL CODE, *supra* note 15, § 306.

civil protection order remedies.[1279] Five states and Puerto Rico authorize protection orders which require respondent to pay petitioner's counseling costs.[1280] Courts may also order these and other forms of assistance to abuse victims under the "catch all" provisions of the state domestic violence statutes.[1281]

A recent amendment of the Minnesota protection order statute authorizes a court to "order the continuance of all currently available insurance coverage without change in coverage or beneficiary designation."[1282] Ordering payment of medical bills and continued coverage on health insurance policies is absolutely critical in light of the high numbers of persons who lack health insurance coverage and the numbers of women whose only access to insurance is dependant on their batterers. Among married couples, 22.2% are uninsured and 5.9% receive medicaid.[1283] When females head households by them-

1279. Bryant v. Burnett, 624 A.2d 584 (N.J. Super. Ct. App. Div. 1993) (ordering respondent to pay emergency room expenses); Mugan v. Mugan, 555 A.2d 2 (N.J. Super. Ct. App. Div. 1989) (upholding order requiring husband to pay wife $120 per week in maintenance as well as other household, medical, dental, mortgage and utility expenses).

1280. DEL. CODE ANN. tit. 10, § 949(a)(7) (Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(f) (Supp. 1993); N.J. STAT. ANN. § 2C:25-29(b)(4) (West Supp. 1993); PA. STAT. ANN. tit. 23, § 6108(a)(8) (1991); UTAH CODE ANN. § 77-36-5(2) (1990 & Supp. 1993); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990).

1281. ALA. CODE § 30-5-7(a) (1989); ALASKA STAT. § 25.35.010(d) (1991); ARIZ. REV. STAT. ANN. § 13-3602(D)(4) (1989); ARK. STAT. ANN. § 9-15-205(a)(6) (1993); CAL. FAM. CODE § 2035 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(b) (West Supp. 1993); DEL. STAT. ANN. tit. 10, §§ 945(4), 948(b), 949(a)(11) (Supp. 1993); D.C. CODE ANN. § 16-1005(c)(10)(1989); FLA. STAT. ANN. § 741.30(4)(b)(g) (West 1986); HAW. REV. STAT. § 586-5(b) (1987 & Supp. 1993); IDAHO CODE § 39-6306(1)(e) (1993); 750 ILCS 60/214(b)(17) (Smith-Hurd 1992 & Supp. 1993); IOWA CODE ANN. § 236.5(2) (1985 & Supp. 1993); KY. REV. STAT. ANN. § 403.750(1)(h) (Michie/Bobbs-Merrill 1984 & Supp. 1992); LA. REV. STAT. ANN. § 46-2136 (West 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(K) (West 1981 & Supp. 1993); MD. CODE ANN., FAM. LAW § 4-506(d) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MINN. STAT. ANN. § 518B.01(6)(a)(11) (West 1990 & Supp. 1993); MO. ANN. STAT. § 455.050 (Vernon 1986 & Supp. 1993); NEV. REV. STAT. ANN. § 33.030(1)(e) (Michie 1986); N.H. REV. STAT. ANN. § 173B:4(I) (1990); N.J. STAT. ANN. § 2C: 25-29(b) (West Supp. 1993); N.M. STAT. ANN. § 40-13-5(A)(5) (Michie 1989 & Supp. 1993); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994); N.D. CENT. CODE § 14-07.1-02.4 (1991 & Supp. 1993); OHIO REV. CODE ANN. § 3113.312(E)(1)(h) (Anderson 1989 & Supp. 1992)); OKLA. STAT. ANN. tit. 22, §§ 60.4C, 60.4D (West 1992); PA. STAT. ANN. tit. 23, § 6108(a) (1991); R.I. GEN. LAWS § 15-15-3(1) (1988 & Supp. 1993); S.C. CODE ANN. § 20-4-60(c)(7) (Law. Co-op 1985); S.D. CODIFIED LAWS ANN. § 25-10-5(6) (1984); TEX. FAM. CODE ANN. § 71.11(a) (West 1986 & Supp. 1993); UTAH CODE ANN. § 30-6-6(1) (1989 & Supp. 1993); VA. CODE ANN. § 16.1-279.1.A(6) (Michie 1988 & Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(e) (West 1986 & Supp. 1993); W. VA. CODE § 48-2A-6(a) (1992 & Supp. 1993); WYO. STAT. § 35-21-105(a)(vi) (1988); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990).

1282. MINN. STAT. ANN. § 518B.01.6(a)(10) (West Supp. 1993).

1283. 1991 DEP'T OF HEALTH STATS., CURRENT POPULATION SURVEY, DEP'T OF HEALTH

selves without assistance of a spouse, the picture changes dramatically: 19.8% are uninsured and 34.5% receive insurance through medicaid.[1284] Of those with private insurance, 70% of married women and 64% of females heading households without a spouse have medical insurance coverage through a spouse or relative.[1285] When separation from a batterer may result in loss of medical insurance, soaring medical costs, and lack or loss of insurance can drive battered women to return to their batterers.[1286]

g. Ordering Attorney's Fees and Litigation Costs to be Paid by Respondent

Twenty-five states, the District of Columbia, and Puerto Rico authorize the payment of attorney fees in a civil protection order.[1287] Twenty-six states and the District of Columbia include court costs as a civil protection order remedy.[1288] Case law also

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AND HUMAN SERVS. TBL. 24.

1284. *Id.*

1285. *Id.*

1286. *See* MODEL CODE, *supra* note 15, §§ 504-507 (discussing recommended provisions for public health settings, health care facilities, and health care workers).

1287. ARK. CODE ANN. § 9-15-205(a)(5) (Michie 1993); ARIZ. REV. STAT. ANN. § 13-3602(M) (1989); CAL. FAM. CODE § 5755 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(7) (1993); D.C. CODE ANN. § 16-1005(c)(8) (1989); GA. CODE ANN. § 19-13-4(a)(10) (1991 & Supp. 1993); IDAHO CODE § 39-6306(1)(f) (1993); 750 ILCS 60/214(b)(13) (Smith-Hurd 1992 & Supp. 1993); KANS. STAT. ANN. § 60-3107(a)(7) (1993); ME. REV. STAT. ANN. tit. 19, § 766.7(1)(J) (West 1981 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3(f) (West Supp. 1993); MISS. CODE ANN. § 93-21-15(1)(f) (Supp. 1993); NEV. REV. STAT. ANN. § 33.030.2(b)(3) (Michie 1986); N.H. REV. STAT. ANN. §§ 178-B:4(I)(B)(6), :10(II)(h) (1990); N.J. STAT. ANN. § 2C:25-29(b)(4) (West 1993); N.Y. FAM. CT. ACT § 842(f) (McKinney 1983); N.C. GEN. STAT. § 50B-3(a)(10) (1989); N.D. CENT. CODE § 14-07.1-02.4.(e) (1991 & Supp. 1993); OKLA. STAT. ANN. tit. 22, §60.4.D(7) (West 1992); OR. REV. STAT. § 107.716(2)(c) (1991); PA. STAT. ANN. tit. 23, § 6108(a)(8) (1991); S.C. CODE ANN. § 20-4-60(c)(6) (Law. Co-op. 1985); TENN. CODE ANN. § 36-3-605(d) (1991); TEX. FAM. CODE ANN. § 71.11(f), (g) (West Supp. 1993); VA. CODE ANN. § 16.1-279.1.D (Michie 1988 & Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(f) (West 1986 & Supp. 1993); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990); *see also* MODEL CODE, *supra* note 15, § 306.

1288. CAL. FAM. CODE § 5755 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949(a)(7) (Supp. 1993); D.C. CODE ANN. §16-1005(c)(8) (1989); GA. CODE ANN. § 19-13-4(a)(10) (1991 & Supp. 1993); IDAHO CODE § 39-6306(1)(f) (1993); 750 ILCS 60/214(b)(13) (Smith-Hurd 1992 & Supp. 1993); KANS. STAT. ANN. § 60-3107(a)(7) (1993); ME. REV. STAT. ANN. tit. 19, § 766(1)(J) (1981 & Supp. 1993); MD. CODE ANN., FAM. LAW § 4-506(d)(11) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MISS. CODE ANN. § 93-21-13(1)(f) (Supp. 1993); MO. ANN. STAT. § 455.050(3)10 (Vernon Supp. 1993); NEV. REV. STAT. ANN. § 33.030(2)(b)(3) (Michie 1986); N.H. REV. STAT. ANN. §§ 178-B:4(I)(b)(6), :10(II)(h) (1990); N.J. STAT. ANN. § 2C:25-29(b)(4) (West Supp. 1993); N.Y. FAM. CT. ACT § 842(f) (McKinney 1983); N.C. GEN. STAT. § 50B-3(a)(10) (1989); N.D. CENT. CODE § 14-

supports the award of attorney fees in protection orders.[1289] However, to receive an attorney's fee award, a civil protection order petitioner must give evidence of the nature and extent of the legal services provided.[1290] In *Schmidt v. Schmidt*,[1291] the court held that because under New Jersey's Prevention of Domestic Violence Act[1292] reasonable attorney's fees are compensatory damages, the fees are not subject to the traditional needs analysis. A petitioner may receive attorney's fees even though she was able to pay them.[1293]

Even if the court does not initially order attorney's fees the respondent's subsequent misconduct may warrant such an award. In *Agnew v. Campbell*,[1294] the court awarded attorney's fees against a respondent who violated an existing civil protection order when he filed a frivolous legal action against the civil protection order petitioner to prevent her from remarrying.[1295] In addition to ordering reimbursement of petitioner's attorney's fees paid to private counsel, courts also award attorney's fees to legal services organizations which successfully argue for a temporary protection order.[1296] Courts have,

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07.1-02.4(e) (1991 & Supp. 1993); OKLA. STAT. ANN. tit. 22, §60.4.D(7) (West 1992); OR. REV. STAT. § 107.716(2)(c) (1991); PA. STAT. ANN. tit. 23, § 6107(d) (1991); S.C. CODE ANN. § 20-4-60(c)(6) (Law. Co-op. 1985); TENN. CODE ANN. § 36-3-605(d) (1991); TEX. FAM. CODE ANN. § 71.11(f), (g) (West Supp. 1993); UTAH CODE ANN. § 30-6-5(4)(b) (Supp. 1993); VA. CODE ANN. § 16.1-279.1.D (Michie 1988 & Supp. 1993); WASH. REV. CODE ANN. § 26.50.060(1)(f) (West 1986 & Supp. 1993); *see also* MODEL CODE, *supra* note 15, § 306.

1289. *See* Parkhurst v. Parkhurst, 793 S.W.2d 634 (Mo. Ct. App. 1990) (awarding attorney's fees in civil protection order); Rogers v. Rogers, 556 N.Y.S.2d 114, 115 (App. Div. 1990) (upholding award of attorney's fees to petitioner seeking protection order). *But see* Ellibee v. Ellibee, 826 P.2d 462 (Idaho 1992) (denying petitioner's request for attorney's fees on appeal by respondent since the appeal was not frivolous, unreasonable or without foundation); Kreitz v. Kreitz, 750 S.W.2d 681, 686 (Mo. Ct. App. 1988) (reversing the trial court's award of attorney's fees to the civil protection order petitioner as an abuse of discretion despite the relevant factor of the respondent's misconduct, in light of the fact that the petitioner's monthly income was more than twice that of the respondent's and exceeded her expenses).

1290. Todd v. Todd, 772 S.W.2d 14, 15 (Mo. Ct. App. 1989) (refusing to award attorney fees to petitioner when she submitted no evidence as to the nature and extent of legal fees requested); *Rogers*, 556 N.Y.S.2d at 115 (upholding award of attorney fees to petitioner seeking protection order but holding that Family court erred in relying on affirmation of counsel alone to determine the amount of fees; reasonable fees and the nature of the services must be established at an adversarial hearing).

1291. 620 A.2d 1388 (N.J. Super. Ct. Ch. Div. 1992).

1292. N.J. STAT. ANN. § 2C:25-29 b(4) (West 1990).

1293. *Schmidt*, 620 A.2d at 1389-90.

1294. No. C3-90-1130, 1990 WL 188723 (Minn. Ct. App. Dec. 4, 1990).

1295. *Id.* at *1-*2.

1296. Spoto v. McCarroll, 593 A.2d 375, 379 (N.J. Super. Ct. App. Div. 1991) (holding

however, placed reasonable limits on attorneys fees awards in civil protection order actions. In *Kass v. Kass*,[1297] the Minnesota Court of Appeals held that absent clear evidence of the civil protection order petitioner's bad faith or intent to assert a frivolous claim, the court will not award attorney's fees against the petitioner when a civil protection order is denied.[1298]

Finally, a petitioner may also receive attorney's fees for prosecuting a violation of a protection order. In *Linda D. v. Peter D.*,[1299] the court awarded $2500 in attorney's fees to a petitioner who sought to prosecute a petition for a violation of a protection order even though she eventually withdrew the underlying violation petition after the respondent consented to a modified and expanded protection order.[1300]

12. Ordering Police Assistance

The police can and should play a vital role in fighting domestic violence. Law enforcement acts as a critical informational link between the abuse victim and the legal and social service systems. Battered women often first hear about the legal rights and the services available to them from police officers responding to their calls for help.[1301] The National Institute of Justice reports that ninety percent of domestic abuse victims who appear before the Philadelphia Family Court for protection orders say that they learned about protection orders from police officers.[1302] Police officers are a major resource for abuse victims, in that they are often the people who refer the victims to protection orders and social services.[1303] Therefore, state

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that the trial court had authority to award attorney's fees to a publicly funded legal services organization after the court issued a temporary protection order).

1297. 355 N.W.2d 335 (Minn. Ct. App. 1984)

1298. *Id.* In that case the petitioner saw a man on the street she believed to be her former husband whom she had left three years before to escape abuse. *Id.* She had moved 124 miles away from him because she feared for her safety. *Id.* She became alarmed when she believed she saw him while she drove in a car. *Id.* The court denied her civil protection order petition for insufficient evidence of present harm or intent to harm, but failed to order attorney's fees against her. *Id.*

1299. 577 N.Y.S.2d 354 (Fam. Ct. 1991)

1300. *Id.*

1301. Hart, *supra* note 991, at 70-71. For this reason, it is essential that police officers participate in continuing education programs on domestic violence. *See* MODEL CODE, *supra* note 15, § 509.

1302. NIJ CPO STUDY, *supra* note 15, at 60.

1303. Hart, *supra* note 991, at 70-71.

statutes should clearly articulate that it is properly the police officer's function to provide information and assistance to a victim of domestic abuse.[1304] This practice promotes a consistent and thorough delivery of vital protective services to needy victims.[1305]

State statutes now require that police provide domestic violence victims a broad variety of assistance. Thirty-three states and Puerto Rico require the police to notify a domestic violence victim of her rights and the services available to her.[1306] Eighteen states and Puer-

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1304. *See* MODEL CODE, *supra* note 15, §§ 204, 223.

1305. Hart, *supra* note 991, at 70-71.

1306. ALA. CODE § 30-6-9 (1989) ("Where facilities are available, any law enforcement officer who investigates an alleged incident of domestic violence may advise the person subject to the abuse of the availability of a facility from which he or she may receive services."), ALASKA STAT. § 18.65.520(a) (1991) ("During the course of responding to an offense involving domestic violence, a peace officer shall orally and in writing inform the victim of services available to the victim and of the rights of the victim . . . ."); ARIZ. REV. STAT. ANN. § 13-3601D (1989) ("When a peace officer responds to a call alleging that domestic violence has been or may be committed, the officer shall inform in writing any alleged or potential victim of the procedures and resources available for the protection of such victim . . . ."); CAL. PENAL CODE § 13701(i) (West 1992) ("Furnishing a written notice to victims at the scene . . . ."); COLO. REV. STAT. ANN. § 14-4-104(2)(a) (West 1993) ("[I]t is the duty of the officer to inform the party protected by the emergency protection order or restraining order that the aggrieved party has the right to initiate contempt proceedings against the alleged violator in the court which issued the original order."); CONN. GEN. STAT. ANN. § 46B-38b(d)(2)-(3) (West Supp. 1993) ("Notifying the victim of the right to file an affidavit or warrant for arrest . . . informing the victim of services available and referring the victim to the commission on victim services."); FLA. STAT. ANN. §§ 741.29(1), 415.606 (West 1986 & Supp. 1993) ("Any law enforcement officer who investigates an alleged incident of domestic violence shall advise the victim of such violence that there is a domestic violence center from which the victim may receive services. The law enforcement officer shall give the victim immediate notice of the legal rights and remedies available . . . using simple English as well as Spanish and shall distribute [notice] . . . ."); IDAHO CODE § 39-6316(2) (1993) ("When a peace officer responds to a domestic violence call, the officer shall give a written statement to victims which alert the victim to the availability of a shelter or other resources in the community, and give the victim a written notice provided by the department of law enforcement."); 750 ILCS 60/304(4) (Smith-Hurd 1992 & Supp. 1993); IOWA CODE ANN. § 236.12(1)(c) (West 1985) ("Providing an abused person with immediate and adequate notice of the person's rights. The notice shall consist of handing the person a copy of the following statement written in English and Spanish, asking the person to read the card and whether the person understands the rights."); KY. REV. STAT. ANN. § 403.785(3)(c) (Michie 1984 & Supp. 1992) ("When a law enforcement officer has reason to suspect that a family member, member of an unmarried couple, or household member has been the victim of domestic violence and abuse, the officer shall use all reasonable means to prevent further abuse, including . . . advising the victim immediately of the rights available to them . . . ."); LA. REV. STAT. ANN. § 46:2140(4) (West Supp. 1993) ("Notifying the abused person of his right to initiate criminal or civil proceedings; the availability of the protection order . . . and the availability of community assistance for domestic violence victims."); ME. REV. STAT. ANN. tit. 19, § 770(6)(c) (1981) ("Giving that person immediate and adequate written notice of his

rights, which shall include information summarizing the procedures and relief available to victims of the family or household abuse . . . "); MASS. GEN. LAWS ANN. ch 209A, § 6(4) (West Supp. 1993) ("Whenever any law officer has reason to believe that a family or household member has been abused, . . . such officer shall . . . give such person immediate and adequate notice of his or her rights. Such notice shall consist of handing said person a copy of the statement which follows below and reading the same to said person."); MICH. COMP. LAWS ANN. § 764.15(c) (West Supp. 1993) ("After intervening in a domestic dispute . . . a peace officer shall advise the victim of the availability of a shelter programs or other services in the community and give the victim the statutory notice . . . . The notice shall include furnishing the victim with a listing of the phone numbers of area shelter program services and a copy of the following statement . . . ."); MINN. STAT. ANN. § 629.341(3) (West Supp. 1993) ("The peace officer shall tell the victim whether a shelter or other services are available in the community and give the victim immediate notice of the legal rights and remedies available. The notice must include furnishing the victim a copy of the . . . statement."); MO. ANN. STAT. § 455-080(4) (Vernon Supp. 1993) ("The officer at the scene of an alleged incident of abuse shall inform the abused party of available judicial remedies for relief from adult abuse and of available shelters for victims of domestic violence."); MONT. CODE ANN. § 46-6-602 (1993) ("Whenever a peace officer arrests a person for domestic abuse . . . if the victim is present, the officer shall advise the victim of the availability of a shelter or other services in the community and give the victim immediate notice of any legal rights and remedies available. The notice must include furnishing the victim with a copy of the . . . statement . . . ."); NEV. REV. STAT. ANN. § 171-1225(1)(a)-(b) (Michie Supp. 1993) ("When investigating an act of domestic violence, a peace officer shall . . . make a good faith effort to explain the provisions of [this act] pertaining to domestic violence and advise victims of all reasonable means to prevent further abuse, including advising each person of the availability of a shelter or other services in the community . . . [And] provide a person suspected of being the victim of an act of domestic violence with a written copy of the . . . statement."); N.H. REV. STAT. ANN. § 173-B:10(I) (1990) ("[A]ll peace officers shall give victims of abuse immediate and adequate notice of their right to go to . . . court . . . to file a petition asking for protection orders against the abusive person and to sign a criminal complaint at the police station."); N.J. STAT. ANN. § 2C-25-23 (West Supp. 1993) ("A law enforcement officer shall disseminate and explain to the victim the following notice, which shall be written in both English and Spanish."); N.M. STAT. ANN. § 40-13-7.B(1) (Michie 1989) ("[A]dvising the victim of the remedies available under the Family Violence Protection Act . . . the right to file a written statement or request for an arrest warrant and the availability of domestic violence shelters, medical care, counseling and other services"); N.Y. FAM. CT. ACT § 812(5) (McKinney Supp. 1994) ("Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense . . . ."); N.C. GEN. STAT. § 50B-5(a) (1989) ("The local law enforcement officer responding to the request for assistance . . . is authorized to advise the complainant of sources of shelter, medical care, counseling and other services."); OHIO REV. CODE ANN. § 3113.31(I) (Anderson 1989 & Supp. 1992) ("Any law enforcement agency that investigates a domestic dispute shall provide information to the family or household members involved regarding the relief available under this section [and the criminal domestic violence statute]."); OKLA. STAT. ANN. tit. 22, § 40.2 (West 1992 & Supp. 1993) ("It shall be the duty of the first peace officer who interviews the victim of the domestic abuse to inform the victim of the twenty-four hour statewide telephone communication service . . . and to give notice to the victim of certain rights. The notice shall consist of handing such victim the following statement . . . ."); PA. STAT. ANN. tit. 18, § 2711(d) (Supp. 1993) ("Upon responding to a domestic violence case, the police

to Rico require written notice of rights and services.[1307] Information

officer shall, orally or in writing, notify the victim of the availability of a shelter, including its telephone number, or other services in the community. Said notice shall include the following statement: 'If you are the victim of domestic violence, you have the right to go to court and file a petition requesting an order for protection from domestic abuse.'"); R.I. GEN. LAWS § 15-15-5(B) (1988 & Supp. 1993) ("Notice by the police officer to the victim shall be by handing the victim a copy of the . . . statement . . . ."); TENN. CODE ANN. § 40-7-103(7)(B), (C) (1990 & Supp. 1993) ("[W]hen a law enforcement officer responds to a domestic violence call and the alleged assailant is no longer present, such officer shall: . . . advise the victim of the availability of a shelter or other services in the community and give the victim immediate notice of the legal rights and remedies available by furnishing the victim a copy of the . . . statement . . . ."); UTAH CODE ANN. § 30-6-8(2)(d) (Supp. 1993) ("When any peace officer has reason to believe a [family member] is being abused, or that there is a substantial likelihood of immediate danger of abuse, although no protection order has been issued, that officer shall use all reasonable means to prevent the abuse, including . . . explaining to the victim his or her rights in these matters."); WASH. REV. CODE ANN. § 10-99-030(4) (West 1990) ("When a peace officer responds to a domestic violence call, the officer shall advise victims of all reasonable means to prevent further abuse, including advising each person of the availability of a shelter or other services in the community, and giving each person immediate notice of the legal rights and remedies available. The notice shall include handing each person a copy of the following statement . . . ."); W. VA. CODE § 48-2A-9(b) (Supp. 1993); WYO. STAT. § 7- 20-104 (1987) ("At the time of arrest . . . or as soon thereafter . . . the peace officer shall advise the victim of the availability of a program that provides services to victims of battering in the community and give the victim notice of the legal rights and remedies available. The notice shall include furnishing the victim a copy of the . . . statement."); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990).

1307. ALASKA STAT. § 18.65.520(s) (1991) ("During the course of responding to an offense involving domestic violence, a peace officer shall orally and in writing inform the victim of services available to the victim and of the rights of the victim . . . ."); CAL PENAL CODE § 13701 (West 1993) ("Furnishing a written notice to victims at the scene . . . ."); FLA. STAT. ANN. § 741.29(1) (1986 & Supp. 1993) ("Any law enforcement officer who investigates an alleged incident of domestic violence shall advise the victim of such violence that there is a domestic violence center from which the victim may receive services. The law enforcement officer shall give the victim immediate notice of the legal rights and remedies available . . . using simple English as well as Spanish and shall distribute [notice] . . . ."); IDAHO CODE § 39-6316(2) (1993) ("When a peace officer responds to a domestic violence call, the officer shall give a written statement to victims which alert the victim to the availability of a shelter or other resources in the community, and give the victim a written notice provided by the department of law enforcement."); 750 ILCS 60/304(a)(4) (Smith-Hurd 1992 & Supp. 1993); IOWA CODE ANN. § 236.12.1(c) (West 1985) ("Providing an abused person with immediate and adequate notice of the person's rights. The notice shall consist of handing the person a copy of the following statement written in English and Spanish, asking the person to read the card and whether the person understands the rights."); ME. REV. STAT. ANN. tit. 19, § 770(6) (1981) ("Giving that person immediate and adequate written notice of his rights, which shall include information summarizing the procedures and relief available to victims of the family or household abuse . . . ."); MASS. GEN. LAWS ANN. ch 209A, § 6(4) (West Supp. 1993) ("Whenever any law officer has reason to believe that a family or household member has been abused, such officer shall . . . give such person immediate and adequate notice of his or her rights. Such notice shall consist of handing said person a copy of the statement which follows below and reading the same to said person."); MICH. COMP. LAWS ANN. § 764.15C (West Supp. 1993) ("After intervening in

which the police must provide includes shelter referral,[1308] the right to initiate contempt proceedings after a violation of a protection order,[1309] the right to file a criminal complaint,[1310] the right to file

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a domestic dispute . . . a peace officer shall advise the victim of the availability of a shelter programs or other services in the community and give the victim the statutory notice . . . . The notice shall include furnishing the victim with a listing of the phone numbers of area shelter program services and a copy of the following statement . . . "); MINN. STAT. ANN. § 629.341(3) (West Supp. 1993) ("The peace officer shall tell the victim whether a shelter or other services are available in the community and give the victim immediate notice of the legal rights and remedies available. The notice must include furnishing the victim a copy of the . . . statement."); MONT. CODE ANN. § 46-6-602 (1993) ("Whenever a peace officer arrests a person for domestic abuse . . . if the victim is present, the officer shall advise the victim of the availability of a shelter or other services in the community and give the victim immediate notice of any legal rights and remedies available. The notice must include furnishing the victim with a copy of the . . . statement . . . ."); N.J. STAT. ANN. § 2C:25-23 (West Supp. 1993) ("A law enforcement officer shall disseminate and explain to the victim the following notice, which shall be written in both English and Spanish . . . ."); N.Y. FAM. CT. ACT § 812(5) (McKinney 1994) ("Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense . . . ."); OKLA. STAT. ANN. tit. 22, § 40.2 (West 1992 & Supp. 1994) (it shall be the duty of the first peace officer who interviews the victim of the domestic abuse to inform the victim of the twenty-four hour statewide telephone communication service . . . and to give notice to the victim of certain rights. The notice shall consist of handing such victim the following statement . . . ."); R.I. GEN. LAWS § 15-15-5(B) (1988 & Supp. 1993) ("Notice by the police officer to the victim shall be by handing the victim a copy of the . . . statement . . . ."); TENN. CODE ANN. § 40-7-103(7)(B), (C) (1990 & Supp. 1993) ("When a law enforcement officer responds to a domestic violence call and the alleged assailant is no longer present, such officer shall . . . advise the victim of the availability of a shelter or other services in the community and give the victim immediate notice of the legal rights and remedies available by furnishing the victim a copy of the . . . statement."); WASH. REV. CODE ANN. § 10.99.030(4) (West 1990) ("When a peace officer responds to a domestic violence call, the officer shall advise victims of all reasonable means to prevent further abuse, including advising each person of the availability of a shelter or other services in the community, and giving each person immediate notice of the legal rights and remedies available. The notice shall include handing each person a copy of the following statement . . . ."); WYO. STAT. § 7-20-104 (1987) ("At the time of arrest . . . or as soon thereafter . . . the peace officer shall advise the victim of the availability of a program that provides services to victims of battering in the community and give the victim notice of the legal rights and remedies available. The notice shall include furnishing the victim a copy of the . . . statement . . . ."); P.R. LAWS ANN. tit. 8, § 621 (1992).

1308. CONN. GEN. STAT. ANN. § 46b-38b(d)(3) (West Supp. 1993); FLA. STAT. ANN. § 415.606 (West 1993); 750 ILCS 60/304 (Smith-Hurd 1992 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 6(3) (West Supp. 1993); N.D. CENT. CODE § 14-07.1-04 (1991); TENN. CODE ANN. § 40-7-103(7)(c) (1990 & Supp. 1993); UTAH CODE ANN. § 30-6-8(2)(c) (Supp. 1993).

1309. COLO. REV. STAT. ANN. § 14-4-104(2)(a) (West Supp. 1993).

1310. *See, e.g.*, 725 ILCS 5/112A-30(b)(2) (Smith-Hurd Supp. 1993); N.J. STAT. ANN. § 2C:25-23 (West Supp. 1993); S.C. CODE ANN. § 20-4-100(a) (Law. Co-op. 1985); UTAH

an affidavit and obtain a warrant for the batterer's arrest,[1311] the batterer's eligibility for parole and possible release,[1312] and the importance of preserving physical evidence.[1313]

Four states require the notice be available in Spanish and English,[1314] and Alaska and Massachusetts require a reasonable effort to give notice in the victim's language.[1315] Rhode Island, moreover, recognizes that domestic violence occurs in all of its communities and, therefore, provides notice in six different languages.[1316] More civil protection order statutes should follow the lead of these states and of the Illinois protection order statute, which requires written notice of rights and services in the language appropriate for the victim, even if it is braille or sign language.[1317]

In addition to notification of rights and services, the better state statutes require the police to assist victims in obtaining these same rights and services. Fourteen states and Puerto Rico require the police to assist the victim with transportation.[1318] In particular, twelve states require the police to transport the victim to shelter if requested.[1319] In eighteen states and Puerto Rico, the police must assist the

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CODE ANN. § 77-36-2(3)(b) (1990 & Supp 1993).

1311. CONN. GEN. STAT. ANN. § 46b-38b(d)(2) (West Supp. 1993).

1312. MASS. GEN. LAWS ANN. ch. 209A § 6(6) (West Supp. 1993).

1313. *See, e.g.*, 750 ILCS 60/304(a)(6) (Smith-Hurd 1992 & Supp. 1993); N.M. STAT. ANN. § 40-13-7.B.(6) (Michie 1989); S.C. CODE ANN. § 20-4-100(b) (Law. Co-op. 1985); UTAH CODE ANN. § 77-36-2(3)(b) (1990 & Supp. 1993); WASH. REV. CODE ANN. § 10.99.030(3)(a) (West 1990).

1314. FLA. STAT. ANN. § 741.29(1) (West 1986 & Supp. 1993); IOWA CODE ANN. § 236.12(1)(c) (1985); N.J. STAT. ANN. § 2C:25-23 (West Supp. 1993); R.I. GEN. LAWS § 15-15-5(B) (1988 & Supp. 1993).

1315. ALASKA STAT. § 18.65.520(b) (1991); MASS. GEN. LAWS ANN. ch. 209A, § 6(4) (West Supp. 1993).

1316. R.I. GEN. LAWS § 15-15-5(B) (1988 & Supp. 1993) (Written notice is available in Cambodian, Hmong, Spanish, English, Laotian, Vietnamese, French, and Portuguese).

1317. 750 ILCS 60/304(a)(4) (Smith-Hurd 1992 & Supp. 1993); 725 ILCS 5/112A-30(a)(4) (Smith-Hurd 1992 & Supp. 1993).

1318. *See, e.g.*, 750 ILCS 60/304(a)(7) (Smith-Hurd 1992 & Supp. 1993); IOWA CODE ANN. § 236.12(1)(b) (1985); KY. REV. STAT. ANN. § 403.785(3)(b) (Michie/Bobbs-Merrill 1984 & Supp. 1992); LA. REV. STAT. ANN. § 46:2140(3) (West Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 770(6)(B) (1981); MASS. GEN. LAWS ANN. ch. 209A, § 6(2) (West 1987 & Supp. 1993); MO. ANN. STAT. § 455.080(5) (Vernon Supp. 1993); N.M. STAT. ANN. § 40-13.7B(2) (Michie 1989); N.C. GEN. STAT. § 50B-5(a) (1989) (authorized); S.C. CODE ANN. § 20-4-100(b) (Law. Co-op. 1985); TENN. CODE ANN. § 40-7-103(7)(B)(i), (ii) (1990 & Supp. 1993); UTAH CODE ANN. § 77-36-2(4) (1990 & Supp. 1993); WASH. REV. CODE ANN. § 10.99.030(5) (West 1990); W. VA. CODE § 48-2A-9(c) (Supp. 1993); P.R. Laws Ann. tit. 8, § 621 (1992).

1319. *See, e.g.*, CAL. PENAL CODE § 13701(g) (West 1992); HAW. REV. STAT. § 709.906(1)(1987 & Supp. 1993); IDAHO CODE § 69-6316(3)(1993); 750 ILCS 60/304(a)(7)

victim in obtaining medical care.[1320] Thirty states and the District of Columbia require the police to assist a petitioner in removing the respondent and gaining possession of the parties' residence.[1321] Eleven states and Puerto Rico require the police to accompany a domestic violence victim to retrieve her personal property.[1322] Case law supports this police involvement. In *FitzGerald v. FitzGerald*,[1323] the Minnesota Court of Appeals held that the trial court erred in not ruling on appellant's request for the return of her property, and if she

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(Smith-Hurd 1992 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 6(3) (West Supp. 1993); MO. ANN. STAT. § 455.080(5) (Vernon Supp. 1993); N.M. STAT. ANN. § 40-13-7B(2) (Michie 1989); N.C. GEN. STAT. § 50B-5(a) (1989) (authorized); S.C. CODE ANN. § 20-4-100(b) (Law. Co-op. 1985); TENN. CODE ANN. § 40-7-103(7)(B)(ii) (1990 & Supp. 1993); WASH. REV. CODE ANN. § 10.99.030(5) (West 1990); W. VA. CODE § 48-2A-9(c)(Supp. 1993).

1320. *See* CAL. PENAL CODE § 13701(g) (West 1992); CONN. GEN. STAT. ANN. § 46b-38b(d)(1) (West Supp. 1993); HAW. REV. STAT. § 709-906(1) (1987 & Supp. 1993); IDAHO CODE § 39-6316(3) (1993); 750 ILCS 60/304(a)(7); 725 ILCS 5/112A-22(c); IOWA CODE § 236.12(1)(a) (1985); KY. REV. STAT. ANN. § 403.785(3)(b) (Michie/Bobbs-Merrill 1984 & Supp. 1992); LA. REV. STAT. ANN. § 46:2140(3) (West Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 770(6)B (1981); MASS. GEN. LAWS ANN. ch. 209A, § 6(2) (West Supp. 1993); MINN. STAT. § 629.342(3)(1) (West Supp. 1993); MO. ANN. STAT. § 455.080(5) (Vernon Supp. 1993); N.M. STAT. ANN. § 40-13-7B(2) (Michie 1989); N.C. GEN. STAT. § 50B-5(a) (1989) (authorized); R.I. GEN. LAWS § 15-15-5(A)(2) (1988 & Supp. 1993); S.C. CODE ANN. § 20-4-100(b) (Law. Co-op. 1985); UTAH CODE ANN. § 30-6-8(2)(b) (1989 & Supp. 1993); WASH. REV. CODE ANN. § 10-99-030(5) (West 1990); P.R. LAWS ANN. tit. 8, § 621 (1993).

1321. ALASKA STAT. § 25.35.050(b)(2) (1991); ARK. CODE ANN. § 9-15-208 (Michie 1993); CAL. PENAL CODE § 13701(3)(b) (West 1992); COLO. REV. STAT. ANN. § 14-4-103(3)(b) (West 1989); D.C. CODE ANN. § 16-1005(C)(4)(9) (1989); FLA. STAT. ANN. § 741.30(6)(a)(2) (West 1986 & Supp. 1993); GA. CODE ANN. § 19-13-4(a)(2) (1991 & Supp. 1993); HAW. REV. STAT. § 586-7 (1987); IDAHO CODE § 39-6309 (1993); IOWA CODE ANN. § 236.12(1)(c)(1) (West 1985); KANS. STAT. ANN. § 60-3107(a)(5) (Supp. 1993); KY. REV. STAT. ANN. § 403.785(3)(a) (Michie/Bobbs-Merrill 1984 & Supp. 1992); MINN. STAT. ANN. § 518B.01.9 (West 1990 & Supp. 1993); NEB. REV. STAT. §§ 42-925, 928 (Supp. 1992); N.H. REV. STAT. ANN. §§ 173-B:4(I(a)(2), :6(II) (1990); N.J. STAT. ANN. § 2C:25-29(2), (6) (West Supp. 1993); N.M. STAT. ANN. § 40-13-7B.4 (Michie 1989); N.D. CENT. CODE § 14-07.1-04 (1991); OHIO REV. CODE ANN. § 3113.31(F)(3) (Anderson 1989 & Supp. 1992); OR. REV. STAT. § 107.718(1)(f) (1991); R.I. GEN. LAWS § 15-15-5(c) (1988 & Supp. 1993); TEX. FAM. CODE ANN. § 71.15(i)(3) (West Supp 1993); VT. STAT. ANN. tit. 15, § 1108(a)(2) (1989); WASH. REV. CODE ANN. § 26.50.080 (West 1986); WIS. STAT. ANN. § 813-12(6)(a) (West Supp. 1993).

1322. CAL. PENAL CODE § 13701(g) (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-102(7.5)(a) (West Supp. 1993); GA. CODE ANN. § 19-13-4(5) (Supp. 1993); 750 ILCS 60/304(a)(3) (Smith-Hurd 1992 & Supp. 1993); KANS. STAT. ANN. § 60-3107(a)(8) (Supp. 1993); LA. REV. STAT. ANN. § 46:2135(C) (West 1982 & Supp. 1993); N.J. STAT. ANN. § 2C-25-29(b)(12) (West Supp. 1993); N.M. STAT. ANN. § 40-13-7B(3) (Michie 1989); N.C. GEN. STAT. § 50B-5(a) (1989) (authorized); OR. REV. STAT. § 107.718(1)(c), .719 (1991); S.C. CODE ANN. § 20-4-100(b) (Law. Co-op. 1985); P.R. LAWS ANN. tit. 8, § 621 (1993); *see also* MODEL CODE, *supra* note 15, § 306.

1323. 406 N.W.2d 52 (Minn. Ct. App. 1987).

could obtain the property, the order may include the assistance of the sheriff.[1324] Some innovative states also require the police to assist a petitioner in obtaining her children from the batterer,[1325] obtaining an arrest warrant,[1326] obtaining an after hours order from a judge,[1327] and in serving process on the respondent.[1328]

Some jurisdictions, such as the District of Columbia, authorize the court to order the police "to take such action as the Family Division deems necessary to enforce its orders . . . ."[1329] Courts have held that the police are obligated to enforce a civil protection order.[1330] Twenty-seven states and the District of Columbia require the police to take a report of a domestic violence incident.[1331] Flori-

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1324. *Id.* at 54.

1325. VT. STAT. ANN. tit. 15, § 1108(a)(3) (1989) ("Enforcement may include, but is not limited to: . . . assisting the recipient of an order granting sole custody of children to obtain sole custody of the children if the defendant refuses to release them.").

1326. TENN. CODE ANN. § 40-7-103(7)(B)(i) (1990 & Supp. 1993).

1327. 750 ILCS 60/304(a)(7) (Smith-Hurd 1992 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 6(5) (West Supp. 1993); VT. STAT. ANN. tit. 15, § 1106(b) (1989); VA. CODE ANN. § 16.1-253.4(B) (Michie Supp. 1993).

1328. *See, e.g.*, ALASKA STAT. § 25.35.040(a) (1991); ARK. CODE ANN. § 9-15-208 (Michie 1993); CAL. FAM. CODE §§ 5606(a), 5802(a) (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-102(10) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 950(a) (Supp. 1993); HAW. REV. STAT. § 586.7 (1985); IDAHO CODE § 39-6310(2) (1993); 725 ILCS 5/112A-22(c) (Smith-Hurd 1992 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 1987 & Supp. 1993); MINN. STAT. ANN. § 518B:01.9 (West Supp. 1993); NEV. REV. STAT. ANN. § 33.060(2) (Michie 1986); N.M. STAT. ANN. § 40-13-6.A (Michie Supp. 1993); N.Y. FAM. CT. ACT § 153-b (McKinney 1993 & Supp. 1994); N.D. CENT. CODE § 14-07.1-04 (1991); OKLA. STAT. ANN. tit. 22, § 60.4F (West 1992); R.I. GEN. LAWS § 15-15-4.1(A) (1988 & Supp. 1993); TENN. CODE ANN. § 36-3-609 (1991 & Supp. 1993); WASH. REV. CODE ANN. § 26.50.090(2) (West 1986 & Supp. 1993); WIS. STAT. ANN. § 813.12(6)(a) (West Supp. 1993).

1329. D.C. CODE ANN. § 16-1005(c)(9) (1989); *see also* MINN. STAT. ANN. § 518B.01.6(a)(10) (West 1990 & Supp. 1993); N.M. STAT. ANN. § 40-13-.5A(5) (Michie 1989 & Supp. 1993).

1330. Baker v. City of New York, 269 N.Y.S.2d 515, 518 (N.Y. App. Div. 1966) (holding law enforcement officers have a duty to enforce civil protection orders); Sorichetti v. City of New York, 408 N.Y.S.2d 219, 228 (Sup. Ct. 1978) (finding police have an obligation and authority to act when violation of a protection order is reported); Tammy S. v. Albert S., 408 N.Y.S.2d 716, 717 (Fam. Ct. 1978) (finding military police, on request, must enforce order of protection issued to military wife who lives on the military base); Nearing v. Weaver, 670 P.2d 137, 138-39 (1983) (holding that a police officer has a duty to arrest a batterer without a warrant if the officer has probable cause to believe that the batterer had been served with a protection order and has violated it).

1331. ALA. CODE § 15-10-3 (Supp. 1993); CAL. PENAL CODE § 13701 (West 1992); CONN. GEN. STAT. ANN. § 46b-38d (West Supp. 1993); D.C. CODE ANN. § 16-1032 (1989 & Supp. 1993); FLA. STAT. ANN. § 741.29(2) (West 1986 & Supp. 1993); HAW. REV. STAT. § 709-906 (1985 & Supp. 1992); 750 ILCS 60/303 (Smith-Hurd Supp. 1993); KY. REV. STAT. ANN. § 403.785 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 46:2141 (West

da, Massachusetts, and Utah provide that the police report shall be available to the domestic violence victim free of charge.[1332]

Two states, New Jersey and Pennsylvania, demonstrate considerable statutory initiative and foresight by authorizing the police to seize a batterer's weapons when investigating a domestic violence call.[1333] New Jersey's statute permits discretionary seizure of weapons on the premises if the police officer believes the weapon exposes the victim to risk of serious bodily injury.[1334] The Pennsylvania statute requires seizure of weapons used in a domestic violence offense.[1335] The New Hampshire civil protection order statute also requires the police to seize any deadly weapons used or threatened with use during a violation of an existing civil protection order.[1336] Courts also authorize the police to seize weapons during a domestic violence call.[1337] In *Johnson v. State*,[1338] an officer acted within his authority when, during a domestic violence call after the officer had probable cause to arrest the defendant for violation of a domestic violence injunction, the officer seized the defendant's gun which was in plain view.[1339] In *People v. Johnson*,[1340] the police were justified in conducting a limited warrantless search for a gun when responding to a domestic violence complaint because upon arriving at

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Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West Supp. 1993); MICH. COMP. LAWS ANN. § 28.257 (West 1981); MINN. STAT. ANN. § 629.341 (West Supp. 1993); MO. ANN. STAT. § 455.085 (Vernon Supp. 1993); MONT. CODE ANN. § 46-6-601 (1993); NEV. REV. STAT. ANN. § 171.137 (1992); N.J. STAT. ANN. § 2C:25-8 (West 1982); N.D. CENT. CODE § 14-07.1-12 (1991); OHIO REV. CODE ANN. § 3113.32 (Anderson 1992); OKLA. STAT. ANN. tit. 22, § 40.6 (West 1992); R.I. GEN. LAWS § 15-15-5 (1988 & Supp. 1993); S.D. CODIFIED LAWS ANN. § 23A-3-21 (Supp. 1993); TENN. CODE ANN. § 40-7-103 (1990 & Supp. 1993); TEX. FAM. CODE ANN. § 71.18 (West 1986 & Supp. 1993); UTAH CODE ANN. § 77-36-2 (1990 & Supp. 1993); WASH. REV. CODE ANN. § 10.99.030 (West 1990 & Supp. 1993); WIS. STAT. ANN. § 968.075 (West Supp. 1993); W. VA. CODE § 48-2A-9 (1992 & Supp. 1993); WYO. STAT. § 7-20-107 (1987).

1332. FLA. STAT. ANN. § 741.29 (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West Supp. 1993); UTAH CODE ANN. § 77-36-2 (Supp. 1993).

1333. N.J. STAT. ANN. § 2C:25-21(3)(d) (West 1992); PA. STAT. ANN. § 6113(b) (1991). For a full discussion of warrantless searches, see *infra* notes 2186-202 and accompanying text.

1334. N.J. STAT. ANN. § 2C:25-2l(3)(d) (West 1992).

1335. PA. STAT. ANN. § 6113(b) (1991).

1336. N.H. REV. STAT. ANN. § 173B:8(I)(b) (1990).

1337. *See* Johnson v. State, 567 So.2d 32 (Fla. Dist. Ct. App. 1990); People v. Johnson, 585 N.Y.S.2d 851 (App. Div. 1992).

1338. 567 So.2d 32 (Fla. Dist. Ct. App. 1990).

1339. *Id.* at 33.

1340. 585 N.Y.S.2d 851 (App. Div. 1992).

the scene they heard a woman scream not to shoot.[1341] More state statutes need to order active police assistance to domestic violence victims and increase law enforcement's frontline role as an information provider. In *State v. Nakachi*,[1342] the court held that the police are authorized to order a couple to leave their vehicle and conduct a search where they have reasonable grounds to believe that the respondent is armed and where the police suspect recent physical abuse between the parties.[1343]

13. Police Liability For Inaction

As stated by the North Dakota Supreme Court:

> As "on the scene" enforcers of domestic-violence laws, police and law enforcement officials play a principal role in protecting battered women. Ineffective police response is a chief reason for continuing high rates of domestic violence. Police are under increasing pressure to take a more active role in preventing domestic violence, and a failure to do so has prompted calls for increased police liability for failure to respond to such incidents. Clearly, incidents or the likelihood of incidents of domestic violence are a valid concern of police and they should take steps to try to prevent their occurrence.[1344]

The following discussion provides a review of court cases in which domestic violence victims have sued police departments. It is important to keep in mind, however, that lawsuits may not be the only way to improve police practices in domestic violence cases. Advocates in some jurisdictions have been effective in changing police tactics through consistently filing complaints and commendations with local police officials, drawing attention to officers who are incorrectly and correctly handling cases. Advocates have also improved police practices through legislative advocacy, and by becoming involved in police training on domestic violence.

In 1989, the U.S. Supreme Court handed down its decision in *Deshaney v. Winnebago City Social Services Department*,[1345] which addressed the issue of the state's duty to protect citizen's from private violence. In that case, a minor boy sued the Winnebago County Department of Social Services under 42 U.S.C. § 1983, alleging that the

1341. *Id.* at 852.
1342. 742 P.2d 388 (Haw. Ct. App. 1987).
1343. *Id.* at 388.
1344. City of Grafton v. Swanson, 497 N.W.2d 421, 423 (N.D. 1993) (citations omitted).
1345. 489 U.S. 189 (1989).

county deprived him of substantive due process rights under the Fourteenth Amendment when the department failed to protect the petitioner from his father's violence, despite notice that he was at risk of abuse.[1346] The Court held that the county did not violate the plaintiff's substantive due process rights, finding that Social Service's notice of the danger and expressions of willingness to protect the boy did not establish a "special relationship" giving rise to an affirmative constitutional duty to protect him.[1347] While the *Deshaney* Court ruled that the Fourteenth Amendment Due Process Clause does not impose an affirmative duty on the state to protect individuals from danger which the state itself did not create or from which the state did not limit the individual's ability to protect herself, the Court affirmed that the state violates the Equal Protection Clause when it selectively denies its protective services to certain disfavored minorities.[1348]

The Court's decision in *Deshaney* did affect battered women's ability to hold the police and local municipalities liable for failure to respond to abuse victims' calls for protection. Prior to the *Deshaney* decision, courts in a number of jurisdictions had recognized causes of actions against the police for failure to protect domestic violence victims. Courts held police who failed to assist domestic violence victims liable under 42 U.S.C. § 1983 for deprivation of substantive due process rights based on a special relationship between the victim and the police created by a protection order,[1349] under the Four-

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1346. *Id.* at 193.

1347. *Id.* at 197.

1348. *Id.*

1349. *See, e.g.*, Raucci v. Town of Rotterdam, 902 F.2d 1050 (2d Cir. 1990) (finding special relationship between municipality and battered woman where she was shot after police had been informed of threats against her and had lead her to believe that action would be taken on her behalf); Dudosh v. City of Allentown, 629 F. Supp. 849 (E.D. Pa. 1985) (recognizing a cause of action under 42 U.S.C. § 1983 for deprivation of due process rights against the individual police officers and police department); *Ashby*, 841 S.W.2d 184 (finding no special relationship where battered was beaten to death following issuance of protection order); Baker v. City of New York, 269 N.Y.S.2d 515 (App. Div. 1966) (holding that while municipality may not be held liable for failure to provide general police protection, there may be liability where a special duty exists to protect a person or class of persons, in this case recipients of civil protection orders); Nearing v. Weaver, 670 P.2d 137 (Or. 1983) (holding that police officers are potentially liable to any intended beneficiaries of a protection order if they knowingly fail to enforce it and that state law which mandates arrest when protection orders are violated creates a special relationship between the police and the recipient of the protection order).

Note that some battered women have brought suits against parties other than police officers claiming the acts or omissions of these parties were the proximate cause of their

teenth Amendment Equal Protection Clause,[1350] and under negligence theories of liability.[1351]

Post-*DeShaney* cases reveal that a battered woman may continue

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being battered. *See, e.g.*, Koepke v. Loo, 23 Cal. Rptr.2d 34 (Ct. App. 1993) (holding that special relationship creating duty to warn domestic violence victim of potential assault can be a relationship between actor and batterer or between actor and victim of abuse; here the third party who became involved in couple's domestic dispute did not have such a duty to warn).

1350. *See, e.g.*, Hynson v. City of Chester Legal Dept., 864 F.2d 1026 (3rd Cir. 1988) (holding that to survive summary judgment on an equal protection claim the plaintiff must offer sufficient evidence that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was the motivating factor, and that the plaintiff was injured by the policy or custom); Watson v. City of Kansas City, Kansas, 857 F.2d 690 (10th Cir. 1988) (denying summary judgment to the city police officers based on claims that the police violated equal protection by failing to provide the same protection to domestic violence victims as it does to victims of other crimes); Bartalone v. County of Berrien, 643 F. Supp. 574 (W.D. Mich. 1986) (holding an individual police officer liable for discrimination under the Fourteenth Amendment Equal Protection Clause but failed to find a pattern, practice or policy needed to hold the city liable); Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984) (holding that the wife assaulted by husband after police received numerous requests for protection stated a claim under the Equal Protection Clause where the police had a practice or pattern of consistently affording less protection to battered women than to other assault victims); Bruno v. Codd, 419 N.E.2d 901 (N.Y. 1979) (holding that an action for declaratory and injunctive relief against the police department to compel the officers to perform a duty imposed upon them by law, to exercise their discretion in a reasonable and nonbiased manner to protect battered wives from their offending partners, just as they would protect other citizen's injured by assault, presented a justiciable question). *But see* Turner v. City of North Charleston, 675 F. Supp. 314 (D.S.C. 1987) (denying equal protection claim and holding that despite a permanent restraining order, the Protection From Domestic Abuse Act does not require that the police provide affirmative protection to victims of domestic violence but is only addressed to follow up procedures, and therefore, since the police did not create the danger, no special relationship existed between the plaintiff and the city creating the affirmative duty on the part of the police to protect the plaintiff); Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. Ct. App. 1992) (rejecting equal protection claim against city where battered woman was beaten to death following issuance of civil protection injunction).

1351. *See, e.g.*, Sorichetti v. City of New York, 492 N.Y.S.2d 591 (1986) (holding that municipal liability does not attach simply because injury occurs because of a violation of a protection order; however, when the police have notice of a possible violation they are obligated to respond). *But see Ashby*, 841 S.W.2d 184 (holding city immune from liability for negligence based on discretionary exercise of judgment where battered woman was beaten to death following issuance of protection order); Hamilton v. City of Omaha, 498 N.W.2d 555, 562 (Neb. 1993) (rejecting victim's negligence cause of action against police officer and city based on "bare legal conclusions" that the officer was negligent in not protecting her after assuring her that he would provide protection, where she failed to allege specific acts or omissions of the officer which would prove the existence of a duty, breach thereof and proximate cause); Braswell v. Braswell, 390 S.E.2d 752 (N.C. Ct. App. 1990) (finding no liability based on negligence against a police sheriff for his police deputy's murder of police deputy's wife even though the wife sought help from the sheriff, since the sheriff was off duty at the time of the shooting and there was no evidence that a police revolver was involved in the shooting).

to bring suits against police departments for violation of the Equal Protection Clause where the plaintiff shows that the department has a pattern or practice of discriminating against domestic violence victims.[1352] In some cases, state domestic violence statutes may create "special relationships" enforceable as a property interest under the Due Process Clause. Therefore, courts may continue to find liability based on a special relationship created by a protection order where the police have not provided "reasonable protection." In *Coffman v. Wilson Police Department*,[1353] the court held that under the Pennsylvania Protection From Abuse Act, a protection order creates a special relationship between the police and the victim.[1354] The victim's right is not a substantive due process right rejected under *DeShaney*, but rather a property right to reasonable police response.[1355] The court also held that the police department's failure to adequately train its officers may also state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause.[1356] Police officers may al-

1352. Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) (recognizing that police inaction to protect a domestic violence victim may be an equal protection violation under the *DeShaney* decision which held that the equal protection claim must be specific and prove that the state selectively denied its protective services to certain disfavored minorities. Plaintiff's were permitted to amend their claim in accordance with *DeShaney*); Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 700 (9th Cir. 1990) (finding no special relationship between the police and the victim based on the police department's notice of victim's plight, but holding that the plaintiff did state an equal protection claim based on animus against women); Howell v. City of Catoosa, 729 F. Supp. 1308, 1311 (N.D. Okla. 1990) (holding that plaintiff's equal protection suit failed because she did not show that the city had a policy or custom of giving less protection to domestic violence victims); Roy v. City of Everett, 823 P.2d 1084 (Wash. 1992) (holding that immunity granted to police officers in the Domestic Violence Act only applied to actions at the scene and not to a failure to act; therefore the police were not immune where plaintiff alleged year long pattern of non-enforcement). *But see* Brown v. Grabowski, 922 F.2d 1097, 1113 (3rd Cir. 1990) (granting police qualified immunity to equal protection claim based on alleged discrimination against domestic violence victims; the court also held that the police did not violate the victim's due process right to access to the courts where the police failed to inform the victim of her right to a restraining order as required under the domestic violence statute).

1353. 739 F. Supp. 257 (E.D. Pa. 1990).

1354. *Id.*; *see also* Losinski v. County of Trempealeau, 946 F.2d 544, 553 (7th Cir. 1991) (holding that a deputy who accompanied domestic violence victim to her home to retrieve her belongings and in whose presence the victim was murdered by her husband is not entitled to immunity on the negligence claim since his obligation to protect the victim was no longer discretionary once he assumed duty to accompany her to her home).

1355. 739 F. Supp. at 265.

1356. *Id.* at 266. *But see* Donaldson v. City of Seattle, 831 P.2d 1098, 1106 (1992) (finding that no liability existed where protection order was issued but was never entered in police tracking system and where the statute did not create an on-going duty to investigate); Siddle v. City of Cambridge, Ohio, 761 F. Supp. 503 (S.D. Ohio 1991) (granting summary

so be successful in suits against police departments when they are injured on a domestic violence call due to the department's failure to provide a back-up officer on the call.[1357]

14. Working with Immigrant Battered Women

As our society becomes more open about the problem of domestic violence, greater numbers of immigrant, refugee, and non-English speaking battered women and children are turning to our courts for protection. They learn about the relief offered by our courts from shelters and social services systems, employers, clergy, police, school counselors, and social workers. In addition, they profit from the educational efforts of bilingual, multicultural programs that work with battered immigrant women.[1358] Although domestic violence affects all communities in the United States and cuts across race, ethnic, religious, and economic lines, undocumented battered women face greater obstacles to escaping violence, because immigration status is a factor that exacerbates the level of violence in abusive relationships when batterers use the threat of deportation as a tool to hold undocumented battered women in violent relationships.[1359]

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judgment to police holding that police gave "reasonable protection" to the recipient of a civil protection order and denying the equal protection claim finding no policy of discrimination).

1357. *See* Eyssi v. City of Lawrence, 618 N.E.2d 1358 (Mass. 1993).

1358. Several programs which have years of experience representing and assisting battered immigrant women have recently banded together to form The National Network for Battered Immigrant Women. These agencies include: Ayuda, Inc. (Washington, D.C.); Asian Law Caucus (San Francisco, CA); Family Violence Prevention Fund (San Francisco, CA); Main Street Legal Services/CUNY Law School (Flushing, NY); National Immigration Project of the National Lawyer's Guild (San Francisco, CA and Boston, MA); San Francisco Neighborhood Legal Assistance Foundation (San Francisco, CA); The Lawyers Committee for Civil Rights of the San Francisco Bay Area (San Francisco, CA); NOW Legal Defense Fund (New York, NY); Asian Women's Shelter (San Francisco, CA); Coalition for Immigrant and Refugee Rights and Services/Immigrant Women's Task Force (San Francisco, CA); and SAKHI for South Asian Women (New York, NY).

1359. WILLIAM R. TAMAYO AND LESLYE E. ORLOFF, SELF-PETITIONING RIGHTS AND PROTECTIONS FOR BATTERED ALIEN SPOUSES AND CHILDREN SEEKING LAWFUL RESIDENT STATUS; AN ANALYSIS OF THE VIOLENCE AGAINST WOMEN ACT OF 1993, H.R. 1133, TITLE II, SUBSECTION C—SAFE HOMES FOR IMMIGRANT WOMEN 3 (1993) (submitted at the request of Senator Edward M. Kennedy, Chairman of the Subcommittee on Immigration and Refugee Policy, Committee on the Judiciary, U.S. Senate).

The legislative history of the Violence Against Women Act H.R. 1133 reiterates the following: "[m]any immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave." COMMITTEE ON THE JUDICIARY, REPORT ON THE VIOLENCE AGAINST WOMEN ACT TO ACCOMPANY H.R. 1133, H.R. Rep. No. 395, 103d Cong., 1st Sess. 26-7 (1993).

Offering battered immigrant women effective assistance through the legal system requires that advocates, attorneys, police, and courts are willing to develop an understanding of immigrant women's life experience. This entails being able to listen carefully to battered immigrant women, and craft creative legal solutions that are respectful of each individual's cultural experience and responsive to her individual needs. Adopting an approach that focuses on each victim's needs and life experiences focuses attention on creative use of the catch-all remedy provisions in state domestic violence statutes, rather than solely on an enumerated list of remedies. This approach also results in stronger civil protection orders that directly address those aspects of the abusive relationship which, if left unaddressed, can serve as continuing arenas for conflict.

Battered immigrant women who seek help from the legal system to stop domestic abuse must overcome significant barriers to receive help. Those barriers include distrustful expectations about the legal system, language and cultural barriers, and fear of deportation. To overcome these barriers to the legal system it is important for advocates and attorneys to build bridges with social service providers, workers in immigrant rights organizations, and church workers who work with immigrants and refugees. Shelter workers, domestic violence advocates, attorneys, and courts should strive to create relationships with and exchange information with persons who are bilingual and bicultural so that these groups can work together to assist battered immigrant women who need assistance from the court system.[1360]

The reticence of many immigrants and refugees to turn to the legal system for help grows out of their experience with legal systems

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Preliminary results from a survey being conducted by Ayuda in Washington, D.C. have found that the rate of battering among undocumented Latino women married to U.S. citizens and lawful permanent residents is 77%. In 69% of these cases citizen or resident batterers had failed to file immigration petitions on behalf of their undocumented spouses. AYUDA, UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES (1993).

1360. Most communities have at least one organization that assists battered women. Similarly, most communities with non-English speaking populations have organizations, churches or other programs which serve the needs of the immigrant or refugee population. Both groups should work to establish ties now, so that battered women will be able to receive effective assistance in the future. An excellent resource for attorneys, social workers and advocates seeking to learn how to advocate for the rights of battered immigrant women is DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN (Deeana Jang et al. eds., 1991).

in their home countries. Many immigrants come from countries whose legal system works very differently than ours. In countries which use a civil law system, the primary form of evidence accepted in court is signed, notarized, and sealed affidavits.[1361] Immigrant litigants in the United States often have great difficulty understanding our common law system where oral testimony is not only valid evidence, but the primary form of evidence presented.[1362]

Further, many immigrants come from countries where the judiciary is an arm of a repressive government and does not function independently. They expect that persons who will prevail in court are persons with the most money or the strongest ties to the government.[1363] In domestic violence cases, batterers will often manipulate these beliefs to get battered immigrant women to drop charges, or dismiss protection order petitions by convincing them that since the batterer is a citizen or has more money, or is a man and therefore his word is more inherently credible, he will win in court and her life will become even more difficult.[1364]

When battered immigrant women do approach the legal system for help, few court systems ensure that they will be provided with the assistance of a certified interpreter.[1365] Few police departments have implemented policies which ensure that domestic violence victims who do not speak English can communicate their complaints effectively, and can learn about their rights as family violence victims.[1366] Further, non-English speaking battered women have limited

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1361. UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY AND DISCRIMINATION 75 (1993).

1362. *Id.*

1363. *Id.*

1364. *Id.*

1365. One of the first jurisdictions to guarantee access to court certified interpreters for all litigants was the District of Columbia. *See, e.g.*, D.C. CODE § 31-2701 (1989); *see also* United States v. Mosquera, 816 F. Supp. 168 (E.D. N.Y. 1993) (recognizing the importance of access to interpreters as a due process right).

Some state statutes have taken limited steps to improve access to the civil protection order system for non-English speaking persons. A number of other jurisdictions have forms available in Spanish to assist petitioners in civil protection order cases. Hart, *supra* note 991, at 8-9. *See also* CAL. CIV. PROC. STAT ANN. § 6112 (West 1992) (requiring that the notice contained in emergency protection orders advising parties of the durations of the order and the availability of a more permanent order be printed in English and Spanish); PA. STAT. ANN. tit. 23, § 6106(g)(1) (providing that forms and clerical assistance must be available to unrepresented applicants in both English and Spanish).

1366. *See, e.g.*, N.M. STAT. ANN. §31-24-5(C)(7) (Michie 1990) (mandating that law enforcement agencies, prosecutors and judges must make all reasonable efforts to afford victims the right to an interpreter or translator so that they can be informed of their legal rights);

access to shelter. When non-English speaking women seek shelter, their requests are often denied by shelter workers who prefer to offer limited numbers of slots to women who can theoretically make better use of all shelter services. Few shelter programs nationally have taken steps to provide bilingual access. The Senate Violence Against Women Act[1367] addresses this problem by amending the Family Violence Prevention and Services Act[1368] to ensure that states distributing funds to domestic violence programs under this federal program certify that they have developed a plan to address the needs of underserved populations, including populations under-served because of ethnic, race, cultural, or language diversity.

Threats and fears of deportation are the single largest concern for all immigrant, refugee, or non-English speaking battered women who seek help fleeing violence. Fear of deportation may hinder battered women from seeking legal assistance whether or not they have already obtained legal immigration status. This is largely due to incorrect information provided to battered women by their batterers. For undocumented women, fear of deportation is the primary reason that few seek any help unless the violence against them has reached crisis proportions.

Many immigrant battered women are undocumented, despite the fact that they are in valid marriages to U.S. citizens or lawful permanent residents through whom they could legally obtain permanent residency. Current U.S. immigration laws place control over the immigration petitioning process exclusively in the hands of the citizen or lawful permanent resident spouse. The Immigration and Nationality Act[1369] contains the last vestiges of coverture in American Law.[1370] Abusive citizens and legal residents use this control to pre-

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R.I. GEN. LAWS § 8-8.15(B) (1988) (mandating that law enforcement officers provide domestic violence victims with oral and written notice of their rights; such notice must be available in English, Portuguese, Spanish, Cambodian, Hmong, Laotian, Vietnamese and French). Three other jurisdictions, Alaska, Iowa, and New Jersey, require police to provide domestic violence victims with written notice in languages other than English. Hart, *supra* note 991, at 66.

1367. S. 11, 103d Cong., 1st Sess. § 2265 (1993).

1368. 42 U.S.C. § 303(a)(2)(C) (1984); 42 U.S.C. § 10402(a)(2)(C) (1984).

1369. Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952).

1370. At common law, the concept of coverture deemed husband and wife during a marriage one legal entity. 41 AM. JUR. 2D *Husband and Wife* § 16 (1964). Wives were subordinate to husbands and lived under the husbands control. *Id.* This concept was incorporated early into American immigration law, and the concept of spousal domination in immigration law was strengthened by Marriage Fraud Amendments in 1986. Immigration Marriage Fraud Amendments of Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1186 (1988)). For complete discussions of the history of immigration law and its

vent their battered undocumented spouses from seeking protection orders, cooperating with police, or leaving a violent home.

Subtitle D of the Violence Against Women Act of 1993 (the "Protection for Immigrant Women"), which was passed unanimously by the House of Representatives on November 20, 1993,[1371] amends the Immigration and Nationality Act in an effort to prevent immigration law from being used by citizen and resident batterers to hold their undocumented wives and children in violent relationships.[1372] The legislative history of the Violence Against Women Act H.R. 1133 summarizes why these changes were needed:

> Domestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizen's legal status depends on his or her marriage to the abuser. Current law fosters domestic violence in such situations by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse. Under the Immigration and Nationality Act, a U.S. citizen or lawful permanent resident can, but is not required to, file a relative visa petition requesting that his of her spouse be granted legal status based on a valid marriage. Also, the citizen or lawful permanent resident can revoke such a petition at any time prior to the issuance of permanent or conditional residency to the spouse. Consequently, a battered spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges or calling the police because of the threat or

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affect on battered women, see JANET M. CALVO, SPOUSE BASED IMMIGRATION LAWS: THE LEGACIES OF COVERTURE, (1991); William R. Tamayo, *The Evolution of United States Immigration Policy, in* DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN ch. 4 (Deeana Jang et al. eds, 1991).

1371. The Violence Against Women Act will go to conference committee as part of the Crime Bill during the spring of 1994. We expect that the provisions contained in Subtitle D which received bi-partisan support in the House Judiciary Committee will be accepted by the Senate in the final version of the Crime Bill.

1372. The citizen and resident spouse's control over the immigration process and consequently control over the deportation of their abused spouse in a very real sense immunizes citizen and resident spouses who batter their wives or children from criminal prosecution for their crimes. If the spouse or child complains to police, cooperates with prosecutors or seeks a protection order, the batterer could turn her in to the Immigration and Naturalization Service and have her deported. Unless the Violence Against Women Act passes, including the Protection of Immigrant Women, Subtitle D, there will continue to be nothing any prosecutor, judge or advocate can do to protect her against deportation. Furthermore, none of the provisions of the Violence Against Women Act aimed at preventing domestic violence and increasing protection to domestic violence victims will be of any help to battered immigrant women unless Subtitle D is included in the final version of the Act.

fear of deportation.[1373]

To address this problem, the Protection of Immigrant Women Subtitle of the Violence Against Women Act will authorize battered spouses and parents of abused children to file their own immigration petitions (self-petitions).[1374] They will also be eligible as abused spouses, children, and parents of abused children for suspension of deportation.[1375] This will offer petitioners protection against their batterers' efforts to have them deported, will make them eligible to receive work authorization,[1376] and will enable them to obtain lawful permanent residency without having to leave the United States.[1377] Undocumented spouses who are validly married to, and have been living in the United States for more than three years with citizens or resident spouses who have failed to file immediate relative petitions, may file a self-petition.[1378] The purpose of this provision is to remove the control citizens and residents have over the immigration process in some families without requiring that victims suffer the first beating.

Until the Violence Against Women Act becomes law, undocumented battered women must weigh their options carefully. If they are married to U.S. citizens, the time lapse from the date that the citizen spouse files the immigration petition until the battered spouse receives her conditional green card could be up to six months. Under the Marriage Fraud Act,[1379] conditional residency is awarded to any one who has not been married for two years on the date they receive their residency.[1380] To obtain permanent residency status, the conditional resident spouse must prove two years later that she is still married to the citizen spouse.[1381] At the end of her two year conditional residency, she must file a joint petition with her spouse.[1382]

This joint filing requirement served to hold battered women in violent relationships for two years before they could obtain permanent

1373. COMMITTEE ON THE JUDICIARY, REPORT ON THE VIOLENCE AGAINST WOMEN ACT TO ACCOMPANY H.R. 1133, H.R. Rep. No. 395, 103d Cong., 1st Sess. 26-7 (1993).

1374. H.R. 1133, 103d Cong., 1st Sess. subtit. D § 241(a) (1993).

1375. H.R. 1133, 103d Cong., 1st Sess. subtit. D § 243 (1993).

1376. *Id.*

1377. *Id.*

1378. H.R. 1133, 103d Cong., 1st Sess. subtit. D § 241(a) (1993).

1379. Immigration Marriage Fraud Amendments of Act of 1986, Pub. L. No. 99-639, §§ 216, 241, 100 Stat. 3537 (codified as amended at 8 U.S.C. §§ 1186, 1251 (1988)).

1380. *Id.*

1381. *Id.*

1382. *Id.*

legal residency. The grave danger this posed to battered immigrant women led Congresswoman Louise Slaughter to introduce and secure passage of a Battered Spouse Waiver[1383] to the joint petitioning requirement. The Battered Spouse Waiver was passed as part of the 1990 amendments to the Immigration and Nationality Act. Its passage was the first formal recognition that the structure of U.S. immigration laws posed a danger to battered immigrant women. The Battered Spouse Waiver allowed a conditional resident who was battered or subject to extreme cruelty by a citizen or resident spouse to apply for a waiver of the requirement that a joint petition be filed at the end of the two year conditional residence. This amendment to the Immigration and Nationality Act, however, failed to protect battered immigrant women married to citizens and lawful permanent residents prior to the filing of a petition for residency or, during the time that the petition is pending, before the immigrant spouse receives her conditional residency.[1384]

Thus, for many battered immigrant women, all "domestic violence options" will have to be weighed against the probabilities that acting to stop the violence may lead to deportation. When the Violence Against Women Act of 1993 becomes law and battered women will be allowed to self-petition and file for suspension of deportation, the dangers associated with obtaining immigration status in this fashion will be greatly reduced.[1385]

Legal immigration status, or lack thereof, is not a fact that legally precludes battered immigrant and refugee women from obtaining civil protection orders, from filing criminal charges against their batterers, or from cooperating with criminal prosecutors. No existing law limits court protection or the ability of the criminal courts to

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1383. Immigration Marriage Fraud Amendments of Act of 1986, Pub. L. No. 99-639, § 216(c)(4), 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1186(c)(4) 1251 (1988)).

1384. For undocumented battered women married to lawful permanent residents, the time lapse before she can receive her green card is over 26 months. During the time prior to the filing of the immigration petition and throughout the waiting period until conditional or permanent residency is granted, a battered immigrant woman's ability to receive immigration papers is totally controlled by the citizen or resident spouse who is in many cases the abuser. For further discussion of these issues, see JANET M. CALVO, SPOUSE BASED IMMIGRATION LAW: THE LEGACIES OF COVERTURE (1991); Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401 (1993).

1385. Until the Violence Against Women Act is signed into law, it is important to note that the only persons who will benefit from the Act will be battered women who are married to their abusers on the date of enactment who remain married until after they file self-petitions.

prosecute based on the victim's or the perpetrator's immigration status. However, the risks associated with taking action to stop the violence must be assessed in light of each battered woman's immigration status. Therefore, it is important for advocates and attorneys who may come in contact with battered immigrant women to be aware of the various means available for an undocumented person to attain legal immigration status. The most likely options for battered immigrant women might include: 1) applying for lawful permanent residence based on marriage to a U.S. citizen[1386] or lawful permanent resident;[1387] 2) battered women who have resided continuously in the United States for more than seven years may be eligible for suspension of deportation;[1388] 3) battered women who have a well founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion if they are forced to return to their home country may be eligible for political asylum;[1389] or 4) battered women who have lived continuously in the United States since 1972 may quality for registry.[1390]

Attorneys and advocates representing battered immigrant women seeking protection orders need to be aware that the remedies immigrant and refugee battered women may need from the court as part of their civil protection order may be affected by their immigrant experience and immigration status. The catch all provisions of state domestic violence statutes have been used creatively to obtain relief peculiar to the needs of battered immigrant women. The following are only a few examples. Courts have issued civil protection orders precluding citizen and resident spouses from withdrawing applications for permanent residence filed on behalf of their abused wives.[1391] Courts have

1386. Immigration and Nationality Act, § 201(b).

1387. *Id.* at § 203(a).

1388. *Id.* at § 244(a).

1389. *Id.* at § 208(a).

1390. *Id.* at § 249. Other actions that a battered woman may opt for include: 1) applying for the Deferred Action Program, pursuant to the Immigration and Naturalization Service Operating Instructions § 242.1(a)(22); 2) obtaining a labor certification pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, which are available for battered women who are skilled workers with at least two years experience, making it a rather limited option; and 3) voluntary departure, as a last resort. The government may grant a limited additional stay in the United States, provided the woman is of good moral character and has the finances to enable her to depart the United States at the end of her stay. Delaying voluntary departure can lead to a more permanent remedy, however, if the woman can be kept legally in the United States long enough to receive an immigrant visa through another program, such as a family petition.

1391. Maldonado v. Maldonado, 631 A.2d 40 (D.C. Ct. App. 1993).

also ordered batterers to sign statements, which are forwarded to the embassy or consulate of the batterer's home country, informing the consul that they are not authorized to issue visitor's visas or any other visa to the U.S. citizen children of the parties absent court order authorizing travel.[1392]

In order to determine exactly what remedies battered immigrant women may need, it is important to carefully interview the immigrant battered woman with the assistance of a bilingual, bicultural interpreter or case worker. The goal of the interview should be to identify her fears of the batterer and the factors that will complicate her ability to leave him. Once these problems are identified, creative remedies should be requested from the court that will address each of these issues. Many of her concerns, including financial support, can be addressed using the remedies specifically enumerated in civil protection order statutes.

Several difficult questions must be explored when battered immigrant women contemplate applying for public benefits. First, one must determine what public benefits might be available to assist battered immigrant women and their children. Second, before applications are made, battered immigrant women must consider what effect applying for public benefits may have on pending immigration petitions or on applications that they may be eligible to file in the future.[1393]

All persons who apply for legal immigration status must prove to the Immigration and Naturalization Service ("INS") that they will not become a public charge.[1394] For most immigrants,[1395] INS

1392. ORLOFF & KLEIN, *supra* note 26, at 8.

1393. If a battered woman has a pending immigration petition, an application for public benefits is generally not advisable. If, on the other hand, a battered immigrant woman will not be applying for legal immigration status immediately or in the near future, short term reliance on public benefits may not preclude her from attaining future immigration benefits. It is essential that advocates and attorneys assisting battered immigrant women consult with an immigration attorney who will review the specifics of each individual's case to assess what danger application for public benefits might pose to her immigration status. Two resources contain an excellent chart which provides an overview of an applicant's immigration status and the types of benefit programs for which the applicant may apply. Charles Wheeler, *Public Benefits for Immigrants and Refugees*, *in* DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN IX-1 (Deeana Jang et al. eds., 1991) [hereinafter IMMIGRANT WOMEN]; NATIONAL IMMIGRATION LAW CENTER, GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS (1992).

1394. 8 U.S.C. § 1182(a)(4) (Supp. IV. 1992). They must also prove that they are not otherwise excludable from the United States. Other grounds for exclusion include: prostitution, criminal behavior, drug use, drug trafficking, positive tests for tuberculosis or HIV infection, membership in the communist party and homosexuality. 8 U.S.C. § 1182(a) (Supp. 1992).

1395. Except those whose status as alien is adjusted to that as an alien lawfully admitted

analyzes the totality of the immigrant's circumstances to evaluate whether the immigrant will become a public charge in the future.[1396] Factors include the immigrant's age, health, past and current income, education, and job skills.[1397] The government looks closely at federal poverty guidelines and counts the spouse and all children in determining whether the applicant falls below the poverty line.[1398] Battered immigrant women who are single heads of household will have to show an ability to provide for all family members and dependents.[1399] Past receipt of public benefits is an important but not controlling factor in predicting whether INS will determine that the petitioner is likely to become a public charge.[1400]

It is important for battered women's attorneys, advocates, and shelter workers to know that immigrant battered women are not categorically excluded from all public benefits programs.[1401] All immigrants and refugees, including undocumented immigrants and persons who received Temporary Protected Status,[1402] may apply for and receive emergency medical services,[1403] services from the Women Infants Children ("WIC") program,[1404] school lunches, and break-

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for temporary residence. 8 U.S.C. § 1160(a)(1) (Supp. IV. 1992).

1396. Matter of Perez, 15 I. & N. Dec. 136, 137 (1974).

1397. Matter of A, 19 I. & N. Dec. 867, 869 (1988).

1398. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 440, 441 (1993).

1399. *Id.*

1400. Wheeler, *supra* note 1393; NATIONAL IMMIGRATION LAW CENTER, *supra* note 1393.

1401. Wheeler, *supra* note 1393; NATIONAL IMMIGRATION LAW CENTER, *supra* note 1393. Often case workers and shelter workers trying to assist battered women presume that applying for services will always bar her ability to obtain legal immigration status. Participation in some public benefit programs for a significant period of time may jeopardize a battered woman's ability to obtain legal immigration status. However, temporary reliance on government assistance programs which assist a battered women in leaving a batterer, absent longer term dependance on the program will not generally preclude her from attaining immigration status at some future time.

1402. 8 U.S.C. § 1254a (Supp. 1992).

1403. This includes emergency medical care under Medicaid. 42 U.S.C. § 1396b(v)(3) (Supp. 1991). Emergency care is defined as treatment of medical conditions that place the patient's health in serious jeopardy, could result in serious impairment to bodily functions or could cause serious dysfunction of any bodily part or organ. *Id.* Coverage includes emergency labor and delivery, but not prenatal care. *Id. See also* Wheeler, *supra* note 1393, at IX-14; National Health Law Program, *Undocumented Aliens and Emergency Care*, 22 CLEARINGHOUSE REV. 619 (1988). Free medical care is also available to undocumented persons under the Hill-Burton Act. 42 U.S.C. 291c(e) (1988). Hospitals who received federal low-interest loans are required to provide a fixed percentage of their medical services free to indigent persons and at low cost to persons whose income is not more than twice federal poverty guidelines. 42 C.F.R. § 124.503 (1993).

1404. The statutory mandate of the Special Supplemental Food Program for WIC is to

fasts,[1405] enrollment in Headstart,[1406] public education from kindergarten through twelfth grade,[1407] federal housing,[1408] and services available through social service block grants.[1409]

Lawful permanent residents, refugees, receivers of asylum, and some amnesty applicants may apply for Aid to Families with Dependant Children ("AFDC"),[1410] Food Stamps,[1411] Supplemental Security Income ("SSI"),[1412] Unemployment Compensation Insurance,[1413] Medicaid,[1414] and Job Training Partnership Act pro-

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prevent poor birth outcomes and to improve the nutritional status and health of pregnant women and infants. 42 U.S.C. § 1786 (1988). Because of the profound effect this program has on citizen children, all immigrants regardless of legal immigration status are eligible to apply for WIC benefits. *Cf. id.* (immigrant status is not mentioned as a bar to eligibility).

1405. Undocumented children and children of undocumented parents are eligible to participate in federal programs that provide free or reduced-price meals to eligible children at schools, child care centers and in summer school programs such as the School Lunch Programs, 42 U.S.C. § 1751 (1988); the Child and Adult Care Food Program, 42 U.S.C. § 1766 (Supp. IV 1991); and the Summer Food Service Programs, 42 U.S.C. § 1761 (1988 & Supp. IV 1991). *See also* 8 U.S.C. § 1255a(h)(4) (Supp. 1992).

1406. NATIONAL IMMIGRATION LAW CENTER, *supra* note 1393, at xi.

1407. Plyer v. Doe, 457 U.S. 202, 226 (1982) (holding that states cannot impose restrictions that prevent children from attending public schools (K-12) due to their immigration status).

1408. Undocumented immigrants are only eligible for public housing if they are part of "mixed families" which contain citizens and ineligible immigrants. 42 U.S.C. § 1436a(c)(1) (Supp. IV 1991). However, most undocumented immigrants are discouraged from applying for federal housing programs by verification procedures. The Department of Housing and Urban Development is required to obtain a declaration of citizenship or proof of immigration status for all applicants and all current participants in federal housing programs. 42 U.S.C. § 1436a(d) (Supp. IV 1991). Additionally, in many large cities the waiting lists for public housing are so long that new arrivals may not come to the top of the list for many years.

1409. NATIONAL IMMIGRATION LAW CENTER, *supra* note 1393, at xi.

1410. 42 U.S.C. § 602 (1993). Lawful permanent residents, refugees, receivers of asylum, conditional entrants and parolees are eligible to apply for AFDC benefits. *Id.* Amnesty applicants may not apply until five years after they received legalization. 45 C.F.R. § 233.50 (1993); *see also* Wheeler, *supra* note 1393, at IX-9, app. XIII-1.

1411. Only limited categories of immigrants may apply for food stamps: lawful permanent residents, registry applicants, refugees, asylees, immigrants granted withholding of deportation, parolees, conditional entrants, and legalized aliens who qualify for SSI. 7 C.F.R. § 273.4(a) (1993).

1412. 42 U.S.C. § 1382c(a) (Supp. IV 1991) allows lawful permanent residents, refugees, asylees, immigrants with temporary resident status, conditional entrants, parolees, immigrants residing in the U.S. pursuant to a stay of deportation, and immigrants granted deferred action status, suspension or withholding of deportation to apply for SSI benefits. *See also* Wheeler, *supra* note 1393, at IX-11 to IX-12.

1413. Immigrants who are lawful permanent residents, refugees, receivers of asylum, immigrants permanently residing in the United States under color of law, and other persons lawfully working in the United States are eligible to apply for Unemployment Compensation Insurance. 51 Fed. Reg. 29,713 (1985); *see also* Wheeler, *supra* note 1393, at IX-16. Amnesty applicants and persons who received Temporary Protected Status are also eligible to apply. *Id.*

grams.[1415] Undocumented parents may also apply for AFDC, Food Stamps, SSI, and Medicaid on behalf of their U.S. citizen children.[1416] However, the amount of funds the family receives will be less than that paid to families where the applicant parent is a citizen.[1417] The grant to families headed by an undocumented parent will only include the children's portion of the funds that other eligible families receive.[1418]

Aside from public benefits, undocumented battered women may receive assistance from a broad variety of non-governmental social service programs. Often assistance with rent money, food, clothing and emergency shelter can be obtained from local churches, homeless programs, community groups, organizations that assist immigrants, shelters, the Red Cross, and city or state government programs that are not subject to federal restrictions. In addition, battered immigrant women may have a wealth of resources available to them through networks of friends or family members. Through years of representing hundreds of battered immigrant women, Ayuda has learned that immigrant battered women are very willing to assist one another in securing temporary housing, food, clothing, and other forms of emergency assistance.[1419] Often, clients will develop friendships with other battered women whose cases were scheduled for court on the same day. It is important for advocates working with battered immigrant women to think creatively about all resources available to help battered immigrant women in the legal system, through public or private social service agencies and through community networks.

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at app. XIII-l.

1414. Medicaid is available to lawful permanent residents, refugees, receivers of asylum, and limited categories of persons permanently residing in the U.S. under color of law. 42 U.S.C. § 1396b(v) (Supp. IV 1991). Amnesty applicants may only qualify for Medicaid for emergency services during the 5 years following legalization, unless they are 65 or older, disabled or a child under 18. 55 Fed. Reg. 36,813 (1990); *see also* Wheeler, *supra* note 1393, at IX-13 to IX-14.

1415. Participants in this program must be eligible to work under the Immigration Reform and Control Act's employer sanctions. 8 U.S.C. § 1324a(a)(1)(A) (1988); 8 C.F.R. § 274a.12 (1993).

1416. *See* Wheeler, *supra* note 1393.

1417. *Id.*

1418. *Id.* at IX-10-11.

1419. *See* Debbie Lee et al., *Community Organizing*, *in* IMMIGRANT WOMEN, *supra* note 1393, at X-9 to X-10.

H. Temporary Protection Orders

1. Remedies Available as Part of a Temporary Protection Order

Twenty-seven jurisdictions authorize the same remedies for both civil and temporary protection orders.[1420] The remaining jurisdictions and the courts also award a wide range of relief in temporary protection orders. Remedies generally include ordering the respondent to vacate a shared residence,[1421] to stay away from petitioner's

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1420. ALA. CODE § 30-5-6(c) (1989); ALASKA STAT. § 25.35.020(c) (1991); ARIZ. REV. STAT. ANN. § 13-3602(C) (Supp. 1993); ARK. CODE ANN. § 9-15-206(b) (Michie 1993); COLO. REV. STAT. ANN. § 14-4-102(2) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 947 (1993); D.C. CODE ANN. § 16-1004(d) (1989); GA. CODE ANN. § 19-13-4 (Supp. 1993); HAW. REV. STAT. § 586-4 (Supp. 1992); IDAHO CODE § 39-6308(1) (1993); IOWA CODE ANN. § 236.5 (West 1985); KAN. STAT. ANN. § 60-3105 (Supp. 1992); KY. REV. STAT. ANN. § 403.740 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2135 (West 1982 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 4 (West Supp. 1993); N.J. STAT. ANN. 2C:25-28 (West 1993); N.M. STAT. ANN. § 40-13-4 (Michie 1989); N.Y. DOM. REL. LAW § 828.1 (McKinney Supp. 1994); OHIO REV. CODE ANN. § 3113.31 (Anderson 1989 & Supp. 1992); OR. REV. STAT. § 107.718 (1991); PA. STAT. ANN. tit. 23, § 6107(b) (1991); R.I. GEN. LAWS § 15-15-4 (1988 & Supp. 1993); TENN. CODE ANN. § 36-3-606 (1991); W. VA. CODE § 48-2A-5 (Supp. 1993); WYO. STAT. § 35-21-104 (1988); P.R. LAWS ANN. tit. 8, § 621 (Supp. 1990).

1421. ALA. CODE § 30-5-7(a)(2) (1989); ALASKA STAT. § 25.35.020(c) (1991); CAL. FAM. CODE § 5552 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(b) (West Supp. 1993); FLA. STAT. ANN. § 741.30(6)(a)(2) (West Supp. 1993); HAW. REV. STAT. § 586-4 (Supp. 1992); IDAHO CODE § 39-6308(1)(b) (1993); 750 ILCS 60/214(b)(2) (Smith-Hurd Supp. 1993); KAN. STAT. ANN. § 60-3106(b) (Supp. 1992); KY. REV. STAT. ANN. § 403.740(d) (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2135.A(3) (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 765.4.C (West 1981 & Supp. 1992); MD.CODE ANN., FAM. LAW §4-505(a)(2)(i) (1991); MASS. GEN. LAWS ANN. ch. 209A, § 3(c) (West Supp. 1993); MINN. STAT. ANN. § 518B.01.7(a)(2) (West Supp. 1993); MISS. CODE ANN. § 93-21-13(2)(b) (Supp. 1992); MO. ANN. STAT. § 455.045(2) (Vernon 1986); NEB. REV. STAT. § 42-924(2) (Supp. 1992); NEV. REV. STAT. ANN. § 33.030.1(b) (Michie 1986); N.J. STAT. ANN. § 2C:-25-28(West 1992); N.Y. FAM. CT. ACT § 828 (McKinney Supp. 1994); N.D. CENT. CODE § 14-07.1-03.2(b) (1991); OHIO REV. CODE ANN. § 3113.31(E)(1)(b) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.3.A.6 (West Supp. 1994); PA. STAT. ANN. tit. 23, § 6108(a)(2) (1991); S.D. CODIFIED LAWS ANN. § 25-10-(2) (1984); TEX. FAM. CODE ANN. § 71.15(g) (West Supp. 1993); UTAH CODE ANN. § 30-6-6(1) (Supp. 1993); VT. STAT. ANN. tit. 15, § 1104(a)(2) (1989); VA. CODE ANN. § 16.1-253.4.B(3) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.070(1)(b) (West Supp. 1993); WIS. STAT. ANN. § 813.12(3)(a) (West Supp. 1993); *see also* Anders v. Anders, 618 So.2d 452 (La. Ct. App. 1993) (granting vacate order *ex parte*); Grant v. Wright, 536 A.2d 319, 320 (N.J. Super. Ct. App. Div. 1988) (awarding *ex parte* temporary protection order to petitioner that included exclusive possession of the residence where the parties lived together but never married even though lease was in respondent's name since landlord had told them the place was "theirs" as opposed to "his"); People v. Forman, 546 N.Y.S.2d 755, 757 (N.Y. Crim. Ct. 1989) (ordering respondent to vacate parties' residence in an ex part temporary protection order); Smart v. Smart, 297 S.E.2d 135 (N.C. Ct. App. 1982) (awarding wife exclusive use of the marital home and ordering respondent husband to remove his personal effects from the home and turn over his

home,[1422] to stay away from petitioner's place of employment,[1423] and may also include an order to pay attorneys fees to a legal services organization representing the petitioner.[1424] Temporary protection orders also frequently require no communication or contact with the petitioner,[1425] no assaulting of the petitioner,[1426] an award of

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keys to the police); Boyle v. Boyle, 12 Pa. D. & C.3d 767 (Pa. Ct. Comm. Pleas 1979) (holding *ex parte* eviction is not a due process violation where the deprivation is temporary, is a remedy of last resort and does not affect title to property); MODEL CODE, *supra* note 15, §§ 305, 306.

1422. *See* ALASKA STAT. § 25.35.020(c) (1991); COLO. REV. STAT. ANN. § 14-4-102(a) (West Supp. 1993); HAW. REV. STAT. § 586-4 (Supp. 1992); IDAHO CODE § 39-6308(1)(f) (1993); 750 ILCS 60/214(b)(3) (Smith-Hurd 1993); KAN. STAT. ANN. § 60-3106(b) (Supp. 1992); LA. REV. STAT. ANN. § 46:2135.A(1) (West 1982 & Supp. 1993); MD. CODE ANN., FAM. LAW § 4-505(a)(2) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MICH. COMP. LAWS ANN. § 552.14(2)(A) (West 1988); MONT. CODE ANN. § 40-4-121(2)(c) (1993); N.J. STAT. ANN. § 2C:25-28 (West Supp. 1993); N.Y. FAM. CT. ACT § 842 (McKinney Supp. 1994); N.C. GEN. STAT. § 50B-3(a)(2) (1989); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Anderson Supp. 1992); PA. STAT. ANN. tit. 23, § 6107(1992). *See also* Grant v. Wright, 536 A.2d 319, 320 (N.J. Super. Ct. App. Div. 1988) (upholding the granting to petitioner of an *ex parte* temporary protection order forbidding defendant from returning to the parties' residence); People v. Derisi, 442 N.Y.S.2d 908 (Suffolk County Ct. 1981) (denying husband access to his home and possessions under an *ex parte* temporary protection order pending a prompt hearing); MODEL CODE, *supra* note 15, §§ 305, 306.

1423. MINN. STAT. ANN. § 518B.01.7(a)(3) (West Supp. 1993); *see also* MODEL CODE, *supra* note 15, §§ 305, 306.

1424. Spoto v. McCarroll, 593 A.2d 375, 379 (N.J. Super. Ct. App. Div. 1991) (holding that a trial court has the authority to award attorney fees to a publicly funded legal services agency following issuance of a temporary protection order).

1425. ALASKA STAT. § 25.35.020(c) (1991); CAL. FAM. CODE § 5505 (West 1993); COLO. REV. STAT. ANN. § 14-4-103(3)(a) (West Supp. 1993); HAW. REV. STAT. § 586-4(a) (Supp. 1992); IDAHO CODE § 39-6308(1)(e) (1993); IND. CODE ANN. § 34-4-5.1-2(b)(3)(B) (West Supp. 1993); KY. REV. STAT. ANN. § 403.740(a) (Michie/Bobbs-Merrill Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3(b) (West Supp. 1993); NEV. REV. STAT. ANN. § 33.030.2)b)(1) (Michie 1986); N.H. REV. STAT. ANN. § 173-B:6 (1990); N.J. STAT. ANN. § 2C:25-29(b)(7) (West 1993); N.Y. FAM. CT. ACT § 842(a) (McKinney Supp. 1994); N.D. CENT. CODE § 14.07.1-03.2(a) (1991); OKLA. STAT. ANN. tit. 22, § 60.3.A.2 (West Supp. 1993); PA. STAT. ANN. tit. 23, § 6108(a)(6) (1991); S.C. CODE ANN. § 20-4-60(a)(2) (Law. Co-op. 1985); VA. CODE ANN. § 16.1-253.1(A)(2) (Michie Supp. 1993); WIS. STAT. ANN. § 813.12(a) (West Supp. 1993); *see also* Cobb v. Cobb, 545 N.E.2d 1161, 1162 (Mass. 1989) (granting Court granted emergency *ex parte* order restraining ex-husband from communicating with his ex-wife prior to hearing on order); Cosme v. Figueroa, 609 A.2d 523 (N.J. Super. Ct. Ch. Div. 1992) (prohibiting contact with the petitioner); Comas v. Comas, 608 A.2d 1005, 1006 (N.J. Super. Ct. Ch. Div. 1992) (prohibiting contact with former spouse); *Grant*, 536 A.2d at 320 (prohibiting respondent from contacting petitioner); Selland v. Selland, 494 N.W.2d 367 (N.D. 1992) (upholding temporary protection order which prohibited respondent from coming within one hundred yards of petitioner and from telephoning her); Marquette v. Marquette, 686 P.2d 990 (Okla. Ct. App. 1984) (prohibiting respondent from contacting wife); MODEL CODE, *supra* note 15, §§ 305, 306.

1426. ALA. CODE § 30-5-7(a)(1) (1989); ALASKA STAT. § 25.35.020(a) (1991); CAL. FAM. CODE § 5505 (West 1993); COLO. REV. STAT. ANN. § 14-4-103(3) (West Supp. 1993); FLA.

temporary custody of the parties' children to the petitioner,[1427] no visitation with the parties' children,[1428] no weapons possession,[1429] and when needed, temporary child support[1430] and spousal

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STAT. ANN. § 741.30(6)(a)(1) (West Supp. 1993); HAW. REV. STAT. § 586-4(a)(1) (Supp. 1992); IDAHO CODE § 39-6308(1)(a) (1993); 750 ILCS 60/214(b)(1) (1992); IND. CODE ANN. § 34-4-5.1(b)(3) (A) (West Supp. 1993); KAN. STAT. ANN. § 60-3106(b) (Supp. 1992); KY. REV. STAT. ANN. § 403.740(b) (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2135.A(1) (West 1982); ME. REV. STAT. ANN. tit. 19, § 765.4.B (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3(a) (West Supp. 1993); MICH. COMP. LAWS ANN. § 600.2950(1)(b) (West 1986); MINN. STAT. ANN. § 518B.01.7(a)(1) (West Supp. 1993); MISS. CODE ANN. § 93-21-13(2)(a) (Supp. 1993); MO. ANN. STAT. § 455.045(1) (Vernon 1986); NEV. REV. STAT. ANN. § 33.030.1(a) (Michie 1986); N.J. STAT. ANN. § 2C:25-29(b)(1) (West Supp. 1993); N.Y. FAM. CT. ACT § 842(c) (McKinney 1983); N.D. CENT. CODE § 14.07.1-03.2(a) (1991); OHIO REV. CODE ANN. § 3113.31(E)(1)(a) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.3.A.2 (West Supp. 1993); PA. STAT. ANN. tit. 23, § 6108(a)(1) (1991); S.C. CODE ANN. § 20-4-60(a)(1) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-6(1) (1984); UTAH CODE ANN. § 30-6-6(1) (Supp. 1993); VT. STAT. ANN. tit. 15, § 1103(a)(1) (1989); VA. CODE ANN. § 16.1-253.1.A(1) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.070(1)(a) (West Supp. 1993); WIS. STAT. ANN. § 813.125(3) (West Supp. 1993); *see also* Smart v. Smart, 297 S.E.2d 135 (N.C. Ct. App. 1982) (restraining husband from assaulting his wife); MODEL CODE, *supra* note 15, §§ 305, 306.

1427. ALA. CODE § 30-5-7(a)(4) (1989); ALASKA STAT. § 25.35.020(c) (1991); CAL. FAM. CODE § 5513 (West 1993); COLO. REV. STAT. ANN. § 14-4-103(3)(c) (West 1989); FLA. STAT. ANN. § 741.30(6)(a)(3) (West Supp. 1993); IDAHO CODE § 39-6308 (1993); KAN. STAT. ANN. § 60-3106(b) (Supp. 1992); LA. REV. STAT. ANN. § 46:2135.A(5) (West 1982); ME. REV. STAT. ANN. tit. 19, § 765.4 (West 1981 & Supp 1992); MD. CODE ANN., FAM. LAW § 4-505(a)(2)(iii) (1991); MASS. GEN. LAWS ANN. ch. 209A, § 3(d) (West Supp. 1993); MO. ANN. STAT. § 455.045(3) (Vernon 1986); NEV. REV. STAT. ANN. § 33.030.1(d) (Michie 1986); N.Y. FAM. CT. ACT § 828 (McKinney 1983); N.C. GEN. STAT. § 50B-3(a)(4) (1989); N.D. CENT. CODE § 14.07.1-03.2(c) (1991); Ohio Rev. Code Ann. § 3113.31(E)(1)(d) (Anderson Supp. 1992); PA. STAT. ANN. tit. 23, § 6108(a)(4) (1991); VT. STAT. ANN. tit. 15, § 1103(c)(3) (1989); VA. CODE ANN. § 16.1-253.1(A)(5) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.070(1)(c) (West Supp. 1993); *see also In re* Marriage of Rodriguez, 545 N.E.2d 731, 732 (Ill. 1989) (granting wife temporary custody of the couple's minor child); Smart v. Smart, 297 S.E.2d 135, 136 (N.C. Ct. App. 1982) (temporary protection order granted wife immediate custody of the children); MODEL CODE, *supra* note 15, §§ 305, 306.

1428. *See, e.g.*, *Cosme*, 609 A.2d at 524 (suspending visitation rights); *Comas*, 608 A.2d at 1006 (denying visitation rights); *Marquette*, 686 P.2d at 992 (holding emergency *ex parte* order which effectively denied ex-husband visitation with parties' child did not violate his procedural due process rights because the deprivation was only for 10 days and was outweighed by state's interest in securing immediate protection for abused persons); *In re* Penny R., 509 A.2d 338, 339 (Pa. Super. Ct. 1986) (suspending father's visitation with child after court received unsolicited letter from the director of a mental health center stating that visitation with the father is contrary to the child's best interests).

1429. N.H. REV. STAT. ANN. § 173-B:6.VII (Supp. 1992); N.J. STAT. ANN. § 2C:25-28(j) (West 1993); *see also* MODEL CODE, *supra* note 15, § 306.

1430. ALA. CODE § 30-5-7(a)(5) (1989); ALASKA STAT. § 25.35.020(c) (1991); LA. REV. STAT. ANN. § 46:2136.A(2) (West 1982); OHIO REV. CODE ANN. § 3113.31(E)(1)(c) (Anderson Supp. 1992); PA. STAT. ANN. tit. 23, § 6108(a)(3) (1991).

support.[1431]

The case law also reveals that courts generally suspend entirely the respondent's visitation rights with the parties' children for the duration of a temporary protection order.[1432] This is true even when suspension of visitation is the indirect consequence of an *ex parte* order prohibiting contact with the custodial parent. In *Marquette v. Marquette*,[1433] the Oklahoma Court of Appeals held that an *ex parte* protection order which restrained the ex-husband respondent from communicating with his ex-wife prior to the hearing, and which effectively denied him visitation with his child for 10 days prior to the hearing did not violate his procedural due process rights in light of the state's interest in protecting abuse victims and the short period of the suspended visitation.[1434]

Both social science research and judicial authorities support the suspension of visitation rights in temporary protection orders. The National Institute of Justice (the "NIJ") civil protection order study found agreement among judges and victims that the potential for renewed violence is greatest during visitation.[1435] The National Council of Juvenile and Family Court Judges (the "NCJFCJ") also notes that since visitation provides the batterer with continued access to the abuse victim through the children, violence against the petitioner often continues.[1436] A batterer may seek visitation with the children in an effort to maintain contact with and control over the abuse victim.[1437] Visitation remains a catalyst for continued intimidation and abuse.[1438] Therefore, it is essential that visitation be explicitly suspended during the short life of the temporary protection order, until the parties can come to court for a hearing on the full hearing.

1431. ALA. CODE § 30-5-7(a)(5) (1989); ALASKA STAT. § 25.35.020(c) (1991); KAN. STAT. ANN. § 60-3106 (Supp. 1992); LA. REV. STAT. ANN. § 46:2135.A(2) (West 1982); MASS. GEN. LAWS ANN. ch. 209A, § 3(e) (West Supp. 1993); OHIO REV. CODE ANN. § 3113.31(E)(1)(c) (Anderson Supp. 1992); PA. STAT. ANN. tit. 23, § 6108(a)(3) (1991).

1432. *See also* MODEL CODE, *supra* note 15, § 306.

1433. 686 P.2d 990 (Okla. Ct. App. 1984).

1434. *Id.* at 995-96; *see also In re* Marriage of Bolt, 854 P.2d 322 (Mont. 1993) (upholding *ex parte* protection order granting temporary custody to petitioner).

1435. NIJ CPO STUDY, *supra* note 19, at 43.

1436. FAMILY VIOLENCE PROJECT, *supra* note 687, at 26.

1437. JUDGE BEN GADDIS, DOMESTIC ABUSE PROTECTION ORDER CONCEPTS 8 (1992).

1438. *See* D.C. TASK FORCE, *supra* note 213, at 141, 151.

2. Legal Standard for Issuing *Ex Parte* Orders

State domestic violence statutes generally issue temporary protection orders based on a showing of "good cause."[1439] Statutes define "good cause" to include an emergency,[1440] immediate danger,[1441] immediate and present danger of abuse,[1442] imminent and present danger of bodily injury,[1443] an occurrence of abuse,[1444] a substantial likelihood of imminent danger of abuse,[1445] clear and convincing evidence of imminent danger of abuse,[1446] and imminent and present danger to a child.[1447] A few states issue temporary protection orders based on probable cause of imminent and present danger,[1448] or on probable cause of irreparable injury.[1449] A temporary protection order may also issue based on the court's reasonable grounds to believe abuse occurred[1450] or that an emergency

1439. ALA. CODE § 30-5-6(a) (1989); ALASKA STAT. § 25.35.020(c) (1991); CAL. FAM. CODE § 5650 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(4) (West Supp. 1993); IOWA CODE ANN. § 236.4.2 (West 1985); KAN. STAT. ANN. § 60-3105 (Supp. 1992); LA. REV. STAT. ANN. § 46:2135.A (West 1982); ME. REV. STAT. ANN. tit. 19, § 765.2 (West Supp. 1992); MISS. CODE ANN. § 93-21-11(2) (Supp. 1993); N.J. STAT. ANN. § 2C:25-28(i) (West Supp. 1993); N.Y. FAM. CT. ACT § 828(1) (McKinney Supp. 1994); OHIO REV. CODE ANN. § 3113.31(D) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.3(A) (West Supp. 1993); PA. STAT. ANN. tit. 23, § 6110(a) (Supp. 1993); R.I. GEN. LAWS § 15-15-4(A)(2) (Supp. 1993); S.C. CODE ANN. § 20-4-50(a) (Law. Co-op. 1985); TENN. CODE ANN. § 36-3-605(a) (1991); UTAH CODE ANN. § 30-6-5(2) (Supp. 1993); VA. CODE ANN. § 16.1-253.1(A) (Michie Supp. 1993).

1440. KAN. STAT. ANN. § 60-3105(a) (Supp. 1992); N.D. CENT. CODE § 14-07.1-08 (1991); PA. STAT. ANN. tit. 23, § 6110(a) (Supp. 1993).

1441. D.C. CODE ANN. § 16-1004(d) (1989).

1442. CAL. FAM. CODE § 5650 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(4) (West Supp. 1993); DEL. CODE ANN. tit. 10, § 947 (1993); ME. REV. STAT. ANN. tit. 19, § 765.2 (West Supp. 1992); MINN. STAT. ANN. § 518B:01.7 (West Supp. 1993); MISS. CODE ANN. § 93-21-11(2) (Supp. 1993); PA. STAT. ANN. tit. 23, § 6110 (Supp. 1993); TENN. CODE ANN. § 36-3-605(a) (1991); VA. CODE ANN. § 16.1-253.1(A) (Michie Supp. 1993); W. VA. CODE § 48-2A-5(a) (Supp. 1993).

1443. COLO. REV. STAT. ANN. § 14-4-102(4) (West 1992); S.C. CODE ANN. § 20-4-50 (Law. Co-op. 1985).

1444. OKLA. STAT. ANN. tit. 22, § 60.3 (West 1989); UTAH CODE ANN. § 30-6-5(2) (Supp. 1993); W. VA. CODE § 48-2A-5(a) (Supp. 1993).

1445. ALASKA STAT. § 25.35.020 (1991); MASS. GEN. LAWS ANN. ch. 209A, § 4 (West Supp. 1993); UTAH CODE ANN. § 30-6-5(2) (Supp. 1993); VA. CODE ANN. § 16.1-253.1(A) (Michie Supp. 1993).

1446. W. VA. CODE § 48-2A-5(a) (Supp. 1993).

1447. DEL. CODE ANN. tit. 10, § 947 (Supp. 1993); MO. ANN. STAT. § 455.035 (Vernon 1986).

1448. GA. CODE ANN. § 19-13-3(b) (1991); HAW. REV. STAT. § 586-4 (Supp. 1992); IND. CODE § 34-4-5.1.2 (West Supp. 1993); N.M. STAT. ANN. § 40-13-4A (Supp. 1993).

1449. IDAHO CODE § 39-6308 (Supp. 1993); S.D. CODIFIED LAWS ANN. § 25-10-6 (1984); WASH. REV. CODE ANN. § 26.50.070(1) (West 1986 & Supp. 1993).

1450. ARIZ. REV. STAT. ANN. § 13-3602(C) (1989); WIS. STAT. ANN. § 813.12(3) (West

exists.[1451]

Case law confirms that the petitioner must show that she is at risk of imminent harm,[1452] and she must show this by a preponderance of the evidence.[1453] In most, if not all jurisdictions, evidence of recent physical violence, which may include visible injuries to the petitioner, is sufficient proof of imminent harm.[1454] However, visible evidence of physical harm is by no means required for a temporary protection order to be issued.[1455] The case law illustrates the broad variety of acts, threats, or situations which are sufficient to constitute imminent harm including: petitioner's fear that the respondent would kidnap their children;[1456] the respondent's visitation violations;[1457] physical abuse following the parties divorce;[1458] the respondent screaming "bitch" at the petitioner and driving off while she still had her hands on the car frame, resulting in her being thrown against a tree;[1459] an anonymous tip to the police that the batterer was trying to kill the petitioner;[1460] the respondent's harassment of petitioner;[1461] the respondent's verbal threats against petitioner;[1462] the re-

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Supp. 1993).

1451. VA. CODE ANN. § 16.1-253.4 (Michie Supp. 1993).

1452. Blazel v. Bradley, 698 F. Supp. 756 (W.D. Wis. 1988) (reversing issuance of *ex parte* protection order where petitioner did not show she was at risk of imminent harm when she alleged that the respondent assaulted her two weeks before but never alleged fear of an attack in the future); Capps v. Capps, 715 S.W.2d 547 (Mo. Ct. App. 1986) (stating that court should renew protection order, absent evidence of new abuse, if temporary protection order's lapsing would place petitioner in an immediate and present danger of abuse); Steckler v. Steckler, 492 N.W.2d 76 (N.D. 1992) (upholding the granting of a temporary protection order where wife petitioner met her burden of proving actual or imminent domestic violence by a preponderance of the evidence); Master v. Eisenbart, Wis. Ct. App. LEXIS 1270, at *9 (Sept. 18, 1991) (upholding finding of risk of immediate harm sufficient to issue a TRO where the police received a tip through a community "crimestoppers" information service that the respondent was trying to kill the petitioner).

1453. *Capps*, 715 S.W.2d 550; Steckler v. Steckler, 492 N.W.2d 76 (1992). Marquette v. Marquette, 686 P.2d 990, 993 (Okla. Ct. App. 1984) (rejecting appellant's argument that the trial court erred when it failed to impose on petitioner the "beyond a reasonable doubt" standard).

1454. *See, e.g.*, GA. CODE ANN. § 19-13-3 (1991); Eichenberger v. Eichenberger, 613 N.E.2d 678 (Ohio Ct. App. 1992); Ellibee v. Ellibee, 826 P.2d 462 (Idaho 1992).

1455. *See, e.g., Steckler*, 492 N.W.2d at 81.

1456. *See* Sanders v. Shepard, 541 N.E.2d 1150 (Ill. App. Ct. 1989).

1457. *See Steckler*, 492 N.W.2d at 78 (finding imminent danger based on the husband's visitation violations, and allegations of physical and verbal abuse following the divorce).

1458. *Id.*

1459. Capps v. Capps, 715 S.W.2d 547, 549 (Mo. Ct. App. 1986).

1460. Master v. Eisenbart, Wis. Ct. App. LEXIS 1270, AT *9 (Sept. 18, 1991).

1461. Marquette v. Marquette, 686 P.2d 990, 991-92 (Okla. Ct. App. 1984) (upholding the granting of an *ex parte* order based on petitioner's allegation in the petition that respondent

spondent throwing the children at the petitioner;[1463] and holding a gun to petitioner's head.[1464]

3. Need for Hearing Prior to Issuance of Temporary Protection Order

The importance of *ex parte* orders in the domestic violence context was strongly emphasized by the Supreme Court of Minnesota in *Matter of Baker*.[1465] In that case, the court held that the procedures of the Domestic Abuse Act do not have to satisfy the notice requirements of the marriage dissolution statute.[1466] The court concluded that an *ex parte* order is "central to the substantive relief provided for under the act."[1467] The court noted that notice or extensive justification for lack of notice would impede a victim's ability to obtain the immediate remedy and extraordinary relief the statute contemplates.[1468] Furthermore, the court even pointed out that such notice could in fact precipitate further domestic violence.[1469] The court concluded that in determining temporary custody, application of the best interest of the child standard is inappropriate in protection order cases, as it obviates the statutory direction to focus instead on the safety of the victim and the child.[1470]

Forty-two states, the District of Columbia, and Puerto Rico authorize courts to issue temporary protection orders *ex parte* based on a petitioner's affidavit or testimony.[1471] The case law embraces this

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assaulted her, continued to her harass her, made verbal threats against her, and threw the children and the children's toys at her).

1462. *Id.*; *see also Steckler*, 492 N.W.2d at 76.

1463. *Marquette*, 686 P.2d at 991.

1464. Koepke v. Loo, 23 Cal. Rptr.2d 34 (Cal. Ct. App. 1993) (upholding granting of temporary restraining order against ex-boyfriend after he held a gun to petitioner's head as she exited her apartment).

1465. 494 N.W.2d 282 (Minn. 1992).

1466. *Id.* at 286-87.

1467. *Id.* at 286.

1468. *Id.* at 286-87.

1469. *Id.* at 286.

1470. *Id.* at 290.

1471. ALA. CODE § 30-5-6 (1989); ALASKA STAT. § 25.35.020(b) (1991); ARIZ. REV. STAT. ANN. § 13-3602 (Supp. 1993); CAL. FAM. CODE §§ 5530, 5756 (West 1993); COLO. REV. STAT. ANN. § 14-4-102(3) (West Supp. 1993); CONN. GEN. STAT. ANN. § 46B-15 (West Supp. 1993); DEL CODE ANN. tit. 10, § 947 (Supp. 1993); D.C. CODE ANN. §16-1004 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1993); GA. CODE ANN. § 19-13-4 (Supp. 1992); HAW. REV. STAT. § 586 (1992); IDAHO CODE § 39-6306 (1993); 725 ILCS 5/112A-15 (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1 (West Supp. 1993); IOWA CODE ANN. § 236.5 (1985 & Supp. 1993); KAN. STAT. ANN. § 60-3107 (Supp. 1992); KY. REV. STAT.

approach as well. Courts have issued *ex parte* protection orders based on the sworn affidavit or testimony of the petitioner.[1472] Courts will issue a temporary protection order prior to a full evidentiary hearing if an opportunity for a hearing is promptly given to the respondent after the entry of the order.[1473] In Oregon, a court will conduct an *ex parte* hearing by telephone or in person within one judicial day after the petition is filed.[1474] In many jurisdictions the courts will issue emergency protection orders twenty-four hours a day.[1475] While a court has the authority to issue an *ex parte* order, it does not have the discretion under the domestic violence statute to deny an *ex parte* hearing to determine whether immediate and present danger of

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ANN. § 403.740 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2136 (West 1982); ME. REV. STAT. ANN. tit. 19, § 765 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-505 (1991); MINN. STAT. ANN. § 518B-01.4 (West Supp. 1993); MISS. CODE ANN. § 93-21-9 (Supp. 1993); MO. ANN. STAT. § 455-050 (Vernon Supp. 1993); NEV. REV. STAT. ANN. § 33-020 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 173-B-6 (1990); N.J. STAT. ANN. § 2C:25-28 (West Supp. 1993); N.Y. FAM. CT. ACT § 842 (McKinney Supp. 1994); N.D. CENT. CODE § 14-07.1 (1991); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4 (West Supp. 1994); OR. REV. STAT. § 107.718 (1991); PA. STAT. ANN. tit. 23, § 6108 (1991); R.I. GEN. LAWS § 15-15-4 (Supp. 1993); S.D. CODIFIED LAWS ANN. § 25-10-1 (1984); TENN. CODE ANN. § 36-3-605 (1991); TEX. FAM. CODE ANN. § 71.15 (West 1986); UTAH CODE ANN. § 30-6-5 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1104 (1989); VA. CODE ANN. § 16.1-253.4 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.070 (West Supp. 1993); W. VA. CODE § 48-2A-5 (1992); WIS. STAT. ANN. § 813.125 (West Supp. 1993); WYO. STAT. § 35-21-105 (Supp. 1993); P.R. LAWS ANN. tit. 8 § 621 (1992); *see also* MODEL CODE, *supra* note 15, §§ 305, 306. *But see In re* Baker, 481 N.W.2d 871 (Minn. Ct. App. 1992) (holding that an *ex parte* temporary restraing order should not have been issued when no attempt to contact the husband was made).

1472. Pendleton v. Minichino, 1992 Conn. Super. Ct. LEXIS 915 (April 2, 1992) (requiring affidavit under oath and judicial involvement for *ex parte* order to reduce risk of erroneous deprivation); Eichenberger v. Eichenberger, 613 N.E.2d 678 (Ohio Ct. App. 1992).

1473. People v. Forman, 546 N.Y.S.2d 755 (N.Y. Crim. Ct. 1989) (holding that temporary protection order can issue without an evidentiary hearing if defendant is accorded his right to a hearing promptly after the order's issuance).

1474. Marshall v. Hargreaves, 725 P.2d 923 (Or. 1986) (conducting an ex parte hearing in person or by telephone within one judicial day after petitioner files for her temporary protection order); *see also* MODEL CODE, *supra* note 15, § 305.

1475. ALA. CODE § 30-5-7 (1989); COLO. REV. STAT. ANN. § 14-4-103(a) (West Supp. 1993); FLA. STAT. ANN. § 741.30 (West Supp. 1993); IOWA CODE ANN. § 236.5 (Supp. 1992); KAN. STAT. ANN. § 60-3105 (Supp. 1992); KY. REV. STAT. ANN. § 403.740 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46-2135 (West Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 765 (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MISS. CODE ANN. § 93-21-11 (Supp. 1993); MO. ANN. STAT. § 455.050 (Vernon Supp. 1993); N.J. STAT. ANN. § 2C:25-28 (West Supp. 1993); N.Y. FAM. CT. ACT § 828 (McKinney Supp. 1994); PA. STAT. ANN. tit. 23, § 6110 (Supp. 1993) (emergency relief available where by filing petition before hearing officer); R.I. GEN. LAWS § 15-15-4 (Supp. 1993); S.C. CODE ANN. § 20-4-70 (Law. Co-op. 1985); VA. CODE ANN. § 16.1-253.4 (Michie Supp. 1993); *see also* MODEL CODE, *supra* note 15, § 305.

abuse exists. In *Marshall v. Hargreaves*,[1476] the Supreme Court of Oregon held that a circuit judge did not have the discretion to deny a hearing to determine the existence of immediate or present abuse for purposes of issuing an *ex parte* temporary protection order even though the petitioner has twice before requested, received, and then dismissed such orders based on essentially the same allegations.[1477] The statute requires, not just permits, an *ex parte* hearing to determine the merits of the petition before a request for a temporary protection order may be denied.[1478]

4. Authority to Issue Temporary Protection Orders *Ex Parte*

Temporary protection orders may issue in both civil and criminal cases. In *State v. Naegele*,[1479] a criminal case, the Ohio Court of Appeals held that an *ex parte* temporary protection order issued as a nonmonetary condition of pretrial release does not violate the defendant's right to bail where the state has a strong interest in protecting the defendant's family members.[1480]

5. Constitutionality of Temporary Protection Orders

To date, courts have rejected challenges to *ex parte* relief granted in protection orders.[1481] This reflects the overriding judicial acceptance of the need for immediate protection of abuse victims and their families without prior notice and hearing for the respondent. Reported case law consistently upholds the constitutionality of *ex parte* temporary protection orders provided that the respondent is promptly afford-

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1476. 725 P.2d 923 (Or. 1986).

1477. *Id.* at 925.

1478. *Id.*

1479. No. 920 (Ohio Ct. App. Nov. 19, 1980).

1480. *Id.*; *see also* State v. Dawson, No. 79AP-565 (Ohio Ct. App. Oct. 18, 1979) (preventing the defendant from entering his own home upon motion of the state according to statute which permits the judge to issue a temporary protection order as a pre-trial condition of release); People v. Derisi, 442 N.Y.S.2d 908 (Suffolk Cty. Ct. 1981) (stating that orders of protection may be made a condition of release on bail).

1481. Blazel v. Bradley, 698 F. Supp. 756 (W.D. Wis. 1988) (holding that *ex parte* orders do not violate due process generally but in this case was wrongly issued because no imminent harm was shown); People v. Forman, 546 N.Y.S.2d 755 (N.Y. Crim. Ct. 1989) (holding temporary protection order may issue without evidentiary hearing so long as one is held promptly after issuing the order); *In re* Penny R., 509 A.2d 338 (Pa. Super. Ct. 1986) (holding that due process required a hearing review within 10 days of *ex parte* temporary protection order which discontinued visitation rights); Boyle v. Boyle, 12 Pa. D. & C.3d 767 (Ct. C.P. 1979) (holding *ex parte* eviction of batterer does not violate due process where the deprivation is temporary, of last resort and does not change the title of property).

ed a hearing.[1482] Courts have routinely held that balanced against the important state interest in protecting domestic violence victims from further abuse, *ex parte* temporary protection orders which temporarily deprive the respondent of property, visitation, or other rights subject to a subsequent prompt hearing survive procedural due process challenges.[1483] Courts have held constitutional the denial of visitation rights for ten days,[1484] the suspension of visitation for fourteen days,[1485] and the eviction from home and suspension of visitation for fifteen days.[1486] Some courts emphasize that the procedural safeguards, including sworn affidavits and mandated judicial involvement, protect against erroneous deprivation of property or rights and therefore insulate *ex parte* temporary protection order's from due process attacks.[1487]

6. Extension of Temporary Protection Orders

Case law splits regarding whether temporary protection orders are extendable. Some courts have refused to extend *ex parte* temporary protection orders without a hearing beyond fourteen days,[1488] and

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1482. *Id.*

1483. Pendleton v. Minchino, 1992 Conn. Super. Ct. LEXIS 915, at *7 (Conn. Super. Ct. April 2, 1992) (holding *ex parte* order which suspended visitation for 14 days until hearing did not violate due process); Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (holding *ex parte* order excluding respondent from home and prohibiting contact with children for 15 days prior to hearing did not violate due process); People v. Derisi, 442 N.Y.S.2d 908 (Suffolk County Ct. 1981) (respondent must be granted prompt hearing after *ex parte* temporary protection order denied him access to his home and personal belongings); Marquette v. Marquette, 686 P.2d 990 (Okla. Ct. App. 1984) (holding *ex parte* order which restrained respondent from communicating with his wife and effectively denied visitation with his children for 10 days prior to the hearing did not violate procedural due process).

1484. Deacon v. Landers, 587 N.E.2d 395 (Ohio Ct. App. 1990) (holding *ex parte* order which restrained respondent from communicating with his wife and effectively denied visitation with his children for 10 days prior to the hearing did not violate procedural due process); *Marquette*, 686 P.2d 990.

1485. *Pendleton*, 1992 Conn. Super. Ct. LEXIS 915, at *34 (holding *ex parte* order which suspended visitation for 14 days until hearing did not violate due process).

1486. *Williams*, 626 S.W.2d at 232 (holding *ex parte* order excluding respondent from home and prohibiting contact with children for 15 days prior to hearing did not violate due process).

1487. Sanders v. Shepard, 541 N.E.2d 1150 (Ill. App. Ct. 1989) (holding that an *ex parte* emergency order supported by affidavits which demonstrate exigent circumstances, in this case fear of concealment of a child, does not violate procedural due process); *Pendleton*, 1992 Conn. Super. Ct. LEXIS 915 at *34 (holding was in part because procedures requiring an affidavit under oath and judicial involvement in issuing such protected against erroneous deprivation of rights).

1488. Nohner v. Anderson, 446 N.W.2d 202 (Minn. Ct. App. 1989) (reversing the trial court's continuance of an *ex parte* order until an evidentiary hearing two months later, hold-

beyond five days.[1489] Case law has also limited temporary spousal support to two weeks,[1490] and capped extensions and duration of temporary protection orders to thirty days, even if the respondent previously consented to a continuance but now asserts the temporary protection order has expired.[1491]

However, courts in Ohio and New York have extended temporary protection orders. In *Eichenberger v. Eichenberger*,[1492] the Ohio Court of Appeals held that in light of the trial court's heavy docket the court did not error when, after continuing a temporary protection order hearing twice, it failed to rule on the temporary protection order within seven days.[1493] The court concluded that the limited delay did not jeopardize the integrity or constitutionality of the process.[1494] In *People v. Forman*,[1495] the court found sufficient evidence to continue a temporary protection order excluding respondent from the residence for an additional two weeks based on evidence that he punched his wife in the mouth and knocked out one of her two front teeth.[1496]

The New Hampshire domestic abuse statute illustrates an innovative statutory authorization for temporary protection orders.[1497] The New Hampshire code does not limit the duration of the temporary protection order remedies, but rather states that "[i]f temporary orders are made *ex parte*, the party against whom such relief is issued may file a written request with the clerk of the court and request a hearing thereon."[1498] If the respondent does not challenge the order or re-

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ing that an *ex parte* temporary protection order may not be extended for more than 14 days without a full hearing and findings of domestic abuse).

1489. Zerhusen v. Zerhusen, 543 A.2d 686 (Md. Ct. Spec. App. 1988) (holding courts have no authority to enter an *ex parte* protection order that lasts for more than five days and courts may not extend such order beyond the statutory five day period).

1490. Brookhart v. Brookhart, 17 Pa. D. & C.3d 795 (1981) (awarding temporary support at evidentiary hearing would become void after two weeks unless the petitioner filed for support under the Civil Procedural Support Act during that time).

1491. Keneker v. Keneker, 579 So. 2d 1083 (La. Ct. App. 1991) (upholding the limiting of the duration of a temporary restraining order on behalf of minor child whose custodial parent allegedly engaged in inappropriate sexual behavior to 30 days holding that the respondent did not waive his right to assert that the temporary protection order expired even though he had earlier consented to its continuance).

1492. 613 N.E.2d 678 (Ohio Ct. App. 1992).

1493. *Id.* at 682-83.

1494. *Id.*

1495. 546 N.Y.S.2d 755 (N.Y. Crim. Ct. 1989).

1496. *Id.* at 759-60.

1497. N.H. REV. STAT. ANN. § 173B:6 (1990).

1498. *Id.*; *see also* OR. REV. STAT. § 107.718(6)(b) (1991); MODEL CODE, *supra* note 15,

quest a hearing, the temporary protection order remedies are left undisturbed.[1499] Under this procedural framework, civil protection order hearings are only scheduled at the request of either party and hearings are held expeditiously within the constitutional time frame.[1500]

7. Appeal of Temporary Protection Orders

Courts differ regarding whether a temporary protection order is appealable. Most jurisdictions which have addressed the issue, however, permit the respondent to appeal the temporary protection order where the respondent challenged, on procedural due process grounds, the *ex parte* nature of the order. In this context, courts have permitted appeals of temporary protection orders entered regarding temporary custody,[1501] temporary visitation,[1502] and no contact with the petitioner.[1503] Temporary protection orders entered as a condition of pretrial release have also been found to be appealable.[1504]

Courts in North Carolina and Ohio, however, have held that temporary protection orders are not appealable.[1505] In *State v. Dawson*, the Ohio Appeals Court held that a temporary protection order ordering the respondent to stay away from the petitioner's home was not appealable.[1506] In *Smart v. Smart*, the North Carolina Court

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§ 308 (authorizing either party to request a hearing to contest or expand relief).

1499. N.H. REV. STAT. ANN. § 173B:6 (1990).

1500. *Id.*

1501. Sanders v. Shepard, 541 N.E.2d 1150 (Ill. App. Ct. 1989) (denying father's appeal of temporary protection order ordering him to produce the parties' minor child since he did not raise a due process objection at the hearing where the *ex parte* emergency protection order did not violate notice due process requirements); Matter of Baker, 481 N.W.2d 871 (Minn. Ct. App. 1992) (reversing a temporary custody award in an *ex parte* temporary protection order due to the absence of particularized findings stating reasons for proceeding *ex parte* based on best interest of the child factors and deficient notice procedures).

1502. Campbell v. Campbell, 584 So.2d 125 (Fla. Dist. Ct. App. 1991) (upholding nonfinal order suspending respondent's visitation rights).

1503. Eichenberger v. Eichenberger, 613 N.E.2d 678 (Ohio Ct. App. 1992) (rejecting respondent's appeal of an initial temporary protection order finding that allegations in the petitioner's affidavit were sufficient to support the order); Schramek v. Bohren, 429 N.W.2d 501 (Wis. Ct. App. 1988) (dismissing wife's action challenging husband's temporary protection order against her on constitutional due process grounds).

1504. *See* People v. Derisi, 442 N.Y.S.2d 908 (Suffolk County Ct. 1981) (allowing respondent to appeal a temporary protection order ordering respondent to vacate his home without a prior hearing or prompt post order hearing).

1505. *See* Smart v. Smart 297 S.E.2d 135 (N.C. Ct. App. 1982); State v. Dawson, No. 79AP-565 (Ohio Ct. App. Oct. 18, 1979).

1506. *Dawson*, No. 79AP-565.

of Appeals held that a temporary protection order granting temporary custody to the petitioner and ordering the respondent to vacate the residence and turn over the keys to the police was not appealable.[1507] In both cases, the courts emphasized the non-final nature of temporary protection orders, and concluded that such orders are not appealable since they are not the ultimate disposition of the controversy.[1508] A petitioner may also not appeal a denial of interlocutory injunctive relief where no underlying claim for permanent injunction relief is before the court.[1509]

I. Standards of Proof

Twenty-one states and the District of Columbia, either by statute or case law, provide that petitioners for civil protection orders must prove by a preponderance of the evidence[1510] that the court should issue a protection order against respondent. A minority of six states provide that the petitioner must prove by a preponderance of the

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1507. *Smart*, 297 S.E.2d at 137.

1508. *Smart*, 297 S.E.2d 137-38; *Dawson*, No. 79AP-565.

1509. Spearman v. Dupree, 342 N.W.2d 755 (Wis. Ct. App. 1983) (court denied appeal of interlocutory injunctive relief where the petitioner had no claim for permanent injunctive relief against abuse and the interlocutory relief, issued only during the pendency of litigation for short term protection to prevent irreparable injury until the court makes a final order, is not an action and cannot stand alone).

1510. *See, e.g.*, ALA. CODE § 30-5-6(a) (1989); DEL. CODE ANN. tit. 10, § 948 (Supp. 1993); D.C. CODE ANN. § 16-1005(c) (1989); GA. CODE ANN. § 19-13-3(c) (1991); 750 ILCS 60/205 (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-5.1-5(a) (Burns 1992); IOWA CODE ANN. § 236-4.1 (1995 & Supp. 1993); LA. REV. STAT. ANN. § 46:2135(B) (West 1982); ME. REV. STAT. ANN. tit. 19, § 765(1) (West 1981 & Supp. 1993); MISS. CODE ANN. § 93-21-11(1) (Supp. 1993); MO. ANN. STAT. § 455.516.1 (Vernon Supp. 1993); N.J. STAT. ANN. § 2C:25-29 (West Supp. 1993); N.H. REV. STAT. ANN. § 173B:4(I) (1990); N.Y. FAM. CT. ACT § 832 (McKinney Supp. 1994); 23 PA. CONS. STAT. ANN. § 6107(a) (1991); S.D. CODIFIED LAWS ANN. § 25-10-5(6) (1984); TENN. CODE ANN. § 36-3-605 (1991); UTAH CODE ANN. § 30-6-5(4) (Supp. 1993); VT. STAT. ANN. tit. § 15, § 1104(b) (1989); VA. CODE ANN. § 16.1-253.1 (Michie Supp. 1993); W. VA. CODE § 48-2A-5(b) (1992); Cruz-Foster v. Foster, 547 A.2d 927 (D.C. 1991) (granting renewal of protection order on showing of preponderance of the evidence); Capps v. Capps, 715 S.W.2d 547, 549 (Mo. Ct. App. 1986) (same); Roe v. Roe, 601 A.2d 1201, 1206 (N.J. Super. Ct. App. Div. 1992) (holding preponderance of the evidence standard is proper in that it best serves the purposes of the act since there are seldom eyewitnesses to domestic violence leading to enhanced credibility problems).

In states where the statute leaves the question open, courts have rejected imposing higher burdens of proof than a preponderance of the evidence. *See, e.g.*, *In re* Marriage of Hagaman, 462 N.E.2d 1276 (Ill. App. Ct. 1984) (holding higher standard of proof required for divorce not required to obtain civil protection order); Marquette v. Marquette, 686 P.2d 990 (Okla. Ct. App. 1984) (holding "beyond a reasonable doubt" standard of proof is not required at protection order trial since the complaining party is the victim of abuse rather than the state).

evidence that she is facing a clear and present danger or an imminent danger.[1511] Oregon goes into further detail and recognizes that the imminent danger can exist when there has been either actual abuse or the recent threat of bodily harm.[1512] Four state statutes use a "reasonable grounds to believe" or "reasonable cause to believe" standard and require that abuse occurred,[1513] that there is an emergency,[1514] or that the petitioner is in "immediate and present" danger.[1515]

The standard of proof can usually be met by showing that the respondent has subjected petitioner to recent abuse.[1516] Many jurisdictions have acknowledged that past abuse is a factor to consider in determining whether the standard of proof has been met.[1517] These

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1511. COLO. REV. STAT. ANN. § 14-4-102(4) (West Supp. 1993); FLA. STAT. ANN. § 741.30(6)(a) (West Supp. 1993); IDAHO CODE § 39-6306(1) (1993); OR. REV. STAT. § 107.718(1) (1991); TEX. FAM. CODE ANN. § 71.15(a) (West 1986); Coughlin v. Lancione, 1992 Ohio Ct. App. LEXIS 874, at *2 (Feb. 25, 1992) (holding that the evidence must be unequivocal that a person was in fear of imminent harm. Here, the record was found to be devoid of statements attributed to the defendant that "could reasonably lead one to be in fear of imminent serious physical harm"; the trial court, therefore, abused its discretion in issuing the protection order).

1512. OR. REV. STAT. § 107.718(2) (1991).

1513. ARIZ. REV. STAT. ANN. § 13-3602(D) (West Supp. 1993); WIS. STAT. ANN. § 813.12(3)(a)(2) (West Supp. 1993).

1514. VA. CODE ANN. § 16.1-253.4(A)-(B) (Michie Supp. 1993).

1515. CAL. FAM. CODE § 5650 (West 1993).

1516. *Cf.*, Harriman v. Harriman, No. 97826, 1990 Conn. Super. Ct. LEXIS 1200 (Sept. 25, 1990) (denying application for relief and dismissing all temporary orders previously granted where father failed to prove that her or his child had been subjected to abuse as defined under the statute, "despite evidence that the [mother's] boyfriend may have spanked the child on one occasion").

1517. *See* Boniek v. Boniek, 443 N.W.2d 196, 198 (Minn. Ct. App. 1989) (finding sufficient evidence of past abuse to show present intent to inflict fear of imminent physical harm, bodily injury or assault); Parkhurst v. Parkhurst, 793 S.W.2d 634, 635-36 (Mo. Ct. App. 1990) (issuing protection order when last incident of abuse, which occurred two months prior to the civil protection order petition, was accompanied by present fear of violence by respondent husband); Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992) (holding that evidence of prior acts of domestic violence were properly admitted into evidence pursuant to the domestic violence act); Grant v. Wright, 536 A.2d 319, 321 (N.J. Super. Ct. App. Div. 1988) (upholding the issuance of an emergency restraining order under the domestic violence act based upon a finding of past harassment at the civil protection order hearing absent a finding that the plaintiff was in present danger of domestic violence); Strollo v. Strollo, 828 P.2d 532, 534-35 (Utah Ct. App. 1992) (admitting evidence of past abuse coupled with present fear of future abuse where defendant threatened to kill petitioner if she divorced him and he had beaten her for eight and a half years, most recently seven months before).

Minnesota makes it most difficult for a petitioner to obtain a protection order by holding that evidence of past abuse is insufficient to show present danger to the petitioner. *See* Andrasko v. Andrasko, 443 N.W.2d 228, 230 (Minn. Ct. App. 1989) (holding that a domestic abuse protection order was improperly issued because, although specific incidents of past abuse were alleged, there was no evidence of any intent to do present harm or a show-

states have recognized the cycle of abuse characteristic of domestic violence as one in which there is a tension building phase, a violent outburst, and a calm period.[1518] One incident of abuse, no matter how remote in time, can be indicative of future and more severe violence.[1519] Past abuse, therefore, can create present fear in the petitioner, and can signify the present intention of the batterer to do her harm.[1520]

Courts enforcing protection orders have held that a petitioner can meet the beyond a reasonable doubt standard of proof required to prove a civil protection order violation based upon petitioner's testimony alone.[1521] The court in *People v. Blackwood* found that uncorroborated testimony of the plaintiff regarding threats was sufficient to meet the higher standard of proof necessary to prove criminal contempt of a civil protection order despite the lack of other witnesses.[1522] Just as uncorroborated testimony of abuse was sufficient to meet a beyond a reasonable doubt standard of proof for contempt in *Blackwood*, it should also be sufficient to meet the lower standard of proof required for the issuance of the initial civil protection order.

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ing of present harm as required by the Minnesota act); Bjergum v. Bjergum, 392 N.W.2d 604, 605-06 (Minn. Ct. App. 1986) (finding that the evidence, including the husband's admission that he had abused his wife in 1984, and the wife's unsubstantiated allegation that her husband had abused their children near the end of 1985, was insufficient to establish the husband's present intention to do harm or inflict fear of harm and thus did not warrant a protection order); Kass v. Kass, 355 N.W.2d 335, 337 (Minn. Ct. App. 1984) (finding that the evidence was insufficient to sustain the issuance of an order for protection pursuant to the Minnesota Domestic Violence act because the only incidents of abuse were several years before and there was no present harm or intention to do harm).

1518. BROWNE, *supra* note 171, at 68. While batterers are often remorseful following a battering incident, the percentage that show remorse declines over time as violence continues. While over 87% showed sorrow and remorse after the first incident, this figure declines to 73% after the second incident and only 58% after the third or one of the worst incidents. *Id.*

1519. *See* DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 17-46 ("Domestic violence is not an isolated, individual event. One battering episode builds on past episodes and sets the stage for future episodes. All incidents of the pattern interact with each other and have a profound effect on the victim. There is a wide range of consequences, some physically injurious and some not; all psychologically damaging.").

1520. Follingstad et al., *supra* note 317, at 115. In a study of psychological abuse in abusive relationships, 54% of battered women use escalating levels of emotional abuse to predict physical abuse.

1521. People v. Blackwood, 476 N.E.2d 742, 743 (Ill. App. Ct. 1985) (affirming defendant's conviction of contempt of civil protection order where ex-wife testified to an encounter where defendant called her a "fucking whore," "a dead bitch," and told her that "he had a plot waiting for her." Defendant denied making such remarks, and no other witnesses testified. The court ruled that the evidence was sufficient to meet the standard of beyond a reasonable doubt).

1522. *See id.*

One court, when faced with the issue of accepting petitioner's unsupported testimony, noted that the petitioner's failure to call the police was not a basis for challenging the petitioner's credibility.[1523] The court in *Blackwood* recognized that the credibility of the petitioner must be assessed in light of the dynamics of domestic violence and the effect of the power and control relationship on the parties.[1524] Her ability to meet the standard of proof necessary to obtain a civil protection order must be determined while keeping these issues in mind.[1525]

Three jurisdictions explicitly provide by statute that a petitioner can extend her protection order for good cause.[1526] The judge presiding over the civil protection order hearing uses his or her discretion to determine whether good cause for extension exists.[1527] Case law suggests that in order to show good cause, the petitioner must meet the same general standards of proof she met upon her initial request for the civil protection order.[1528] She must usually show by a preponderance of the evidence that she is still in fear of harm by

1523. Betts v. Floyd, No. CX-91-2155, 1992 Minn. Ct. App. LEXIS 257, at *2 (Mar. 12, 1992) (where petitioner presented testimony and other evidence supporting her allegations of abuse and respondent argued that she could not be believed because she did not complain to the police when the police were called, the fact finder's issuance of a civil protection order based on a determination of petitioner's credibility will not be overturned; case was reversed on other grounds).

1524. *Blackwood*, 476 N.E.2d at 745.

1525. Battered women, especially those who have been victimized over a long period, tend to underestimate both the frequency and the severity of the violence they experience when their reports are compared to witnesses' reports, hospital recordes, etc. *See* BROWNE, *supra* note 171, at 10; *see also* DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 38-39. Some of the victim's behaviors within the court system can be understood in light of the control the batterer has managed to enforce by isolating the victim. Through incremental isolation of the victim, some batterers can increase their psychological control of the victim to the point that they literally determine reality for the victim. The psychological control tactics used by batterers are similar to those used in brainwashing prisoners of war and hostages. The more successful the batterer has been at isolating the victim, the more he controls what she believes and does.

1526. *See* D.C. CODE ANN. 16-1005(d) (1989) (granting extensions of protection orders for good cause); 725 ILCS 5/112A-20(e) (Smith-Hurd Supp. 1993) (extensions only for good cause shown); N.M. STAT. ANN. § 40-13-6(B) (Michie Supp. 1993) (allowing extensions of protection orders for up to six months upon a showing of good cause); Maldonado v. Maldonado, 631 A.2d 40, 42 (D.C. 1993) (noting that a civil protection order can be extended for good cause); Cruz-Foster v. Foster, 597 A.2d 927, 929 (D.C. 1991) (noting that a protection order may be modified, extended or rescinded upon a showing of good cause). For a full discussion of civil protection order extensions, see *infra* notes 1749-64 and accompanying text.

1527. *Maldonado*, 631 A.2d at 42.

1528. *See Cruz-Foster*, 597 A.2d at 930 & n.3.

the respondent.[1529]

Fear of harm may be assessed, as in cases of civil protection order issuance, in light of past abuse and prior protection orders.[1530] In fact, the judge issuing a civil protection order can be found to abuse his or her discretion in determining whether good cause for extension exists if he or she fails to consider the history of abuse between the parties or the provisions of any prior protection orders.[1531] As the court held in *Cruz-Foster v. Foster*, the effect of the stay-away order on the question of whether the civil protection order should be extended must be considered.[1532] The court further held that in deciding whether to extend a protection order issued pursuant to the District's Intrafamily Offenses Act[1533] beyond one year, the "entire mosaic" should be considered, including all episodes of violence during the parties' marriage.[1534] Therefore, the court may not simply rely on a lack of recent episodes of physical abuse to deny extension of the protection order.

Extension of a civil protection order should not be denied solely because the respondent is incarcerated.[1535] As the court held in *Maldonado v. Maldonado*, incarceration does not preclude a showing of good cause.[1536] The court based its holding upon several factors including the effect termination of the civil protection order would have on child support payments, and the possibility that respondent would be released before anticipated, would escape, or would gain access to a telephone or a third party through whom he could harass petitioner.[1537] The court stated that:

> [A]lthough a [civil protection order] does not guarantee that such conduct will not occur, it nonetheless serves as some deterrent.

1529. *See, e.g.*, Jenkins v. Jenkins, 784 S.W.2d 640, 644 (Mo. Ct. App. 1990) (finding sufficient evidence to support the decision to extend the order since the wife would be placed in a position of immediate and present danger of abuse if the order were not extended).

1530. *See, e.g., Boniek*, 443 N.W.2d at 198.

1531. *Cf. Maldonado*, 631 A.2d at 42-3.

1532. *Cruz-Foster*, 597 A.2d at 930-31 (remanding case to trial judge to consider the effect of a stay-away order on the question of whether a civil protection order should be extended).

1533. D.C. CODE § 16-1001 (1989).

1534. *Cruz-Foster*, 597 A.2d at 930-31.

1535. *Maldonado*, 631 A.2d at 42 (holding that the trial court judge abused his discretion in finding that good cause for extension of civil protection order did not exist when respondent was "locked up").

1536. *Id.*

1537. *Id.* at 43-44.

> Thus, we conclude that even if the husband remained incarcerated, that circumstance would not prevent him from engaging in conduct, either alone, through others, or both, that would be barred by the [civil protection order] if it had been extended.[1538]

Modification of civil protection orders can occur upon a showing of good cause[1539] or a substantial change in circumstances.[1540]

J. Efforts to Improve Accessibility to the Courts for Battered Women Appearing Pro Se

1. The Need to Make Courts Accessible to Domestic Violence Victims[1541]

The National Council of Juvenile and Family Court Judges recommends that court facilities be specifically designed to provide protection and security for victims and their witnesses. The Council states that "[v]ictims and witnesses awaiting hearings in family violence cases are frequently intimidated by defendants in the same room or waiting area . . . . Courts must provide secure, separate waiting areas for victims in family violence cases because of the likelihood of threat, intimidation, harassment or recurring violence."[1542]

The vast majority of domestic violence victims in every jurisdiction come to court seeking civil protection orders without the assistance of counsel.[1543] Appearing *pro se* is difficult for the terrified victim of abuse, often encountering the court system for the first

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1538. *Id.* at 43.

1539. N.J. STAT. ANN. § 2C:25-29(d) (West Supp. 1993); N.Y. FAM. CT. ACT § 844 (McKinney 1983).

1540. MO. ANN. STAT. § 455.528(1) (Vernon Supp. 1993); VT. STAT. ANN. tit. § 15, § 1103(b) (1989). For a full discussion of civil protection order modifications, see *infra* notes 1743-48 and accompanying text.

1541. *See* MODEL CODE, *supra* note 15, § 313.

1542. FAMILY VIOLENCE PROJECT, *supra* note 687, at 39; *see also* Bozer v. Higgins, 596 N.Y.S.2d 634, 637-38 (Sup. Ct. 1992). In *Bozer*, the court upheld a security policy which required all persons entering the court to pass through a magnetometer and have their briefcases searched on the grounds that, like airport searches, it was consensual and protection to those in court outweighed the intrusiveness of the search. *Id.* The court gained support for its holding from a federal case which noted that "the need to protect Family Courts from the very real potential for violent incidents more than justifies the use of magnetometers. the emotional stresses of divorce proceedings . . . [and] domestic violence are fertile grounds for violent incidents in Family Court." Legal Aid Society of Orange County v. Crosson, 784 F. Supp. 1127, 1130 (S.D.N.Y. 1992).

1543. D.C. TASK FORCE, *supra* note 213, at 143. Based on research conducted by a special task force, it is estimated conservatively that in most jurisdictions at least 66% of domestic violence victims appear at civil protection order courts *pro se*.

time. Petitioners must not be dissuaded from seeking protection from the courts due to their fear and lack of knowledge about courtroom procedures. Jurisdictions have responded to the needs of these petitioners applying for protection *pro se* in several ways.[1544]

Both state statutes and case law encourage and require court employees to assist petitioners in filing for civil protection orders.[1545] Twenty-one states permit designated court employees to assist with preparation and filing of petitions for protection orders.[1546]

1544. DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note 23, at 39. The author of this section of the book suggests the following court procedures: ensuring that a safe place is available in the court house for abused parties to wait until their case is called; requiring that the parties sit on opposite sides of the court room; calling domestic violence cases as early as possible on the court calendar or having a calendar that is solely for domestic violence cases; ensuring that any statements made from the bench indicating that the court takes evidence of domestic violence seriously in the cases before it; using court policy to assure the safety of the abused party by ordering the alleged abuser to remain in the courtroom until the abused party has left the building; ordering the bailiff to accompany the abused party to transportation; having multiple actions with the same parties remain under the jurisdiction of one judge. *Id.*

1545. *See* MODEL CODE, *supra* note 15, §§ 302, 510 (including training for court personnel).

1546. ARK. CODE ANN. § 9-15-203(a) (Michie 1993) (the clerks of the court shall provide simplified forms and clerical assistance to help petitioners with the writing and filing of a petition if the petitioner is not represented by counsel); DEL. CODE ANN. tit. 10, § 946(d) (Supp. 1993) (court provides forms and instructions in simple understandable English; court staff shall assist in filing all necessary papers); FLA. STAT. ANN. § 741.30(3)(c)(1)-(2) (West Supp. 1993) (clerk assists petitioners in obtaining injunctions and provides simplified forms with instructions); GA. CODE ANN. § 19-13-3(d) (1991) ("Family violence shelter or social service agency staff members designated by the court may explain to all victims not represented by counsel the procedures for filling out and filing all forms and pleadings necessary for the presentation of their petition to the court. The clerk of the court may provide forms for petitions and pleadings to victims of family violence or to any other person designated by the superior court . . . authorized to advise victims on filling out and filing such petitions and pleadings. The clerk shall not be required to provide assistance to persons in completing such forms or in presenting their case to the court. Any assistance provided . . . shall be performed without cost to the petitioners. The performance of such assistance shall not constitute the practice of law . . . ."); HAW. REV. STAT. § 586-3(d) (1985) (family court designates employee or nonjudicial agency to provide forms and assist the person completing the application); 750 ILCS 60/205(b)(3) (Smith-Hurd Supp. 1993) (domestic abuse advocates to assist victims in preparing petitions); KY. REV. STAT. ANN. § 403.730(2) (Michie/Bobbs Merrill Supp. 1992) (provide accept and file forms requesting protection order); LA. REV. STAT. ANN. § 46:2138 (West Supp. 1993) (make applications available, provide clerical assistance to the petitioner, advise indigent applicants of the availability of filing in forma pauperis, and provide notary services); ME. REV. STAT. ANN. tit. 19, § 764 (2) (West Supp. 1992) (provide forms and clerical assistance in completing and filing complaint and other necessary documents; assistance may not include legal advice; clerk provides written notice of resources where plaintiff may receive legal and social service assistance); MINN. STAT. ANN. § 518B.01(4)(d)-(f) (West Supp. 1993) (court provides simple forms and clerical assistance to help write and file petitions; court shall advise petitioner of right to file a motion and affida-

A Minnesota court upheld provisions of the Domestic Abuse Act that require the court to provide forms and clerical assistance to help with the writing and filing of petitions, to advise the petitioners of their rights to file a motion and affidavit and to sue in forma pauperis, and to assist with the writing and filing of motions and affidavits.[1547] The offering of these services by Court employees did not constitute an unconstitutional violation of the separation of powers doctrine. Oklahoma has upheld the right of the courts to issue preprinted court forms which the petitioner can fill out and file as a request for a civil protection order against a due process challenge.[1548]

Twenty-three states and the District of Columbia do not require filing fees from civil protection order petitioners.[1549] Of those states

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vit and to sue in forma pauperis and shall assist in writing and filing the motion and affidavit; court shall assist in serving respondent by published notice); MO. ANN. STAT. § 455.508 (Vernon Supp. 1993) (explain to unrepresented petitioners the procedures for filing all forms and pleadings; advise petitioner of right to file a motion and affidavit to sue in forma pauperis; notice of available clerk assistance will be conspicuously posted; assistance is provided without cost to petitioners); NEV. REV. STAT. § 33.050(3) (1986) (clerk of court shall assist any party in completing and filing the application, affidavit, and any other paper or pleading necessary to initiate or respond to petition; assistance does not constitute the practice of law); N.J. STAT. ANN. § 2C:25-28(c) (1992) (clerk or other designated employee assists petitioner in completing necessary forms for filing summons, complaint or other pleading); N.Y. FAM. CT. ACT § 823(a)(i) (McKinney 1983) (rules of court authorize probation service to confer with potential petitioner's about filing petition); OKLA. STAT. ANN. tit. 22, § 60.2(D) (Supp. 1992) (at request of plaintiff, the clerk of the court shall prepare or assist the plaintiff in preparing the petition); OR. REV. STAT. § 107.718(3) (1991) (clerk provides forms and instruction brochure explaining rights under the statute); PA. STAT. ANN. tit. 23, § 6106(g) (1991) (courts and hearing officers shall provide simplified forms and clerical assistance in English and Spanish to help with the writing and filing of the petition for protection by an unrepresented petitioner; advise petitioner of right to file an affidavit in forma pauperis, and assist with the writing and filing of affidavit); UTAH CODE ANN. § 30-6-4(1)-(2) (Supp. 1993) (provide forms and assistance and inform unrepresented plaintiffs of possibility of filing in forma pauperis and of means available for the service of process); WASH. REV. CODE ANN. § 26.50.030(3) (West Supp. 1993) (all clerks offices provide forms, instructions, and informational brochures, and names and telephone numbers for community resources; assistance provided by clerks is not the practice of law); W. VA. CODE § 48-2A-4(e) (Supp. 1993) (magistrate courts are to provide assistance to certain petitioners); WYO. STAT. § 35-21-103(e) (Supp. 1993) (provide standard forms with instructions for completion).

1547. State v. Errington, 310 N.W.2d 681, 682-83 (Minn. 1981).

1548. *Cf.* Marquette v. Marquette, 686 P.2d 990, 994-96 (Okla. Ct. App. 1984) (upholding civil protection order and temporary protection order, which were obtained using pre-printed court forms, on the ground that there were procedural safeguards sufficient to satisfy defendant's due process rights, given the interest of the state in protecting victims of domestic violence).

1549. ALA. CODE § 30-5-1 to -11 (1989); CAL. FAM. CODE § 5512(a) (West 1993); COLO. REV. STAT. ANN. § 14-4-102 (West Supp. 1993); D.C. CODE ANN. § 16-1004 (1989); Ga. Code Ann. § 15-6-77(a) (1991); HAW. REV. STAT. § 586-3 (1985 & Supp. 1992); IDAHO CODE § 39-6305 (1993); 750 ILCS 60.202(b) (Smith-Hurd Supp. 1993); KAN. CIV. PROC.

that do require filing fees, twenty-one states expressly authorize the court to waive the filing fee for indigent petitioners.[1550] Four of the states with waiver provisions add that the income from the abuser cannot be considered in determining whether a waiver of fees is appropriate.[1551] Maryland, Nebraska, and West Virginia allow filing fees to be deferred until the completion of a full hearing.[1552] Indigent victims in need of the court's protection are more likely to approach the courts when no fees are required or when waiver provisions are in place and are readily accessible. However, since filing for a waiver adds another level of paperwork for *pro se* petitioners who may already find the court process daunting, state statutes should explicitly require that no filing fees be charged in civil protection order cases. No fees should be charged for filing, service, or for securing the appearance of witnesses.[1553]

For *pro se* litigants, courts have been willing to avoid strict

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CODE § 60-3014(a) (Vernon Supp. 1993); KY. REV. STAT. ANN. § 403.730(3) (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2134 (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 764(3) (West 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993); MINN. STAT. ANN. § 518B.01(3)(a) (West Supp. 1993); MISS. CODE ANN. § 93-21-9 (Supp. 1993); N.H. REV. STAT. ANN. § 173B:3(II) (1990); N.Y. FAM. CT. ACT § 821 (McKinney 1983 & Supp. 1994); N.C. GEN. STAT. § 50B-2 (1989); OHIO REV. CODE ANN. § 3113.31(J) (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.2(c) (West Supp. 1994); OR. REV. STAT. § 107.710 (1991); R.I. GEN. LAWS § 15-15-2 (1988); VT. STAT. ANN. tit. 15, § 1103(c) (1989); VA. CODE ANN. § 16.1-253.1 (Michie Supp. 1992).

1550. ALASKA STAT. § 25.35.040 (1991); ARIZ. REV. STAT. ANN. § 13-3602(c) (Supp. 1992); CONN. GEN. STAT. ANN. § 52-259b (West 1991); FLA. STAT. ANN. § 741.30 (West Supp. 1993); IND. CODE ANN. § 34-4-5.1 (West Supp. 1993); IOWA CODE ANN. § 236.3 (West Supp. 1993); LA. REV. STAT. ANN. § 46:2138 (West Supp. 1993); MD. CODE ANN., FAM. LAW § 4-504(c) (Supp. 1993); MO. ANN. STAT. § 455-508 (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-122 (1993); NEB. REV. STAT. § 42-924.01 (Supp. 1992); NEV. REV. STAT. ANN. § 33.050(2) (Michie 1986); N.M. STAT. ANN. § 40-13-3(G) (Michie Supp. 1993); Pa. Stat. Ann. tit. 23, § 6106(c) (1991); S.C. CODE ANN. § 20-4-40(e) (Law. Co-op. 1992); S.D. CODIFIED LAWS ANN. § 25-10-3(4) (1984); TENN. CODE ANN. § 36-3-604(a) (1993); TEX. FAM. CODE ANN. § 71.11(f) (West Supp. 1993); UTAH CODE ANN. § 30-6-4(3) (Supp. 1993); WASH. REV. CODE ANN. § 26.50.040(2) (West 1986); WYO. STAT. § 35-21-103(d) (Supp. 1993); *see also* MODEL CODE, *supra* note 15, § 312.

1551. NEB. REV. STAT. § 42-924.01 (Supp. 1992); N.M. STAT. ANN. § 40-13-3(G) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.040(2) (West 1986); WYO. STAT. § 35-21-103(d) (Supp. 1993).

1552. MD. CODE ANN., FAM. LAW § 4-504(c) (Supp. 1993); NEB. REV. STAT. § 42-924.01 (Supp. 1992); W. VA. CODE § 48-2A-4(f) (Supp. 1993).

1553. In order to encourage states to move swiftly to change their laws and procedures to ensure that domestic violence victims will not be required to pay fees in connection with civil protection order proceedings, both the House and Senate versions of the Violence Against Women Act condition funding awards to states upon each state certifying that no such fees are charged. H.R. 1133, 103d Cong., 1st Sess., title I, subtitle A, § 113 (1993); *see also* MODEL CODE, *supra* note 15, § 312.

interpretations of court rules that could be used to bar access to the courts, and frustrate the intent of the civil protection order statute of offering victims swift and immediate protection. In *Campbell v. Campbell*,[1554] while holding that a family court rule should not be used to file a domestic violence claim, the court concluded that the wife's petition substantially followed the form outlined in the civil protection order statute, noting that she had reasonable cause to fear domestic violence, and should be considered a petition filed under such statute.[1555] In *Capps v. Capps*,[1556] petitioner filed a motion to modify an order of protection when she intended to file a motion to renew the order for 180 days.[1557] The court, however, treated her motion as a motion to renew and granted her the appropriate protection.[1558]

Courts have also ruled against application of court procedural rules that are antithetical to the goal of domestic violence statutes to offer swift protection to victims.[1559] A Pennsylvania court determined that the requirement that preliminary objections be filed was prohibited in a protection order action so as not to frustrate the act's purpose of creating an efficient, simple, and rapid vehicle for resolution of domestic disputes.[1560] These relaxed procedures to avoid delay in issuance or implementation of the order are essential in cases of domestic violence, where the victim's emergency needs predominate.[1561]

1554. 584 So. 2d 125 (Fla. Dist. Ct. App. 1991).

1555. *Id.* at 126.

1556. 715 S.W.2d 547 (Mo. Ct. App. 1986).

1557. *Id.* at 549.

1558. *Id.* at 552-53.

1559. *See generally* Mahorsky v. Mahorsky, 22 Pa. D. & C.3d 210 (Ct. Comm. Pleas 1982).

1560. *Id.* at 213.

1561. *Cf.* Traiforos v. Mahoney, No. C3-92-340, 1992 Minn. Ct. App. LEXIS 633 (Minn. Ct. App. July 7, 1992) (petitioner filed for both an *ex parte* temporary protection order and a civil protection order against respondent; temporary protection order was issued, but at the civil protection order hearing the trial court found the abuse did not occur. The order was then converted to one for harassment and prohibited future contact between the parties. Respondent argued that the trial court erred in issuing a harassment order under the Domestic Abuse Act. Appellate court held that the trial court's error was harmless and the order stood); Lucia v. Lucia, 465 A.2d 700 (Pa. Super. Ct. 1983) (where husband failed to file exceptions to the trial court's order excluding him from the marital home pursuant to the Protection From Abuse Act, he waived the issue of sufficiency of the evidence on appeal); Knisely v. Knisely, 441 A.2d 438 (Pa. Super. Ct. 1982) (where husband failed to file exceptions as to whether his actions constituted abuse at the hearing where he was ordered to refrain from abusing his wife and to keep the peace, he waived the issue on appeal).

2. Developing and Funding Domestic Violence Coordinating Councils and Other Services for Battered Women

Forty-five state statutes provide for and fund crisis intervention, counseling, shelter, and advocacy services for abused women and their children.[1562] States should follow the lead of Connecticut which recently enacted a law creating family violence and intervention units in the Connecticut judicial system.[1563] The intervention units accept referrals of domestic violence cases from judges and provide judges with an oral or written report and recommendation in each case.[1564] The intervention units must identify victim service needs, and contract with victim and offender services to provide these programs.[1565] The intervention unit will also create a pretrial family violence education programs for persons charged with domestic violence.[1566]

The Connecticut statute highlights the crucial need for judicial

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1562. ALA. CODE § 30-6-2 to 8(a) (1989); ALASKA STAT. § 18.66.010 (1991); ARIZ. REV. STAT. ANN. §§ 12-284(C), 25-311.01(E), 36-3002 (1993); CAL. PENAL CODE § 13823.4 (West 1992); COLO. REV. STAT. ANN. §§ 26-7.5-105, 39-22-801 (West 1990); CONN. GEN. STAT. ANN. § 17-580 (West 1992); FLA. STAT. ANN. § 741.01(2) (West Supp. 1993); GA. CODE ANN. § 19-13-20 to 22 (1991); HAW. REV. STAT. § 587-1 (Supp. 1992); IDAHO CODE § 39-5212 (1993); 20 ILCS 2210/3 (Smith-Hurd 1993); IND. CODE ANN. §§ 33-17-14-2, 33-19-5-1(a), 33-19-6-13 (West Supp. 1993); IOWA CODE ANN. § 236.15A (West Supp. 1993); KAN. STAT. ANN. § 23-108(a) (Supp. 1992); LA. REV. STAT. ANN. § 46: 2126 (West Supp. 1993); ME. REV. STAT. ANN. tit. 22, § 8501 (West 1992); MD. CODE ANN., FAM. LAW § 2-404(b) (Supp. 1992); MASS. GEN. LAWS ANN. tit. 17, § 16 (West Supp. 1993); MICH. COMP. LAWS ANN. § 400.1505 (West 1988); MINN. STAT. ANN. § 357.021 (West 1991 & Supp. 1993); MISS. CODE ANN. § 19-5-93(o), 25-7-13(2), 93-21-115, 93-21-117 (Supp. 1993); MO. ANN. STAT. § 451.151(3) (Vernon Supp. 1993); MONT. CODE ANN. §§ 3-10-601(4)(g), 52-6-101 (1993); NEB. REV. STAT. § 42-904 (1988); NEV. REV. STAT.ANN. § 122.060(4) (Michie 1993); N.H. REV. STAT. ANN. § 173B:13 (1990); N.J. STAT. ANN. § 30:14-11, 37:1-12.1 (West Supp. 1993); N.Y. SOC. SERV. LAW §§ 62(5)(f), 459-b to -c, 481-f (McKinney 1992); N.C. GEN. STAT. § 50B-9 (Supp. 1993); N.D. CENT. CODE §§ 14-03-22, 27-01-10 (Supp. 1993); OHIO REV. CODE ANN. § 3113.34 (Anderson 1989); OKLA. STAT. ANN. tit. 43A, § 3-314.1 (West Supp. 1994); OR. REV. STAT. §§ 106.045, 108.660 (1991); PA. STAT. ANN. tit. 71, § 611.13 (1990); R.I. GEN. LAWS § 12-29-6.1 (Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 25-1-10, 25-10-16 (Supp. 1993); TENN. CODE ANN. § 67-4-411(b) (Supp. 1993); TEX. HUM. RES. CODE ANN. § 51.001 (West 1990); UTAH CODE ANN. § 63-63a-6 (1993); VT. STAT. ANN. tit. 3, § 18 (1985); VA. CODE ANN. § 63.1-318 (Michie 1991); WASH. REV. CODE ANN. § 70.123.090 (West 1992); W. VA. CODE §§ 48-1-24, 48-2C-6 (1992); WISC. STAT. ANN. §§ 46.95, 973.055 (West 1985 & Supp. 1993); WYO. STAT. § 9-2-102 (1991).

1563. CONN. GEN. STAT. ANN. § 46b-38c(a) (West Supp. 1993); *see also* MODEL CODE, *supra* note 15, §§ 501, 502 (creation of state and local advisory councils on domestic violence).

1564. CONN. GEN. STAT. ANN. § 46b-38c(c).

1565. *Id.*

1566. *Id.* § 46b-38c(g).

training in the dynamics of domestic violence. The Connecticut Judicial Department must, therefore, establish an ongoing training program for judges, bail commissioners, court clerks, and family division personnel to inform them of the law on domestic violence, the function of the family violence intervention units, and the use of protection orders.[1567]

3. Discovery

Civil protection order discovery provisions should be formulated in light of the summary nature of civil protection order proceedings and the need to avoid delays in the issuance of a protection order. Courts, attorneys, and advocates must guard against the use of discovery by respondents as a means of intimidating petitioners or locating them. Discovery which requires any direct contact between the parties should not be used or enforced.[1568] Minimizing contact between the parties in domestic violence cases reduces friction between the parties, and reduces the danger to the petitioner posed by each renewed contact.

Most states do not have special discovery rules applicable to civil protection order cases, but limit the discovery to that which is "appropriate to the proceedings involved or preclude discovery where necessary to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or [any] prejudice to any person or the court."[1569] In domestic violence cases, these standards must be interpreted in order to best protect the victim.[1570] Discovery is inappropriate, for example, when it delays the issuance of a protection order or when the batterer uses discovery to gain access to details concerning the victim's current life, especially information concerning her whereabouts.[1571] The District of Columbia's Intrafamily Rules accommodate the need to assure victim safety, and define the scope of discovery as "limited to matters directly relating to the incident or incidents of abuse alleged in the petition or answer, and to medical treatment obtained as a result of those incidents"; expansion of the scope of discovery is allowed only by court order.[1572]

1567. *Id.* § 46b-38c(i) (West Supp. 1993).

1568. *See, e.g.*, D.C. CT. R. ANN., SUPER. CT.—INTRAFAMILY PROC., R. 8(d) (Michie 1993).

1569. Orloff, *supra* note 768, at 141.

1570. *See id.* at 143.

1571. *Id.* at 143.

1572. D.C. CT. R. ANN., SUPER. CT.—INTRAFAMILY PROC., R. 8(b) (Michie 1993).

Case law on the scope of discovery in domestic violence cases illuminates the need to safeguard the victim from intrusive discovery procedures which threaten her freedom. In a New York case,[1573] the respondent in a family offense proceeding sought an examination of the petitioner before trial.[1574] The court denied the request because of the "tensions," the "risk of violence," and the "need for permanent protection" which characterize family offense cases.[1575] It explained that delay caused by an examination would only aggravate these conditions.[1576] The court implied that an examination before trial can be inherently intimidating, especially for an unrepresented petitioner.[1577] The court set forth that:

> In most cases, petitioners who bring family offense petitions come to the Family Court for immediate protection for themselves and their children. They are seldom represented by attorneys. They come to the court tense, desperate, fearful and confused. To subject them to an examination before trial would be totally inappropriate and would discourage future petitioners from bringing petitions.[1578]

Batterers have attempted to use discovery rules to gain access to a battered woman's diary. In a New Jersey case,[1579] the court found that the wife's diary about specific events occurring between herself and her husband, which she kept at her lawyer's direction, was a work-product properly not produced to her husband.[1580] These courts have clearly acknowledged in their holdings restricting discovery and strictly adhering to the work-product immunity rule, that the dangers inherent in the examination and discovery procedures outweigh the importance of the respondent's right to acquire certain information.

4. Concerns Regarding the Danger Continuances Pose to Battered Women

Continuances should generally be avoided in civil protection order cases and, if granted, should be conditioned upon the issuance

1573. Kunz v. Kunz, 462 N.Y.S.2d 559 (N.Y. Fam. Ct. 1983).
1574. *Id.* at 559.
1575. *Id.* at 560.
1576. *See id.*
1577. *See id.*
1578. *Id.*
1579. Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992).
1580. *Id.* at 1209.

of a temporary protection order.[1581] Continuances of the hearing date at which the civil protection order can issue pose a danger to petitioners.[1582] The longer the delay, the more time the batterer will have to gain access to his victim and attempt to convince her to withdraw the petition.[1583] In other cases where the petition is filed as violence is escalating, the delays caused by continuances leave the battered woman subject to threats and intimidation.[1584] Repeated continuance of civil protection order cases undermines battered women's confidence that the legal system can help them, makes them reluctant to follow through, and reinforces their batterer's claims that the courts will ultimately side with him.[1585]

A number of state statutes have provided restrictions on the use of continuances in civil protection order cases that reflect an understanding of these concerns.[1586] When a continuance is granted, a

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1581. Ganley, *supra* note 21, at 43-44.

1582. *Id.* Batterers in domestic violence cases "may have terrorized the abused party over the period of time between the assault and the time of the court proceeding in order to coerce the [battered woman] into compliance. The more time that passes between the event and the court hearing at which the civil protection order is ultimately issued, the more likely that the batterer may increase the violence and threats of violence, or may bargain effectively with the battered woman promising that if she drops the charges or changes her testimony in court the violence will stop or the batterer will give her custody of the children." *Id.*

1583. *Id.* at 45; *see also* Clark v. State, 629 A.2d 1322, 1328 (Md. Ct. Spec. App. 1993) (ruling that the court "cannot allow witnesses to be threatened or improperly coerced into dropping charges. At a minimum, we must protect those who appropriately seek the protection of the courts.").

1584. HARLOW, *supra* note 3, at 3. Battered women call the police and seek help in 51% of the cases in order to keep an abusive incident from happening again; 47% of battered woman call the police to stop an ongoing incident from happening. *Id.*

When battered women do seek help it is essential that they be able to receive a swift response offering protection without delay. If continuances are allowed, women are open to threats from abusers. Research on successful completers of batterer treatment programs provides insight on just how pervasive the use of threats is for batterers. Among the 2/3 of batterers who remained non-violent 18 months after the completion of treatment, researchers found that the overwhelming majority of batterers continued their use of threats. *See* Jeffery L. Edelson & Maryann Syers, *Relative Effectiveness of Group Treatments for Men who Batter*, 26 SOC. WORK RES. & ABSTRACTS 10, 10-17 (1990).

1585. Ganley, *supra* note 21, at 45.

1586. ALA. CODE § 30-5-6(c) (1989) (a temporary protection order may be issued if a continuance is granted); CONN. GEN. STAT. ANN. § 46b-15(b) (West 1992) (if continuance granted *ex parte* orders are not continued except by consent or good cause shown); FLA. STAT. ANN. § 741.30(6)(c) (West 1986) (continuances should be granted only for good cause); HAW. REV. STAT. § 586.5 (Supp. 1992) (continuance granted for a maximum of ninety days if no service); IDAHO CODE § 39-6306(1) (1993) (if one party is represented by counsel, a continuance shall be granted only for good cause, should be kept to a minimum reasonable duration and may be limited to certain requested remedies); 750 ILCS 60/213(b) (Smith-Hurd 1993) (continuances should be granted only for good cause, should be kept at a

temporary protection order should issue to protect the petitioner during the intervening period.[1587]

Courts have adopted varying approaches to the amount of time a case may be continued when a temporary protection order is in effect. In *Eichenberger v. Eichenberger*, the Ohio Court of Appeals held that the trial court did not err in twice continuing a civil protection order hearing date, thereby failing to hold the hearing within seven days of issuance.[1588] The court's rationale was that the limited delay was reasonable in light of the trial judges' heavy docket responsibilities, and neither the integrity nor the constitutionality of the proceedings were jeopardized.[1589] However, in *Nohner v. Anderson*,[1590] the Minnesota Court of Appeals held that the trial court could not continue an *ex parte* order for more than 14 days without a full hearing and findings of domestic abuse.[1591] Additionally, in *Keneker v. Keneker*,[1592] the court placed limits on continuances, holding that despite the respondent's consent to a continuance of a temporary protection order based on alleged inappropriate sexual behavior with his minor child, he did not waive his right to assert the expiration of the temporary protection order since under no circumstances could a temporary protection order remain in effect for longer than 30

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minimum reasonable duration and may be limited to certain requested remedies); IOWA CODE ANN. §§ 236.4.5, 236.4.3 (1985) (continuance granted to secure counsel); LA. REV. STAT. ANN. § 46:2135(E) (West 1982) (continuance shall not exceed 10 days); ME. REV. STAT. ANN. tit. 19, § 765(6) (West Supp. 1992) (may extend temporary protection order); MISS. CODE ANN. § 93-21-11 (Supp. 1992) (maximum of 20 days); N.Y. FAM. CT. Act §§ 826(a), 828.3 (McKinney 1983 & Supp. 1994) (continuance to allow for three days following service and temporary protection order may be extended); PA. STAT. ANN. tit. 23, § 6107(c) (1991) (may extend temporary protection order); S.C. CODE ANN. § 20-4-50 (Law. Co-op. 1985) (if served late, the respondent is entitled to a continuance to have five full days notice); TEX. FAM. CODE ANN. § 71.09(b), (c) (West Supp. 1993) (maximum continuance of 14 days after date of hearing if served less than 48 hours before hearing but if no service, maximum continuance is 14 days from date of request for rescheduling); WASH. REV. CODE ANN. § 26.50.050 (West Supp. 1992) (if served late, the respondent is entitled to a continuance to receive five full days notice); W. VA. CODE § 48-2A-5(d) (1992 & Supp. 1993) (upon continuance, temporary orders may be extended).

1587. N.Y. FAM. CT. ACT §§ 826(a) & 828.3 (McKinney 1983 & Supp. 1994) (continuance proper to allow for three days following service and temporary protection order may be extended); PA. STAT. ANN. § 6107(c) (1991); *see also* D.C. CT. R. ANN., SUPER. CT.—INTRAFAMILY PROC., R. 4(d) (Michie 1993).

1588. 613 N.E.2d 678, 682 (Ohio Ct. App. 1992).

1589. *Id.* at 682.

1590. 446 N.W.2d 202 (Minn. Ct. App. 1989).

1591. *Id.* at 203.

1592. 579 So. 2d 1083 (La. Ct. App. 1991).

days.[1593]

Courts may, however, limit the respondent's ability to frustrate the rapid progress of a protection order case. In *Mahorsky v. Mahorsky*,[1594] the court held that the respondent may not file preliminary objections in a protection order action because these objections will frustrate the purpose of the Protection from Abuse Act to create an efficient, simple, and rapid vehicle for resolution of a domestic violence dispute.[1595]

The preferred procedure that offers protection to the rights of both victims and respondents would be to allow extension or reissuance of a temporary protection order in any case where service has not been achieved. In cases where respondent has been served, courts should condition granting respondent's request for a continuance on entering, extending, or reissuing a temporary protection order. In cases where petitioner requests a continuance, the court should seek respondent's consent to the temporary issuance of a protection order or hold a brief hearing to determine whether a temporary protection order should issue or re-issue pending a hearing on the petition for a civil protection order. All temporary protection order statutes should set the length of the temporary protection order at 30 days so as to improve the possibility of holding a full hearing within a statutory time frame that preserves respondent's due process rights to a hearing.

5. Representation of Petitioner in Civil Protection Order Cases

A grave need exists to greatly increase legal representation of petitioners in civil protection order proceedings.[1596] Several state statutes specifically provide for the petitioner's legal representation in a proceeding to issue[1597] and to enforce a civil protection order.[1598] The protection order statutes of Illinois and Texas provide

1593. *Id.* at 1085.

1594. 22 Pa. D. & C.3d 210 (Ct. Comm. Pleas 1962).

1595. *Id.* at 212-13.

1596. NIJ CPO STUDY, *supra* note 19, at 19.

1597. ALA. CODE § 30-5-6 (1989) (petitioner has right to counsel); IDAHO CODE § 39-6306(1) (1993) (if either party has counsel the court may enter an order to appoint council for the opposing side); WYO. STAT. § 35-21-103(e) (1988) (court may appoint an attorney to assist and advise petitioner); *see also* 750 ILCS 60/213.3 (Smith-Hurd 1993) (court will appoint independent counsel for high risk adult petitioner with disabilities).

1598. CAL. FAM. CODE § 5805 (West 1993) (court may appoint counsel to represent the petitioner to enforce a restraining order); NEB. REV. STAT. § 42-907(4) (1988) (requires the Department of Public Welfare to provide "emergency legal counseling and referral"); WASH.

that prosecutors may assist petitioners in obtaining protection orders where a criminal prosecution is also filed.[1599] Case law raises other issues connected to the representation of the petitioner in a civil protection order proceeding. *Roe v. Roe*[1600] illustrates how an attorney's representation can protect a domestic violence victim. In that case, the court held that a diary kept by the petitioner on the advice of her attorney was not subject to discovery as work product of the attorney.[1601] Some progressive courts are, however, unwilling to penalize a domestic violence victim in need of protection when her lawyer is not well-trained in domestic abuse dynamics and litigation. In *Kobey v. Morton*,[1602] the court reversed a mutual restraining order against the petitioner and held that her attorney's comment during her temporary protection order hearing that the court might, on its own motion, issue mutual restraining orders was not an implied consent to the order where the attorney expressly objected at the hearing.[1603]

Significant evidence indicates that a *pro se* system which allows battered women to seek a civil protection order without the assistance of an attorney is necessary to ensure access to protection. It is, however, far from ideal. In the vast majority of cases, the court hearing for a civil protection order is the first time a battered woman sees her batterer following the violent incident which led to the petition. The victim is terrified, unclear of her legal rights, and highly susceptible to the batterer's influence and control. The National Institute of Justice's study of civil protection orders found a grave need for legal representation of battered women in civil protection order proceedings. Most judges they interviewed believed strongly that:

> [v]ictims who are not represented by counsel are less likely to get protection orders and, if an order is issued, it is less likely to contain all appropriate provisions regarding exclusion from the residence, temporary custody of children, child support, and protective limitations on visitation rights . . . .
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> Further, difficulties for victims in advocating effectively for

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REV. CODE ANN. § 26.50.120 (West 1986) (if probable cause of violation of order the district attorney must assist a petitioner who cannot afford an attorney).

1599. 750 ILCS 60/202 (Smith-Hurd 1993); TEX. FAM. CODE ANN. § 71.04 (West Supp. 1993).

1600. 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992).

1601. *Id.* at 1209.

1602. 278 Cal. Rptr. 530 (Ct. App. 1991).

1603. *Id.* at 532.

> their own rights may also stem from the climate of emotional crisis or fear that usually precipitates seeking a protection order. Since most victims are not schooled either in the applicable law or in legal advocacy, skilled legal assistance may be crucial in obtaining adequate protection orders.
>
> An attorney for the petitioner is especially important when the respondent appears with counsel . . . . In cases in which the petitioner is without legal representation . . . it is often more difficult for the court to adequately assess the need of the victims and any children for protection.[1604]

One solution to the lack of legal representation for battered women is to increase the role of lay advocates. This solution requires cooperation between lawyers and nonlawyer advocates who are authorized to represent battered women who go to court seeking civil protection orders. Lay battered women's advocates for many years have been assisting battered women who seek civil protection orders. They help them prepare court papers and talk with them in the halls of the court house about their rights. Judges have found battered women's advocates to be of assistance to the court and have come to rely in many instances on their expertise.[1605] The Supreme Court of Minnesota recognized the importance of non-lawyer domestic violence advocates for the representation of battered women by entering an order that permits domestic violence advocates to attend court, sit at the counsel table, confer with the victim, and address the court in protection order proceedings and in the sentencing phase of criminal prosecutions.[1606]

Courts in the vast majority of jurisdictions have moved slowly in adopting this enlightened approach. Lay advocates are still typically not permitted to speak for the petitioner during the civil protection order proceeding. This restriction on nonlawyer practice severely limits the effectiveness of advocates, and must be changed.[1607] Five innovative state statutes, those of California, New York, Pennsylvania, West Virginia, and Wisconsin, are exceptions and specifically authorize lay persons to accompany the petitioner at her civil protection order hearing.[1608] However, even in these states, some limits are

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1604. NIJ CPO STUDY, *supra* note 19, at 19.

1605. Czapanskiy, *supra* note 23, at 247.

1606. *In re* Domestic Abuse Advocates, No. C2-87-1089, 1991 Minn. LEXIS 34, at *1 (Minn. Feb. 5, 1991); *see also* Czapanskiy, *supra* note 23, at 258.

1607. Leslye Orloff, Address at the American Bar Assoc. Commission on Nonlawyer Practice (June 25, 1993).

1608. CAL. FAM. CODE § 5519(d) (West 1993) (lay person may not give legal advice);

placed on the lay person's role. The California statute provides that a nonlegal support person may accompany the petitioner at the hearing or a mediation session.[1609]

A sound system would make trained lay advocates associated with battered women's programs, legal services, or law school clinics the first line in service provision or of referral for battered women. The lay advocates would handle cases that were fairly straight forward and routine, but they would refer more complicated cases to trained domestic violence attorneys for representation. Cases in which the batterer was represented by counsel would also be referred for attorney representation.[1610]

In recognizing the benefits of the *pro se* process, it is necessary to point out the problems. While we need a process that guarantees access to all needy abused persons, battered women who can obtain legal assistance from trained counsel are much more likely to receive civil protection orders which contain complete and effective relief.[1611] The country needs more attorneys able and willing to act as battered women's advocates.[1612] Few legal services programs across the country, however, presently allocate staff time and resources to assisting battered women. Some, like the legal services programs in the District of Columbia, most often only offer legal representation in domestic violence cases to batterers.

The National Institute of Justice recommends that more attorneys undertake representation of battered women in civil protection order

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N.Y. FAM. CT. ACT § 838 (McKinney 1983 & Supp. 1994) (petitioner entitled to presence of a counselor, non-witness friend, social worker or relative; however, lay person may not participate unless called as a witness at the court's discretion); PA. STAT. ANN. tit. 23, § 6111 (1991) (specifically includes advocate and counselor); W. VA. CODE § 48-2A-4 (1992 & Supp. 1993) (specifically includes person of petitioner's choice); WIS. STAT. ANN. § 895.73 (West Supp. 1993) (petitioner may be accompanied in court by a service representative).

1609. CAL. FAM. CODE § 5519(d) (West 1993).

1610. Orloff, *supra* note 1607.

1611. NIJ CPO STUDY, *supra* note 19, at 19.

1612. D.C. TASK FORCE, *supra* note 213, at 146, 161. Civil protection orders are more likely to be awarded after trial if petitioner is represented by counsel and fewer cases are returned to files without court action. The report concluded that counsel should be appointed to represent petitioners in civil protection order contempt actions for enforcement and that representation of petitioners by members of the private bar should be encouraged. Funding should be sought to compensate attorneys for services rendered. *Id.*

As violence continues, greater numbers of battered women turned to informal sources (friends) and professionals for help. "Between the first and last violent incident, the use of lawyers rises from 6% to 50%, while that of social service agencies increases from 8% to 43%." SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 232 (1982).

proceedings.[1613] To help accomplish this goal, local legal services organizations should change their program priorities to place a high priority on serving victims of domestic violence petitioning for protection orders. Setting a priority of representation of battered women is a preventative step that may ultimately reduce the need for other legal services. Since there is a direct causal relationship between domestic violence, homelessness, and the need for public benefits, assisting battered women may help prevent some of these other serious problems.

One suggestion is for one-third of the funding allocated to the programs to be spent in each of the following areas: family, housing, and benefits. The Governing Board of the Legal Services Corporation (the "LSC") has clear statutory authority under the Legal Services Corporation Act of 1974 and the regulations promulgated thereunder[1614] to distribute its funds to various legal services organizations throughout the country in this way.[1615] The LSC must place priority on those populations most in need of legal services.[1616]

Family violence is a major issue in the United States and is the root cause of many family legal problems. Thirty percent of divorced adults cite physical abuse as the reason for their divorce.[1617] An advocate for Brooklyn Legal Services reports that thirty percent of divorces involve violence as a factor.[1618] Domestic violence is thus the root of many family legal problems. When allocating resources to legal services programs in the family law area, the LSC should make

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1613. NIJ CPO STUDY, *supra* note 19, at 22.

1614. 42 U.S.C. § 2996 (1988); 45 C.F.R. § 1609 (1992).

1615. *See* 42 U.S.C. § 2996f(a)(2)(C) (1993) ("With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this subchapter, the Corporation shall . . . insure that (i) recipients, consistent with goals established by the Corporation, adopt procedures for determining and implementing priorities for the provision of such assistance, taking into account the relative needs of eligible clients for such assistance . . . including particularly the needs for service on the part of significant segments of the population of eligible clients with special difficulties of access to legal services or special legal problems . . . ; and (ii) appropriate training and support services are provided in order to provide such assistance to such significant segments of the population of eligible clients . . . ").

An alternative approach to the Legal Services Corporation setting the priorities with funding would be to require that all programs applying for LSC funding describe whether they provide family law assistance, the type of assistance, and whether they place a priority on representing battered women. Programs which do not place any priority on representing battered women should have to explain why they do not.

1616. 45 C.F.R. § 1620.2 (1992).

1617. NATIONAL DOMESTIC VIOLENCE MEDIA CAMPAIGN, EXECUTIVE SUMMARY (1993).

1618. DEL MARTIN, BATTERED WIVES 164 (1976).

certain that a significant portion of resources are being used to represent battered women. Investing in representation of family violence victims is sound public policy, because ending violence in the home has a preventative effect on so many other societal problems, including homelessness, juvenile delinquency, and teenage suicide.

Rather than handling domestic violence cases, some legal services programs have instead placed a priority on representing indigent persons in uncontested divorce cases. This approach allows the agency to handle matters for a large numbers of clients with limited investment of attorney time. Allocating legal services program resources to simple divorces when there is an overwhelming need for legal representation in domestic violence and custody cases raises serious questions about the commitment these programs have to offering family law representation. Uncontested divorce cases should not be deemed "most needy of representation." It is incumbent upon the LSC to develop a mechanism for investigating what resources are being devoted to family law representation, and how those resources are being allocated. The focus of the inquiry must move beyond counting persons served and instead place priority on the type of services offered. Emphasizing too heavily the number of clients served drives programs to offer less critical services, because they are the ones that can be offered in the highest quantities. This emphasis leaves battered women who fear for their lives and who are most needy of representation so that they may obtain full and adequate court protection without any means of obtaining needed counsel.

A few states explicitly address the issue of the availability of counsel for the petitioner. For example, the Nebraska statute requires the state to provide "emergency legal counseling and referral."[1619] The Wyoming statute authorizes the court to appoint an attorney to assist the petitioner in seeking a civil protection order.[1620] In Chicago, free legal counsel is provided by the prosecutors office to battered women who are seeking both a civil protection order and pursuing a current criminal prosecution,[1621] while in Ithaca, New York, private attorneys are paid a reduced fee by the county to represent indigent

1619. NEB. REV. STAT. § 42-907(4) (1988).

1620. WYO. STAT. ANN. § 35-21-103(e) (West 1993); *see also* IDAHO CODE § 39-6306(1) (1993) (providing that where one side has counsel, counsel will be provided for other party); WASH. REV. CODE ANN. §26.50.120 (West 1986) (providing that district attorney will represent victim in contested cases).

1621. *See* NIJ CPO STUDY, *supra* note 19, at 22.

battered women.[1622]

In some jurisdictions, local bar associations and other professional organizations are actively involved in organizing lawyers to represent victims on a *pro bono* basis. For example, each year the District of Columbia Bar offers an intensive training to local lawyers who are willing to represent battered women. Several large Washington, D.C. law firms, such as Crowell & Moring, also operate extensive *pro bono* programs serving domestic violence victims.

6. Representation of Respondent in Civil Protection Order Hearing

Courts across the country consistently hold that while the respondent has a right to counsel in a contempt proceeding for violation of a protection order,[1623] he does not have a right to counsel during the initial issuance of the civil protection order.[1624] This is so even though the respondent may be imprisoned for contempt if he later violates the protection order.[1625]

Courts have further found that a legal representative's advice does not relieve the respondent of his obligation to respect court orders. In *Nickler v. Nickler*,[1626] the court held the respondent in contempt and the respondent's attorney in violation of disciplinary rules when the attorney advised the respondent to ignore an allegedly improperly issued civil protection order rather than take needed steps to vacate the order.[1627] The court firmly concluded that

> regardless of whether or not the subject order is illegal . . . defen-

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1622. *Id.*

1623. Thompson v. Thompson, 559 A.2d 311, 314 (D.C. 1989) (permitting continuance for the respondent to secure counsel prior to hearing on criminal contempt); Sanders v. Shepard, 541 N.E.2d 1150, 1156 (Ill. App. Ct. 1989) (holding that indigent respondent was entitled to appointed counsel at the hearing for indirect civil contempt where he faced imprisonment); *see also* N.Y. FAM. CT. ACT § 846(a) (McKinney 1983); PA. STAT. ANN. tit. 23, § 6114(b) (1991).

1624. Cloutterbuck v. Cloutterbuck, 556 A.2d 1082, 1087 (D.C. 1989) (denying respondent husband appointment of counsel at initial civil protection order hearing even though he could be imprisoned for contempt if he later violated the order); People *ex rel.* Williams v. Rhodes, 540 N.E.2d 1114, 1115 (Ill. App. Ct. 1989) (denying indigent respondent husband right to counsel in proceeding to issue civil protection order based on his abuse of his wife). *But see* ALA. CODE § 30-5-6(a) (1989); ALASKA STAT. § 25.35.010(b) (1991); IDAHO CODE § 39-6306(c) (1992); IOWA CODE ANN. § 236.4(5) (1985); KAN. STAT. ANN. § 60-3106(a) (Supp. 1993); PA. STAT. ANN. tit. 23, § 6107(a) (1991); S.C. CODE ANN. § 20-4-40(c) (1985).

1625. *Cloutterbuck*, 556 A.2d at 1087.

1626. 45 Pa. D. & C.3d 49 (Ct. Comm. Pleas 1985).

1627. *Id.* at 55.

> dant and his lawyer were in error when they unilaterally elected to violate the order. Defendant, through his counsel, never approached the court prior to the instant proceeding alleging illegality . . . nor was any other acceptable effort made to change or vacate said order . . . .[1628]

The court held that "[i]f a court has competent jurisdiction to issue an order, such an order must be obeyed until properly vacated."[1629] Here the defendant transferred property in violation of an existing protection order, and the "fact that defendant's counsel advised him to ignore the court's order does not provide defendant with a shield against a contempt proceeding."[1630]

Further, even in the context of a criminal prosecution, the batterer respondent may not easily prevail on an ineffective assistance of counsel claim. In *State v. Harper*,[1631] the Utah Court of Appeals held that the defendant could not prevail on his ineffective assistance of counsel claim when he failed to show "reasonable probability" that proper representation by his attorney would have prevented his conviction where the testimony of the defendant, victim, and victim's physician overwhelmingly supported the conviction.[1632]

K. Failure to Appear at Hearing

The National Institute of Justice study of civil protection order cases found that there are several reasons why a petitioner may not appear at her hearing for a civil protection order, including: 1) the victim is physically unable to appear for the hearing due to injuries; 2) the victim is intimidated by threats of greater violence from the respondent as a result of pursuing court action; and 3) the victim does not understand that a second hearing is required.[1633]

Dr. Anne Ganley confirms in a State Justice Institute funded curriculum for civil court judges on domestic violence that battered women may not appear at the civil protect order hearing because their batterers prevent them from attending.[1634] In other cases, victims will halt the court process because the violence has temporarily

1628. *Id.*
1629. *Id.*
1630. *Id.*
1631. 761 P.2d 570 (Utah Ct. App. 1988).
1632. *Id.* at 572.
1633. NIJ CPO STUDY, *supra* note 19, at 29.
1634. Ganley, *supra* note 21, at 46.

stopped.[1635] In many of these cases, Dr. Ganley reports that the batterer has merely changed tactics.[1636] He begins using good behavior to bring an end to the court proceedings.[1637] Other victims fail to show up for hearings because their batterers have intercepted court notices.[1638]

The likelihood that one of these situations exists makes dismissal of a civil protection order petition based solely on petitioner's failure to appear without further inquiry a dangerous proposition. When a petitioner fails to appear for a civil protection order hearing, courts and attorneys should not agree to immediately dismiss the case. Instead, the matter should be continued to a new court date in the near future. The court and counsel should make efforts to communicate with the petitioner, and the petitioner should be sent notice of the court date with an explanation of the importance of appearing for the civil protection order hearing. Any court dismissal for petitioner's failure to appear should be without prejudice.[1639] When the court is uncertain of the reason for petitioner's failure to appear and the respondent asks for dismissal, courts should be especially wary and take steps to ascertain petitioner's desires.[1640]

When the respondent fails to appear at the hearing, the court should issue the civil protection order by default based on evidence presented by the petitioner.[1641] Four states specifically authorize the court to issue a default civil protection order when the respondent fails to appear.[1642]

1635. *Id.*

1636. *Id.*

1637. *Id.*

1638. *Id.*

1639. *See, e.g.*, D.C. CT. R. ANN., SUPER. CT.—INTRAFAMILY PROC., R. 5.

1640. Orloff, *supra* note 768, at 154. Where the respondent requests dismissal and the court is uncertain as to the reason for the petitioner's failure to appear, the court may want to continue the case, notify the petitioner of the continuation date, and inform the respondent that the case will not be dismissed unless the petitioner comes to court to request it in person. *Id. But see* Eaches v. Steigerwalt, 569 A.2d 975 (Pa. Super. Ct. 1990) (holding that while costs could be assessed against complainants who initiated a protection from abuse proceeding but then failed to appear at the subsequent hearing, it was error to award these costs to the defendant). The *Eaches* case runs counter to the position presently being adopted by Congress discouraging requirements that domestic violence victims pay fees. *See supra* notes 1549-53 and accompanying text.

1641. Orloff, *supra* note 768, at 154-55. When the respondent has been served with notice of the hearing and fails to appear, the court, unless prohibited by statute, should issue a protection order. *Id.*

1642. 750 ILCS 60/219(3) (Smith-Hurd 1993) (if the defendant is served); ME. REV. STAT. ANN. tit. 19, § 765 (West Supp. 1992) (interim relief can be issued *ex parte* in defendant's

Some jurisdictions authorize the issuance of a bench warrant for the respondent who has failed to appear to ensure that the respondent is brought before the court.[1643] The petitioner should be notified of the bench warrant issuance and the date of the continued hearing. If a bond is set, it should be set in light of the facts pertinent to the safety of the petitioner and the respondent's criminal record. Bench warrants are particularly useful in jurisdictions where default protection orders must be served on the respondent before they can be enforced. Temporary Protection Orders must always be issued simultaneously with a bench warrant, as this provides the victim with protection that will become immediately effective once the respondent is detained on the bench warrant and served.

Default civil protection orders served upon the respondent are valid orders to be taken as seriously by the courts and law enforcement officials as those issued at a hearing where respondent is present.[1644] If the respondent desires a new trial after being served with the default order, the respondent must file a timely post-verdict motion.[1645] Where defendant has a history of failing to appear in court, the court may require an appearance bond to ensure his future appearance.[1646]

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absence); MASS. GEN. L. ch. 209A, § 4 (Supp. 1993) (if defendant does not appear, order continues as a matter of law); UTAH CODE ANN. § 30-6-5(3) (Supp. 1993) (if the defendant is served).

1643. *See, e.g.*, WASH. REV. CODE § 26.18.050(3) (West 1993).

1644. *See, e.g.*, People v. Zarebski, 542 N.E.2d 445 (Ill. App. Ct. 1989) (affirming jury verdict that defendant violated default protection order by harassing petitioner and entering her residence, since jury could find that defendant's conduct constituted harassment of wife and that he knowingly violated the protection order since the officer who served defendant with the order advised him that he would be in violation of the order should he go into the house).

1645. *See, e.g.*, Melvin v. Melvin, 580 A.2d 811, 817 (Pa. Super. Ct. 1990) (stating that where a default protection order is issued when respondent fails to appear at a civil protection order hearing, the rule to show cause is not the proper vehicle by which to pursue husband's request for a new trial on equitable grounds, as relief could have been requested in a timely post-verdict motion).

1646. *See, e.g.*, State v. Weller, 563 A.2d 1318, 1319 (Vt. 1989) (holding that the trial court reasonably concluded that the defendant's failure to report to his probation officer increased the risk that he would not appear in court. The defendant was convicted of domestic violence against wife was placed on probation, and the district court required an appearance bond to ensure that the defendant would appear).

L. Dismissals and Withdrawal of Orders[1647]

Attorneys and courts should consider requests for dismissals of civil protection orders carefully.[1648] When a petitioner asks that the court dismiss or withdraw an order, the court should question the petitioner outside the presence of the respondent to ascertain fully whether the respondent is coercing the petitioner.[1649] In cases where the petitioner wishes to return to her batterer who has promised not to continue the violence, the petitioner should be informed by the court and by counsel that a civil protection order may issue even if the parties remain together.[1650] The provisions of the protection order would prohibit further abuse.[1651] If the court doubts whether the petitioner's request to dismiss is voluntary, the court should continue the matter rather than dismiss the protection order.[1652]

A number of state civil protection order statutes reflect this cautious approach to withdrawals and dismissals of civil protection orders. New Jersey permits the court to dismiss a civil protection order upon motion only if the court has a full record in front of it.[1653] The Idaho statute allows for court modification of a civil protection order if the petitioner, voluntarily and without duress, consents to the waiver of any part of the order.[1654] Maine, Minnesota, and Nevada require notice to the petitioner and a hearing before the respondent may dismiss a protection order.[1655] Missouri will permit the parties

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1647. For the position of judicial authorities on dismissals of criminal domestic violence actions, see MODEL CODE, *supra* note 15, §§ 212, 213.

1648. Ganley, *supra* note 21, at 47 ("[W]e often ignore the multiple barriers to domestic violence victims and blame them for 'their ambivalence' rather than eliminating the barriers."). *Id.*

1649. D.C. CT. R. ANN., SUPER. CT.—INTRAFAMILY PROC., R. 10 ("In allowing dismissal, the Court may wish to inquire carefully about the voluntariness of the petitioner's actions and advise the petitioner of the right to refile the petition if all other statutory requirements are met.").

1650. Ganley, *supra* note 21, at 46. Sometimes battered women stop the court process because the violence has temporarily stopped and they do not feel that the order is necessary. Abused parties may be unaware that the batterer has merely switched tactics of control—they are using good behavior to manipulate an end to the court proceedings. *Id.*

1651. This type of order ensures that if the batterer re-abuses the petitioner, she will be able to enforce her order through contempt. This order will be useful for victims willing to attempt to reunite with their batterers. "Ninety-three percent of battered women are willing to forgive and forget the first beating that they suffered from their partners." GILLESPIE, *supra* note 124, at 147.

1652. Orloff, *supra* note 768, at 176-77; NIJ CPO STUDY, *supra* note 19, at 28.

1653. N.J. STAT. ANN. § 2C:25-29(d) (West Supp. 1993).

1654. IDAHO CODE § 39-6311(4) (1993).

1655. ME. REV. STAT. ANN. tit. 19, § 765.5 (1981) (respondent may move to dismiss a

to dismiss a civil protection order by mutual consent.[1656]

Case law reflects courts' struggles with the conflicting concerns involved in the dismissal of protection orders. Courts vacillate between respecting the petitioner's request to dismiss an order and protecting the petitioner from continued coercion and abuse. In *Irene D. v. Anthony D.*,[1657] the court refused to dismiss a protection order on the petitioner's request, finding that since the parties' 10 year old child was struck in the course of the respondent's assault on the petitioner, a discontinuance of the wife's individual claim would be inimical to the child's best interest.[1658] In *Marshall v. Hargreaves*,[1659] the Supreme Court of Oregon held that a circuit judge did not have the discretion to deny a hearing to determine the existence of immediate or present abuse for purposes of issuing an *ex parte* temporary protection order even though the petitioner had twice before requested, received, and then dismissed such orders based on essentially the same allegations.[1660]

Courts have also addressed dismissal of domestic violence criminal complaints. In *Lakewood v. Pfeifer*,[1661] the court refused to dismiss a domestic violence prosecution based on the prosecutor's conclusory statement that insufficient evidence and supporting factual statements existed.[1662] In *Commonwealth v. Hatfield*,[1663] the court, while deciding to dismiss a domestic violence criminal prosecution after the victim refused to testify, concluded that given the increasing numbers of battered spouses who refuse to testify, the court should exercise its judicial discretion based on a detailed record of the

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temporary protection order only on two days notice to the petitioner of a hearing); MINN. STAT. ANN. § 518B.01 (West Supp. 1993) (dismissal of civil protection order only after motion and notice); NEV. REV. STAT. ANN. § 33.080.2 (1986) (respondent may move to dismiss temporary protection order only after two days notice to the petitioner).

1656. MO. ANN. STAT. § 455.060.5 (Vernon Supp. 1993).

1657. 449 N.Y.S.2d 584 (Fam. Ct. 1982).

1658. *Id.* at 586; *see also In re* J.E.P., 432 N.W.2d 483 (Minn. Ct. App. 1988) (ordering dismissal of mother's civil protection order filed on child's behalf where no guardian ad litem was appointed to represent the child); Cunningham v. Cunningham, 673 S.W.2d 478 (Mo. Ct. App. 1984) (vacating wage assignment provision of civil protection order where petitioner failed to provide evidence to support maintenance request).

1659. 725 P.2d 923 (Or. 1986).

1660. *Id.*; *see also* NIJ CPO STUDY, *supra* note 19, at 28-29. ("While repeat petitioners can be frustrating . . . there usually are good reasons for the victim's return . . . ."). For a full discussion of the problems related to court sua sponte dismissals of civil protection order petitions, see ORLOFF & KLEIN, *supra* note 26, at 60-66.

1661. 583 N.E.2d 1133 (Ohio Mun. Ct. 1991).

1662. *Id.* at 1136.

1663. 593 A.2d 1275 (Pa. Super. Ct. 1991).

parties' history of abuse.[1664]

While considering dismissals carefully, courts should dismiss a protection order where a batterer has sought it in an effort to intimidate his partner. In *Chieco v. Chieco*,[1665] the court reversed a protection order issued to a husband, finding that the petitioner did not fear injury or need protection but rather sought to intimidate his wife who had commenced a divorce action based on cruel and inhuman treatment.[1666]

M. Jury Trial

In no jurisdiction is there a right to jury trial in civil protection order cases for the issuance, modification, or extension of a civil protection order. Protection orders are civil in nature and the possibility of a criminal penalty upon violation does not create a right to a jury trial.[1667] This policy favorably recognizes the fact that the exigent circumstances of domestic violence require speedy determinations of whether a protection order will be issued, continued, or changed.

There is also no right to a jury trial in a contempt proceeding.[1668] This policy emerges in part from the fact that contempt is not an offense which demands the right to a jury trial.[1669] It is only in the context of prosecutions for multiple contempt charges that the defendant may have a right to a jury trial in some jurisdictions.[1670]

1664. *Id.* at 1277.

1665. 566 N.Y.S.2d 345 (App. Div. 1991).

1666. *Id.*

1667. *See, e.g.*, 750 ILCS 60/206 (Smith-Hurd 1991) (providing that there is no right to jury trial for modifications, extension, vacation or issuance of civil protection order); Cooke v. Naylor, 573 A.2d 376, 377 (Me. 1990) (explaining that Domestic Protection from Abuse Act is civil in nature and even though there is the possibility of criminal sanctions for the violation of the orders under the Act, it does not violate the constitutional right to trial by jury in criminal cases).

1668. PA. STAT. ANN. tit. 23, § 6114(b) (1991) (providing that there is no right to jury trial in an action to enforce a civil protection order).

1669. *See, e.g.*, State *ex rel.* Hathaway v. Hart, 690 P.2d 514, 516 (Or. Ct. App. 1984) (holding that the defendant in a criminal contempt proceeding for violating an order has no statutory or constitutional entitlement to a jury trial); Eichenlaub v. Eichenlaub, 490 A.2d 918, 920 (Pa. Super. Ct. 1985) (rejecting claim that contempt was a serious offense giving rise to a jury trial since the maximum sentence authorized was six months imprisonment plus $1,000 fine, especially in light of the emergency conditions in which such contempt cases must be adjudged; and explaining that the Domestic Violence Act, which provides for a sentence for contempt and does not give the defendant a right to jury trial on such a charge, enjoys a strong presumption of constitutionality because it does not clearly and palpably violate constitutional provisions for jury trial).

1670. *See infra* notes 1902-16 and accompanying text for a more complete discussion of

N. Court Orders in Civil Protection Order Cases

1. Findings

The National Council of Juvenile and Family Court Judges urge states to amend civil protection order statutes to require courts to issue written findings of fact and conclusions of law when courts deny a civil protection order, fail to order batterers into treatment or allow unsupervised visitation or custody to a domestic violence perpetrator.[1671]

Both state statutes and case law require courts to make findings of fact when issuing a protection order. Seven states mandate courts to make either oral or written findings of fact.[1672] A number of states also require a statement of legal findings.[1673] The statutes of Illinois, Kentucky, and Maine require the court to state its reasons for a denial or reservation of a remedy.[1674] Case law requires courts to make findings of fact as to what abuse occurred.[1675] New York case law further encourages courts, in an effort to aid prosecutions for contempt, to specifically mention in findings of fact that the defendant was informed of the existence and purpose of the civil protection order.[1676] In *In re Marriage of Hagaman*,[1677] the Illinois Appeals

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this issue.

1671. *See* FAMILY VIOLENCE PROJECT, *supra* note 687, at 4-5.

1672. FLA. STAT. ANN. § 741.30(7)(d)(1) (West Supp. 1993) (mutual civil protection order required written findings of fact and law to clarify for the police); 750 ILCS 60/214(c) (Smith-Hurd 1991); ME. REV. STAT. ANN. tit. 19, § 766.1 (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 1993) (mutual civil protection order requires written findings of fact); N.Y. FAM. CT. ACT § 842(a) (McKinney Supp. 1994); TEX. FAM. CODE ANN. § 71.10(a) (West 1986) (court must state findings of abuse); VA. CODE ANN. § 16.1-253.4A (Michie 1988).

1673. IDAHO CODE § 39-6306 (1993); KAN. STAT. ANN. § 60-3107 (Supp. 1992); KY. REV. STAT. ANN. § 403.735 (Baldwin 1993); LA. REV. STAT. ANN. § 46:2136 (West 1982); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-506(c)(2) (1993); N.J. STAT. ANN. § 2C:25-18 (West Supp. 1993); W. VA. CODE § 48-2A-6 (1993).

1674. 750 ILCS 60/221(a)(2) (Smith-Hurd 1991); KY. REV. STAT. ANN. § 403.735(4) (Michie/Bobbs-Merrill 1993); ME. REV. STAT. ANN. tit. 19, § 765.3A (West Supp. 1992).

1675. *See* Thomas v. Thomas, 477 A.2d 728, 729 (D.C. 1984) (ordering trial judge to make findings of fact as to what specific intrafamily offenses occurred and why the court issued a protection order); Andrasko v. Andrasko, 443 N.W.2d 228, 230 (Minn. Ct. App. 1989) (reversing trial court because it issued a civil protection order without issuing findings of fact as to what abuse occurred); *see also* People v. Thompson, 206 Cal. Rptr. 516, 519 (Ct. App. 1984) (holding that domestic violence falls within the continuous course of conduct exception which arises when acts are so closely connected that they form part of one and the same transaction. Consequently, the prosecutor seeking a domestic violence conviction does not need to elect and the jury does not need to agree unanimously on which specific act the guilty verdict rests).

1676. *See, e.g.*, People v. Stevens, 506 N.Y.S.2d 995 (City Ct. 1986) (noting that findings

Court, sustaining the trial court's award of exclusive possession of the marital residence to the petitioner, held that the trial court need not make specific findings on all factors referenced in the statute to issue a civil protection order, provided the record reflects that the court considered relevant factors to determine the specific remedies.[1678] While courts may not need to address every factor enumerated in the civil protection order statute, courts should read the relevant psychological reports and prior civil protection order findings on which it relies in determining whether to issue a protection order.[1679] However, in *Delisser v. Hardy*,[1680] the court held that before a court may impose enhanced penalties for contempt of a protection order, the court must make findings of fact describing the defendant's contemptuous conduct which defeated or prejudiced the plaintiff's remedy.[1681]

2. Advisory Opinions

A judge cannot dismiss a civil protection order *sua sponte* prior to respondent having been served and joined in the action. In *Sabio v. Russell*,[1682] the trial court was found to be without authority to issue an advisory opinion which found the statute providing protection from abuse unconstitutional and dismissed the petition where the defendant was never served with process, was not before the trial court, and was not before the district court.[1683]

3. Consent Orders

Eighteen state statutes authorize the issuance of consent civil protection orders.[1684] Case law also supports the issuance of protec-

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should include mention that the defendant was informed of the civil protection order as these findings will eliminate later question about the defendant's knowledge at a contempt trial).

1677. 462 N.E.2d 1276 (Ill. App. Ct. 1984).

1678. *Id.* at 1280.

1679. *See, e.g.*, Matter of M.D., 602 A.2d 109, 115 (D.C. 1992) (reversing civil protection order finding an abuse of discretion where trial court continued a prior civil protection order suspending visitation for one year without having read either the psychiatric evaluation which challenged the recommendation against visitation or the findings underlying the civil protection order on which the court relied).

1680. 749 P.2d 1207 (Or. Ct. App. 1988).

1681. *Id.* at 1209; *see also* Baker v. Florida, 622 So. 2d 193 (Fla. Dist. Ct. App. 1993) (remanding contempt conviction where court failed to make sufficient oral findings to sustain charge); Glater v. Fabianich, 625 N.E.2d 96 (Ill. App. Ct. 1993) (failing to reverse lower court's failure to state jurisdictional findings on record).

1682. 472 So. 2d 869 (Fla. Dist. Ct. App. 1985).

1683. *Id.*

1684. ALA. CODE § 30-5-7(a) (1989) (court may approve consent agreement); DEL. CODE

tion orders by consent of the parties.[1685] Courts will fully enforce a civil protection order signed and agreed to by the parties.[1686] In *Maldonado v. Maldonado*,[1687] the District of Columbia Court of Appeals concluded that encouraging consent agreements serves the purpose of the Intrafamily Offense Act,[1688] and therefore, "if the consent is voluntary a trial judge ordinarily should issue the civil protection order when requested."[1689] However, "[i]f the trial court declines to issue a civil protection order freely consented to by a respondent, we believe that a strong statement of reasons for not doing so should be set forth."[1690] Judge Schwelb, in his concurrence, flatly concluded that since "there was no basis whatever for any finding that the decree was unlawful, unreasonable or inequitable, and the judge made no such finding . . . I perceive no basis for the judge's refusal to sign the consent order."[1691]

In *State v. Stahl*,[1692] the court held that a protection order extended by consent of the respondent without a finding of abuse could

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ANN. tit. 10, § 948(b) (Supp. 1993) (court shall grant appropriate relief if respondent consents to entry of a protection order); GA. CODE ANN. § 19-13-4 (1991) (court may approve consent agreement); IND. CODE ANN. § 34-4-5.1-6 (West Supp. 1993); IOWA CODE ANN. § 236.5.2 (West Supp. 1993) (court may approve consent agreement); KAN. STAT. ANN. § 60-3107(a) (1992) (court may approve consent agreement); LA. REV. STAT. ANN. § 46:2136A (West 1982) (court may approve consent agreement); ME. REV. STAT. ANN. tit. 19, § 766.1 (West Supp. 1992) (court may approve consent agreement and may enter consent civil protection order without finding of abuse); MISS. CODE ANN. § 93-21-13.2 (1992) (court may approve consent agreement); N.Y. FAM. CT. ACT § 824 (McKinney Supp. 1994) (court may approve consent agreement); N.C. GEN. STAT. § 50B-3(a) (1993) (court may approve consent agreement); OHIO REV. CODE ANN. § 3113.31E(1) (Anderson 1992) (court may approve consent agreement); OKLA. STAT. ANN. tit. 22, § 60.2 (West Supp. 1994) (court may approve consent agreement); ORE. REV. STAT. § 107.716(3) (1991) (court may approve consent agreement); PA. STAT. ANN. tit. 23, § 6108(a) (1991) (court may approve consent agreement); S.D. CODIFIED LAWS ANN. § 25-10-3 (1985) (court may approve consent agreement); TEX. FAM. CODE ANN. § 71.12(c) (West Supp. 1993) (court may approve consent agreement); W. VA. CODE § 48-2A-6(e) (1992) (court may approve consent agreement).

1685. *See* Vogt v. Vogt, 455 N.W.2d 471, 474 (Minn. 1990) (entering consent agreement); Commonwealth v. Smith, 552 A.2d 292, 293 (Pa. Super. Ct. 1988) (holding that double jeopardy did not bar criminal prosecution and consent agreement based on the same incident).

1686. *See, e.g.*, Rayan v. Dykeman, 274 Cal. Rptr. 672 (Cal. Ct. App. 1990) (holding fully enforceable a consent agreement which required a transfer of property to respondent despite the bankruptcy of the petitioner); Lee v. State, 799 S.W.2d 750, 753 (Tex. Crim. App. 1990).

1687. 631 A.2d 40 (D.C. Ct. App. 1993).

1688. D.C. CODE ANN. §§ 16-1001, 16-1026 (1989 & Supp. 1993).

1689. 631 A.2d at 44.

1690. *Id.*

1691. *Id.*

1692. 416 N.W.2d 269 (S.D. 1987).

form the basis for a criminal contempt charge for a violation of that order.[1693] The court held that the respondent cannot attack or appeal a civil decree entered with his consent, absent such grounds as mistake or fraud.[1694] Courts, relying on a sworn petition, also issue consent civil protection orders between the parties without a finding of abuse.[1695] However, a consent mutual civil protection order will not be issued against a petitioner where there has been no petition filed against or finding of abuse by the petitioner.[1696] The civil protection order must be consented to by the parties, not by counsel.[1697]

4. Mutual Civil Protection Orders

Mutual protection orders undermine the purpose and strength of domestic violence statutes, which seek to end violence and hold batterers accountable. Therefore, such orders should not be permitted absent a petition, notice, hearing, and findings of violence against each party. Gender bias reports from many states note that judges frequently enter mutual orders even when there was no complaint filed and no evidence of any violent conduct by the victim.[1698] Both researchers and judicial authorities strongly recommend against the

1693. *Id.* at 270.

1694. *Id.*

1695. *See* ME. REV. STAT. ANN. tit. 19, § 766.1 (West Supp. 1992) (court may approve consent agreement and may enter consent civil protection order without finding of abuse); *Maldonado*, 631 A.2d at 40 (explaining that court should issue a consent civil protection order if voluntarily entered into by both parties); Betts v. Floyd, 1992 Minn. App. LEXIS 257 (Ct. App. March 12, 1992) (stating that civil protection order may be issued upon agreement of the parties without a finding of abuse).

1696. *See* Deacon v. Landers, 587 N.E.2d 395, 398 (Ohio Ct. App. 1990) (reversing mutual civil protection order since their was no finding of domestic violence by the petitioner and noting in dicta that the statute may require that even in uncontested consent agreements the plaintiff must present evidence to sustain the issuance of the consent civil protection order). Under the Violence Against Women Act, H.R. 1133, S. 11, 103rd Cong., 1st Sess. § 2265 (1993), which will become law in early 1994, mutual protection orders entered without a petition, notice, hearing and specific findings against each party will not be afforded full faith and credit by sister states.

1697. *See* Erhart v. Erhart, 776 S.W.2d 450, 451 (Mo. Ct. App. 1989) (reversing a protection order when no evidence was offered to support it even though both parties' counsel stipulated to the continuation of the protection order).

1698. Czapanskiy, *supra* note 23, at 247, 253; *see also Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System, reprinted in* 8 GA. ST. U. L. REV. 539, 586-7 (1992); *Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Final Report, reprinted in* 15 WM. MITCHELL L. REV. 829, 878 (1989); NEVADA SUPREME COURT GENDER BIAS TASK FORCE, JUSTICE FOR WOMEN, 62-63 (1988).

issuance of mutual protection orders.[1699] Four out of five victims of intimate offenders resist assaults.[1700] They passively resist by trying to get help, threatening, or arguing or using evasive action twice as often as victims resort to violence or aggression in self-defense and in response to an abusive relationship.[1701] The legal system's focus in these cases should be upon identifying, restraining, and punishing the primary aggressor in the relationship, not victims who are attempting to protect themselves.[1702] Battered women who receive help and support when they reach out for assistance are significantly less likely to turn to violence as the only means of protecting themselves against their batterer's continued violence.[1703]

Judicial authorities also recognize that all violence between parties should not be perceived or treated equally. The recommendations of the National Council of Juvenile and Family Court Judges are clear and unequivocal: "Judges should not issue mutual protective or restraining orders," citing serious issues of due process, enforcement, and gender bias.[1704] Judge Ben Gaddis, a family court judge in Hilo, Hawaii, specifically points out the importance of identifying the primary aggressor in a violent relationship. He explains:

> One way to determine the identity of the primary aggressor is to make an assessment as to which party is afraid of being seriously hurt. Usually only one party is afraid of the other. The primary

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1699. *See* FAMILY VIOLENCE PROJECT, *supra* note 687, at 19.

1700. HARLOW, *supra* note 3, at 6.

1701. *Id.*

1702. "Abusive" acts reported by batterers are often acts of resistance by their victims. Careful fact finding by the court and presentation of evidence by counsel will often reveal that one party is the primary aggressor and the other was acting in self-defense. Ganley, *supra* note 21, at 24.

Studies indicate that even when women are physically violent against their batterers who are the primary aggressors in the relationship, women suffer more injuries during assaults, are attacked much more frequently, with more aggressive actions during a single attack and each attack is more severe than when women use force against their male batterers. Assertions that men and women are equally violent fail to account for these factors and fail access the impact that forcible sexual assault, perpetrated solely by men, has on intimate relationships. Browne, *supra* note 10, at 1078.

1703. Research indicates that there is a correlation between an increase in legal protection and services for battered women and a decrease in the number of homicides committed by women against male partners. From 1979 to 1984, this type of homicide decreased by more than 25%. Angela Browne & K.R. Williams, Resource Availability for Women at Risk: Its Relationship to Rates of Female-Perpetrated Homicide, paper presented at the American Society of Criminology Annual Meeting (Nov. 11-14, 1987, Montreal, Canada).

1704. *See* FAMILY VIOLENCE PROJECT, *supra* note 687, at 24; *see also* NIJ CPO STUDY, *supra* note 19, at 47. ("There are . . . compelling reasons to use this remedy sparingly.").

> aggressor usually is not concerned about being hurt but uses violence by the other party as a justification or explanation for his own actions.[1705]

Courts should look carefully at abusive relationships to determine who is the primary aggressor and who is using self-defense. Issuing mutual protection orders may place a battered woman at greater risk. Mutual orders confuse the police as to the truly dangerous party, and increase the batterer's sense of legitimacy in his violence.[1706] Furthermore, case law reveals that batterers may seek protection orders to intimidate their partners. In *Chieco v. Chieco*,[1707] the court reversed a protection order issued to a husband finding that the petitioner did not fear injury or need protection, but rather sought to intimidate his wife who had commenced a divorce action based on cruel and inhuman treatment.[1708] This case demonstrates the usefulness of the court determining who is the aggressor in the relationship.

A number of states have recognized the dubious nature of mutual protection orders, and have placed significant limits on their issuance. Eight state statutes refuse to issue mutual protection orders without requiring each party to file a petition.[1709] North Dakota will issue a mutual restraining order only if the court specifically finds that neither party acted in self defense.[1710] Florida, Massachusetts, and North Dakota, require a court to enter written findings of fact when issuing a mutual civil protection order, which clearly states who did what and who is restrained.[1711] California and West Virginia will only issue mutual protection orders if both parties appear in court and each present evidence of abuse by the other.[1712] Alaska will only

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1705. Judge Ben Gaddis, Domestic Abuse Protective Order Concepts, at 5-6 (Sept. 22, 1992) (Unpublished Paper).

1706. FAMILY VIOLENCE PROJECT, *supra* note 687, at 24.

1707. 566 N.Y.S.2d 345 (App. Div. 1991).

1708. *Id.*

1709. ARIZ. REV. STAT. ANN. § 13.3602G (1993); FLA. STAT. ANN. § 741.302(h)(1) (West Supp. 1992); 750 ILCS 60/215 (Smith-Hurd 1991); KY. REV. STAT. ANN. § 403.735(2) (Michie/Bobbs-Merrill 1993) (no mutual protection order unless separate petition by the respondent); ME. REV. STAT. ANN. tit. 19, § 761-A.5, 766.7 (West Supp. 1993) (not available because undermines the purpose of the act); MO. ANN. STAT. § 455.050.2 (Vernon 1993); N.Y. FAM. CT. ACT § 841 (McKinney 1992); N.D. CENT. CODE § 14-07.1-02.6 (1992); TEX. FAM. CODE ANN. § 71.121 (West Supp. 1992); *see also* MODEL CODE, *supra* note 15, § 310.

1710. N.D. CENT. CODE § 14-07.1-02.5 (Supp. 1993).

1711. FLA. STAT. ANN. § 741.30 (7)(d)(1) (West Supp. 1993) (court must set out specific findings of law and fact to clarify for the police); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 1993); N.D. CENT. CODE § 14-07.1-02.5 (Supp. 1993).

1712. CAL. FAM. CODE § 5514 (West 1993); W. VA. CODE § 48-2A-6 (1993); *see also*

issue such an order if there is good cause based on the extraordinary circumstances of the case.[1713]

The Violence Against Women Act of 1993, which passed the House and Senate in November of 1993, when enacted, will offer interstate enforcement of civil protection orders.[1714] However, under this federal legislation, mutual protection orders will not be awarded interstate enforcement unless each party has filed a petition, has been served, has had an opportunity for a hearing, and specific findings have been entered against that party.[1715]

Courts across the country have recognized the danger of mutual orders and have severely restricted their use.[1716] Courts require a cross petition, notice to the petitioner, and evidence of actual or threatened domestic violence before the court will issue a mutual protection order.[1717] In *Deacon v. Landers*,[1718] the court reversed a

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Maksuta v. Higson, 577 A.2d 185, 186 (N.J. Super. Ct. App. Div. 1990) (issuing a mutual protection order absent a cross petition but did so only upon a finding that both parties committed domestic violence, and awarding temporary support to the respondent woman ordered to vacate the parties' residence based on her violent acts, even though the respondent filed no counterclaim); Jane Y. v. Joseph Y., 474 N.Y.S.2d 681 (Fam. Ct. 1984) (ordering respondent to vacate home but also issuing protection order on behalf of the children directing the petitioner not to consume alcoholic beverages in the home or be intoxicated in the presence of the children).

1713. ALASKA STAT. § 25.35.010(e) (1993) (mutual protection orders are only mutual as to petitioner not to communicate to respondent and only issued after finding that the petitioner committed domestic violence against the respondent).

1714. H.R. 1133, S. 11, 103rd Cong., 1st Sess. § 2265(A) (1993).

1715. *Id.* at § 2265(C).

1716. *See, e.g.*, Kobey v. Morton, 278 Cal. Rptr. 530 (Ct. App. 1991) (setting forth that the court cannot grant a mutual protection order where no petition or cross-complaint was filed or where the party never received notice or the opportunity to be heard); Fitzgerald v. Fitzgerald, 406 N.W.2d 52, 54 (Minn. Ct. App. 1987) (reversing mutual protection order where there was no evidence that petitioner wife abused respondent husband); *Maksuta*, 577 A.2d at 185 (noting that a mutual protection order will only be granted upon a finding that both parties committed acts of domestic violence).

1717. *See* Lucke v. Lucke, 300 N.W.2d 231, 236 (N.D. 1980) (refusing to exclude respondent's oldest daughter from the family residence where she was never brought in as a party); Heard v. Heard, 614 A.2d 255, 258 (Pa. Super. Ct. 1992) (holding that it was error for trial court to sua sponte issue a mutual protection order to husband when only wife had petitioned the court for relief; to receive relief a petitioner "must" file a petition and a hearing must be held thereon for the court to have power to issue an order); Commonwealth v. Allen, No. 3458, 1988 Pa. C.P. LEXIS 13 (March 7, 1988) (considering cross petition for civil protection order; awarding civil protection order to initial petitioner but rejected mutual civil protection order finding insufficient evidence); *see also* Linville v. Lillard, No. 01-90-00367-CV, 1991 WL 19840 (Tex. Ct. App. Feb. 14, 1991) (upholding denial of civil protection order and reversing issuance of permanent mutual injunction against harassment between divorced parties since the trial court lacked jurisdiction to issue the injunction after divorce was finalized); Baldwin v. Moses, 386 S.E.2d 487, 489 (W. Va. 1989) (holding that a magis-

mutual civil protection order as a denial of the petitioner's due process rights where the petitioner was not given notice or a hearing to rebut the respondent's charges, and the respondent presented insufficient evidence of actual or threatened domestic violence.[1719] In *Fitzgerald v. Fitzgerald*,[1720] the court reversed a mutual civil protection order when only the petitioner requested protection and there was no evidence that the petitioner wife abused the respondent husband.[1721] Therefore, the mutual protection order may not issue without a petition and evidence of abuse by each party.[1722] In *Kobey v. Morton*,[1723] the appellate court concluded that the trial court has no inherent power to grant a mutual protection order against the petitioner where the respondent never filed a petition or cross complaint, and where petitioner never received notice or the opportunity to respond to the allegations.[1724] Specifically, the court held that the statute "calls for the formality of a cross-complaint before the court imposes on the plaintiff 'what approximates a permanent injunction.'"[1725] The court's inherent power does not extend so far as to encompass an order without a petition to serve as a vehicle for that order.

O. Mediation

Like mutual protection orders, the mediation process undermines the goal of domestic violence statutes to protect abuse victims and delegitimize the batterer's violence. Judicial authorities have severely criticized the use of any mediation in both protection order proceedings and in divorce, custody, and visitation cases which involve domestic abuse. The NCJFCJ concluded:

> Judges should not mandate mediation in cases where family violence has occurred . . . . Mediation is a process by which the parties voluntarily reach consensual agreement about the issue at hand. Violence, however, is not a subject for compromise. Thus, when the

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trate court has jurisdiction to grant civil protection order relief to former wife against former husband even though the final divorce decree enjoined each party from molesting or annoying the other).

1718. 587 N.E.2d 395 (Ohio Ct. App. 1990).
1719. *Id.* at 398.
1720. 406 N.W.2d 52 (Minn. Ct. App. 1987).
1721. *Id.* at 54.
1722. *Id.*
1723. 278 Cal. Rptr. 530 (Ct. App. 1991).
1724. *Id.* at 530.
1725. *Id.* at 532.

> issue before the court is a request for an order of protection or a criminal family violence charge, mediation should not be mandated.
>
> The victim receives no protection from the court with a mediated "agreement not to batter." And a process which involves both parties mediating the issue of violence implies, and allows the batterer to believe, that the victim is somehow at fault.[1726]

The NIJ challenged the appropriateness of mediation in child custody cases where there is a history of spousal abuse.[1727] The NIJ concluded that the "balance of power in victim/abuser relationships is so weighted that the possibility of victim coercion during mediation is virtually unavoidable . . . . This imbalance of power would continue after the mediation session as well, since the parties' relationship would not be altered."[1728] The NCJFCJ calls for judges to scrutinize closely mediated agreements involving victims of domestic violence, and recommends that judges urge victims to have questionable agreements reviewed by counsel.[1729]

The positions adopted by judicial authorities are well grounded in sound research on power and control in abusive relationships and the effect that the power dynamic has on a domestic violence victim's ability to bargain equally. Research has found that the tools of the legal system (rules of evidence, open court hearings, court reporters) are better suited to counter the power imbalance in abusive relationships of parties entering the court system.[1730] Abused women who have suffered prior violence are intimidated by their batterers during mediation and are fearful that asserting their interests or those of their children will incite continued harm at the hands of their batterer.[1731]

1726. FAMILY VIOLENCE PROJECT, *supra* note 687, at 28.

1727. GOOLKASIAN, *supra* note 780, at 62.

1728. *Id.*

1729. FAMILY VIOLENCE PROJECT, *supra* note 687, at 28; *see also* Czapanskiy, *supra* note 23, at 273. ("[W]e need to use extreme caution when we consider taking family law issues outside the realm of courts and into private dispute resolution systems. Given our general social conditioning, the professionals who staff such systems are likely to be just as baised as judges. Because they do not operate in the open, however, holding them accountable is much more difficult."). *Id.*

1730. *See generally* JESSICA PEARSON, MEDIATION AND DOMESTIC VIOLENCE: TECHNICAL ASSISTANCE AND RESEARCH (1989).

1731. Mediation in domestic violence cases is improper because men have greater bargaining power given their position of power in the economic and social structure. Women have more to lose given their lower economic and social status and their role as primary caretaker of the children in many families. Even the most skillful mediators cannot reduce or eliminate differences in power embedded in the relationship. *See* H. Cohen, *Mediation in Divorce: Boon or Bane?* 5 WOMEN'S ADVOC. 1-2 (1983); Charlotte Germane et al., *Mandatory Custo-*

Policymakers in states with the most experience in mediating custody disputes have begun to conclude that mediation of custody must not occur in families where there has been spouse or child abuse,[1732] and several innovative states now preclude mandatory mediation or restrict mediation in their civil protection order statutes.[1733] The Supreme Court of Minnesota clarifies the definition of mediation. In *Vogt v. Vogt*,[1734] the court held that only when there is no probable cause of domestic violence may the court order or refer parties to mediation.[1735] The court reversed the temporary visiting arrangements established in a protection order when it found that the Court Services representative went beyond consulting the parties, and instead overrode the misgivings of the petitioner and exacted a signed written agreement from the parties in violation of state statutory law prohibiting mediation in domestic violence cases.[1736]

P. Peace Bonds and Penal Bonds

A few state civil protection order statutes authorize courts to require the respondent to provide a bond to prevent further violations

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dy Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence, 1 BERKELEY WOMEN'S L.J. 175 (1985); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317-30 (1990) [hereinafter *Gentle Jeopardy*]; Barbara J. Hart, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. 347-63 (1990); J. Schulman & Laurie Woods, *Legal Advocacy v. Mediation in Family Law*, 6 WOMEN'S ADVOC. 3-4 (1983); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985). 32% of battered women are fearful during negotiations for child custody, and about 22% stated that they were fearful of retaliatory violence during negotiations for child support and 27.7% were fearful during negotiations for property. 13% of the women in the study stated that they gave up legal rights because of their fear of retaliatory violence. D. Kurz and K. Coughey, The Effects of Marital Violence on the Divorce Process, Paper Presented at the American Sociological Association Meeting (Aug. 1989).

1732. *Gentle Jeopardy*, *supra* note 1731, at 317-30.

1733. IOWA CODE ANN. § 236.13 (1993); ME. REV. STAT. ANN. tit. 19, § 768.5 (1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 1993); WIS. STAT. ANN. § 767.11 (West 1993); N.M. STAT. ANN. § 40-13-3(D) (Michie 1993); *see also* Hart, *supra* note 991. State statutes which exempt or partially exempt custody and visitation cases from mediation when domestic violence exists include: CAL. CIVIL CODE § 4607.2 (West Supp. 1993); MINN. STAT. ANN. § 518.619(2) (West 1990); N.H. REV. STAT. ANN. § 458:15-a (1992); N.D. CENT. CODE § 14-07.1-02.4(d) (1993); OHIO REV. CODE ANN. § 3109.052(A) (Anderson 1992); OR. REV. STAT. § 107.755 (1991); WASH. REV. CODE ANN. § 26.09.184 (1993); *see also* MODEL CODE, *supra* note 15, §§ 311, 407, 408(A), 408(B).

1734. 455 N.W.2d 471 (Minn. 1990).

1735. *Id.* at 475.

1736. *Id.* at 474.

of a protection order.[1737] Case law supports the issuance of peace bonds in domestic violence cases. The court in *State v. Weller*[1738] held that for a peace bond to issue in a domestic violence case, 1) the court must hold a separate hearing; 2) the state must present evidence as to the defendant's threat to the peace; 3) the peace bond must be issued on notice; 4) the court must make specific factual findings and enumerate prescribed conduct; and 5) the peace bond must have a specified duration.[1739] Peace bonds may also issue to ensure compliance with specific provisions of a protection order. In *In re Marriage of Rodriguez*,[1740] the court conditioned limited visitation in a protection order on the respondent posting a $10,000 bond based on the respondent previously violating a temporary protection order by failing to return the minor child to the petitioner mother.[1741] The Supreme Court of Illinois held that the mother had standing to execute the bond after the father failed to return the child as ordered.[1742]

Q. Modification, Extension, and Duration of Civil Protection Orders

1. Modifications of Civil Protection Orders

Twenty-seven jurisdictions permit either party to move for modification of an existing civil protection order.[1743] Careful analysis is required when courts consider modifying an existing civil protection

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1737. *See, e.g.*, MINN. STAT. ANN. § 518B.01 (West 1993) (maximum $10,000); N.C. GEN. STAT. § 15A-534.1 (1993) (appearance bond as condition of pretrial release).

1738. 563 A.2d 1318 (Vt. 1989).

1739. *Id.* at 1321-22.

1740. 545 N.E.2d 731 (Ill. 1989).

1741. *Id.* at 732.

1742. *Id.* at 734.

1743. ALA. CODE § 30-5-7(b) (1989); ARK. CODE ANN. § 9-15-209 (Michie 1993); DEL. CODE ANN. tit. 10, § 949(c) (1993); D.C. CODE ANN. § 16-1005 (1989); HAW. REV. STAT. § 586-9 (1985); IDAHO CODE § 39-6313 (1993); IOWA CODE ANN. § 236.5 (West Supp. 1993); KAN. STAT. ANN. § 60-3107(e) (Supp. 1992); LA. REV. STAT. ANN. § 46-2136B (West 1982); ME. REV. STAT. ANN. tit. 19, § 766 (West Supp. 1993); MD. CODE ANN., FAM. LAW § 4-507 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 1993); MINN. STAT. ANN. § 518B.01 (West 1990); MO. ANN. STAT. § 455-050.2 (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-121(11)(a) (1993); NEB. REV. STAT. § 42-924(3) (1992); N.H. REV. STAT. ANN. § 173B:4 (1992); N.J. STAT. ANN. § 2C:25-29 (West Supp. 1993); N.M. STAT. ANN. § 40-13-6B (Michie 1993); N.Y. FAM. CT. ACT § 844 (McKinney 1984); N.D. CENT. CODE § 14-07.1-02.6 (Supp. 1993); OR. REV. STAT. § 107-730 (1991); PA. STAT. ANN. tit. 23, § 6108(b) (1991); R.I. GEN. LAWS § 15-15-3 (Supp. 1993); S.C. CODE ANN. § 20-4-70 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-10 (1984); TEX. FAM. CODE ANN. § 71.14 (West 1986); VA. CODE ANN. §§ 16.1-253.1B, 279.1B (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.130 (1986).

order. Since most battered women make two to five attempts to flee their batterer's before they succeed,[1744] many women who receive civil protection orders may attempt to reunite with their batterers after the civil protection order has been issued. When this occurs one or both of the parties should request modification of the civil protection order to remove the stay away provisions while retaining in effect the no abuse clause. This practice is recommended by the National Institute of Justice study on civil protection orders.[1745]

In some cases, however, the respondent will seek modifications in an effort to maintain control over the petitioner. Wary of such requests, the court in *Todd v. Todd*[1746] refused to modify a consent civil protection order on the respondent's request despite a finding that the petitioner had refused to abide by the custody terms of the order.[1747] In other cases, petitioners will seek modifications of the civil protection order where its terms are unworkable, to change visitation times, or to add a stay away provision if the parties were living together at the time the civil protection order was issued and they have now separated.[1748]

2. Extensions of Orders/Reissuance in Writing

Twenty-eight jurisdiction's statutes specifically state that civil protection orders are extendable.[1749] Most courts extend protection

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1744. Lewis Okun, *Termination or Resumption of Cohabitation in Woman Battering Relationships: A Statistical Study*, *in* COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 113 (Gerald Hotaling et al. eds., 1988).

1745. NIJ CPO STUDY, *supra* note 19, at 53.

1746. 772 S.W.2d 14 (Mo. Ct. App. 1989).

1747. *Id.* at 15.

1748. *See, e.g.*, Casey v. Shy, 712 S.W.2d 461 (Mo. Ct. App. 1986) (reversing a modification of a consent civil protection order which increased the weekly child support award from $20 to $50 despite the mother's claims that the expenses were greater than she anticipated and the child's needs were neglected).

The *Casey* case also provides an excellent example of what happens when a civil protection order respondent is represented and the petitioner is not. In the earlier civil protection order action that resulted in a consent agreement there was a dramatic power imbalance. It is not at all uncommon for unrepresented domestic violence victims to bargain away financial relief for safety when faced with a represented batterer. Courts should be particularly sensitive to such conditions that existed at the time the civil protection order was issued when considering modifications generally. *See also* Ross v. Ross, 543 N.Y.S.2d 162 (1989) (refusing to modify wife's protection order to include an additional provision giving her temporary exclusive occupancy of the marital home while the divorce action is pending where she did not show by a preponderance of the evidence that the husband committed family offenses which would require him to stay away from the marital home).

1749. ALASKA STAT. § 25.35.010(c) (1991); ARIZ. REV. STAT. ANN. § 13-3602 (Supp. 1993); ARK. CODE ANN. § 9-15-205 (Michie 1987) (where threat of domestic violence still

orders based on continued fear without the requirement of additional acts of violence against the petitioner. In *Barry v. Iverson*,[1750] the court held that the petitioner's reasonable continuing fear of the respondent was sufficient to extend the duration of the civil protection order for one year.[1751]

In *Cruz-Foster v. Foster*,[1752] the court held that, in deciding whether to extend a civil protection order beyond one year under the Intrafamily Offense Act, it should consider the entire history of abuse between the parties.[1753] Specifically, the court reversed a trial judge's denial of extension of a protection order where the judge "gave no consideration, at least explicitly, to the 'entire mosaic'" of the parties relationship.[1754] In *Maldonado v. Maldonado*,[1755] the District of Columbia Court of Appeals reversed, as an abuse of discretion, a trial judge's denial of an extension of a protection order based solely on the fact that the husband was incarcerated, where the husband could technically be released prior to the expiration of the civil protection order, could escape from jail, could continue to harass and threaten the respondent from jail, and where the husband consented to the extension.[1756] In *Capps v. Capps*,[1757] the Missouri Court

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exists); CAL. FAM. CODE § 5756 (West 1993); CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 949 (Supp. 1993); D.C. CODE ANN. § 16-1004 (1992); FLA. STAT. ANN. § 741.30 (West Supp. 1993); IDAHO CODE § 39-6306 (1993); 750 ILCS 60/220 (Smith-Hurd Supp. 1993); IND. CODE § 34-4-5.1-5 (West Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(6) (Supp. 1992); LA. REV. STAT. ANN. § 46:2136 (West 1982); ME. REV. STAT. ANN. tit. 19, § 765(6) (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3(i) (West Supp. 1993); MINN. STAT. ANN. § 518B.01(6) (West Supp. 1993); MO. ANN. STAT. § 455.040 (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 173B:4(III) (Supp. 1992); N.M. STAT. ANN. § 40-13-6(B) (Michie Supp. 1993); OHIO REV. CODE ANN. § 3113-31(E)(3) (Anderson Supp. 1992); OR. REV. STAT. § 107.725 (1991); R.I. GEN. LAWS § 15-15-3(2) (Supp. 1993); S.C. CODE ANN. § 20-4-70 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-1 (1992); TENN. CODE ANN. § 36-3-605(b) (1992); VT. STAT. ANN. tit. 15, § 1103 (1985); WASH. REV. CODE ANN. § 26.50.060(2) (West Supp. 1993); W. VA. CODE § 48-2A-5(d) (Supp. 1993); WIS. STAT. ANN. § 813.12(4)(c) (West Supp. 1993); WYO. STAT. § 35-21-106 (Supp. 1993). For a discussion of the standards of proof for extension, see *supra* notes 1526-38 and accompanying text.

1750. No. C8-90-801, 1990 WL 119349 (Minn. Ct. App. Aug. 10, 1990).

1751. *Id. But see* Ferris v. Clark, 1993 Conn. Super. Ct. LEXIS 1215 (Conn. Super. Ct. May 19, 1993) (refusing to extend a restraining order based on no finding of physical abuse during existence of order). This decision demonstrates the dire need for judicial training on domestic violence. The tone of this decision displays clear prejudice and bias against this specific battered woman.

1752. 597 A.2d 927 (D.C. 1991).

1753. *Id.* at 930.

1754. *Id.* at 931.

1755. No. 93-FM-199, 1993 D.C. App. LEXIS 227 (Sept. 13, 1993).

1756. *Id.* at *5-*13.

of Appeals held that renewal of a civil protection order did not require that petitioner allege new acts of abuse so long as the circumstances which formed the basis for the initial order continued unabated.[1758] The court extended a civil protection order against a husband based on evidence that while he came to pick up his son for a weekend visit, he screamed "bitch" at the petitioner and drove off suddenly while the petitioner's hands were still on the frame of his car.[1759]

In *Knuth v. Knuth*,[1760] the Minnesota Court of Appeals upheld the extension of a civil protection order based on the respondent's continued and frequent presence in the petitioner's vicinity, including moving within two blocks of the family residence, following the petitioner, loitering around the family home and domestic violence shelter where petitioner stayed, and looking into the petitioner's house.[1761] The court held that such behavior placed the petitioner in fear of imminent bodily harm sufficient to extend the protection order.[1762] These courts recognize the pivotal role that the civil protection order may have played in reducing the violence between the parties during the order's initial term. Only by reviewing the totality of violence in the relationship and the totality of the present circumstances of the relationship and actions between the parties can a proper determination be made.

Respondents must have actual notice that petitioner has requested a civil protection order extension. In *Jenkins v. Jenkins*,[1763] the Missouri Court of Appeals held that personal service upon the respondent was not required for an extension of a civil protection order since the

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1757. 715 S.W.2d 547 (Mo. Ct. App. 1986).

1758. *Id.* at 552.

1759. *Id.* at 549. *But see* Bandelier v. Bandelier, 757 S.W.2d 281 (Mo. Ct. App. 1988) (reversing a civil protection order in light of the facts of this case finding that the petitioner's claim that the respondent was in her home several times since the issuance of the original order did not establish immediate and present danger of abuse sufficient to renew the order or issue a new one); Keith v. Keith, 28 Pa. D. & C.3d 462 (Ct. Comm. Pleas 1984). The court refused to extend a civil protection order beyond a year against a father who sexually abused his minor daughters even though his close proximity caused them stress, fear, and emotional strain since no new abusive acts occurred during the proceeding year. This court appears to have entirely ignored the key role the civil protection order undoubtedly played in preventing such further abuse. The civil protection order's success in preventing abuse does not necessarily mean that the continued need for the protection order has been eliminated.

1760. 1992 Minn. App. LEXIS 696 (Minn. Ct. App. 1992).

1761. *Id.* at *1.

1762. *Id.* at *3.

1763. 784 S.W.2d 640 (Mo. Ct. App. 1990).

respondent was personally served with the original civil protection order, the motion to extend was filed prior to the expiration of the order, and the respondent had actual notice of the motion to extend.[1764]

3. Duration of Orders

The growing statutory trend is to increase the duration of civil protection orders. A number of progressive states now issue civil protection orders lasting for several years or indefinitely. Six states, Colorado, Michigan, New Jersey, North Dakota, Oklahoma, and Washington place no limit on the duration of civil protection orders.[1765] California and Hawaii's courts issue civil protection orders for a full three years,[1766] and in Illinois and Wisconsin, courts issue civil protection orders for a full two years.[1767] While only a small minority of the states still issue civil protection orders for less than a year,[1768] over half of the states still issue protection orders for one year.[1769]

1764. *Id.* at 643; *see also* State v. Jankowski, 496 N.W.2d 215 (Wis. Ct. App. 1992) (ordering the trial court to grant defendant's motion to dismiss the charges against him for violating a domestic abuse injunction on the grounds that the injunction was a nullity as it had been improperly extended without notice or hearing).

1765. COLO. REV. STAT. ANN. § 14-4-102 (West Supp. 1993); MICH. COMP. LAWS ANN. § 552.14 (West 1992); N.J. STAT. ANN. § 2C:25-28 (West Supp. 1993); N.D. CENT. CODE § 14-07.1-02 (1991); OKLA. STAT. ANN. tit 22, § 60.4(F) (West 1992); WASH. REV. CODE ANN. § 26.50.060(2) (West Supp. 1993); *see also* MODEL CODE, *supra* note 15, §§ 306, 307 (All orders are to be issued *ex parte* for these functions: (1) enjoining abuse against the petitioner, (2) prohibiting contact with the petitioner, (3) requiring the respondent to vacate the premises, (4) requiring the respondent to stay away from petitioner, (5) granting temporary custody to the petitioner, and (6) prohibiting exchange of personal property. Either party can request a hearing within 30 days following service; at the hearing, the *ex parte* order can be modified and additional relief may be granted.).

1766. CAL. FAM. CODE § 5756 (West 1993); HAW. REV. STAT. § 586-5.5 (Supp. 1992).

1767. 725 ILCS 5/112A-20 (Smith-Hurd 1993); WIS. STAT. ANN. § 35-21 (West 1992).

1768. ALASKA STAT. § 25.35.020 (1991) (twenty days); ARIZ. REV. STAT. ANN. § 13-3602(J) (Supp. 1993) (six months); CONN. GEN. STAT. ANN. § 46b-15(d) (West Supp. 1993) (ninety days); GA. CODE ANN. § 19-13-4(c) (Supp. 1991) (six months); LA. REV. STAT. ANN. § 46:2136(D) (West 1982) (ninety days); MD. CODE ANN., FAM. LAW § 4-506 (1992); N.M. STAT. ANN. § 40-13-6(B) (Michie Supp. 1993) (six months); S.C. CODE ANN. § 20-4-70 (Law. Co-op. 1985) (six months); UTAH CODE ANN. § 30-6-5 (1992) (four months); W. VA. CODE § 42-A-6(b) (Supp. 1993) (sixty days); WYO. STAT. § 35-21-106 (Supp. 1993) (three months with unlimited extensions of additional three month durations, each on a showing of good cause).

Furthermore, even in states where longer protection orders may be available, a very small minority of courts may, under certain circumstances, issue civil protection orders for less than the full statutorily permitted time. *See, e.g.*, Fitzgerald v. Fitzgerald, 406 N.W.2d 52 (Minn. Ct. App. 1987) (holding that the trial court's issuance of a civil protection order for three months rather than the statutorily permitted one year was not an abuse of discretion

Social science research supports the need for increasing the duration of civil protection orders.[1770] Battered women who leave their abusive partners are sometimes followed and harassed for months and even years.[1771] Some batterers continue to harass and beat their partners twenty-five years after the victims have left them.[1772] Physical abuse continues after separation for two-thirds of battered women.[1773] Over one-half of the homicides of female spouses and intimate partners are committed by male batterers after their partners have left them.[1774] Over the past ten years, our newspapers have been filled with stories of women like Agnes Scott whose batterer husband tracked her down after seven years and mutilated her.[1775]

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where the alleged abuse occurred two months before the petitioner filed for the order, both parties were in treatment for chemical dependency, the respondent expressed an interest in staying away from and not contacting the petitioner, and the petitioner may request an extension of the order if circumstances warrant it in the future); Brookhart v. Brookhart, 17 Pa. D. & C.3d 795 (1991) (holding that the temporary support awarded in a civil protection order would become void in two weeks if the petitioner did not file for support under the Civil Procedure Support Act within that time). These shorter protection orders offer little protection to domestic violence victims in that they require repeated court appearance for extensions and often do not last long enough to protect victims throughout the separation period required before they can file for divorce or secure permanent custody and child support orders.

1769. ALA. CODE § 30-5-7 (1989); ARK. CODE ANN. § 9-15-205(b) (Michie 1987); DEL. CODE ANN. tit. 10, § 949(b) (Supp. 1993); D.C. CODE ANN. § 16-1005(d) (1981); FLA. STAT. ANN. § 741.30(7)(b) (West Supp. 1993); IDAHO CODE § 39-6306(5) (1993); IND. CODE ANN. § 34-4-5.1-5(c) (West Supp. 1993); IOWA CODE ANN. § 236.5(2)(e) (West Supp. 1993); KAN. STAT. ANN. § 60-3107(a)(6) (Vernon Supp. 1993); KY. REV. STAT. ANN. § 403.750(2) (Michie/Bobbs-Merrill Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 766(2) (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 3(i) (West Supp. 1993); MINN. STAT. ANN. § 518B.01(6)(b) (West Supp. 1993); MISS. CODE ANN. § 93-21-17(2) (Supp. 1993); MONT. CODE ANN. § 40-4-121(6) (1993); NEB. REV. STAT. § 42-924(3) (Supp. 1992); NEV. REV. STAT. ANN. § 33.080(3) (Michie 1985); N.H. REV. STAT. ANN. § 173B:4(III) (Supp. 1992); N.Y. FAM. CT. ACT § 842 (McKinney Supp. 1994); N.C. GEN. STAT. § 50B-3(b) (1989); OHIO REV. CODE ANN. § 3113-31(E)(3) (Anderson Supp. 1992); OR. REV. STAT. § 107.718(1) (1991); PA. STAT. ANN. tit. 23, § 6108(b) (1991); R.I. GEN. LAWS § 15-15-3(2) (Supp. 1993); S.D. CODIFIED LAWS ANN. § 25-10-5 (1992); TENN. CODE ANN. § 36-3-605(b) (1991); TEX. FAM. CODE ANN. § 71-13(a) (West Supp. 1993); VT. STAT. ANN. tit. 15, § 1103(b) (1989); VA. CODE ANN. § 16.1-279.1(B) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.60(2) (West Supp. 1993).

1770. *See supra* notes 599-604 and accompanying text.

1771. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 114 (1987).

1772. *See* ANN JONES, WOMEN WHO KILL 298-99 (1980).

1773. D. Kelso and L. Personette, Domestic Violence and Treatment Services for Victims and Abusers (1985) (unpublished report, on file with ALTM Associates, Anchorage, Alaska).

1774. PATRICK A. LANGAN & CHRISTOPHER A. INNES, BUREAU OF JUSTICE STATISTICS, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 2 (1986).

1775. JONES, *supra* note 1772, at 299. In half the states in this country, the homicide rates of women victims in partner homicide increased by 75% between 1976 and 1986. Angela Browne & Kirk R. Williams, Gender-Specific Effects on Patterns of Homicide Perpe-

Clearly, courts cannot presume that a batterer's attempts to control and injure the abuse victim will end in a month, a year, or ten years.

To be truly effective, civil protection orders should last indefinitely, leaving either party the right to return to court to request modification or termination of the order. Custody, visitation, and child support provisions contained in civil protection orders should also remain in effect until they are modified by a subsequent court proceeding or until the children reach the age of majority. This approach has the advantage of minimizing the need for parties in domestic violence cases to continually meet in court under circumstances fraught with conflict.[1776] For *pro se* litigants, such an approach will make the court more accessible by eliminating the need for multiple hearings in different courts, before different judges, applying different laws and court procedures. Where the parties in the civil protection order proceeding are unmarried, this approach allows the parties to solve all legal issues between them in one court proceeding. If the terms of the civil protection order are working, the parties will not need to meet each other again in court. For married parties who will need to return to court to obtain a divorce, this approach may promote greater numbers of more amicable, uncontested divorces. Further, this approach will preserve court time and resources that may be better devoted to the smaller percentage of cases that are truly contested and require the full attention of the court to diffuse the conflict and offer protection. Litigants who are not satisfied with the terms of the original order of the court may return to court at any time to amend, modify, or rescind that order by filing a petition either before the civil protection order judge or in a custody, divorce, or child support proceeding and by providing notice to the opposing party.[1777]

In the alternative, three year extendable civil protection orders are recommended. This time-frame provides protection of sufficient

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tration, Paper Presented at the American Psychological Association of New York, (Aug. 1987).

1776. This approach would also prevent such unfortunate instances as in the case of *State v. Jankowski*, 496 N.W.2d 215 (Wis. Ct. App. 1992), in which the conviction of a defendant for three violations of a domestic abuse injunction was reversed on the grounds that the court did not have the authority to extend the injunction, making it a nullity. If the petitioner had not been required to go into court to extend the order in the first place, the initial injuction would have served to adequately protect her from the continued abuse of the defendant.

1777. D.C. TASK FORCE, *supra* note 213, at 155. ("The Task Force sees no reason why parties who are often unrepresented should be required to file separate court actions for permanent custody, visitation, and support if the issues have been resolved fully in the CPO proceeding.").

duration for the parties to complete divorce, custody, and child support litigation. These orders protect the victim and her children during what can be an emotionally charged and volatile time. Whenever civil protection orders are issued with specific termination dates, it is still advisable to ensure that their custody, visitation, and child support provisions remain in effect indefinitely until modified by subsequent court action.

4. Duty to Provide a Forum

Case law and statutes confirm that courts must provide a forum to petitioners to hear civil protection order requests, and courts must rule on the merits of a civil protection order petition. The state of Maine requires the court to grant the petitioner the opportunity to testify on the merits of her civil protection order petition.[1778] The Supreme Court of Oregon, in *Marshall v. Hargreaves*,[1779] held that a circuit judge did not have the discretion to deny a hearing to determine the existence of immediate or present abuse for purposes of issuing an *ex parte* temporary protection order even though the petitioner has twice before requested, received, and then dismissed such orders based on essentially the same allegations.[1780] Requiring courts to hear civil protection order complaints despite petitioner's previous unwillingness to follow through with a civil protection order action is sound public policy, because it recognizes that, statistically, battered women vacillate between seeking help and returning to their batterers two to five times before ultimately leaving.[1781] These policies assure that the courthouse doors always remain open to victims in need. To adopt any other approach would cut off help to those who need it most.

1778. ME. REV. STAT. ANN. tit. 19, § 765-3-A (West Supp. 1992).

1779. 725 P.2d 923 (Or. 1986).

1780. *Id.* at 925; *see also* Sabio v. Russell, 472 So. 2d 869 (Fla. Dist. Ct. App. 1985) (holding trial court was without authority to issue an advisory opinion which found the domestic violence statute unconstitutional and dismissed the civil protection order petition where the defendant was never served process and was never before the trial court); NIJ CPO STUDY, *supra* note 19, at 28 (providing explanation for why petitioners may fail to appear or request withdrawal of orders).

1781. *See* Lewis Okun, *Termination or Resumption of Cohabitation in Women Battering Relationships: A Statistical Study, in* COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 107, 113 (Gerald T. Hotaling et al. eds., 1988).

R. Immunity

1. Judicial Immunity

Judges issuing protection orders are immune from suits brought against them by batterers. In *Agnew v. Campbell*,[1782] the Minnesota Court of Appeals held that judicial immunity protected the trial judge from the respondent's suit after the judge issued a civil protection order against the respondent, held respondent in contempt for violating the protection order, and ordered a psychiatric examination of the respondent.[1783] In *Patten v. Beauchamp*,[1784] the court held that a judge issuing a protection order performs a judicial act and therefore is immune from civil damages.[1785]

2. Prosecutorial Immunity

Minnesota, Washington, and Wisconsin place specific responsibilities on prosecutors in domestic violence cases. Minnesota prosecutors must notify a victim of a decision not to prosecute and inform the victim of the procedure and benefits of seeking a protection order.[1786] Washington requires prosecutors to notify domestic violence victims within five days if charges were not filed and inform the victim of procedures to initiate a criminal proceeding.[1787] In *Collins v. King County*,[1788] the Washington Court of Appeals held that the county prosecutor enjoyed absolute prosecutorial immunity from liability where the children of a domestic violence victim who was murdered by her batterer, despite requests to the police to arrest him, sued for wrongful death, emotional distress, negligence, and federal and state civil rights violations.[1789] Wisconsin takes an innovative approach and requires that prosecutors issue guidelines for the handling of domestic violence cases.[1790] However, recently in *Buckley v. Fitzsimmons*,[1791] the United States Supreme Court clarified prosecutorial immunity and held that while state prosecutors enjoy absolute prosecutorial immunity when functioning as an advocate, the prosecu-

1782. No. C3-90-1130, 1990 WL 188723 (Minn. Ct. App. Dec. 4, 1990).
1783. *Id.* at *2.
1784. 599 F. Supp. 288 (D.N.D. 1984).
1785. *Id.* at 294-95.
1786. MINN. STAT. ANN. § 611A.0315 (West Supp. 1993).
1787. WASH. REV. CODE ANN. § 10.99.060 (West 1992).
1788. 742 P.2d 185 (Wash. Ct. App. 1987).
1789. *Id.* at 187-89.
1790. WIS. STAT. ANN. § 968.075 (West Supp. 1993).
1791. 113 S. Ct. 2606 (1993).

tors have only qualified immunity when performing investigatory or administrative functions.[1792] Under the "functional approach," whether a prosecutor receives absolute immunity depends on the "nature of the function performed, not on the identity of the actor who performed it."[1793] Prosecutors have absolute immunity when they act as an advocate for the state in the "initiation and pursuit of a criminal prosecution including the presentation of the state's case at trial."[1794] Such conduct is given absolute immunity because it is "intimately associated with the judicial phase of the criminal process."[1795]

However, a prosecutor's acts of investigation or administration are subject only to qualified immunity.[1796] Such activities, when performed by police, are entitled to only qualified immunity, and this same standard applies to prosecutors who perform those tasks.[1797] While absolute prosecutorial immunity extends to the prosecutors professional evaluation and presentation of evidence, qualified immunity extends to a prosecutor who performs the detective's role in seeking evidence to establish probable cause.[1798] The court concluded that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have any one arrested."[1799] Therefore, in domestic violence cases, when a prosecutor acts as an investigator of the crime, he is entitled to only qualified immunity. However, his discretion in prosecuting the crime once probable cause is established is still protected by absolute immunity.[1800] Finally, in *Parrotino v. City of Jacksonville*,[1801] the court held that where the prosecutor's office promised to secure a restraining order for an abused victim, where she relied on this specific promise and failed to seek protection elsewhere, and where the prosecutor's office misplaced these documents and the victim ultimately was killed by her batterer, the prosecutor's office may be liable for negligence for violating its duty of care.[1802]

1792. *Id.* at 2617.
1793. *Id.* at 2613 (citation omitted).
1794. *Id.* at 2613.
1795. *Id.* (citation omitted).
1796. *Id.* at 2616.
1797. *Id.* at 2615.
1798. *Id.* at 2616.
1799. *Id.* at 2616.
1800. *Id.* at 2615.
1801. 612 So. 2d 586 (Fla. Dist. Ct. App. 1992).
1802. *Id.* at 590.

3. Suits Against Court Employees

Both state statutes and case law encourage and require court employees to assist petitioners in filing for civil protection orders. Twenty-two states permit designated court employees to assist with preparation and filing of petitions for protection orders.[1803] These

1803. ARK. CODE ANN. § 9-15-203 (Michie 1987) ("[t]he clerks of the court shall provide simplified forms and clerical assistance to help petitioners with the writing and filing of a petition under this chapter if the petitioner is not represented by counsel"); DEL. CODE ANN. tit. 10, § 946 (Supp. 1993) (court provides forms and instructions in simple understandable English; court staff shall assist in filling all necessary forms); FLA. STAT. ANN. § 741.30(3) (West Supp. 1993) (clerk provides a copy of law, simplified forms, financial affidavit and clerical assistance for the preparation and filing of such petitions and affidavits by an unrepresented victim); GA. CODE ANN. § 19-13-3(d) (1991) ("Family violence shelter or social service agency staff members designated by the court may explain to all victims not represented by counsel the procedures for filling out and filing all forms and pleadings necessary for the presentation of their petition to the court. The clerk of the court may provide forms for petitions and pleadings to victims of family violence or to any other person designated by the superior court . . . authorized to advise victims on filling out and filing such petitions and pleadings. The clerk shall not be required to provide assistance to persons in completing such forms or in presenting their case to the court. Any assistance provided . . . shall be performed without cost to the petitioners. The performance of such assistance shall not constitute the practice of law . . . ."); HAW. REV. STAT. § 586-3(d) (Supp. 1992) (family court designates employee or nonjudicial agency to provide forms and assist the person completing the application); 750 ILCS 60/202(d) (Smith-Hurd Supp. 1993); KY. REV. STAT. ANN. § 403.730 (Michie Supp. 1992) (provide accept and file forms requesting protection order); LA. REV. STAT. ANN. § 46:2138 (West Supp. 1993) (make forms available for applications, provide clerical assistance to the petitioner, advise indigent applicants of the availability of filing in forma pauperis, and provide notary services); ME. REV. STAT. ANN. tit. 19, § 764(2) (West Supp. 1992) (provide forms and clerical assistance in completing and filing complaint and other necessary documents; assistance may not include legal advise; clerk provides written notice of resources where plaintiff may receive legal and social service assistance); MINN. STAT. ANN. § 518B.01(4) (West Supp. 1993) (court provides simple forms and clerical assistance to help write and file petitions; court shall advise petitioner of right to file a motion and affidavit and to sue in forma pauperis and shall assist in writing and filing the motion and affidavit; court shall assist in serving respondent by published notice); MO. ANN. STAT. § 455.508 (Vernon Supp. 1993) (explain to unrepresented petitioners the procedures for filing all forms and pleadings; advise petitioner of right to file a motion and affidavit to sue in forma pauperis; notice of available clerk assistance will be conspicuously posted; assistance is provided without cost to petitioners); NEV. REV. STAT. ANN. § 33.050 (Michie 1985) (clerk of court shall assist any party in completing and filing the application, affidavit, and any other paper or pleading necessary to initiate or respond to petition; assistance does not constitute the practice of law); N.J. STAT. ANN. § 2C:25-28(c) (West Supp. 1993) (clerk or other designated employee assists petitioner in completing necessary forms for filing summons, or other complaint); N.Y. FAM. CT. ACT § 823 (McKinney Supp. 1994) (rules of court authorize probation service to confer with potential petitioner's about filing petition); OKLA. STAT. ANN. tit. 22, § 60.2(D) (West Supp. 1994) (at request of petitioner the clerk of the court shall prepare or assist the plaintiff in preparing the petition); OR. REV. STAT. § 107.718(3) (1991) (clerk provides forms and instruction brochure explaining the rights under the statute); PA. STAT. ANN. tit 23, § 6106(g) (1991) (courts and hearing officers shall provide simplified forms and clerical assistance in English and Spanish to help with writing and filing of the

statutes are constitutional. In *State v. Errington*,[1804] the Supreme Court of Minnesota held that subsections of that state's Domestic Abuse Act[1805] which required the "court" to assist abuse victims in writing and filing petitions, advise petitioners of their right to file a motion and affidavits and assist with the same, did not violate the separation of powers doctrine because "court" should be interpreted to mean "clerk of the court" and not the court itself.[1806]

Not only are court employees required to assist domestic violence victims, but they may be liable for failing to do so. When court employees deter abuse victims from filing petitions for protection orders, a cause of action may lie against them. In *Bruno v. Codd*,[1807] the court held that a cause of action may lie against court employees who deter domestic violence victims from filing civil protection order petitions.[1808] In order to bring suit against court employees, however, petitioners must first exhaust their administrative remedies within the court.[1809] In *Bruno*, the court denied injunctive relief against the nonjudicial family court personnel since the petitioners had failed to first seek redress from the Chief Judge of the Family Court.[1810] However, the importance of Family Court clerk assistance to battered woman seeking protection orders is reflected in the following observation by the *Bruno* court:

> [i]n concept and in fact, the Family Court fulfills a unique function in our system of justice. Though its legal ministrations are not directed to the indigent alone, the social and economic factors that generate its mass of sensitive, emotion-laden and highly individu-

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petition for protection by an unrepresented petitioner; advise petitioner of right to file an affidavit in forma pauperis and assist with the writing and filing of affidavit); S.D. CODIFIED LAWS § 25-10-3 (1992) (provides petition forms with instructions for completion); UTAH CODE ANN. § 30-6-4 (1992) (provide forms and assistance in preparing and filing complaint to unrepresented petitioners; inform of possibility of filing in forma pauperis and of mans available for the service of process); WASH. REV. CODE ANN. § 26.50.030(3) (West Supp. 1993) (all clerks offices provide forms, instructions, and informational brochures, and names and numbers for community resources free of charge; assistance provided by clerks is not the practice of law); W. VA. CODE § 48-2A-4(e)(1) (Supp. 1993) (provide forms and assistance for the filing of petition); WYO. STAT. § 35-21-103(e) (Supp. 1993) (provide standard forms with instructions for completion).

1804. 310 N.W.2d 681 (Minn. 1981).
1805. MINN. STAT. ANN. § 518B (1980).
1806. 310 N.W.2d at 682-83.
1807. 393 N.E.2d 976 (N.Y. 1979).
1808. *Id.* at 981.
1809. *See id.*
1810. *Id.* at 980-81.

> alized cases—including those which feature the interspousal violence on which the plaintiffs focus—in practice flood its calendars with *pro se* litigants who must depend on the court rather than counsel to instruct them in the niceties of the legal process.[1811]

S. Appeal of Civil Protection Order

Both state statutes and case law place limits on appeals of protection orders.[1812] Nevada affirmatively mandates that protection orders remain in effect and cannot be stayed pending an appeal.[1813] Maine and Vermont only permit appeals of civil protection orders based on error of law or an abuse of discretion.[1814]

Courts consistently hold that a party waives the right to appeal a civil protection order on any issue he or she does not object to at the hearing at which the civil protection order was issued.[1815] Courts have denied civil protection order appeals where a respondent failed to challenge at the hearing whether his conduct constituted abuse,[1816] where respondent failed to object to the sufficiency of evidence to warrant a vacate order,[1817] and where respondent failed to make due process objections when the court issued the emergency protection order without notice based on affidavits.[1818] An appeal, however, may be taken successfully from a civil protection order where the trial court failed to consider all relevant evidence. In *Mat-*

1811. *Id.* at 977.

1812. *See, e.g.*, Steeves v. Campbell, No. C1-93-1612, 1993 Minn. App. LEXIS 1164 (Minn. Ct. App. Nov. 30, 1993) (noting that an order denying a new trial motion in domestic abuse proceeding is not appealable).

1813. NEV. REV. STAT. ANN. § 33.030(3) (Michie 1985).

1814. ME. REV. STAT. ANN. tit. 19, § 768(1) (West Supp. 1992); VT. STAT. ANN. tit. 15, § 1109 (1992).

1815. *Cf.* People v. Torres, 581 N.Y.S.2d 869 (App. Div. 1992) (holding that since the defendant failed to object at his criminal domestic violence trial to evidence that he laughed at the degree of the injuries he inflicted on his wife, he failed to preserve the issue for appeal). Although this is a criminal domestic violence case, the result is equally applicable in a civil protection order hearing.

1816. Knisely v. Knisely, 441 A.2d 438 (Pa. Super. Ct. 1982) (holding that where the respondent husband never filed exceptions challenging whether his actions constituted abuse at the hearing, he waived the issue on appeal).

1817. Lucia v. Lucia, 465 A.2d 700 (Pa. Super. Ct. 1983) (holding that respondent failed to preserve the issue of the sufficiency of evidence to support an order excluding him from his marital home because he did not file exceptions to the order).

1818. Sanders v. Shepard, 541 N.E.2d 1150 (Ill. App. Ct. 1989) (holding that where respondent failed to make due process objections at the civil protection order trial when the court issued an EPO without notice based on affidavits, he cannot later raise those objections on an appeal of a finding of indirect civil contempt).

ter of M.D.,[1819] the court reversed on appeal the trial court's decision to extend a civil protection order denying visitation since the trial judge failed to read a psychiatric report which challenged the recommendation against visitation and failed to read the findings underlying the civil protection order on which the court relied.[1820]

A party appealing a trial court's contempt decision must meet a high burden of proof. In *State v. Lipcamon*,[1821] the court held that it would not reverse the trial court's decision whether to hold a respondent in contempt unless it finds a gross abuse of discretion.[1822] The trial court had refused to hold the respondent wife in contempt for violating a no contact order when she retrieved needed diabetes medicine from the marital home.[1823]

T. Confidentiality of Abused Party's Address

Seventeen state statutes specifically limit disclosure of the abused party's home address.[1824] The California and Delaware statutes are the most effective and comprehensive in that they prevent disclosure not only of petitioner's home address, but also the address of petitioner's school, job, children, and child care service.[1825] This innovative and comprehensive approach recognizes that batterers will often attempt to discover the address of a location the petitioner frequents in order to locate her and follow her to the undisclosed address. This danger posed by the batterer extends not only to the

1819. 602 A.2d 109 (D.C. Ct. App. 1992).

1820. *Id.* at 117; *see also* Selland v. Selland, 494 N.W.2d 367 (N.D. 1992) (holding that the husband's appeal of a permanent protection order was proper because the trial court abused its discretion by refusing his demand for a change of venue).

1821. 483 N.W.2d 605 (Iowa 1992).

1822. *Id.* at 607.

1823. *Id.*

1824. ARIZ. REV. STAT. ANN. § 13-3602(B)(1) (Supp. 1993); ARK. CODE ANN. § 9-15-206(e) (Michie 1987); CAL. FAM. CODE § 5517 (West 1993); DEL. CODE ANN. tit 10, § 946(b) (Supp. 1993); 750 ILCS 60/203 (Smith-Hurd Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766-A (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-504(b)(2) (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 8 (West 1992); MISS. CODE ANN. § 93-21-9(7) (Supp. 1993); MO. ANN. STAT. § 455.510(3) (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-121(12) (1993); N.J. STAT. ANN. § 2C:25-25(c) (West Supp. 1993); PA. STAT. ANN. tit 23, § 6112 (1991); R.I. GEN. LAWS § 15-15-3(1)(e) (Supp. 1993); TEX. FAM. CODE ANN. § 71.11 (West Supp. 1993); WASH. REV. CODE ANN. § 10.99.040(1)(c) (West Supp. 1993); WIS. STAT. ANN. § 813.125(5) (West Supp. 1993). The District of Columbia protects the confidentiality of the abused party's address through court rules. *See also* MODEL CODE, *supra* note 15, § 304.

1825. CAL. FAM. CODE § 5517 (West 1993); DEL. CODE ANN. tit. 10, § 946(b) (Supp. 1993).

home, but also to other locations frequented by petitioner and to which the batterer could have access and opportunity to injure or intimidate the petitioner. To further protect the safety of domestic violence victims, the court in *Michigan Welfare Rights Organization v. Dempsey*[1826] enjoined the Department of Social Security from disclosing the addresses of abused AFDC recipients to their batterers.[1827]

II. ENFORCEMENT OF CIVIL PROTECTION ORDERS[1828]

A. Introduction

According to the National Institute of Justice Study:

> Enforcement is the Achilles' heel of the civil protection process, because an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security. Offenders may routinely violate orders, if they believe there is no real risk of being arrested . . . . For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported.[1829]

Thirty-three states and the District of Columbia enforce protection orders through contempt.[1830] Twenty-four of those states and

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1826. 462 F. Supp. 227 (E.D. Mich. 1978).

1827. *Id.* It is not at all uncommon for batterers to call government agencies, particularly agencies which provide financial payments, food stamps, or health benefits to their spouse, and either attempt to obtain information about the victim's whereabouts or provide information that will result in the cessation of benefits to the victim and her children. Such information might include incorrect information that the victim is working or earning money that would make her ineligible for benefits.

1828. For a more detailed discussion of the process of preparing for and litigating civil protection order contempt actions, see ORLOFF & KLEIN, *supra* note 26, at 49.

1829. NIJ CPO STUDY, *supra* note 19, at 49; *see also* MODEL CODE, *supra* note 15, § 314 (requiring registration and enforcement of civil protection orders from other jurisdictions); *Id.* § 313 (requiring registration of all protection orders issued in the state within 24 hours).

1830. ALA. CODE § 30-5-10(b) (1989); ARIZ. REV. STAT. ANN. § 13-3602I (Supp. 1993); ARK. CODE. ANN. § 9-15-210 (Michie 1987); COLO. REV. STAT. ANN. § 14-4-105 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(g) (West Supp. 1993); D.C. CODE ANN. § 16-1005(f) (1981); FLA. STAT. ANN. § 741-30(9)(a) (West Supp. 1993); GA. CODE ANN. § 19-13-6(a) (1991); 750 ILCS 60/223(b) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.8 (West Supp. 1993); KAN. STAT. ANN. § 60-3110 (1993); KY. REV. STAT. ANN. § 403.760 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 46:2137(A) (West 1982); ME. REV. STAT. ANN. tit. 19, § 769 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-508 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993); MICH. COMP. LAWS ANN. § 600.2950(6) (West 1986); MINN. STAT. ANN. § 518B.01(14)(c) (West

the District of Columbia enforce a civil protection order by civil or criminal contempt.[1831] Five of these states only enforce civil protection orders through criminal contempt.[1832] In three states, civil contempt is the only contempt enforcement option.[1833] In other states that offer civil contempt as an option, criminal statutes classify violation of a civil protection order as a misdemeanor, which is generally the primary form of civil protection order enforcement.[1834] Forty states and Puerto Rico prosecute a violation of a protection order as a misdemeanor.[1835] In seven additional states, violation of a

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Supp. 1993); MISS. CODE ANN. § 93-21-21 (Supp. 1993); N.H. REV. STAT. ANN. § 173B:8(II) (1990); N.J. STAT. ANN. § 2C:25-30 (West Supp. 1993); N.Y. FAM. CT. ACT § 846-a (McKinney 1992 & Supp. 1994); N.C. GEN. STAT. § 50B-4(a) (1989); N.D. CENT. CODE § 14.07.1-06 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(L)(1)(b) (Anderson Supp. 1992); OR. REV. STAT. § 107.720(4) (1991); PA. STAT. ANN. tit. 23, § 6114 (1991); R.I. GEN. LAWS §§ 8-8.1-3, 15-15-3 (Supp. 1993); TENN. CODE ANN. § 36-3-610 (1991); TEX. FAM. CODE ANN. § 71.16(a) (West 1986); VT. STAT. ANN. tit. 15, § 1108(b) (1989); VA. CODE ANN. § 16.1-279.1(c) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(3) (West Supp. 1993); W. VA. CODE § 48-2A-7 (Supp. 1993).

1831. ALA. CODE § 30-5-10(b) (1989); ARIZ. REV. STAT. ANN. § 13-3602I (Supp. 1993); ARK. CODE. ANN. § 9-15-210 (Michie 1987); CONN. GEN. STAT. ANN. § 46b-15(g) (West Supp. 1993); D.C. CODE ANN. § 16-1005(f) (1981); FLA. STAT. ANN. § 741-30(9)(a) (West Supp. 1993); GA. CODE ANN. § 19-13-6(a) (1991); 750 ILCS 60/223(b) (Smith-Hurd Supp. 1993); IOWA CODE ANN. § 236.8 (West Supp. 1993); KAN. STAT. ANN. § 60-3110 (1993); KY. REV. STAT. ANN. § 403.760 (Michie/Bobbs-Merrill Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 769 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-508 (Supp. 1993); MINN. STAT. ANN. § 518B.01(14)(c) (West Supp. 1993); MISS. CODE ANN. § 93-21-21 (Supp. 1993); N.H. REV. STAT. ANN. § 173B:8(II) (1990); N.J. STAT. ANN. § 2C:25-30 (West Supp. 1993); OHIO REV. CODE ANN. § 3113.31(L)(1)(b) (Anderson Supp. 1992); OR. REV. STAT. § 107.720(4) (1991); R.I. GEN. LAWS §§ 8-8.1-3, 15-15-3 (Supp. 1993); TENN. CODE ANN. § 36-3-610 (1991); VA. CODE ANN. § 16.1-279.1(c) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(3) (West Supp. 1993); W. VA. CODE § 48-2A-7 (Supp. 1993).

1832. LA. REV. STAT. ANN. § 46:2137 (West 1982); MICH. COMP. LAWS ANN. § 600.2950(6) (West 1986); N.D. CENT. CODE § 14.07.1-06 (Supp. 1993); PA. STAT. ANN. tit. 23, § 6114 (1991); VT. STAT. ANN. tit. 15, § 1108(b) (1989).

1833. ALA. CODE § 30-5-10(b)(1992); ARIZ. REV. STAT. ANN. § 13-3602I (1992), IOWA CODE ANN. § 236.8 (West 1992).

1834. DEL. CODE ANN. tit. 10, § 950 (1992); MASS. GEN. LAWS ANN. ch 209A, § 7 (West 1992); N.C. GEN. STAT. § 50B-4 (1992).

1835. ALA. CODE § 30-5A-3 (Supp. 1993); ALASKA STAT. § 11.56.740(b) (Supp. 1993); ARK CODE. ANN. § 9-15-207 (Michie 1987); ARIZ. REV. STAT. ANN. § 13-3602(g) (1989); CAL. PEN. CODE § 273.6 (West 1993); COLO. REV. STAT. ANN. § 18-6-803.5 (West Supp. 1993); CONN. GEN. STAT. ANN. § 53a-107 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 950 (Supp. 1993); FLA. STAT. ANN. § 741-31 (West Supp. 1993); GA. CODE ANN. § 19-13-6(b) (1991); HAW. REV. STAT. § 586-11 (Supp. 1992); IDAHO CODE § 39-6312 (1993); 750 ILCS 60/221(c) (Smith-Hurd Supp. 1993); IND. CODE ANN. § 34-4-6-3(h) (West Supp. 1993); KAN. STAT. ANN. § 60-3107(g) (Supp. 1993); KY. REV. STAT. ANN. § 403.763(2) (Michie/Bobbs-Merrill Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 769 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 4-509 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 7

civil protection order results in a warrantless arrest, but the statutes are silent on how the action is to be charged.[1836] Twenty-one states will enforce civil protection orders through contempt or as a misdemeanor.[1837] The civil protection order statutes of Minnesota, Missouri, North Dakota, Ohio, Texas, and Washington now prosecute some violations of a protection order as a felony.[1838] Washington state may also force a defendant who violates a civil protection order to submit to electronic monitoring.[1839] The statutory trend in recent years is to augment contempt enforcement with misdemeanor charges,[1840] and to heighten the criminal classification for a violation of a

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(West Supp. 1993); MINN. STAT. ANN. § 518B.01(14)(a) (West Supp. 1993); MO. ANN. STAT. § 455.085(7) (Vernon Supp. 1993); MONT. CODE ANN. § 45-5-626 (1993); NEB. REV. STAT. § 42-924(3) (Supp. 1992); NEV. REV. STAT. ANN. § 33.100(i) (Michie Supp. 1993); N.M. STAT. ANN. § 40-13-6(E) (Michie Supp. 1993); N.C. GEN. STAT. § 5013-4 (1992); N.D. CENT. CODE § 14-07.1-6 (Supp. 1993); OHIO REV. CODE ANN. § 2919.27 (Anderson Supp. 1993); OKLA. STAT. ANN. tit. 22, § 60.6 (West 1992); 23 PA. CONS. STAT. ANN. § 6114 (1991 & Supp. 1993); R.I. GEN. LAWS §§ 8-8.1-3, 15-15-3 (Supp. 1993); S.C. CODE ANN. § 16-25-50 (1976); TEX. FAM. CODE ANN. § 71.16 (West Supp. 1993); UTAH CODE ANN. § 30-6-6 (Supp. 1993); VT. STAT. ANN. tit. 15, § 1108(b) (1989); VA. CODE ANN. § 16.1-253.2 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(1) (West Supp. 1993); W. VA. CODE § 48-2A-10(d) (Supp. 1993); WIS. STAT. ANN. § 813.12(8) (West Supp. 1993); WYO. STAT. §§ 6-4-404, 35-21-106(c) (Supp. 1990); P.R. LAWS ANN. tit. 8, § 628 (Supp. 1990); *see also* MODEL CODE, *supra* note 15, § 202.

1836. IOWA CODE ANN. § 236.12 (West Supp. 1993); LA. REV. STAT. ANN. § 46:2140(1) (West Supp. 1993); N.H. REV. STAT. ANN. § 173B:8 (1992); N.J. STAT. ANN. § 2c:25-21(3) (West 1992); OR. REV. STAT. § 133.310(3)(a)-(c) (1991); S.D. CODIFIED LAWS ANN. § 14.03(b) (West Supp. 1993); TENN. CODE ANN. § 36-3-611(a)(2) (1991).

1837. ALA. CODE §§ 30-5-10, 30-5A-3 (Supp. 1993); ARK. CODE ANN. §§ 9-15-207, 210 (Michie 1987); COLO. REV. STAT. ANN. § 18-6-803.5 (West Supp. 1993); CONN. GEN. STAT. ANN. § 53a-107 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 950 (Supp. 1993); FLA. STAT. ANN. § 741-31 (West Supp. 1993); GA. CODE ANN. § 19-13-6 (1991); 750 ILCS 60/223 (Smith-Hurd Supp. 1993); KAN. STAT. ANN. §§ 60-3107, 3110 (1993); KY. REV. STAT. ANN. §§ 403.760, 763 (Michie/Bobbs-Merrill Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 769 (West Supp. 1992); MD. CODE ANN., FAM. LAW §§ 4-508, 509 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993); N.D. CENT. CODE § 14-07.1-06 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(L) (Anderson Supp. 1992); R.I. GEN. LAWS § 8-8.1-3 (Supp. 1993); TEX. FAM. CODE ANN. § 71.16 (West 1986 & Supp. 1993); VT. STAT. ANN. tit. 15, § 1108(b) (1989); VA. CODE ANN. §§ 16.1-253.2, 16.1-279.1(c) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.110 (West Supp. 1993); W. VA. CODE §§ 48-2A-7, 10(d) (Supp. 1993).

1838. MINN. STAT. ANN. § 518B.01 (1993); MO. ANN. STAT. § 455.085(7) (felony for civil protection order violation if evidence of prior violations within the last five years); N.D. CENT. CODE § 14-07.1-06 (Supp. 1993); OHIO REV. CODE. ANN. § 2919.27 (Anderson 1993) (felony for temporary protection order violation if two or more violations of this or another protection order); TEX. FAM. CODE ANN. § 71.16(b) (West Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(4) (West Supp. 1993).

1839. WASH. REV. CODE ANN. § 26.50.110(1) (West Supp. 1993).

1840. In twenty-one states, civil protection order violations may be prosecuted either as

protection order.[1841] For example, states like Colorado and Kansas recently began prosecuting violations of civil protection orders as misdemeanors while also retaining contempt enforcement of protection orders.[1842] Minnesota, Texas, and Washington, have heightened the criminal classification for a civil protection order violation from misdemeanor to felony.[1843] When petitioners bring contempt actions to enforce civil protection orders, courts may award attorney fees to a petitioner who seeks a contempt conviction. In *Linda D. v. Peter D.*,[1844] the court awarded $2500 in attorney fees to a petitioner who sought to prosecute a petition for a violation of a protection order even though she eventually withdrew the underlying petition after the respondent consented to a modified and expanded protection order.[1845]

The distinction between criminal and civil contempt is that in criminal contempt cases, the courts seek to punish the past violation of the law, while in civil contempt cases the court seeks to coerce future compliance with the law. *Neal v. Brooks*[1846] illustrates this distinction. In *Neal*, the Texas Court of Appeals held that the appellant was found guilty of criminal as opposed to civil contempt when he was sentenced to 10 days in jail for violation of an order of protection.[1847] The violation was criminal rather than civil contempt be-

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contempt and/or as a misdemeanor. ALA. CODE §§ 30-5-10, 30-5A-3 (Supp. 1993); ARK. CODE ANN. §§ 9-15-207, 210 (Michie 1987); COLO. REV. STAT. ANN. § 18-6-803.5 (West Supp. 1993); CONN. GEN. STAT. ANN. § 53a-107 (West Supp. 1993); DEL. CODE ANN. tit. 10, § 950 (Supp. 1993); FLA. STAT. ANN. § 741-31 (West Supp. 1993); GA. CODE ANN. § 19-13-6 (1991); 750 ILCS 60/223 (Smith-Hurd Supp. 1993); KAN. STAT. ANN. §§ 60-3107, 3110 (1993); KY. REV. STAT. ANN. §§ 403.760, 763 (Michie/Bobbs-Merrill Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 769 (West Supp. 1992); MD. CODE ANN., FAM. LAW §§ 4-508, 509 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993); N.D. CENT. CODE § 14-07.1-06 (Supp. 1993); OHIO REV. CODE ANN. § 3113.31(L) (Anderson Supp. 1992); R.I. GEN. LAWS § 8-8.1-3 (Supp. 1993); TEX. FAM. CODE ANN. § 71.16 (West 1986 & Supp. 1993); VT. STAT. ANN. tit. 15, § 1108(b) (1989); VA. CODE ANN. §§ 16.1-253.2, 16.1-279.1(c) (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.50.110 (West Supp. 1993); W. VA. CODE §§ 48-2A-7, 10(d) (Supp. 1993).

1841. *See supra* notes 1835-38.

1842. COLO. REV. STAT. ANN. §§ 14-4-105, 18-6-803.5 (West Supp. 1993); KAN. STAT. ANN. §§ 60-3107(g), 60-3110 (Supp. 1993).

1843. MINN. STAT. ANN. § 518B.01 (1993); TEX. FAM. CODE ANN. § 71.16(b) (West Supp. 1993); WASH. REV. CODE ANN. § 26.50.110(4) (West Supp. 1993).

1844. 577 N.Y.S.2d 354 (Fam. Ct. 1991).

1845. *Id.* at 355-56.

1846. No. 88-127-111, 1988 Tenn. Crim. App. LEXIS 731 (Tenn. Crim. App. Nov. 23, 1988).

1847. *Id.* at 11-12.

cause the imprisonment was not remedial or coercive in nature.[1848] The court did not seek to compel the defendant to do something; rather, the court sought to punish the defendant for violating the protection order and sought to vindicate the authority of the law and the courts.[1849] In *Cipolla v. Cipolla*,[1850] the court held that determinate sentences for violating a civil protection order are based on adjudications of criminal, not civil contempt.[1851]

B. Enforcement of Protection Orders on Federal Land, Native American Reservations, and in Other Jurisdictions

1. Full Faith and Credit

Six states have provisions in their civil protection order statutes which authorize their courts to give full faith and credit to the laws and orders of other state courts.[1852] Nevada and New Jersey specifically allow their courts to accept the order of a sister state as evidence of facts.[1853] Nevada alone allows its courts to issue its own civil protection order based upon a sister state's finding of facts, and to register certified copies of orders from other courts.[1854] The Violence Against Women Act of 1993, which passed the Senate and House of Representatives in November of 1993 and is expected to go to conference in May 1994,[1855] provides that any protection order issued by the court of one state shall be accorded full faith and credit by the court of another state and enforced as if it were the order of the enforcing state.[1856] Full faith and credit will only be afforded to civil protection orders that issue following the filing of a petition, if the court has jurisdiction over the parties and matter and the opposing party is given reasonable notice and opportunity to be heard.[1857] Mutual civil protection orders that have not met these criteria will be

1848. *Id.*
1849. *Id.*
1850. 398 A.2d 1053 (Pa. Super. Ct. 1979).
1851. *Id.* at 1055.
1852. NEV. REV. STAT. ANN. § 33.090 (1986); N.H. REV. STAT. ANN. § 173B:11-6 (Supp. 1993); N.J. STAT. ANN. § 2C:25-13a (West Supp. 1993); N.M. STAT. ANN. § 40-13-6 (Michie Supp. 1993); 23 PA. CONS. STAT. ANN. § 6104 (1992); W. VA. CODE § 48-2A-3(e) (Supp. 1993); *see also* MODEL CODE, *supra* note 15, § 314.
1853. NEV. REV. STAT. ANN. § 33.090 (1992); N.J. STAT. ANN. § 2C:25-29 (West Supp. 1993).
1854. NEV. REV. STAT. ANN. § 33.090 (1992).
1855. S. 11, 103d Cong., 1st Sess. (1993); H.R. 1133, 103d Cong., 1st Sess. (1993).
1856. S. 11, 103d Cong., 1st Sess. § 2265 (1993).
1857. *Id.*

unenforceable.

2. Federal Lands

Courts are authorized to issue and enforce state civil protection orders for incidents of violence occurring on federally owned military installations.[1858] In *Cobb v. Cobb*, the Supreme Judicial Court of Massachusetts upheld the issuance of a protection order to a member of the armed forced and her minor son who lived and worked on a military installation.[1859] The court noted that "[t]he order was, of course, effective against the defendant as to his conduct while not on ceded land."[1860] In the absence of any indication that such an order interfered with the federal function, the order properly also applied to the defendant while he was on the ceded land. The New York court in *Tammy S. v. Albert S.*,[1861] held that a protection order may issue to residents of a federally owned military installation and that the military authorities shall enforce the state civil protection order by apprehending the respondent and delivering him to the civil authority. This approach assures that state civil protection order protections reach all victims needing protection where they live and are most vulnerable. In *Albert S.*, the court concluded that the petitioner, the wife of a member of the armed forces, was a victim of domestic violence requiring the Family Court's aid and could receive and demand enforcement of a protection order on the military base.[1862]

In addition to a state civil protection order, a person who works or resides on a military base may also seek a military protection order.[1863] While infrequently used, the advantage of a military protection order over a state civil protection order is that since the mili-

1858. Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989 (noting that court may issue and enforce a civil protection order on a federal military base); Tammy S. v. Albert S., 408 N.Y.S.2d 716 (Fam. Ct. 1978) (explaining that state has jurisdiction to enforce civil protection order even though the parties live on military base).

1859. 545 N.E.2d 1161, 1164 (Mass. 1989).

1860. *Id.* The official rate of reported abuse in military families is 23.4%. Among enlisted men the rate is 27.1%. DEPARTMENT OF DEFENSE, CHILD AND SPOUSE ABUSE STATISTICAL REPORT, FISCAL YEAR 1992 (1993). These reported figures probably reflect only a portion of the abuse actually occurring, since resistance to reporting spouse abuse would be equally strong or stronger among military families than the general population, due to the close connection between the batterers' work and home environments.

1861. 408 N.Y.S.2d 716 (1978).

1862. *Id.* at 716.

1863. Interview with Whitney Watrose, Project Manager, United States Marine Corps., Coordinated Community Response to Spouse Abuse, E.S., Inc., in Washington, D.C. (Jan. 4, 1994).

tary always retains jurisdiction over members of the armed forces, the military may enforce its military protection order even if the respondent flees to another state.[1864]

3. Native American Lands

Similar problems arise regarding the issuance and enforcement of civil protection orders for parties who live or work on Native American lands. Within the United States there are over 500 tribes and, therefore, an equal number of tribal customs, laws, and codes.[1865] Each tribe determines whether its tribal code allows for protection orders.[1866] While state and tribal courts theoretically may have to respect and enforce each other's laws and orders, in practice, state and tribal protection orders often operate independently. Charon Asetoyer, an experienced women's advocate, explains that a domestic violence victim who lives or works on a Native American reservation should seek both a state civil protection order, which will be enforced off the reservation, and a tribal civil protection order, which will protect her on the reservation.[1867] In practice there is no cross jurisdiction, so the victim should not expect either protection order to be enforced outside of its respective jurisdiction.[1868] For example, in *St. Germaine v. Chapman*,[1869] the court held that the state courts did not have the authority to enter a domestic abuse injunction against a tribal member, as the state's exercise of jurisdiction violated the tribe's right to govern itself. The court further concluded that the tribe's enactment of a domestic abuse ordinance virtually identical to the state statute entitled it to exclusive jurisdiction over the matter and warranted a reversal of the lower court's injunction.[1870]

C. Civil Contempt

Civil protection order violations, typically enforced through civil contempt, include failure to pay child support or other monetary relief, and failure to vacate a residence[1871] or turn over property. In

1864. *Id.*

1865. Telephone Interview with Professor Nell Newton, The Washington College of Law, The American University (Sept. 15, 1993).

1866. *Id.*

1867. Interview with Charon Asetoyer, Director of the Native American Women's Health Resource Center, in Lake Andes, S.D. (Oct. 5, 1993).

1868. *Id.*

1869. 505 N.W.2d 450 (Wis. Ct. App. 1993).

1870. *Id.* at 451.

1871. This may also be prosecuted as criminal contempt. *See* City of Columbus v.

Sanders v. Shepard,[1872] the court held the respondent in civil contempt for failure to produce a minor child according to the terms of the civil protection order.[1873] Failure to produce the child was civil contempt because the incarceration was not punitive, but rather effected to incur respondent's remedial compliance.[1874] Placing the burden on the respondent to prove he was unable to produce the child, through no fault of his own, did not violate his due process rights in a civil contempt proceeding.[1875]

D. Criminal Contempt

1. Acts Constituting Criminal Contempt

In *Dunkelberger v. Pennsylvania Board of Probation and Parole*,[1876] the court held that a parolee's conviction for violating a protection order, which prohibited him from contacting his daughter or her mother, provides a criminal basis for parole revocation.[1877] The court specifically held that "a finding of criminal contempt under the Protection From Abuse Act is a crime."[1878] The court further concluded that because "'[c]riminal contempt is a crime in every fundamental respect . . . a violation of the law, a public wrong which is punishable by fine or imprisonment or both,'" and the respondent parolee was found in criminal contempt under the Protection From Abuse Act, he committed a crime punishable by imprisonment within the meaning of the Parole Act.[1879]

In addition to a violation of a protection order being a criminal act in and of itself, courts have identified a broad variety of violent acts that constitute criminal contempt. Death threats and threats to harm the petitioner[1880] or those close to the petitioner,[1881] in person and by

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Patterson, No. 82AP-47, 1982 WL 4556 (Ohio Ct. App. Dec. 9, 1982) (holding defendant in criminal contempt when he failed to vacate in compliance with a temporary protection order). *But see* Hayes v. Hayes, 597 A.2d 567, 571 (N.J. Super. Ct. Ch. Div. 1991) (maintenance order in protection order not enforceable in later divorce action because intent was only to bridge emergency situation).

1872. 541 N.E.2d 1150 (Ill. App. Ct. 1989).

1873. *Id.* at 1154.

1874. *Id.* at 1158.

1875. *Id.* at 1159.

1876. 593 A.2d 8 (Pa. Commw. Ct. 1991).

1877. *Id.* at 10.

1878. *Id.* at 9.

1879. *Id.* at 9-10 (quoting Cipolla v. Cipolla, 398 A.2d 1053 (Pa. Super. Ct. 1979)).

1880. People v. Allen, 787 P.2d 174, 175 (Colo. Ct. App. 1989) (defendant found guilty of contempt for violating stay away order where he went to wife's residence, broke into her house,

telephone,[1882] have been found to constitute criminal contempt. Courts have also found child abduction and concealment to constitute criminal contempt.[1883] Other violent acts that constituted criminal contempt include marital rape and sexual assault,[1884] beatings and battery,[1885] stalking,[1886] assault,[1887] damaging petitioner's car,[1888] kicking in the door of petitioner's home,[1889] and breaking into petitioner's

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and threatened to kill her); United States v. Dixon, 598 A.2d 724, 725 (D.C. 1991), *cert. denied*, 112 S. Ct. 1759 (1992), *aff'd in part and rev'd in part*, 113 S. Ct. 2849 (1993) (defendant found guilty of criminal contempt for violating stay away order by threatening and assaulting petitioner); People v. Blackwood, 476 N.E.2d 742, 743 (Ill. App. Ct. 1985) (holding respondent in contempt where he called petitioner a "fucking whore," and a "dead bitch" and told her a plot was waiting for her); Eichenlaub v. Eichenlaub, 490 A.2d 918, 919 (Pa. Super. Ct. 1985) (holding respondent in contempt where he threatened wife's life, abused and beat her, and stalked her by waiting in her driveway).

1881. Brown v. State, 595 So. 2d 259, 260 (Fla. Dist. Ct. App. 1992) (holding that going to petitioner's house, shouting obscenities, and vowing to beat up petitioner's boyfriend constitutes contempt).

1882. People v. Lucas, 524 N.E.2d 246, 247 (Ill. App. Ct. 1988) (holding that calling petitioner, making threats over the telephone, and breaking into the marital home constitutes contempt of a protection order); Gilbert v. State, 765 P.2d 1208, 1209 (Okla. Crim. App. 1988) (holding that defendant violated protection order by kicking down wife's door, damaging her car, and threatening her over the telephone).

1883. *In re* Marriage of D'Attomo, 570 N.E.2d 796, 798 (Ill. App. Ct. 1991) (trial court found father in indirect criminal contempt for absconding with his son and concealing him for two years during the course of the parties' divorce proceedings, in violation of civil protection order which specifically prohibited him from taking the child from the jurisdiction or concealing him); People v. Rodriguez, 514 N.E.2d 1033, 1034 (Ill. App. Ct. 1987) (trial court found defendant guilty of child abduction, residential burglary, and battery).

1884. Cole v. Cole, 556 N.Y.S.2d 217, 219 (Fam. Ct. 1990) (contempt based on finding of marital rape).

1885. People v. Townsend, 538 N.E.2d 1297, 1298 (Ill. App. Ct. 1989) (trial court held defendant in contempt when he entered the petitioner's residence and struck her on the face at least once); *Rodriguez*, 514 N.E.2d at 1034; Commonwealth v. Allen, 486 A.2d 363, 365 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985) (respondent violated civil protection order by forcibly entering petitioner's residence and physically abusing her); Wagner v. Wagner, 564 A.2d 162 (Pa. Super. Ct. 1989) (finding husband in indirect criminal contempt for violating order prohibiting him from harassing, threatening, or abusing his wife); Eichenlaub v. Eichenlaub, 490 A.2d 918, 919 (Pa. Super. Ct. 1985). *But see* Commonwealth v. Zerphy, 481 A.2d 670 (Pa. Super. Ct. 1984) (finding defendant not in criminal contempt where defendant struck petitioner twice in the face with his fists and threatened her with a rifle in her home).

1886. *Eichenlaub*, 490 A.2d at 918.

1887. United States v. Dixon, 598 A.2d 724, 725 (D.C. 1991), *cert. denied*, 112 S. Ct. 1759 (1992), *aff'd in part and rev'd in part*, 113 S. Ct. 2849 (1993) (finding defendant guilty of criminal contempt for violating stay away order, threatening, and assaulting petitioner).

1888. Gilbert v. State, 765 P.2d 1208, 1209 (Okla. Crim. App. 1988) (finding that defendant violated protection order by kicking down his wife's door, damaging her car, and threatening her over the telephone).

1889. State v. Andrasko, 454 N.W.2d 648, 649 (Minn. Ct. App. 1990) (convicting defendant for violating civil protection order when he arrived at his wife's home and kicked in the door);

home.[1890]

Courts have held batterers in criminal contempt for a broad variety of conduct in addition to violent acts. They have often found criminal contempt when the respondent violates a stay away or no contact order by coming to or within a certain distance of the petitioner's home.[1891] Coming to the petitioner's home during a nonvisitation day is sufficient grounds for criminal contempt.[1892] The respondent's failure to vacate[1893] and failure to return children also constitutes criminal con-

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Gilbert, 765 P.2d at 1209.

1890. People v. Allen, 787 P.2d 174, 175 (Colo. Ct. App. 1989) (defendant found guilty of contempt for violating stay away order where he went to wife's residence, broke into the house, and threatened to kill her); People v. Townsend, 538 N.E.2d 1297, 1298 (Ill. App. Ct. 1989) (defendant held in contempt when he entered the petitioner's residence and struck her on the face at least once); People v. Rodriguez, 514 N.E.2d 1033, 1034 (Ill. App. Ct. 1987) (defendant guilty of child abduction, residential burglary, and battery); Commonwealth v. Gordon, 553 N.E.2d 915, 916 (Mass. 1990) (defendant violated civil protection order when he came to petitioner's residence and then attempted to forcibly enter her residence); Commonwealth v. Allen, 486 A.2d 363, 365 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985) (respondent violated civil protection order by forcibly entering petitioner's residence and physically abusing her).

1891. Siggelkow v. State, 731 P.2d 57, 59 (Alaska 1987) (affirming the sentencing of defendant to an 18 month suspended sentence and four years probation for repeatedly violating a no contact order); United States v. Dixon, 598 A.2d 724, 725 (D.C. 1991), *cert. denied*, 112 S. Ct. 1759 (1992), *aff'd in part and rev'd in part*, 113 S. Ct. 2849 (1993) (finding defendant guilty of criminal contempt for violating stay away order, threatening, and assaulting petitioner); People v. Zarebski, 542 N.E.2d 445, 447 (Ill. App. Ct. 1989) (defendant violated protection order by harassing petitioner and entering her residence); *Gordon*, 553 N.E.2d at 916; People v. Stevens, 506 N.Y.S.2d 995, 996 (Oswego City Ct. 1986) (finding that defendant willfully violated stay away order by going to his wife's residence); City of Reynoldsburg v. Eichenberger, No. CA-3492, 1990 Ohio App. LEXIS 1613 (Ohio Ct. App. Apr. 18, 1990) (defendent convicted of violating civil protection order which prohibited him from visiting or approaching his family, their home, employment, or school without consent of the court when he was arrested outside of the marital home); Eichenlaub v. Eichenlaub, 490 A.2d 918, 919 (Pa. Super. Ct. 1985) (respondent threatened wife's life, abused and beat her, and stalked her by waiting in her driveway); Dunkleberger v. Pennsylvania Bd. of Probation Parole, 593 A.2d 8 (Pa. Commw. Ct. 1991) (holding respondent in criminal contempt when he contacted petitioner and her daughter in violation of the protection order); Lee v. State, 799 S.W.2d 750, 751 (Tex. Crim. App. 1990) (defendant violated stay away order by going within 200 yards of former wife's house).

1892. Leonetti v. Riehl, 546 N.Y.S.2d 879, 880 (App. Div. 1989) (respondent jailed for violation of protection order where he went to petitioner's house on a nonvisitation day); *see also* Shafer v. Shafer, No. 93 CA 16, 1993 Ohio App. LEXIS 5955 (Ohio Ct. App. Dec. 1, 1993) (affirming lower court's decision not to hold petitioner-mother in contempt for withholding father's visitation when she thought he had been abusive to the children). *But see* State v. Haley, 629 A.2d 605 (Me. 1993) (vacating a criminal contempt finding based on harassment where respondent repeatedly called petitioner, because harassment was not statutorily provided for in the protection order statute).

1893. Thomas v. State, 634 A.2d 1 (Md. 1993) (affirming respondent's sentence to 60 days imprisonment for violating vacate order); City of Columbus v. Patterson, No. 82AP-47, 1982 WL 4556 (Ohio Ct. App. Dec. 9, 1982) (defendant held in contempt when he failed to vacate

tempt.[1894] Other actions considered criminal contempt include telephoning petitioner,[1895] filing a frivolous lawsuit against petitioner,[1896] following petitioner in a car,[1897] placing a box of clothes covered with tomato juice on petitioner's doorstep, engaging in telephone hang-ups, calling petitioner's parents, sending petitioner unwanted flowers, and having unwanted pizza delivered to petitioner's home.[1898] In *State* ex rel. *Delisser v. Hardy*,[1899] the court held that the defendant could be held in contempt for violating a restraining order where he entered the multi-unit apartment complex in which the petitioner's apartment was located and, on a separate occasion, entered the complex and put a letter under the petitioner's door.[1900] The court specifically noted that the "defendant did not need directly to threaten plaintiff in her apartment in order to threaten or menace her within the meaning of the restraining order."[1901]

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in compliance with a temporary protection order).

1894. *In re* Marriage of Rodriguez, 545 N.E.2d 731, 732 (Ill. 1989) (father held in contempt of *ex parte* order granting petitioner custody of minor child when he failed to return the child to the mother).

1895. State v. Brockelman, 862 P.2d 1040 (Colo. Ct. App. 1993) (defendant held in contempt for telephoning petitioner in violation of restraining order); State v. Horton, 620 N.E.2d 437 (Ill. App. Ct. 1993) (defendant held in indirect contempt for contacting petitioner); People v. Darnell, 546 N.E.2d 789 (Ill. App. Ct. 1989) (harassing telephone calls violated civil protection order); Saliterman v. State, 443 N.W.2d 841 (Minn. Ct. App. 1989) (defendant held in contempt when he made unwanted telephone calls to petitioner and petitioner's family, made hang-up calls, and had unwanted pizza and flowers delivered to petitioner); State *ex rel.* Emery v. Andisha, 805 P.2d 718 (Or. Ct. App. 1991) (defendant violated protection order when he called his son); City of Columbus v. Kostrevski, No. 92AP-1257, 1993 Ohio App. LEXIS 1188 (Feb. 23, 1993) (affirming conviction and probation revocation of defendant-wife where she made abusive telephone calls in violation of protection order); State v. Kiser, No. 90-1192-CR, 1990 Wis. App. LEXIS 1028 (Nov. 14, 1990) (defendant violated harassment injunction when he made five telephone calls to the petitioner during a thirty minute period); State v. Moore, No. 89-0553-CR, 1989 Wis. App. LEXIS 915 (Sept. 1, 1989) (husband telephoned his wife in violation of a civil protection order). *But see* State v. Haley, 629 A.2d 605 (Me. 1993) (vacating a criminal contempt finding based on harassment where respondent repeatedly called petitioner, because harassment was not statutorily provided for in the protection order statute).

1896. Agnew v. Campbell, No. C3-90-1130, 1990 WL 188723 (Minn. Ct. App. Dec. 4, 1990) (defendant held in contempt when he filed frivolous suit seeking to enjoin the petitioner's pending marriage).

1897. People v. Whitfield, 498 N.E.2d 262, 265 (Ill. App. Ct. 1986) (defendant violated civil protection order by following his former wife in his car).

1898. *Saliterman*, 443 N.W.2d at 842-43.

1899. 749 P.2d 1207 (Or. Ct. App. 1988).

1900. *Id.* at 1208.

1901. *Id.*

2. Multiple Crimes and Multiple Contempts

When a defendant is alleged to have committed more than one violation of a protection order, courts may consolidate the actions against the defendant for trial purposes. This is beneficial to the effective functioning of the judicial system as the facts, witnesses, and information necessary for adjudication will often be the same or similar on many if not all counts. Even though these offenses are consolidated for procedural purposes, they retain their individual character as separated from each other by both time and circumstances.

The criminal case of *State v. Schackart*[1902] illustrates the importance of recognizing the individuality of violent acts against the same victim, acts which involve separate criminal intent and separate criminal infringements on the victim's rights. Here, the defendant first pulled a gun on his estranged wife and ordered her to remove her clothes. Forty-five minutes later he sexually assaulted her. Based on this conduct, he was convicted of sexual assault and aggravated assault.[1903] He appealed his convictions on several grounds, one being that he had been subject to a double punishment for a single act which had continued over a period of time. The court held that he was correctly charged with both offenses since they were separate and distinct in time and nature.[1904]

Prosecuting and sentencing multiple civil protection order violations should be approached in the manner in which the *Schackart* court approached the prosecuting and sentencing of separate offenses against the same victim. Where individual acts are committed against another person and are separated by at least forty-five minutes in time, they should be prosecuted and punished separately, even where consolidated for trial purposes. This policy justly considers the seriousness of the individualized impact each offense has on the victim. It recognizes that each violation of the order is a "volitional act of criminal behavior"[1905] which subjects the abuse victim to distinctively painful infringements on her freedom. It also serves to deter the defendant from committing future acts which can give rise to additional charges and

1902. 737 P.2d 398 (Ariz. Ct. App. 1987).

1903. *Id.* at 399.

1904. *Id.* at 400; *see also* People v. Healy, 18 Cal. Rptr. 2d 274 (Cal. Ct. App. 1993) (holding that defendant, who inflicted multiple batteries against cohabitant over time, could be charged with multiple violations of cohabitant abuse statute as opposed to being charged with a continuous course of conduct offense).

1905. James R. Thompson & Gary L. Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury*, 61 GEO. L.J. 621, 642 (1973).

subsequent sentences.

Violations of civil protection orders are usually punishable as contempts or misdemeanors which are most often deemed to be petty offenses as their penalties do not usually exceed a six month term of imprisonment for any individual offense.[1906] In fourteen states, the maximum penalty for a violation of a civil protection order is six months or less.[1907] Petty offenses are considered minor and do not carry a right to jury trial, and are therefore an exception to the Sixth Amendment.[1908]

When petty offenses are consolidated for trial purposes, in many states the fact that the aggregated sentence may exceed the penalty for a single petty offense does not entitle the defendant to a jury trial that he could not have demanded if each petty offense were tried separately.[1909] In other states, however, courts have not clarified whether the possibility of aggregate sentences exceeding six months for civil protection order criminal contempt may give rise to a right to a jury trial.[1910] As the court stated in *Scott v. District of Columbia*,[1911]

1906. Crimes carrying penalties of up to six months in prison have repeatedly been held by the Supreme Court to be petty offenses. Codispoti v. Pennsylvania, 418 U.S. 506 (1974); Baldwin v. New York, 399 U.S. 66 (1970); Bloom v. Illinois, 391 U.S. 194 (1968); Duncan v. Louisiana, 391 U.S. 145 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

1907. LA. REV. STAT. ANN. § 46:2137(A) (West 1992) (six months); MD. CODE ANN., FAM. LAW § 4-509(a) (Supp. 1993) (maximum 60 days); MICH. COMP. LAWS ANN. § 600.2950(6) (West 1986) (penalty for violating restraining order is not more than 90 days imprisonment); MISS. CODE ANN. § 93-21-21 (Supp. 1993) (six months); MONT. CODE ANN. § 45-5-626(2) (1993) (same); NEV. REV. STAT. § 33.100(1)(b) (Supp. 1993) (if accompanied by violent act, sentence to a maximum of six months); N.J. STAT. ANN. § 2C:25-30 (West 1993) (minimum 30 days); N.Y. JUD. LAW § 846-a (McKinney Supp. 1983) (six months); 23 PA. CONS. STAT. ANN. § 6114(b) (1991) (same); S.C. CODE ANN. § 16-25-50 (Law. Co-op. 1985) (maximum 30 days); TENN. CODE ANN. § 36-3-610 (1991) (six months); TEX. FAM. CODE ANN. § 71.16(a) (West 1986) (same); VT. STAT. ANN. tit. 15, § 1108(b) (1989) (same); W. VA. CODE § 48-2A-7(b) (Supp. 1993) (maximum of 30 days). *But see* CAL. FAM. CODE § 5807 (West 1993) (one year); CONN. GEN. STAT. § 46b-15(c) (1992) (same); IDAHO CODE § 39-6312(1) (1993) (same); MO. ANN. STAT. § 455.085 (Vernon Supp. 1993) (same); N.D. CENT. CODE § 14-07.1-06 (Supp. 1993) (same); OKLA. STAT. ANN. tit. 22, § 60.6(A) (West 1992) (same); R.I. GEN. LAWS § 15-15-3(3) (Supp. 1993) (same); UTAH CODE ANN. § 30-6-6(5) (Supp. 1993) (same).

1908. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (jury trial not required in prosecutions for petty offenses); Cheff v. Schackenberg, 384 U.S. 373 (1966) (same); District of Columbia v. Clawans, 300 U.S. 617, (1937) (same); District of Columbia v. Colts, 282 U.S. 63, 72-73 (1930) (same); Schick v. United States, 195 U.S. 65, 68-72 (1904) (same); Natal v. Louisiana, 139 U.S. 621, (1891) (same); Callan v. Wilson, 127 U.S. 540, 557 (1888) (same); Lawton v. Steele, 152 U.S. 133 (1894) (same); *see also* Thompson & Starkman, *supra* note 1905, at 622.

1909. *See, e.g.*, Scott v. District of Columbia, 122 A.2d 579, 581 (D.C. 1956); City of Ft. Lauderdale v. Byrd, 242 So. 2d 494, 497 (Fla. Dist. Ct. App. 1970); State v. Janes, 415 P.2d 543, 546 (N.M. 1966).

1910. *See* Scott v. District of Columbia, 122 A.2d 579 (D.C. 1956).

"[w]e see no reason why consolidation of a number of petty offenses in one information should confer upon the defendant a right he would not have had if the charges were brought in separate informations."[1912] In *Scott*, the fact that two criminal contempt violations were being tried together, and that their aggregated penalty exceeded that authorized for a single petty offense, did not change the nature of the hearing and did not entitle the defendant to the right to a jury trial.[1913]

National case law shows that several jurisdictions are in agreement with the *Scott* court,[1914] and clearly indicates that the defendant should not be granted additional rights because he engaged in repeated incidents of criminal conduct rather than one single act. If the defendant does not have a right to a trial by jury for any one of his violations, he does not have that right when the violations are tried together in a single hearing.[1915] Requiring that defendant have a jury trial[1916] in these cases ignores the individuality of the acts committed, and fails to acknowledge that the acts are being consolidated for procedural purposes only. Substantively, they are distinct and may be treated accordingly. Each separate act carries its own separate penalty and generates certain defendant rights.

3. Criminal Contempt Standard and Burden of Proof

To establish criminal contempt, the petitioner has the burden of proving beyond a reasonable doubt that the defendant violated the pro-

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1911. *Id.* at 581.

1912. *Id.* at 581.

1913. *Id.*

1914. *See, e.g.*, City of Fort Lauderdale v. Byrd, 242 So. 2d 494 (Fla. Dist. Ct. App. 1970); City of Monroe v. Wilhite, 233 So. 2d 535 (La. 1970); State v. James, 415 P.2d 543 (N.M. 1966) (three petty misdemeanors do not become a felony when consolidated for trial even if their aggregated penalty would be classified as a felony). *But see* Haar v. Hanrahan, 708 F.2d 1547 (10th Cir. 1983); State v. Sklar, 317 A.2d 160 (Me. 1974).

1915. The question of a batterer's right to a jury trial will only arise when a victim files several contempts simultaneously. This problem can be totally avoided if victims can be encouraged to file contempt motions as the violations occur. For many battered women, however, this approach is not practical. Battered women will most often await several violations of their civil protection order before attempting to enforce it. They may be too afraid to act initially, or they may believe the violence will stop. When a battered woman notifies counsel of several civil protection order violations, it is advisable to research local criminal law on petty offenses and to file separate contempt motions in order to avoid a a jury trial, if the jursidiction will award a jury trial when the counts are consolidated. If the contempts are filed separately, they may still be consolidated for trial if the defendant agrees to waive any right to a jury trial that he may arguably have in a particular jurisdiction.

1916. *See supra* notes 1667-70 and accompanying text for more information on jury trials.

tection order.[1917] New York's statute states that there must be "competent proof that the respondent willfully failed to obey any such order."[1918] Similarly, in *State v. Lipcamon*,[1919] the Supreme Court of Iowa held that to prove contempt beyond a reasonable doubt the state must show that the defendant willfully and intentionally violated the no contact order with a bad or evil purpose.[1920]

The holdings in domestic violence criminal cases are both instructive and relevant to illustrate how petitioners may meet this burden in criminal contempt proceedings. The petitioner's testimony may be enough to establish proof beyond a reasonable doubt. The court in *People v. Blackwood*[1921] illustrated how this higher standard can be met. In that case, the Illinois Appeals Court upheld a contempt conviction based on the petitioner ex-wife's uncorroborated testimony that the defendant called her a "fucking whore" and a "dead bitch," and told her that he had a plot waiting for her.[1922] Her testimony alone, absent other witnesses, met the higher standard of proof to show contempt of a civil protection order.[1923] Further, in *People v. Stevens*,[1924] the court held that, for purposes of a hearing to revoke bail based on an alleged civil protection order violation, the prosecutor did not have to prove that an order of protection was issued to the defendant since the court could determine from reviewing its records that the defendant was informed of the civil protection order and its requirements.[1925]

Some domestic violence victims may choose to bring contempt motions alleging a course of contemptuous conduct rather than seek a

1917. *See, e.g.*, State v. Lipcamon, 483 N.W.2d 605 (Iowa 1992) (state must prove beyond a reasonable doubt that the petitioner violated the no contact order); Vito v. Vito, 551 A.2d 573 (Pa. Super. Ct. 1988) (guilt must be proven beyond a reasonable doubt); Neal v. Brooks, No. 88-127-III, 1988 Tenn. Crim. App. LEXIS 731 (Nov. 23, 1988) (same).

1918. N.Y. JUD. LAW § 846-a (McKinney 1983).

1919. 483 N.W.2d 605 (Iowa 1992).

1920. *Id.* at 607.

1921. 476 N.E.2d 742 (Ill. App. Ct. 1985).

1922. *Id.* at 743. *But see* State v. Lehikoinen, 463 N.W.2d 770, 771 (Minn. Ct. App. 1990) (where, in a criminal case, the victim recanted on the witness stand her earlier reports that her physical injuries were due to the defendant's physical abuse). In *Lehikoinen*, the petitioner testified at trial that her injuries resulted from respondent defending himself against her attack and from a subsequent fall. *Id.* The appellate court reversed the trial court's conviction finding no evidence of abuse since no one else testified, and the earlier police reports were not entered into evidence. *Id.* at 772.

1923. *Blackwood*, 476 N.E.2d at 743.

1924. 506 N.Y.S.2d 995 (Oswego City Ct. 1986).

1925. *Id.* at 999.

separate sentence for each individual violation. In these cases, criminal domestic violence actions are also instructive. In *People v. Thompson*,[1926] a husband was charged and convicted of spousal abuse after he raped, sodomized, and beat his wife with a breadboard. The court held that the prosecutor was not required to elect which act was the basis of the charge because domestic violence falls within the continuous course of conduct exception.[1927] It meets this exception because the spousal abuse statute contemplated protecting victims from a continuous series of acts over a period of time. *Pro se* victims are often forced to prosecute criminal contempt actions without the assistance of counsel or the state prosecutors. The ability to prove a course of conduct as opposed to individual acts of contempt can be a great help in enabling them to meet the "beyond a reasonable doubt" burden of proof.[1928]

4. Batterer's Duty to Obey Civil Protection Order Absent Court Action to Rescind or Modify Order

Courts have consistently ruled in proceedings to hold respondents in contempt for violation of protection orders that a respondent must obey the order until the court vacates it, even if the respondent has reason to believe such order was illegally issued.[1929] A court will also hold a respondent in contempt for violating an existing protection order even though the appeals court later vacates that order.[1930]

1926. 206 Cal. Rptr. 516 (Cal. Ct. App. 1984).

1927. *Id.* at 519.

1928. D.C. TASK FORCE, *supra* note 945, at 153-54. In a study of all civil protection order cases in 1989 in the D.C. Superior Court, the Task Force found that 75% of all contempt actions were filed *pro se*. The Task Force expressed grave concern that so few petitioners were represented in contempt proceedings. In these mostly criminal contempt actions, respondents are entitled to appointed counsel, due process, and proof of contempt beyond a reasonable doubt. The inherent imbalance in the proceedings when prosecution is left to a *pro se* victim has led to the low rate of contempts proven at trial. Contempt was found in 55.1% of cases tried and only 14.2% of contempts filed. *Id.* at 154 n.272. Because an imbalance exists due to the victim's lack of representation, the Task Force recommends that steps be taken to ensure that petitioners are represented by counsel in proceedings to enforce civil protection orders by contempt. *Id.* at 154; *see also* Czapanskiy, *supra* note 23, at 250 n.11 (noting that in Maryland only 11% of litigants in domestic or family law cases received needed legal assistance).

1929. *See* Nickler v. Nickler, 45 D. & C.3d 49 (Pa. Ct. C.P. 1985) (holding respondent in contempt for violating civil protection order that his attorney told him to ignore on the belief that the order was illegal).

1930. *See* State v. Andrasko, 454 N.W.2d 648 (Minn. Ct. App. 1990) (defendant, who went to his wife's residence and kicked in the door, was convicted for violating a protection order in existence at the time and was not relieved of the consequences of violating the order even though the order was later vacated by the appeals court).

Courts must also have continuing jurisdiction to enforce their orders for violations that occur during the existence of a civil protection order even if the petitioner does not bring the enforcement action until after the order terminates. Courts should enforce such orders post-termination to emphasize the importance of respect for court orders. As in *Nickler v. Nickler*[1931] and *State v. Andrasko*,[1932] where the suspected illegality or later vacation by a higher court did not excuse the respondent's willful violation of a court order, orders should be enforced if a violation occurred during the life of the civil protection order whether or not the contempt motion is filed before the civil protection order expired. In *Andrasko*, the court held the respondent in contempt for violating a civil protection order which the appeals court later invalidated.[1933] Respect for court orders and protection of family violence victims demand such a response. If a court may rightly hold a respondent in contempt for violating a civil protection order which a higher court later vacates, a court should have the ability to address a violation of an unchallenged civil protection order even though the enforcement action was not initiated until after the order expired. The proper inquiry is whether the order was in effect at the time of the violation.

Under this analysis, a petitioner can enforce a civil protection order to obtain a monetary judgment that comes due during the life of such order. However, a petitioner may not seek payment for expenses that accrued after the protection order expired. In *Drake v. Drake*,[1934] the Ohio Court of Appeals dismissed a contempt motion for failure to pay utilities ordered in a civil protection order where the petitioner sought payment for utilities used after the protection order had expired.[1935]

Additional contempt issues that courts have addressed include a determination that courts may still enforce a civil protection order's property provisions despite a transferor's bankruptcy,[1936] and that a civil protection order against a minor respondent must be enforced in the juvenile court.[1937] The Washington Court of Appeals in *State v.*

1931. 45 D. & C.3d 49 (Pa. Ct. C.P. 1985).

1932. 454 N.W.2d 648 (Minn. Ct. App. 1990).

1933. *Andrasko*, 454 N.W.2d at 649.

1934. No. C.A. 9114, 1985 WL 7861 (Ohio Ct. App. Mar. 19, 1985).

1935. *Id.* at *1.

1936. Rayan v. Dykeman, 274 Cal. Rptr. 672 (Ct. App. 1990) (civil protection order was not null and void as a result of transferor's bankruptcy, and the court could impose $2500 in sanctions for refusal to transfer property as ordered in the civil protection order).

1937. Diehl v. Drummond, 2 D. & C.4th 376 (Pa. Ct. C.P. 1989) (civil protection order

Horton[1938] held that the prosecutor, under the equal protection clause of the Constitution, has the discretion to elect whether to charge civil protection order violations as misdemeanors or contempts since the purpose of a particular charge may be to coerce rather than punish.[1939]

5. Reunification

Battered women typically make between two and five attempts to leave violent relationships before they successfully leave their batterers.[1940] Twenty-six percent of victims and thirty-one percent of batterers interpret battering as a sign of love.[1941] Ninety-three percent of battered women are willing to forgive and forget the first beating that they suffered from their partners.[1942] While batterers are often remorseful following a battering incident,[1943] the percentage of batterers who are remorseful declines over time as violence continues.[1944]

The most dangerous time for battered women is when they attempt to separate from their abusers. Women who leave their batterers assume a seventy-five percent greater risk of being killed by them.[1945] Many battered women have finely honed survival skills that have allowed them to survive in the relationship. Battered women need to be able to

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against 16 year old minor must be enforced in the juvenile court).

1938. 776 P.2d 703 (Wash. Ct. App. 1989).

1939. *Id.* at 704-05.

1940. Okun, *supra* note 1781, at 113 ("The average number of previous separations among women who resumed cohabitating with the batterer was 2.42, compared to 5.07 among shelter residents who never resumed cohabitating after they left the shelter.").

1941. June Henton et al., *Romance and Violence in Dating Relationships*, 4 J. FAM. ISSUES 467, 474 (1983); Demie Kurz, *Social Science Perspectives on Wife Abuse: Current Debates and Future Directions*, 3 GENDER & SOC'Y 489, 493 (1989) (25% of wives and 33% of husbands think that "a couple slapping one another was at least somewhat necessary, normal, and good").

1942. GILLESPIE, *supra* note 119, at 147. Following the first beating, 50% of women tried harder to comply with their husband's wishes in an attempt to control the battering. Irene Hanson Frieze, *Perceptions of Battering by Battered Women*, Paper Presented at the National Family Violence Research Conference, Durham, N.H. (July 1987). Among college relationships where violence occurred, 26% to 37% of students claimed that the relationship improved or became more committed after the assault, with twice as many men as women making this claim. BROWNE, *supra* note 166, at 42.

1943. Batterers are reported to be seductive and charming when they are not being violent, and women fall for their short-lived, but persuasive, promises. *See* BATTERED WOMAN, *supra* note 4, at 55, 129.

1944. Over 87% of batterers showed sorrow and remorse after the first incident; this declines to 73% after the second incident, and only 58% after the third or one of the worst incidents. Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, *in* 3 ADVANCES IN APPLIED PSYCHOLOGY 68 (M.J. Saks & L. Saxe eds., 1984).

1945. *National Estimates and Facts About Domestic Violence*, NCADV VOICE, Special Edition: Battered Women in Prison, Winter 1989, at 12.

assess when it is safest to leave. When battered women turn to the police or the court system for help, they will follow through with the court process only so long as they see that the judicial system is helping to stop the violence. If court intervention does not effectively hold the batterer accountable and stop the violence, she may reengage in prior survival strategies and return to her batterer.[1946] This will be particularly true where the batterer successfully assumes control of the court process.

Both the state legislatures and courts support the continued validity and enforcement of protection orders despite the intervening reunification of the parties.[1947] Eight state statutes affirmatively maintain that reunification of the parties does not preclude enforcement of a protection order.[1948] Courts have also sanctioned this approach and enforced protection orders subsequent to a reunification of the parties. In *State v. Kilponen*,[1949] the court, in a criminal prosecution for burglary, admitted a restraining order against the defendant husband into evidence to show unlawful entry. The court noted that the order had not expired when the defendant entered the home and he "could not

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1946. Ganley, *supra* note 21, at 45. Judges who are not schooled in the dynamics of domestic violence, too often focus their inquiry on the relationship and the abused party. This approach fails to place responsibility for the violence with the perpetrator and supports his minimization, denial, and rationalization of his violent behavior. It also provides him with excuses for his conduct. *Id.* at 34.

1947. These statutes and cases follow a well established rule in divorce cases that a victim's continued relationship with the respondent does not constitute condonation to excuse fault. *See, e.g.*, Sullivan v. Sullivan, 162 A.2d 453 (Md. 1960) (cohabitation after acts of cruelty does not constitute condonation).

1948. CAL. PENAL CODE § 13710(b) (West 1992) (the terms and conditions of the protection order remain enforceable, notwithstanding the acts of the parties, and may be changed only by court order); DEL. CODE ANN. tit. 10, § 949(d) (Interim Supp. 1993) (only the court may modify an order and the reconciliation of the parties shall have no affect on the validity of any provision in the order); 40 ILCS 2312/20 (Smith-Hurd 1992) (petitioner cannot excuse violation by invitation); ME. REV. STAT. ANN. tit. 19, § 766.8 (West Supp. 1993) (petitioner cannot take action/inaction which alters the civil protection order's effectiveness); MINN. STAT. ANN. § 518B.01(6)(d) (West Supp. 1993) (an order granting protective relief is not voided by the admittance of the abusing party into the dwelling from which the abusing party is excluded); MINN. STAT. ANN. § 518B:01(14)(g) (West Supp. 1993) (the admittance into petitioner's dwelling of an abusing party excluded from the dwelling under an order of protection is not a violation by the petitioner of the order for protection); N.H. REV. STAT. ANN. § 173B:4V (1992) (temporary reconciliation of parties shall not revoke order); 23 PA. CONST. STAT. ANN. § 6113(g) (1991) (resumption of co-residence on the part of the plaintiff and defendant shall not nullify the provisions of the court order directing defendant to refrain from abusing the plaintiff or minor children); TEX. FAM. CODE ANN. § 71.16 (West Supp. 1992) (petitioner may not give respondent permission to ignore a protection order and order remains valid unless the court changes it); *see also* MODEL CODE, *supra* note 15, § 308.

1949. 737 P.2d 1024 (Wash. Ct. App. 1987).

change the court's order."[1950]

Courts have held that the civil protection order lies between the respondent and the court. The petitioner cannot invite or excuse a violation of a court order.[1951] In *Cole v. Cole*,[1952] the court held that reunification of the parties for a two month period after the issuance of a protection order did not waive the petitioner's right to enforce the civil protection order, and did not act as a waiver to a contempt charge for marital rape.[1953] In that case, the parties resumed cohabitation after the court entered a protection order prohibiting the respondent husband from harassing, menacing, assaulting, attempting to assault, or recklessly endangering the petitioner. After the cohabitation, which resumed after the civil protection order was entered, had ended, the respondent forcibly entered the petitioner's home and sexually assaulted her. The court held that:

> [t]he validity of the court's order was in no way impaired, affected, nor nullified, by the petitioner's consensual cohabitation with the respondent after entry of the order. As stated in the order itself, the order remains in full force and effect until such time, if at all, as the order is modified or terminated by a future order of a court having competent jurisdiction.
>
> The court holds that acquiescence by a petitioner in cohabitation by a respondent after an order of protection is issued does not constitute a waiver by the petitioner of the right to be free from intrusions by the respondent after cohabitating terminates, upon either the rights of safety or the rights of privacy secured by the order. A victim of domestic violence who has procured an order of protection is entitled to the court's protection from further violence throughout the duration of an order of protection, even if the victim is desirous of pursuing a goal of voluntary reconciliation with the offender. Attempts to salvage the otherwise beneficial aspects of a relationship which is afflicted by unlawful behavior would be discouraged if the law permitted the very attempt of salvation to result in a loss of protection from the sinister aspect. The law does not impair an individual's choice to pursue a relationship with one whose prior conduct has evinced a need for judicial limits upon destructive behavior.[1954]

1950. *Id.* at 1029.
1951. *Cf.* MODEL CODE, *supra* note 15, § 308.
1952. 556 N.Y.S.2d 217 (Fam. Ct. 1990).
1953. *Id.* at 219.
1954. *Id.*

Similarly, in *City of Reynoldsburg v. Eichenberger*,[1955] the court held the defendant, an attorney, in contempt for violating a stay away and no contact order despite his argument that an intervening attempt at reunification vacated the effectiveness of the civil protection order.[1956] The court refused to dismiss the contempt charge despite the wife's request, since the purpose of the contempt proceedings was to punish the defendant for purposely violating a court order. In *People v. Townsend*,[1957] the Illinois Appeals Court held the defendant in contempt for violating conditions of an order of protection when he entered the petitioner's residence at her invitation, and struck her in the face.[1958] The court held that the petitioner's invitation to violate a protection order did not shield the defendant from a contempt conviction.[1959] Moreover, several states, such as Maine and Minnesota, confirm by statute what has become a standard assumption at the trial level in most jurisdictions, that a petitioner may not be found in violation of her own protection order.[1960]

Finally, even in New Jersey, the only state where courts had previously interpreted the New Jersey domestic violence statute to automatically vacate a protection order upon reunification of the parties,[1961] case law has interpreted the 1990 amendment to the New Jersey domestic violence statute[1962] to preclude vacating a civil protection order upon parties' reunification. *Torres v. Lancellotti*[1963] limited the reach of pre-1990 case law. In *Torres*, the court refused to

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1955. No. CA-3492, 1990 Ohio App. LEXIS 1613 (Apr. 18, 1990).

1956. *Id.* at *4.

1957. 538 N.E.2d 1297 (Ill. App. Ct. 1989).

1958. *Id.* at 1298-99.

1959. *Id.* at 1299.

1960. ME. REV. STAT. ANN. tit. 19, § 766.8 (West Supp. 1993) ("Criminal sanctions may not be imposed upon the plaintiff for violation of any provision of the plaintiff's order for protection."); MINN. STAT. ANN. § 518B.01(14)(g) (West Supp. 1993) (petitioner is not in violation of her civil protection order if she allows the respondent to return to their residence); *see also* Shafer v. Shafer, No. 93 CA 16, 1993 Ohio App. LEXIS 5955 (Dec. 1, 1993) (petitioner cannot be held in contempt of her own civil protection order where she denies visitation based on belief that father was abusive to children).

1961. *See* Mohamed v. Mohamed, 557 A.2d 696, 698 (N.J. Super. Ct. App. Div. 1989) (holding that the parties' intervening 16 month reconciliation destroyed the viability of the initial protective order). The court reasoned that since the purpose of the Prevention of Domestic Violence Act is to provide emergent, not long range, relief to the parties, the intervening reconciliation requires that prior orders be dismissed sua sponte. *Id.* The abuse victim must petition anew in light of the present circumstances. *Id.*

1962. N.J. STAT. ANN. § 2C:25-18 (West 1992).

1963. 607 A.2d 1375 (N.J. Super. Ct. Ch. Div. 1992).

automatically vacate a temporary restraining order based on the parties' reconciliation which amounted to sexual relations on one occasion followed by continued harassment. The court held that in light of the 1990 amendment's directive to courts to provide abuse victims with both long term as well as emergent relief, no protection order under the act should be vacated upon reconciliation of the parties without consideration of the continued need for protection and restraints on the respondent.[1964]

Before a New Jersey court may vacate a protection order under the pre-1990 *Mohamed* discussion, the court must determine that a true reconciliation occurred *and* that the need for protection no longer exists. Any court considering vacating a civil protection order due to the parties reunification must take the following factors into account to determine the need for continued protection: 1) the previous history of domestic violence between the parties, 2) the existence of immediate danger to person or property, 3) the financial circumstances of the parties, 4) the best interest of the victim and dependents, 5) the existence of a verifiable civil protection order in another jurisdiction, and 6) proof of changed circumstances since the entry of the prior order.[1965] The *Torres* court concluded that attempted reconciliations of short duration do not amount to true reconciliations and, therefore, the civil protection order should remain in effect.[1966]

Courts in all jurisdictions should follow the lead of the courts in *Eichenberger*,[1967] *Kilponen*,[1968] *Cole*,[1969] and *Townsend*[1970] and clarify that civil protection orders can and do continue in effect despite the parties' reunification or petitioner's invitation to enter her residence. If the parties do reunite, the civil protection order remains enforceable. The preferred approach would be for the parties to return to the court and obtain a modification of the civil protection order to reflect the changed circumstances between the parties. The civil protection order could be modified to allow contact between the parties but to preclude future acts of violence.[1971] When parties reconcile, civil protec-

1964. *Id.* at 1377-78.
1965. *Id.* at 1377.
1966. *Id.* at 1378.
1967. No. CA-3492, 1990 Ohio App. LEXIS 1613 (Apr. 18, 1990).
1968. 737 P.2d 1024 (Wash. Ct. App. 1987).
1969. 556 N.Y.S.2d 217 (Fam. Ct. 1990).
1970. 538 N.E.2d 1297 (Ill. App. Ct. 1989).
1971. *See* NIJ CPO STUDY, *supra* note 19, at 53 (discussing preferred practices regarding modifications).

tion orders may be modified to remove the stay away provision or no contact provisions. Simple procedures for modification should be available in all jurisdictions.[1972] Should petitioner wish to separate again and respondent refuses to comply, she may return to court to have her civil protection order modified to re-impose the stay away and no contact provisions. Evidence of post-reunification violence and petitioner's desire to have the respondent stay away from her would constitute sufficient evidence for courts to grant petitioner the modification.

Courts across the country also issue civil protection orders to parties who have not decided to separate. These orders play an important role in shifting the balance of power in the relationship so as to reduce or eliminate continued violence. For many domestic violence victims, these orders provide them with the first opportunity for a reduced level of tension and violence at home. Many battered women who sought such orders explain that the orders enabled them to begin to work toward ultimately leaving their batterers and creating a safe life away from the violence. In light of research that indicates that most battered women make between two and five attempts to leave a batterer before they succeed,[1973] it is very important for courts to issue civil protection orders to parties whether or not they are ready to separate permanently. Battered women should not be punished or left without protection because they have attempted to save their relationships when they seek civil protection order enforcement after parties have reconciled. Enforcement will help to preclude future violence.

6. Protection Order Contempt Trials

To convict the defendant of contempt of a protection order, the state must prove that the defendant had notice of the order.[1974] The court may establish notice from its own records. In *People v. Stevens*,[1975] the court held that the prosecutor in a criminal contempt

1972. When parties reconcile and civil protection order modifications are requested, the modified civil protection order should function as a new civil protection order for the maximum term so that in most states petitioner can have continued protection for at least one year following reunification, a time when she will need the greatest protection.

1973. *See supra* note 1940.

1974. *See* People v. Darnell, 546 N.E.2d 789 (Ill. App. Ct. 1989) (respondent, whose harassing telephone calls violated a protection order, was not convicted of contempt because the state failed to prove that respondent had notice of the order).

1975. 506 N.Y.S.2d 995 (Oswego City Ct. 1986).

trial need not prove that the protection order was actually issued to the defendant where the court, upon review of its own records, found that the defendant had been informed of the protection order and its contents at the civil protection order hearing.[1976]

Courts in domestic violence contempt proceedings should have latitude similar to courts hearing criminal domestic violence cases. Courts should have the discretion to limit what the defendant may argue to the court. The reasoning in *State v. Moore*,[1977] a criminal contempt case, should apply to arguments made to the court in a criminal contempt proceeding. In *Moore*, the Wisconsin Court of Appeals held that the trial court did not abuse its discretion when it prevented the defendant from appealing to the jury's sense of justice and fundamental fairness to nullify the conviction despite the defendant's technical contempt of a no contact order.[1978] Similarly, the voluntariness of guilty pleas in criminal contempt actions should parallel case law in criminal domestic violence prosecutions. In *Saliterman v. State*,[1979] the court of appeals held that where the defendant agreed to plead guilty to two charges of violating a protection order if the state dropped three harassment charges, the defendant's guilty pleas were voluntary.[1980]

An important trial issue concerns the role of a child's testimony where a civil protection order issuance or enforcement is sought on behalf of a child. The Missouri civil protection order statute directly addresses this issue and provides protection for minor children of petitioners.[1981] The statute provides that hearings for a child's civil protection order may be open or closed and that the child's testimony may be in camera or videotaped. Case law supports this approach. In *Desmond v. Desmond*,[1982] the court held, in a custody case where severe spousal abuse was alleged, that an in camera interview outside the courthouse in a local park or other nonintimidating environment with the parties' children is appropriate to lessen the children's anxiety and encourage the children to be more open.[1983] The Georgia

1976. *Id.* at 998.
1977. No. 89-0553-CR, 1989 WL 143052 (Wis. Ct. App. Sept. 1, 1989).
1978. *Id.* at *2.
1979. 443 N.W.2d 841 (Minn. Ct. App. 1989).
1980. *Id.* at 844.
1981. MO. ANN. STAT. § 455.516.1 (Vernon 1993).
1982. 509 N.Y.S.2d 979 (Fam. Ct. 1986).
1983. *Id.* at 981.

Court of Appeals' decisions in *Young v. State*[1984] and *Watkins v. State*,[1985] both criminal prosecutions, provide an analysis for an innovative approach that could be adapted to cases where a mother seeks a civil protection order or enforcement of such an order through criminal contempt on behalf of a child without requiring that child to testify at the hearing. In *Young*, testimony of other witnesses was admitted in lieu of the victim's testimony. The court of appeals held that the trial court properly found that the defendant beat the victim's head against the floor, wall, and refrigerator resulting in severe head injuries based, in part, on the testimony of the victim's mother, child, and cousin about the incident at issue and prior violent behavior.[1986] The approach of the court was to admit testimony of police officers as to the victim's statements and injuries when the victim refused to testify.

In *Watkins*, the appeals court held that the trial court properly found that the respondent beat the petitioner with a chair, threatened her with a gun, and stabbed her with scissors, even though the victim recanted earlier statements at trial, based on the testimony of police officers as to the victim's statements at the time of the assault, the presence of fresh puncture wounds, the presence of weapons in the house, and the general disarray of the scene.[1987] The court specifically held that the petitioner's statement to the police at the time of the respondent's arrest was substantive evidence of the respondent's guilt in a criminal trial.[1988] These decisions provide support for an approach that would supplant the child's testimony with that of the mother's or law enforcement officer's to establish abuse sufficient to issue a civil protection order on behalf of a child. When the quantum of proof required to issue a civil protection order is a preponderance of the evidence, such testimony should be clearly adequate. When the child's testimony is needed for a criminal contempt action where the burden of proof is identical to the standard used in the *Young* and *Watkins* criminal proceedings, it may also be possible to avoid calling the child as a witness if other testimony is available to prove the violence against the child beyond a reasonable doubt.

Both *Young* and *Watkins* also illustrate that victim cooperation is

1984. 348 S.E.2d 135 (Ga. Ct. App. 1986).
1985. 360 S.E.2d 47 (Ga. Ct. App. 1987).
1986. *Young*, 348 S.E.2d at 135-36.
1987. *Watkins*, 360 S.E.2d at 48-49.
1988. *Id.* at 48.

not always necessary to hold a respondent in contempt of a protection order. Testimony of the police, family members, and other witnesses to the violence and injuries may support a finding of contempt where, as in *Young* and *Watkins*, such testimony can support a criminal conviction beyond a reasonable doubt even absent the victim's willingness or ability to testify.

Another trial issue in criminal domestic violence cases, which is relevant in civil protection order and contempt proceedings, is whether the petitioner or prosecutor must elect which specific act is the basis for the domestic violence charge. In *People v. Thompson*,[1989] the court held that the crime of spousal abuse falls within the continuous course of conduct exception where the acts are so closely connected that they form part of the same transaction.[1990] Consequently, the prosecutor need not elect, and the jury need not agree unanimously, on which act the guilty verdict is based.[1991] Similarly, in a civil protection order contempt trial, when the petitioner files for contempt based on a series of contemptuous incidents, the court should not need to identify any one act in a series of acts which together violated the civil protection order, unless the victim is seeking to have each violation punished separately.

E. Contemnor's Due Process Rights

A respondent in a civil protection order case cannot be found in contempt of an order unless he has been given notice of the order's issuance.[1992] He must be given notice of the time and place of the hearing.[1993] The protection order itself must give respondent suffi-

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1989. 206 Cal. Rptr. 516 (Ct. App. 1984).

1990. *Id.* at 518.

1991. The same is true in a proceeding for issuance of a civil protection order, where petitioner need not prove each allegation in her complaint. Proof of any one incident or act is sufficient.

1992. *See, e.g.*, People v. Darnell, 546 N.E.2d 789, 790 (Ill. App. Ct. 1989) (no contempt where state failed to prove that respondent had been served with papers or otherwise had knowledge of protection order). *But see* People v. Hazelwonder, 485 N.E.2d 1211, 1213 (Ill. App. Ct. 1985) (there is no statutory requirement that notice of a possible protection order be given to a respondent; however, respondent is entitled to due process, and thus had the respondent been surprised by the court's determination to impose such a protection and had he asked for time to present evidence in opposition to it, the court should have granted such a request).

1993. *See, e.g.*, Neal v. Brooks, No. 88-127-III, 1988 Tenn. Crim. App. LEXIS 731, at *12 (Tenn. Crim. App. Nov. 22, 1988) (in criminal proceedings, the contemnor is entitled to notice as to the time and place of the hearing); Vito v. Vito, 551 A.2d 573, 575-76 (Pa. Super. Ct. 1988) (new trial ordered due in part to the trial court's failure to give contemnor

cient notice of the specific acts which he is prohibited from committing.[1994]

As in any criminal proceeding, the alleged contemnor is entitled to representation by counsel,[1995] is presumed innocent until proven guilty beyond a reasonable doubt,[1996] cannot be compelled to give evidence against himself,[1997] can secure the attendance of witnesses,[1998] may cross-examine the witnesses against him, and is protected against hearsay testimony.[1999] Furthermore, double jeopardy attaches in a criminal contempt proceeding and therefore the petitioner may not appeal a finding of not guilty of criminal contempt of a protection order.[2000] The alleged contemnor does not, however, have a right to jury trial.[2001] Further, due process is not violated when respondent is held pre-trial in a criminal contempt case. In *Commonwealth v. Allen*,[2002] the alleged contemnor was properly held pretrial on a contempt charge for nine days, then sentenced to time

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notice of the contempt proceedings).

1994. *See, e.g.*, Brown v. State, 595 So. 2d 259, 260 (Fla. Dist. Ct. App. 1992) (court in contempt proceedings ruled that defendant had sufficient notice of the specific acts for which he could be punished); Gilbert v. State, 765 P.2d 1208, 1209-11 (Okla. Crim. App. 1988) (state's protection from domestic abuse act not unconstitutionally vague so as to deny defendant due process in connection with protection orders; he had sufficient notice that kicking down his wife's door, breaking out the rear window and damaging the grill of her car would be violations of the issued protection orders); *Neal*, 1988 Tenn. Crim. App. LEXIS 731, at *12.

1995. *See, e.g.*, Thompson v. Thompson, 559 A.2d 311, 314-15 (D.C. 1989) (holding that the trial court could not deny a continuance in a criminal contempt proceeding based on the respondent's failure to secure counsel prior to the hearing where he was not notified until trial date that he was entitled to a court-appointed counsel if he could not afford his own, or that the contempt charge would be treated as criminal rather than civil).

1996. *See, e.g.*, State *ex rel.* Hathaway v. Hart, 690 P.2d 514, 516 (Or. Ct. App. 1984), *aff'd*, 708 P.2d 1137 (1985) (guilt must be proven beyond a reasonable doubt in contempt proceedings); *Vito*, 551 A.2d at 577 (same); *Neal*, 1988 Tenn. Crim. App. LEXIS 731, at *13 (same).

1997. *See, e.g.*, *Neal*, 1988 Tenn. Crim. App. LEXIS 731, at *13.

1998. *See, e.g.*, *Hart*, 690 P.2d at 516 (defendant has right to secure the attendance of witnesses).

1999. *See, e.g.*, *Vito*, 551 A.2d at 577 (new trial granted in part because trial court allowed hearsay testimony during contempt proceedings).

2000. Cipolla v. Cipolla, 398 A.2d 1053, 1056 (Pa. Super. Ct. 1979) (where respondent found not guilty of indirect criminal contempt for willfully violating a protection order the petitioner wife could not appeal since the criminal safeguard of double jeopardy attaches in the contempt proceeding).

2001. *See, e.g.*, Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. Ct. 1985) (statute providing that defendant in contempt proceeding does not have right to jury trial on such charge enjoys a strong presumption of constitutionality, and because it does not clearly, palpably, and plainly violate constitutional provisions for jury trial, it is not unconstitutional).

2002. 486 A.2d 363 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985).

served plus a $750 fine and costs.

Whereas the respondent facing criminal contempt possesses many of the due process rights granted to criminal defendants, the due process rights for a civil contemnor are more restricted.[2003] In *Sanders v. Shephard*,[2004] for example, the court decided that in a civil contempt proceeding the respondent has the burden of proving that he was unable, through no fault of his own, to comply with the protection order. Such placement of the burden on him does not violate due process because the court's orders were in the nature of civil, rather than criminal, contempt.[2005]

Sentencing contemnors may be different than sentencing persons in other criminal matters. In *Wagner v. Wagner*,[2006] the court upheld a six month jail sentence for a civil protection order violation. The court explained that the minimum and maximum sentencing requirements of the sentencing code do not apply to sentences imposed under the Protection from Abuse Act.[2007] The court further stated that while a contempt proceeding under the act is criminal in nature, it does not receive all of the protections that regular criminal proceedings receive.[2008] Sanctions imposed, therefore, are best left to the discretion of the offended court subject to only a few legal restrictions.

1. Double Jeopardy

Double jeopardy does not bar a subsequent criminal prosecution for the same act for which a civil protection order is issued.[2009] Courts should not permit the existence of a criminal prosecution to delay the issuance of a civil protection order to a domestic violence victim.[2010]

Moreover, double jeopardy does not preclude a subsequent crimi-

2003. *See* State v. Dumas, No. C8-92-2312, 1993 Minn. App. LEXIS 556 (Minn. App. Ct. June 1, 1993) (affirming the denial of respondent's motion to retract guilty plea to contempt of order; the plea was the basis for dismissal of other charges).

2004. 541 N.E.2d 1150 (Ill. App. Ct. 1989).

2005. *Id.* at 1159.

2006. 564 A.2d 162 (Pa. Super. Ct. 1989), *appeal denied*, 578 A.2d 415 (Pa. 1990).

2007. *Id.* at 163-64.

2008. *Id.*

2009. *See* Commonwealth v. Allen, No. 3458, 1988 Phila. Cty. Rptr. LEXIS 13, at *30 (Commw. C.P. Ct. Mar. 7, 1988) (boyfriend's criminal complaint filed after girlfriend's protection order petition was not barred by double jeopardy but rather by collateral estoppel).

2010. ORLOFF & KLEIN, *supra* note 26, at 22-28; *see also supra* notes 1581-85 and accompanying text.

nal prosecution for violation of a different civil protection order provision from that which formed the basis for a criminal contempt finding. For example, in *People v. Allen*,[2011] the court held that a subsequent criminal prosecution for burglary, criminal mischief, criminal trespass, and menacing, after the defendant was held in contempt for violating a stay away protection order by breaking into the petitioner's home and threatening to kill her, did not violate double jeopardy since the proof required for the criminal offenses was greater than the proof needed to establish indirect contempt of the stay away provision.[2012]

However, both state civil protection order statutes and case law address the more difficult issue of possible double jeopardy where the state pursues a criminal prosecution based on the same incident for which the defendant was or may be held in criminal contempt of a civil protection order. A number of state domestic violence statutes specifically confirm that a civil protection order does not preclude other civil or criminal remedies.[2013] Missouri law states that enforcement of protection orders through criminal contempt does not preclude criminal prosecution, or visa versa.[2014] Indeed, the courts have clearly identified the need for this approach. In *Commonwealth v. Smith*,[2015] the court noted that to bar subsequent criminal prosecutions because of a finding of criminal contempt would gravely impair either the state's interest in punishing crime or severely undermine the practical utility of the Protection from Abuse Act in preventing physical and sexual abuse.

2011. 787 P.2d 174 (Colo. Ct. App. 1989).

2012. *Id.* at 175-76; *see also* People v. Rodriguez, 514 N.E.2d 1033 (Ill. App. Ct. 1987) (husband entered petitioner's home, beat her, and took their child in violation of a protection order; double jeopardy did not bar criminal prosecution for residential burglary and battery but did bar criminal prosecution for child abduction where defendant was previously held in indirect criminal contempt for child abduction).

2013. *See* ALASKA STAT. § 25.35.010(d) (1991); CAL. FAM. CODE § 5518 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46b-15(h) (West Supp. 1992); 38 ILCS 112A-14(b) (Smith-Hurd Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993); N.M. STAT. ANN. §§ 40-13-3.F, 40-13-6.H (Michie Supp. 1993); R.I. GEN. LAWS § 15-15-2 (1988); *see also* 40 ILCS 2312-23(a)(11) (Smith-Hurd Supp. 1992) (abuse victim may prosecute both a civil protection order violation and other crimes committed in violation of a civil protection order); KY. REV. STAT. ANN. § 403.760(4) (Michie/Bobbs-Merrill Supp. 1992) (same); OHIO REV. CODE ANN. § 3113.31(L)(2) (Anderson Supp. 1992) (same). *But see* 40 ILCS 2312-23(b) (Smith-Hurd Supp. 1992) (contempt and criminal prosecution may be barred); KY. REV. STAT. ANN. § 403.760(5) (Michie/Bobbs-Merrill Supp. 1992) (civil and criminal punishment for the same violation of an order is mutually exclusive).

2014. MO. REV. STAT. § 455.358.5 (Supp. 1993).

2015. 552 A.2d 292 (Pa. Super. Ct. 1988), *appeal denied*, 568 A.2d 1247 (Pa. 1989).

On July 29, 1993, the U.S. Supreme Court issued its first ruling ever in a domestic violence case. In *United States v. Dixon*,[2016] the Court ruled that double jeopardy would not bar a battered woman from enforcing her civil protection order through criminal contempt while the state proceeds against her batterer criminally for his crime, as long as the contempt proceeding and the criminal prosecution each require proof of additional elements under the *Blockburger* "same elements" test.[2017] This ruling assures that battered women with civil protection orders will no longer be forced to choose between criminal prosecution and proceeding to enforce civil protection orders through criminal contempt when civil protection order respondents commit new crimes against petitioners.

In a separate criminal proceeding,[2018] the United States Attorney's Office obtained a grand jury indictment for the respondent

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2016. 113 S. Ct. 2849 (1993). This case was a consolidated appeal of two actions: *United States v. Dixon*, a drug related contempt action, and *United States v. Foster*, a criminal domestic violence prosecution.

2017. *Id.* at 2859-64 (noting Blockburger v. United States, 284 U.S. 299, 304 (1932), *overruled by* Whalen v. United States, 445 U.S. 684 (1980)). The Supreme Court's ruling in *Dixon* confirmed the validity of decisions rendered in several states which had ruled similarly that double jeopardy did not attach when a criminal prosecution followed a contempt proceeding. *See* People v. Totten, 514 N.E.2d 959, 965 (Ill. 1987) (prosecution for aggravated battery following and arising out of an adjudication for direct criminal contempt was not barred by double jeopardy); Sanders v. Shepard, 541 N.E.2d 1150, 1158 (Ill. App. Ct. 1989) (holding that father's subsequent imprisonment for contempt for failure to produce a minor child and previous conviction for abduction did not violate double jeopardy since elements of the crimes were different); People v. Lucas, 524 N.E.2d 246, 250 (Ill. App. Ct. 1988) (subsequent criminal prosecution for aggravated assault and battery arising out the same conduct for which defendant was held in criminal contempt did not violate double jeopardy since the criminal offenses of assault and battery required proof which the contempt charge did not); Commonwealth v. Allen, 486 A.2d 363, 364 (Pa. 1984) (holding that since the Protection from Abuse Act has its roots in equity and is essentially civil in nature, the court's use of contempt to enforce its orders under the Act does not bar a later criminal prosecution); Commonwealth v. Zerphy, 481 A.2d 670, 672 (Pa. 1984) (where defendant was found not guilty of indirect criminal contempt for violating a protection order, a subsequent prosecution on charges with respect to the defendant's conduct toward the police officers answering the domestic violence call did not violate double jeopardy); Commonwealth v. Smith, 552 A.2d 292, 294-95 (Pa. Super. Ct. 1988) (double jeopardy does not bar criminal assault prosecution even though the defendant entered into and violated a consent agreement with wife under the Prevention from Abuse Act and was held in contempt for the same incident), *appeal denied*, 568 A.2d 1247 (1989); Commonwealth v. Allen, 469 A.2d 1063, 1069-70 (Pa. Super. Ct. 1983) (criminal prosecution for rape and trespass was not barred by double jeopardy since the charges of criminal trespass and rape each required the presentation of evidence on elements beyond the proof needed to convict for contempt), *aff'd in part and rev'd in part*, 486 A.2d 363 (1984), *cert. denied*, 474 U.S. 842 (1985).

2018. For procedural history, see United States v. Dixon, 598 A.2d 724 (D.C. 1991), *aff'd in part and rev'd in part*, 113 S. Ct. 2849 (1993).

on several counts of felony and misdemeanor assaults and threats against his wife. Some of the incidents included in the indictment stemmed from the same incidents for which the respondent was charged and convicted of criminal contempt. The trial court, in ruling on the respondent's motion to dismiss as double jeopardy, ruled that the contempt conviction and the criminal prosecution were separate offenses each containing an element not contained in the other, and thus under *Blockburger*, the criminal prosecution was not barred by double jeopardy.[2019]

On appeal, the Court of Appeals for the District of Columbia reversed the trial court's ruling and held that defendant Foster could not be tried in a criminal prosecution for the same conduct for which he was found in criminal contempt of the civil protection orders.[2020] The court cited the Supreme Court's decision in *Grady v. Corbin*[2021] as controlling on the double jeopardy issue.[2022]

In *Grady*, the defendant Corbin received two traffic tickets after his automobile crossed the center line and struck two oncoming cars, killing one person and injuring a second. Corbin appeared in traffic court and pleaded guilty to the traffic charges. The judge accepted the plea, imposed a $300 fine, and suspended Corbin's license for six months. When a grand jury indicted him two months later on several charges, including manslaughter, Corbin challenged the indictment on double jeopardy grounds. The Supreme Court upheld the state court's ruling of double jeopardy.[2023]

In *Grady*, the Supreme Court took note of the *Blockburger* test, which set out the traditional test applied in double jeopardy cases. Where the same act constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one, is whether each provision requires proof of a fact which the other does not.[2024] The Supreme Court held in *Grady* that in order to avoid double jeopardy, in addition to passing the "same elements" test of *Blockburger*, the subsequent prosecution must also satisfy a "same conduct" test.[2025] The *Grady* "same conduct" test

2019. *Id.* at 728-29.
2020. *Id.* at 731.
2021. 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993).
2022. *Dixon*, 598 A.2d at 730.
2023. *Grady*, 495 U.S. at 524.
2024. Blockburger v. United States, 284 U.S. 299, 304 (1932), *overruled by* Whalen v. United States, 445 U.S. 684 (1980).
2025. *Grady*, 495 U.S. at 510, 515-16.

stated that the Double Jeopardy Clause bars subsequent prosecution in which the government, to establish an essential element of the subsequent offense, will need to prove conduct that constitutes an offense for which the defendant has already been prosecuted.[2026] The Court of Appeals for the District of Columbia concluded in *Dixon* that the conduct underlying Foster's contempt prosecution was the very same conduct for which the government now sought to try him in the pending criminal case.[2027] Therefore, *Grady* precluded the subsequent criminal prosecution.

The United States appealed the court of appeals' *Dixon* decision to the United States Supreme Court. The Supreme Court reversed,[2028] clearing the way for battered women to bring contempt actions against their batterers to obtain swift enforcement of civil protection orders and thereby secure their immediate safety without jeopardizing the state's ability to vindicate society's interests in prose-

2026. *Id.* at 510.

2027. *Dixon*, 598 A.2d at 731.

2028. United States v. Dixon, 113 S. Ct. 2849 (1993). Prior cases overturned by *Dixon* include: State v. Kipi, 811 P.2d 815, 818-19 (Haw. 1991), *cert. denied*, 112 S. Ct. 194 (1991) (prosecution for burglary in the first degree, with a maximum penalty of 10 years in jail, and three counts of terroristic threatening in the second degree, with a maximum sentence of one year imprisonment for each count barred by no contest plea on contempt of a civil protection order charge followed by a sentence of five months incarceration); *In re* Marriage of D'Attomo, 570 N.E.2d 796, 801-02 (Ill. App. Ct. 1991) (holding that removing and concealing of a child in violation of a custody order constitutes the same offense as child abduction, and prosecution for both violates double jeopardy under the *Blockburger* "same elements" test); People v. Gartner, 491 N.E.2d 927, 932-33 (Ill. App. Ct. 1986) (holding that double jeopardy barred the defendant's prosecution for aggravated assault where the defendant had been found in contempt of a protection order based on the same facts), *rev'd*, People v. Totten, 514 N.E.2d 959 (1987); State v. Tatro, No. L-84-308, 1985 WL 7096 (Ohio Ct. App. Apr. 12, 1985) (double jeopardy bars subsequent assault prosecution based on the same facts as a previous domestic violence conviction); Commonwealth v. Aikins, 618 A.2d 992 (Pa. Super. Ct. 1993) (holding that, under the *Grady* test, a subsequent prosecution for burglary is precluded by conviction for indirect criminal contempt arising out of protection order which protected premises burglarized); Commonwealth v. Allen, 469 A.2d 1063, 1070 (Pa. Super. Ct. 1983) (holding that defendant's subsequent prosecution on assault charges based on the same conduct which supported the contempt finding was barred by double jeopardy because the assault and criminal contempt charge did not each require proof of an additional fact), *aff'd in part and rev'd in part*, 486 A.2d 363 (1984), *cert. denied*, 474 U.S. 842 (1985); State v. Magazine, 393 S.E.2d 385, 396 (S.C. 1990) (sentence of five years imprisonment and fine of $1,188 restitution barred where defendant had been previously found in contempt of a civil protection order and was sentenced to one year imprisonment which was suspended upon a payment of a fine of $1,500 and future compliance with the civil protection order); Jivers v. State, 406 S.E.2d 154, 156-57 (S.C. 1991) (where conduct supporting criminal domestic violence conviction was the same conduct supporting the later charge of assault and battery with intent to kill, the subsequent prosecution violated the double jeopardy clause).

cuting the batterer.

In a fragmented opinion, a majority of six Justices[2029] agreed that the Double Jeopardy Clause posed no bar to criminal prosecutions against Foster for counts relating to assault with attempt to kill and threats against his wife. The reasoning behind this conclusion differed greatly among the Justices. Four Justices agreed that the Double Jeopardy Clause would not bar subsequent criminal prosecution of Foster for *any* of the offenses that were also addressed in Foster's contempt proceeding. Justices Rehnquist, O'Connor, and Thomas found that the "same elements" test in *Blockburger* did not bar any of the criminal charges in *Dixon*.[2030] Each further concluded that the "same conduct" test in *Grady* was badly reasoned, unworkable, and should be overruled. Justice Blackmun, the fourth Justice to concur that the Double Jeopardy Clause posed no bar to Foster's criminal prosecution on any count, found that contempt cannot be the same offense as a substantive violation of the criminal laws.[2031] However, Justice Blackmun saw no need to overrule *Grady*. He stated that "the interests served in vindicating the authority of the court are fundamentally different from those served by the prosecution of violations of the substantive criminal law."[2032]

Justices Scalia and Kennedy ruled that Foster's subsequent criminal prosecution for simple assault was barred by *Blockburger's* "same elements" test because Foster's simple assault charge did not contain any element not found in his previous contempt offense.[2033] Justices Scalia and Kennedy based their conclusion on *Dixon*'s unique facts. In *Dixon*, Foster was charged with simple assault in violation of D.C. Code § 22-504, based on the same event that was the subject of his prior contempt conviction for violating that provision of the civil protection order forbidding him to assault his wife and his mother-in-law. In reaching this conclusion, Justices Scalia and Kennedy take note of the fact that it is not obvious that the word "assault" in the civil protection order was intended to carry the same exact meaning that the word "assault" does in the criminal code under § 22-

2029. Justices Scalia, Kennedy, Rehnquist, O'Connor, Thomas, and Blackmun.

2030. *Dixon*, 113 S. Ct. at 2865.

2031. *Id.* at 2868.

2032. *Id.* at 2881.

2033. *Id.* at 2859; *see also* Hernandez v. State, 624 So. 2d 782 (Fla. Dist. Ct. App. 1993) (holding that defendant, previously convicted of violation of protection order injunction, cannot be tried again for criminal contempt based on violation of same order).

504.[2034] However, since Judge Murphy, the trial judge who heard the civil protection order contempt action, construed the term "assault" in the context of the civil protection order to mean "assault under § 22-504" and that interpretation was never appealed, Justices Scalia and Kennedy found that, under the trial judge's unchallenged interpretation of "assault," the subsequent criminal prosecution would be barred under *Blockburger*.[2035] Therefore, according to Justices Scalia and Kennedy, if the assault forbidden under the civil protection order were defined in a manner different from "assault under § 22-504," the subsequent prosecution, even under the criminal assault statute, might be permissible under the Double Jeopardy Clause.

In those few remaining criminal assault cases where double jeopardy *may* pose a bar to the subsequent criminal action if the contempt motion goes forward before the criminal action, the court and petitioner's counsel should first determine whether the contempt action can be decided in such a fashion so as to avoid double jeopardy issues. For example, after hearing the evidence in the case, instead of finding that the respondent assaulted his wife, the trial judge could have found in *Dixon* that respondent approached petitioner in violation of the stay away provisions of the civil protection order, grabbed her, and threw her against a parked car.

Despite the fact that double jeopardy will no longer pose a bar to criminal prosecutions that follow contempt proceedings in the vast majority of cases, there is a continuing need for cooperation and coordination between domestic violence victims bringing contempt motions and state prosecutors. Coordination will prevent poorly worded contempt findings from unwittingly precluding criminal prosecutions in some cases, as occurred on one count in *Dixon*. In addition, appointment of counsel for civil protection order petitioners pursuing enforcement through contempt would help eliminate conflicts that may arise, and assist the petitioner in successfully prosecuting her criminal contempt case. It is strongly urged that each jurisdiction adopt such a practice.

2. Collateral Estoppel

The doctrine of collateral estoppel can arise in the domestic violence context. In the case of *Commonwealth v. Allen*,[2036] a girl-

2034. *Dixon*, 113 S. Ct. at 2858 n.3.

2035. *Id.* at 2864.

2036. No. 3458, 1988 Phila. Cty. Rptr. LEXIS 13 (Commw. C.P. Ct. Mar. 7, 1988); *see*

friend and boyfriend both filed protection orders against each other. The girlfriend prevailed on her request for a protection order, while the boyfriend failed to meet his burden of proof, and thus his request to have a protection order issued against his girlfriend was denied.[2037] Subsequent to the protection order hearing on both petitions, the boyfriend brought a private criminal complaint, and the girlfriend argued that such an action would constitute double jeopardy. The court held that rather than constituting double jeopardy, such an action was barred by collateral estoppel.[2038] The boyfriend's criminal complaint was based upon a set of facts that had already been adjudicated against him in the civil protection order case. When issues have been decided by a valid judgment, those issues cannot be relitigated between the same parties. The boyfriend whose civil protection order request had been denied in a civil case could not bring a criminal complaint to gain renewed access to his victim.[2039]

F. Sentencing

The cycle of violence can end in the death of the victim or a separation. In such cases, the batterer often moves on to a new victim.[2040] The violence may also stop as a result of negative experiences such as social and legal sanctions,[2041] loss of children, and social embarrassment.[2042] Dr. Anne Ganley states:

> Domestic violence is repeated because *it works*. It gets overtly, covertly, and inadvertently reinforced by all of society's institu-

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also People v. Roselle, 602 N.Y.S.2d 50 (App. Div. 1993).

2037. *Allen*, 1988 Phila. Cty. Rptr. LEXIS 13, at *6.

2038. *Id.* at *30.

2039. *Id.*

2040. *See* TERRIFYING LOVE, *supra* note 4, at 71-72 (95% of men who sought treatment for battering behavior admitted abusing more than one woman); Jeffrey Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, *in* FAMILY VIOLENCE 377 (Lloyd Ohlin & Michael Tonry eds., 1989); Lenore E. Walker & Angela Browne, *Gender and Victimization by Intimates*, 53 J. PERSONALITY 177, 192 (1985) (at least half of batterers who complete treatment programs continue their violent behavior with new partners).

2041. Over time, the possibility of new court involvement becomes the strongest deterrent of future violence. *See generally* Jeffrey Edleson & Maryann Syers, *Relative Effectiveness of Group Treatments for Men Who Batter*, 26 SOC. WORK RES. & ABSTRACTS 10, 10-17 (1990).

Domestic violence is repeated because it works and is covertly, overtly, and inadvertently reinforced by society's institutions. Since battering is learned behavior, courts can provide batterers with motivation for change. Battering stops when batterers are held accountable and choose to stop. *See* Ganley, *supra* note 21, at 34, 40.

2042. Fagan, *supra* note 2040, at 389 (social stigmatization).

> tions . . . . The pattern of domestic violence . . . allows the perpetrator to gain control of the victim through fear and intimidation. The fact that most domestic violence is learned means that the perpetrator's behavior can be changed. Most individuals can learn not to batter when there is sufficient motivation for changing that behavior. The court plays a strong role in providing perpetrators with sufficient motivation to change and participates in the rehabilitation process by holding perpetrators accountable for both the violence and for stopping the pattern of coercive control. Most importantly, the court plays an essential role in protecting the abused party during the perpetrator's rehabilitation process, and in monitoring that process to ensure the perpetrator's compliance.[2043]

1. Considerations at Sentencing

In all domestic violence cases, the goals of sentencing domestic violence offenders are identical. This is true whether the sentencing follows a criminal contempt conviction for violating a civil protection order, or whether the sentencing follows a criminal trial for crimes committed against family members.[2044] The need to hold the batterer accountable for his actions, and the need to be cognizant of the harm the batterer's actions have caused the victim, remain constant in all domestic violence contexts. The most important sentencing goals which address issues common to all batterers and victims are: 1) stopping the violence; 2) protecting the victim, the children, and other family members; 3) protecting the general public; 4) holding the batterer accountable for the violent conduct; 5) upholding the legislative intent to treat domestic violence as a serious crime; 6) providing restitution for the victim; and 7) rehabilitating the batterer.[2045] The National Council of Juvenile and Family Court Judges advocate that every sentence imposed in a family violence case should order offender involvement in activities specifically designed to reduce future violence, require an alcohol and drug evaluation where appropriate, mandate successful completion of treatment, and provide for formal supervision and monitoring of compliance.[2046] These all-inclusive

2043. Ganley, *supra* note 1519, at 30-31 (citations omitted).

2044. *Cf.* Grageda v. United States Immigration & Naturalization Serv., No. 92-70322, 1993 U.S. App. LEXIS 33634 (9th Cir. Dec. 28, 1993). Note that in *Grageda*, the Ninth Circuit held that spousal abuse is a crime of "moral turpitude" which can be the basis for an alien's deportation under the Immigration and Nationality Act.

2045. NANCY D. LEMON, DOMESTIC VIOLENCE: A BENCHGUIDE FOR CRIMINAL CASES 151 (1989), *cited in* ORLOFF & KLEIN, *supra* note 26, at 37.

2046. Family Violence Project, The National Council of Juvenile and Family Court Judges,

sentences are most effective in protecting the abused party.

State statutes provide insight into how various jurisdictions approach sentencing of domestic offenders.[2047] Thirty-four jurisdictions statutorily authorize jail time for civil protection order violations, thirty-one of which stipulate either a minimum or a maximum number of days to which the defendant can be sentenced.[2048] Thirty-two states

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2047. For a detailed guide to sentencing acts of domestic violence within one jurisdiction, see P.R. LAWS ANN. tit. 8, §§ 631-636 (1990). Puerto Rico's statutory sentencing provisions in this area are very specific. A single incident of abuse and abuse by threat warrant a fixed 12 month jail term. *Id.* § 631. Extenuating circumstances diminish the sentence to 9 months, while aggravating circumstances increase the sentence to 18 months. *Id.* Aggravated abuse leads to a fixed term of 3 years if one or more of the following exists: (a) in the case of spouses or cohabitors, when they are separated or there is an order for protection excluding one of the parties from the residence, the person enters the dwelling of the person or the place in which he/she is lodged and the abuse is committed therein; or (b) when grave bodily harm is inflicted on the person; or (c) when it is committed with a lethal weapon under circumstances that do not indicate the intention of killing or maiming; or (d) when committed in the presence of minors; or (e) when it is committed after an order for protection or resolution has been issued against the person charged, in aid of the victim of abuse; or (f) the person is induced, incited, or forced to be drugged with controlled substances, or with any other substance or means that alters the will of the person, or to become intoxicated with alcoholic beverages; or (g) when child abuse is committed and simultaneously incurred. *Id.* § 632. When the defendant is found to have restricted the victim's liberty, he/she faces a fixed 3 year term, to be increased to 5 years if there are aggravating circumstances and to be decreased to 2 years if there are extenuating circumstances. *Id.* § 634. Sexual assault is placed into several categories which cover a sentencing range of from 10 to 25 year fixed terms. *Id.* § 635. If the defendant uses force, violence, intimidation, or the treat of imminent bodily harm, he faces a 30 year fixed term, increased to 50 years when aggravating circumstances exist and decreased to a minimum of 20 years when extenuating circumstances exist. *Id.* § 635. If in addition, the sexual abuse occurred in the home or immediate environment of the home of the victim and the parties were living apart, the sentencing range is 40 to 99 years imprisonment. *Id.* § 635.

2048. ARK. CODE § 9-15-207 (Michie Replacement 1993); CAL. FAM. CODE § 5807 (West 1993) (a willful and knowing violation of a restraining order is a crime punishable under § 273.6 of the Penal Code); COLO. REV. STAT. § 186-803.5 (Supp. 1993) (class three misdemeanors); CONN. GEN. STAT. ANN. § 46b-38c(e) (West Supp. 1993) (punishable by a term of imprisonment of not more than 1 year and a fine or not more than $1,000, or both); D.C. CODE ANN. § 16-1005(f) (1989) (violation of any temporary or permanent order issued under this chapter shall be punishable as contempt); IDAHO CODE § 39-6312.1 (1993) (punishment not to exceed 1 year in jail and a fine not to exceed $5,000); 725 ILCS 5/112A-23(f) (Smith-Hurd 1992) (penalty shall be the penalty that generally applies in criminal or contempt proceedings); IOWA CODE ANN. § 236.8 (West 1993) (the defendant shall serve a jail sentence); LA. REV. STAT. ANN. 46 § 2137 (West 1992) (may be punished by a fine for not more than $500 or jail for as long as 6 months, or both); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993) (not more than 2 and 1/2 years in a house of correction); MD. CODE ANN., FAM. LAW. § 4-509 (West Supp. 1993) (fine not exceeding $500 or imprison-

statutorily authorize the imposition of fines for civil protection order violations and set maximum dollar amounts.[2049] Some states provide

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ment not exceeding 60 days, or both); MICH. COMP. LAWS ANN. § 600.2950(6) (West 1986) (imprisoned for not more than 90 days and may be fined not more than $500); MINN. STAT. ANN. § 518B.01(14) (West Supp. 1993) (defendant must be sentenced to a minimum of 3 days imprisonment, among other things); MISS. CODE ANN. § 93-21-21 (Supp. 1993) (court may punish the defendant by imprisonment for not more than 6 months or a fine of not more than $1,000, or both); MO. ANN. STAT. § 455.085.7 (Vernon Supp. 1993) (violation is a class A misdemeanor); NEB. REV. STAT. § 42-924(3) (Supp. 1992) (class II misdemeanor); N.D. CENT. CODE § 14-07.1-06 (Supp. 1993) (violation is a class A misdemeanor); NEV. REV. STAT. ANN. § 33.100 (Michie Supp. 1993) (guilty of misdemeanor; if violation accompanied by violent act the court shall sentence him to imprisonment for not fewer than 5 days, but no more than 6 months, among other things); N.J. STAT. ANN. § 2C:25-30 (West Supp. 1993) (any person convicted of a second or subsequent nonindictable domestic violence contempt offense shall serve a minimum term of not less than 30 days); N.Y. FAM. CT. ACT § 846(a) (McKinney Supp. 1994) (jail term not to exceed 6 months); OHIO REV. CODE ANN. § 2919.27 (Anderson 1993) (varies with number of previous convictions for violation of order, if any); OKLA. STAT. ANN. tit. 22, § 60.6(A) (West 1992) (punishable by a fine of not more than $1,000 or by a term of imprisonment of not more than 1 year, or both); OR. REV. STAT. § 107.718(3) (1991) (punishable by a fine of up to $300, a jail term or up to 6 months, or both); 23 PA. CONS. STAT. § 6114(b) (1991) (imprisonment of up to 6 months or a fine not to exceed $1,000, or both); R.I. GEN. LAWS § 15-15-3 (Supp. 1993) (punished by a fine of no more than $1,000 or by imprisonment for not more than 1 year, or both); S.C. CODE ANN. § 16-25-30 (1985) (must be punished by a fine of not more than $200 or imprisonment of not more than 30 days); TENN. CODE ANN. § 36-3-610 (1991) (upon violation of the order the court may hold the defendant in contempt and punish him in accordance with the law); TEX. FAM. CODE ANN. § 71.16(b) (West Supp. 1992) (violation of order may be a felony punishable by a fine of as much as $10,000 or by imprisonment for as long as 10 years, or both); UTAH CODE ANN. § 30-6-6(5) (Supp. 1993) (class A misdemeanor carrying penalties of fine and imprisonment); VT. STAT. ANN. tit. 13, § 1030 (West Supp. 1993) (imprisoned not more than 1 year or fined not more than $5,000, or both); WIS. STAT. ANN. § 813.12(8) (West Supp. 1993) (punishment not more than $1,000 or imprisoned for not more than 9 months, or both); W. VA. CODE § 48-2A-7 (Supp. 1993) (imprisonment of up to 30 days and a fine not to exceed $1,000, or both).

2049. ARK. CODE ANN § 9-15-207(b) (Michie 1993) (one thousand); CAL. FAM. CODE § 5807 (West 1993); COLO. REV. STAT. ANN. § 18-6-803.5(2) (West Supp. 1993) (five thousand); CONN. GEN. STAT. ANN. § 46b-15(c) (West Supp. 1993) (one thousand); D.C. CODE ANN. § 16-1005(f) (1989) (one thousand); FLA. STAT. ANN. § 741.31 (West Supp. 1993) (five hundred); IDAHO CODE § 39-6312(1) (1993) (five thousand); 725 ILCS 5/112A-23(g) (Smith-Hurd Supp. 1993) (unspecified fine); LA. REV. STAT. ANN. 46 § 2137 (West 1982) (five hundred); ME. REV. STAT. ANN. tit. 19, § 769(i) (West Supp. 1992) (two thousand); MD. CODE ANN., FAM. LAW § 4-509(a) (Supp. 1993) (five hundred); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993) (five thousand); MICH. COMP. LAWS ANN. § 60.2950(6) (West 1986) (five hundred); MINN. STAT. ANN. § 518B.01(18) (West Supp. 1993) (seven hundred); MISS. CODE ANN. § 93-21-21 (1993) (one thousand); MO. ANN. STAT. § 455.538.4(1) (Vernon Supp. 1993) (one thousand); MONT. CODE ANN. § 45-5-206(3) (1993) (one thousand); NEB. REV. STAT. § 42-924 (1988) (five hundred); NEV. REV. STAT. ANN. § 33.100 (Michie Supp. 1993) (two thousand); N.J. STAT. ANN. § 2C:25-30 (West Supp. 1993) (one thousand); N.D. CENT. CODE § 12.1-32-01(5) (1985) (one thousand); OHIO REV. CODE ANN. § 2919.27 (Anderson 1993) (two hundred-fifty); OKLA. STAT. ANN. tit. 22, § 60.6(A) (West 1992) (one thousand); OR. REV. STAT. § 107.718(3) (1991) (three hundred);

that a sentence can include a fine and jail time.[2050] In contempt cases in New York, the court may modify a civil protection order, issue a new civil protection order, or put the defendant in jail for up to six months.[2051]

Factors which have been considered by the state legislatures and courts to increase a domestic violence offender's sentence include: prior criminal convictions, prior treatment for domestic violence, prior history of domestic violence, substance abuse, history of threats to others, great bodily injury or threats of great bodily injury, viciousness and callousness, use of a weapon, a victim who is particularly vulnerable, multiple victims, planning or sophistication indicating premeditation, and tying, binding, or confining.[2052] These factors should be considered and weighed, whether a judge is sentencing a defendant for a civil protection order violation or for another act of domestic violence being prosecuted as a misdemeanor or a felony. In all criminal domestic violence cases, the problems these factors present, and the issues they raise, are similar regardless of the context in which they are considered.

Some civil protection order statutes specifically provide that the sentencing judge may consider aggravating factors. Illinois and Oklahoma, for example, stipulate that the court must consider evidence of aggravation or mitigation.[2053] Illinois adds that the criminal court may consider other civil protection order violations in sentencing.[2054] Missouri, New Jersey, Oklahoma, North Dakota, Ohio, and Illinois provide that further violations increase the defendant's sentence,[2055] and Oklahoma's statute states that no probation or sus-

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23 PA. CONS. STAT. ANN. § 6114(b) (1991) (one thousand); R.I. GEN. LAWS § 15-5-3(3) (Supp. 1993) (one thousand); TEX. FAM. CODE ANN. § 71.16(b) (West Supp. 1993) (ten thousand); UTAH CODE ANN. § 30-6-6(5) (1990 & Supp. 1993) (one thousand); VT. STAT. ANN. tit. 13, § 1030(a) (Supp. 1993) (five thousand); W. VA. CODE § 48-2A-7(b) (1992 & Supp. 1993) (one thousand); WIS. STAT. ANN. § 813.12(8) (West Supp. 1993) (same).

2050. *See, e.g.*, D.C. CODE ANN. § 16-1005(f) (1989); MONT. CODE ANN. § 45-5-206(3) (1993); 23 PA. CONS. STAT. ANN. § 6114(b) (1991).

2051. N.Y. JUD. LAW § 846-a (McKinney Supp. 1994). These options are regularly combined at the trial level in many states.

2052. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 138-40.

2053. 750 ILCS 5/112A-23(f)(2) (Smith-Hurd 1992); OKLA. STAT. ANN. tit. 22, §60.6(B) (West 1992).

2054. 725 ILCS 5/112A-23(f)(3)(i) (Smith-Hurd 1992).

2055. 725 ILCS 5/112A-23(f)(3)(ii) (Smith-Hurd 1992); MO. REV. STAT. § 455.085(7) (Vernon Supp. 1993) (violation of civil protection order is a felony); N.J. STAT. ANN. § 2C:25-14 (West 1992) (second violation of a protection order requires a minimum thirty day sentence); N.D. CENT. CODE § 14-07.1-06 (Supp. 1993) (second or subsequent violation

pended sentence can reduce the sentencing minimum.[2056] Wisconsin calls for a maximum two year increased penalty for an act of domestic violence which occurs within twenty-four hours of an arrest for domestic violence.[2057]

Statutes and court cases recommend that specific sentences be imposed in domestic violence cases. These statutes and case law provide that a sentence may include no contact with the victim,[2058] a fine or community service and a term of incarceration,[2059] reimbursement of plaintiff's attorney's fees,[2060] reimbursement of plaintiff's medical care due to violence,[2061] and counseling at defendant's expense.[2062] The Massachusetts statutory provisions on sanctions for civil protection order violations put great emphasis on victim restitution by specifically listing that the defendant can be ordered to monetarily compensate the victim for the cost of her shelter and emergency housing, lost earnings, out-of-pocket expenses for injuries, moving expenses, the cost of obtaining an unlisted phone number, reasonable attorney's fees, support, and property damag-

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of a protection order is a felony); OHIO REV. CODE ANN. § 2919.27(B) (Anderson 1993) (felony for temporary protection order violation if 2 or more previous violations of this or other protection order); OKLA. STAT. ANN. tit. 22, § 60.6B (West 1992) (mandatory imprisonment for second or subsequent violation of protection order).

2056. OKLA. STAT. ANN. tit. 22, § 60.6(D) (West 1992).

2057. WIS. STAT. ANN. § 939.621 (West Supp. 1993) (post-arrest act becomes a felony).

2058. *See* People v. Hazelwonder, 485 N.E.2d 1211, 1212 (Ill. App. Ct. 1985) (sentence for defendant, who was convicted of violating a protection order, included a new protection order); *see also* DOMESTIC VIOLENCE IN CRIMINAL CASES, *supra* note 23, at 146 (recommending that courts consider issuing a no-contact order, even in those cases where the offenders sentence includes a period of incarceration, to help prevent the defendant from calling or writing the victim from jail). This is exactly the approach the Court of Appeals for the District of Columbia took in *Maldonado v. Maldonado*, due to its recognition that the wife would be left open to harassment or threatening communications should he gain access to a telephone or should he be released early or escape from jail. No. 93-FM-199, 1993 D.C. App. LEXIS 227 (D.C. Sept. 13, 1993). With regard to prohibiting contact by telephone, the court stated, "[a]lthough threats to commit physical harm by one incarcerated may, in some instances, not rise to the level of seriousness that physical abuse does, such conduct can nonetheless have significant adverse effects upon the victim." *Id.* at *9.

2059. NEV. REV. STAT. ANN. § 33.100 (Michie Supp. 1993) (one hundred hours of community service and five days to six months imprisonment).

2060. 725 ILCS 5/112A-23(f) (Smith-Hurd Supp. 1993); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993); NEV. REV. STAT. ANN. § 33.100(c) (Michie Supp. 1993).

2061. NEV. REV. STAT. ANN. § 33.100(c) (Michie Supp. 1993).

2062. MONT. CODE ANN. § 45-5-206(4) (1993) (defendant must pay for and complete twenty-five hours of counseling for him/herself); NEV. REV. STAT. ANN. § 33.100(d) (Michie Supp. 1993) (must pay for and complete counseling for him/herself); UTAH CODE ANN. § 77-36-5(2) (Supp. 1993) (may be required to pay for defendant's own counseling as well as victim's counseling).

es.[2063] This statute follows the position urged by the Attorney General's Task Force on Family Violence, which seeks to make abusers accountable for their conduct and includes placing financial responsibilities on batterers at their sentencing.[2064]

A study of recent case law reveals that courts have employed various sentencing methods intended to punish a batterer for past domestic violence while trying to deter future violent acts. Many courts allow a contempt sentence to be stayed pending future civil protection order violations, upon which the defendant may be called to court for sentencing.[2065] This approach has two advantages. First, for some batterers the threat of the outstanding sentence will be enough to encourage them to change their behavior and participate in a batterer's treatment program. Second, if the deterrent is ineffective, the judge will be asked to impose a sentence on the first violent act at a time when the defendant has already demonstrated his unwillingness to stop the violence and comply with court orders. Under these circumstances, even the judges most sympathetic to batterers will be more likely to impose upon the batterer a longer sentence, one that is more akin to those given in all other criminal actions.

The National Council of Juvenile and Family Court Judges recommends that batterer's receive enhanced penalties for second or subsequent crimes involving domestic violence.[2066] Ohio provides that in a criminal case where the defendant has been previously convicted of domestic violence, subsequent incidents will be charged and sentenced as felonies rather than misdemeanors.[2067] The Wisconsin Appellate Court held that a harsher sentence for the violation of a domestic abuse injunction was properly based on the finding that the defendant failed to change his behavior after previous, more lenient

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2063. MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 1992).

2064. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEP'T OF JUSTICE, FINAL REPORT 35 (1984); *see also* DOMESTIC VIOLENCE IN CRIMINAL CASES, *supra* note 23, at 146. For a broad range of potential probation and parole conditions that are recommended by the National Council of Juvenile and Family Court Judges, see MODEL CODE, *supra* note 15, §§ 219, 220.

2065. *See, e.g.*, People v. Lucas, 524 N.E.2d 246, 247 (Ill. App. Ct. 1988) (contempt sentencing may be stayed pending future civil protection order violations); People v. Whitfield, 498 N.E.2d 262, 264 (Ill. App. Ct. 1986) (husband received conditional discharge of sentence after first contempt finding provided he ceased abuse and harassment of wife); *see also* MODEL CODE, *supra* note 15, § 218.

2066. *See* MODEL CODE, *supra* note 15, § 203.

2067. State v. Amos, No. 12-088, 1988 Ohio App. LEXIS 78 (Ohio Ct. App. Jan. 15, 1988) (where defendant has been previously convicted of domestic violence, subsequent incidents will be charged as felonies rather than misdemeanors).

sentences for prior violations of such injunction.[2068] The Oklahoma Criminal Court of Appeals held that where the defendant was found to have violated civil protection orders on four counts, revocation of suspended sentences for earlier violations of some civil protection orders was proper.[2069]

Only two states have expungement provisions in their statutes which allow the court to erase a convicted respondent's record under certain circumstances. Vermont provides that the court may expunge a civil protection order criminal contempt conviction if two years pass without the respondent obtaining another conviction.[2070] Arizona allows the court to expunge a conviction if the complete sentence is served without a new violation.[2071]

These expungement policies are not advisable for several reasons. First, they treat criminal behavior against intimates less seriously than other criminal behavior. In addition, they base expungement upon cessation of violence for a fairly short period of time against one victim rather than focusing on the batterer's treatment and rehabilitation. In most instances, batterers will continue battering multiple partners over time.[2072] The expungement statutes not only fail to account for the fact that the batterer may be in a new abusive relationship with another woman after his separation from the victim involved in the conviction, but expungement prevents future victims and future courts from obtaining basic conviction information available on all other criminals. Domestic violence is often hidden from public scrutiny, and if a batterer's record is expunged, it may destroy the one means the public has of assessing the danger he presents to society and other potential victims. Further, the fact that no further conviction has occurred in two years is not an accurate measure of whether or not his violence has truly ceased. A batterer may use the need to have two years pass before he may qualify for expungement as an incentive to keep tight power and control in future relationships. The availability of expungement in these cases may actually

2068. State v. McDaniel, 502 N.W.2d 285 (Wis. Ct. App. 1993).

2069. Gilbert v. State, 765 P.2d 1208 (Okla. Crim. App. 1988) (where defendant was found guilty on four counts of violating domestic abuse act, revocation of suspended sentences for earlier violations of some earlier protection orders was proper).

2070. VT. STAT. ANN. tit. 15, § 1108(b) (1989).

2071. ARIZ. REV. STAT. ANN. § 13-3601(H) (Supp. 1993).

2072. TERRIFYING LOVE, *supra* note 4, at 72 (95% of men who sought treatment for battering behavior admitted abusing more than one woman); Fagan, *supra* note 2040, at 377-425; Walker & Browne, *supra* note 2040, at 17 (at least half of the batterers who complete treatment programs continue their violent behavior with new partners).

encourage even more violence. Through threats or intimidation, a batterer may be very effective in preventing his present or future victim from reporting new incidents.

2. Victim Impact Statements

A victim impact statement is a statement read into the record during sentencing in a criminal trial to inform the court of the impact the crime had on the victim and her family.[2073] The purpose of victim impact statements is well articulated in the 1982 Report for the President's Task Force on Victims of Crime:

> Judges should allow for, and give appropriate weight to, input at sentencing for victims of violent crime . . . . [E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice . . . . Defendants speak and are spoken for often at great length, before sentence is imposed. It is outrageous that the system should contend it is too busy to hear from the victim.[2074]

These statements are very important in domestic violence cases, as there are often no witnesses to the abuse the victim has suffered. Additionally, if the victim is economically dependent on the batterer, the judge will need this information so that the sentence imposed does not force the victim to have to return to the batterer as her only means to stave off indigence.[2075]

Use of victim impact statements does not violate due process, so long as certain conditions are met. The statement must be made under oath, and the defendant must have notice that the witness offering the victim impact statement will be testifying or will be available so that the defendant may cross-examine her.[2076] In *Buschauer v.*

2073. Deborah P. Kelly, *Have Victims Gone Too Far—Or Not Far Enough*, A.B.A. SEC. CRIM. JUST. 22 (1991).

2074. 1982 REPORT FOR THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *quoted in* ORLOFF & KLEIN, *supra* note 26, at 46.

2075. In sentencing domestic violence offenders, courts should be aware of the economic consequences of their sentences. Courts can structure sentences in some cases in such a way that the victim does not become economically devastated. The court may wish to sentence the defendant with a work release so that he may continue providing the economic sustenance on which the victim is often completely dependent.

2076. *See, e.g.*, State v. Brockelman, 862 P.2d 1040 (Colo. Ct. App. 1993) (awarding restitution for medical expenses based on victim impact statement); State v. Kinley, No. 2826, 1993 Ohio App. LEXIS 3272 (Ohio Ct. App. June 24, 1993) (upholding admission of victim impact statement in domestic murder prosecution).

State,[2077] the court held that a victim impact statement made by defendant's mother-in-law which contained specific details regarding defendant's history of domestic violence violated due process, because defendant received no notice that his mother-in-law would offer the statement, the statement was not made under oath, and the defendant was given no opportunity for cross-examination.[2078]

3. Sentences Upheld

The U.S. Attorney General's Task Force on Family Violence concluded in its final report that: "In all cases when the victim has suffered serious injury, the convicted abuser should be sentenced to a term of incarceration. In cases involving a history of repeated abusive behavior or when there is a significant threat of continued harm, incarceration is also the preferred disposition."[2079] A study of the case law reveals that the types of sentences that have been upheld in domestic violence cases include jail terms, monetary sanctions, bonds, probation, and injunctions.

For violations of civil protection orders, state courts have upheld a variety of sentences, including: six months in jail for violating an order which prohibited respondent from threatening, abusing, or harassing his wife;[2080] six months imprisonment for wilful violation of a protection order;[2081] ninety days imprisonment for stalking, beating, and hospitalizing wife;[2082] nine days and $750 fine for forcibly entering plaintiff's residence and physically abusing her;[2083] eighteen months suspended with four years probation for repeated violations of an order prohibiting contact with former wife;[2084] thirty days in jail

2077. 804 P.2d 1046 (Nev. 1990).

2078. *Id.* at 1048.

2079. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 2064, at 34; *see also* NIJ CPO STUDY, *supra* note 19, at 58.

2080. Wagner v. Wagner, 564 A.2d 162 (Pa. Super. Ct. 1989) (upholding six month jail sentence for violating civil protection order).

2081. Murdock v. Murdock, 583 N.Y.S.2d 501 (App. Div. 1992).

2082. Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. Ct. 1985).

2083. Commonwealth v. Allen, 486 A.2d 363, 365 (Pa. 1984) (trial court found defendant in contempt of protection order, ordered him to pay a fine of $750 and costs, and discharged him from prison where he had been held for nine days).

2084. *See, e.g.*, Siggelkow v. State, 731 P.2d 57, 62 (Alaska 1987) (upholding respondent's sentence for repeated violations of court order prohibiting contact with former wife proper; where respondent's contempt prejudiced his former spouse's right to be left alone, his contempt was properly punishable by imprisonment upon revocation of probation as court can authorize sentence of imprisonment when right or remedy of a party to the case has been defeated or prejudiced by the contempt).

for wilful violation of a protection order;[2085] imprisonment for six hundred days, after finding respondent guilty of four separate criminal contempts of petitioner and her mother's civil protection orders;[2086] revocation of probation and six months in jail for going to wife's home and threatening residents, and for telephoning wife;[2087] six months in jail for breaking into plaintiff's residence and threatening to kill her;[2088] revocation of parole and seven days imprisonment for violating no contact provision of order;[2089] $2,500 in sanctions for violating provision of order;[2090] and probation for twelve months, conditioned on sixteen hours of public service work and imprisonment of two days for harassing former wife.[2091] A father who was found in contempt of a custody order for failing to return the child to the custodial mother was ordered to post a $10,000 penal bond and was allowed limited visitation with the child.[2092]

Sentencing in domestic violence criminal cases of contempt should be guided by the criminal courts which have upheld sentences of batterers convicted of domestic violence offenses. The act of contempt of a civil protection order is also a criminal act, such as an assault, for which batterers can, but may or may not, be prosecuted in criminal court. Criminal courts can likewise look to the civil protection order courts to understand how a criminal sentence must protect the victim from further abuse at the same time it holds the batterer

2085. Duquette v. Ducatte, 477 N.Y.S.2d 1002 (App. Div. 1984).

2086. United States v. Dixon, 113 S. Ct. 2849, 2854 (1993) (trial court found defendant to have violated the civil protection orders beyond a reasonable doubt on four separate occasions and was sentenced to 150 days for each count with sentences to run consecutively).

2087. State v. Martinez, 495 N.W.2d 527 (Wis. Ct. App. 1992) (upholding sentence to two consecutive six month terms and probation revocation for two violations of protection order).

2088. People v. Allen, 787 P.2d 174, 175 (Colo. Ct. App. 1989).

2089. Dunkelberger v. Pennsylvania Bd. of Probation and Parole, 593 A.2d 8 (Pa. Commw. Ct. 1991).

2090. Rayan v. Dykeman, 274 Cal. Rptr. 672, 674 (Ct. App. 1990) (violator of order sanctioned $2,500 for refusing to transfer real estate property; bankruptcy does not bar enforcement of order).

2091. People v. Whitfield, 498 N.E.2d 262, 264 (Ill. App. Ct. 1986) (respondent's conditional discharge was revoked upon second contempt and he was sentenced); *see also* State v. Ramsey, 831 P.2d 408, 413 (Ariz. Ct. App. 1992) (holding that the portion of the domestic violence statute which required prosecutorial concurrence with the judge's decision to defer the entry of guilt and place offender on probation violates the separation of powers doctrine; judge may defer the entry of guilt pending a showing that the offender has successfully completed probation).

2092. *In re* Marriage of Rodriguez, 545 N.E.2d 731, 732 (Ill. 1989).

accountable for his actions. *State v. Sutley*[2093] shows how similar issues are relevant when sentencing occurs following a case of domestic violence, whether after a criminal trial or contempt proceeding. The behavior being punished is often the same, and the goals of sentencing, holding the batterer accountable and protecting the victim, are the same. Here, the court held that the probation order restrictions, which ordered respondent to remain outside one section of his home county and to stay away from the victim and her family, were proper as they were related to the crime and helped to insure that defendant would remain law abiding.[2094]

4. Sentences Overturned

Appellate courts have been careful to keep in mind that domestic violence offenders must receive the same treatment as all other criminals. The goals of sentencing are to hold the offender accountable and protect his victim from further abuse.[2095] The court in *State v.*

2093. No. 90-A-1495, 1990 Ohio App. LEXIS 5520 (Ohio Ct. App. Dec. 14, 1990).

2094. *Id.* at *10; *see also* People v. Burts, No. 1-90-0768, 1993 Ill. App. LEXIS (Ill. App. Ct. Nov. 29, 1993) (upholding thirty year sentence for first degree murder of intimate partner); People v. Brown, 620 N.E.2d 674 (Ill. App. Ct. 1993) (upholding fifty year sentence for first degree murder of ex-wife, plus an additional twenty years for attempted murder, both to run consecutively); People v. Hazelwonder, 485 N.E.2d 1211 (Ill. App. Ct. 1985) (upholding the conditioning of probation on ninety days in prison and the issuance of another protection order where defendant, originally convicted for violating a protection order obtained by his ex-wife and sentenced to six months probation, subsequently violated probation by damaging the property of ex-wife's relatives); Thomas v. State, 634 A.2d 1 (Md. 1993) (upholding thirty year sentence where defendant was convicted of serious assault of wife by striking her in the head and back with a steam iron, sixty day sentence for violating vacate order, and six month sentence for telephone harassment); State v. Christopherson, No. C4-92-900, 1992 Minn. App. LEXIS 1243 (Minn. Ct. App. Dec. 16, 1992) (upholding sentence ordering defendant to undergo chemical dependency and domestic abuse counseling, pay restitution, and have no contact with victim-former wife); State v. Whitaker, 397 S.E.2d 372 (N.C. Ct. App. 1990) (upholding nine year sentence after guilty plea to assault with a deadly weapon where trial court found aggravating factors that assault was committed while defendant was on probation for previous assaults on wife and acts were done with premeditation and deliberation); State v. Weller, 563 A.2d 1318 (Vt. 1989) (trial court that placed defendant on probation and required an appearance bond reasonably concluded that the defendant's failure to report to his probation officer increased the risk that he would not appear in court); State v. Gipson, 499 N.W.2d 301 (Wis. Ct. App. 1993) (upholding thirteen year sentence of defendant convicted of sexually assaulting his stepson where the offense was serious, defendant had prior convictions, and a history of domestic violence). *But see* State v. J.F., 621 A.2d 520 (N.J. Super. Ct. 1993) (vacating part of defendant's sentence that banished him from the state because banishment is not among the remedies authorized by the Prevention of Domestic Violence Act).

2095. *Cf.* MODEL CODE, *supra* note 15, § 217 (residential confinement in home of victim prohibited).

Huletz[2096] upheld these principles when it overturned the sentence of a defendant convicted of fourth degree assault on his live-in girlfriend. The Alaska Appellate Court held that where the offense is punishable by one year in jail and a fine of $5,000, or both, and there were no mitigating circumstances, the trial court's no contact order plus a $250 fine and forty hours of community service was too lenient.[2097]

In *State v. Hobbs*,[2098] the Washington Court of Appeals held that a trial court's finding that the defendant was extremely distressed at the time of the offense did not support the trial court's conclusion, when imposing an exceptional sentence, that defendant's capacity was significantly impaired at the time of the offense.[2099] The court further found that the existence of a present harmonious relationship between the defendant and the victim did not justify the imposition of an exceptional sentence.[2100] Further, the court added that it lacked discretion to decide whether the exceptional sentence should be sustained for reasons on which the trial court did not rely.[2101] Here, the court was clearly aware of the need to hold the defendant accountable for the abuse he inflicted, and thus barred defendant from presenting an excuse for his behavior and prevented entry of an order to mitigate the sentence.

Sentences in domestic violence cases have also been overturned due to procedural errors.[2102] Judicial authorities, courts, and legislatures have recognized the danger that diversion or deferred prosecution programs present in domestic violence cases. The National Council of Juvenile and Family Court Judges concluded that "[d]iversion should only occur in extraordinary cases, and then only after an ad-

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2096. 838 P.2d 1257 (Alaska Ct. App. 1992).

2097. *Id.* at 1258; *see also* State v. Tenny, 493 N.W.2d 824 (Iowa 1992) (vacating sentences for three domestic abuse convictions and remanding for resentencing on the grounds that they did not include the mandatory two day minimum jail term and participation in a batterer's treatment program); State v. Davis, 493 N.W.2d 820 (Iowa 1992) (remanding for resentencing for not including two day minimum jail term required under domestic abuse statute); Thomas v. State, 634 A.2d 1 (Md. 1993) (remanding for sentence reconsideration because a court, in a criminal domestic violence case, may not impose twenty year sentence, based on victim's life expectancy, for slapping wife in violation of protection order).

2098. 801 P.2d 1028 (Wash. Ct. App. 1990).

2099. *Id.* at 1030.

2100. *Id.* at 1031.

2101. *Id.* at 1031-32.

2102. State v. Horton, 620 N.E.2d 437 (Ill. App. Ct. 1993) (vacating sentence of defendant, who stipulated to violation of protection order, for failure to properly admonish defendant about the potential ramifications of his guilty plea).

mission of guilt before a judicial officer has been entered."[2103] A judgment of guilt must appear on the respondent's record. Adopting this approach, the court in *State v. Aguilar*[2104] decided that the sentencing judge did not have the authority to enter a judgment of guilt under the plea agreement, which provided that upon successful completion of probation, the judgment of guilt was not to be entered.[2105]

III. CRIMINAL DOMESTIC VIOLENCE PROSECUTIONS[2106]

A. Definitions of Domestic Violence Crimes

Respondents in domestic violence cases have been criminally prosecuted for a broad variety of acts committed following the issuance of a civil protection order. Actions which have been criminally prosecuted include:[2107] failing to stay away from former wife;[2108] entry into residence followed by physical abuse or harassment;[2109]

2103. FAMILY VIOLENCE PROJECT, *supra* note 687, at 37; *see also* DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 144-45.

2104. 831 P.2d 443 (Ariz. Ct. App. 1992).

2105. *Id.* at 447. In *Aguilar*, the conviction and sentence imposed were thus reversed, and the matter was remanded to the trial court for further proceedings. *Id.* at 449. *But see* State v. Sirny, 772 P.2d 1145, 1146 (Ariz. Ct. App. 1989) (where defendant pleaded guilty to beating his live-in girlfriend and the entry of guilt was deferred placing the defendant on probation after he served a three month jail sentence under a deferred prosecution program, it was error to impose a jail sentence).

2106. *See* MODEL CODE, *supra* note 15, §§ 210, 214.

2107. For more criminal cases, see NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 25 JUV. & FAM. L. DIG. (1993).

2108. People v. Hazelwonder, 485 N.E.2d 1211 (Ill. App. Ct 1985).

2109. *See, e.g.*, Rodriguez v. State, 588 So. 2d 1031, 1032 (Fla. Dist. Ct. App. 1991) (after defendant entered residence of former girlfriend, he was convicted of burglary of a dwelling with assault, burglary of a conveyance with assault, kidnapping to inflict bodily harm or to terrorize, aggravated battery, aggravated assault and violation of court injunction issued to protect against domestic violence); State v. Williams, 582 N.E.2d 1158, 1160 (Ill. App. Ct. 1991) (defendant found guilty of unlawful restraint and residential burglary when, after wife received protection order against him, he entered her residence by crawling through a basement window and grabbing her from behind, restricting her from leaving and ripping her clothes amidst a violent fight); People v. Zarebski, 542 N.E.2d 445, 447 (Ill. App. Ct. 1989) (defendant convicted of violating protection order after entering residence of estranged spouse and harassing her); People v. Townsend, 538 N.E.2d 1297, 1298 (Ill. App. Ct. 1989) (defendant convicted of contempt of a protection order after entering residence of recipient of order and while there striking her on face at least once); People v. Lucas, 524 N.E.2d 246, 247-48 (Ill. App. Ct. 1988) (defendant found to be in contempt of temporary restraining order after making threats to wife over phone; during period before sentencing, defendant again entered marital residence and held wife in a strangle hold while holding a knife to her throat, threatened her, and later struck her 8-9 times in the back of the head and neck with

stabbing;[2110] shooting;[2111] running a car, in which wife was a passenger, off the road and subsequently stabbing her twenty-two times;[2112] placing a box of former wife's clothes covered in tomato juice on her doorstep and leaving threatening messages on her phone machine;[2113] telephoning the recipient of a protection order;[2114]

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a beer glass leaving pieces of glass in her neck; based on this conduct he was convicted of aggravated assault and battery); State v. Rodriguez, 514 N.E.2d 1033, 1034 (Ill. App. Ct. 1987) (defendant who entered residence of ex-wife when protection order pending, beat her, and took the child was charged with child abduction, residential burglary, and battery); People v. Stevens, 506 N.Y.S.2d 995, 996 (Oswego City Ct. 1986) (after order issued against defendant prohibiting him from going to residence of wife, he broke into the residence and assaulted her friend leading to the court finding of contempt of the issued order); Commonwealth v. Allen, 469 A.2d 1063, 1065 (Pa. Super. Ct. 1983) (defendant found in contempt of order when, subsequent to plaintiff's receiving a protection order against defendant, he forcibly entered house and abused her); State v. Kilponen, 737 P.2d 1024, 1026 (Wash. Ct. App. 1987) (defendant found in violation of pretrial release and restraining orders prohibiting him from communicating with his wife and going to family residence when he broke into family home with intent of tying up his wife and making her watch him commit suicide); State v. Hamilton, 472 N.W.2d 248 (Wis. Ct. App. 1991) (defendant went to premises of apartment he shared with wife the day after he was ordered to stay away from said apartment for 24 hours). *But see* Commonwealth v. Zerphy, 481 A.2d 670, 671 (Pa. Super. Ct. 1984) (defendant found not guilty of indirect criminal contempt for violating a protection order when he waited for recipients of order at their home and was holding a rifle).

2110. State v. Syriani, 428 S.E.2d 118 (N.C. 1993) (affirming defendant's conviction for first degree murder of his wife after stabbing her 28 times, once in the brain, with a screwdriver); Donaldson v. City of Seattle, 831 P.2d 1098, 1100-01 (Wash. Ct. App. 1992) (temporary order of protection issued against defendant but was not recorded in the state's criminal information system; during period of order's existence, defendant entered recipient of order's home and stabbed her to death giving rise to this wrongful death action).

2111. White v. State, 616 So. 2d 21 (Fla. 1993) (affirming defendant's conviction for first degree murder of former girlfriend by shooting her during period in which she had a restraining order against him).

2112. People v. Seaman, 561 N.E.2d 188, 191 (Ill. App. Ct. 1990) (subsequent to wife obtaining protection order against defendant to prevent further abuse, defendant ran off the road a car in which wife was a passenger, then stabbed her twenty-two times; during trial where defendant was found guilty of attempted murder but found to be mentally ill, evidence of the protection order was considered).

2113. People v. Salvato, 285 Cal. Rptr. 837 (Ct. App. 1991) (defendant convicted of six different charges after leaving tomato juice stained clothing on ex-wife's doorstep and leaving threatening messages on her phone machine; convictions later reversed due to procedural error).

2114. *See, e.g.*, People v. Darnell, 546 N.E.2d 789 (Ill. App. Ct. 1989) (reversing for prosecutorial error defendant's conviction for harassing by telephone in violation of protection order); Saliterman v. State, 443 N.W.2d 841 (Minn. Ct. App. 1989) (defendant convicted of violating no contact order by telephoning and sending flowers and pizza to recipient of order); People v. Forman, 546 N.Y.S.2d 755 (Crim. Ct. 1989) (holding that violation of protection order provision requiring defendant, charged with criminal contempt for threatening his wife with violence over the telephone in violation of a temporary protection order, to "abstain from offensive conduct against" his wife could not support the charge of criminal contempt because the terms of the order were vague and indefinite); State v. Martinez, 495 N.W.2d

assaulting and threatening recipients of an order including assault with a deadly weapon;[2115] writing and following the recipient of an injunction against harassment and contacting her friends, parents, and employers;[2116] repeatedly contacting former spouse;[2117] striking and kicking wife;[2118] and going to wife's apartment and subsequently bringing wife and children to their family farm.[2119]

When these same types of acts occur between people involved in domestic relationships, they are prosecuted criminally regardless of whether a protection order exists. These acts have been criminally prosecuted as domestic violence: assault, battery, manslaughter, attempted murder, murder,[2120] or kidnapping,[2121] and include:

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527 (Wis. Ct. App. 1992) (defendant convicted of protection order violation for calling wife on phone); State v. Kiser, 464 N.W.2d 680 (Wis. Ct. App. 1990) (defendant convicted of five counts of violating a harassment injunction after making series of five collect calls within a thirty minute time period to complainant); State v. Moore, 449 N.W.2d 338 (Wis. Ct. App. 1989) (based on a phone call to wife, defendant convicted of violating domestic abuse injunction which ordered him to "avoid contacting or causing any person other than a party's attorney to contact [his wife] unless she consents in writing").

2115. United States v. Dixon, 598 A.2d 724 (D.C. 1991) (defendant convicted on four counts of criminal contempt for violating civil protection orders obtained by his wife and mother-in-law based on assaultive and threatening behavior including an attack with a machete); People v. Blackwood, 476 N.E.2d 742 (Ill. App. Ct. 1985) (defendant convicted of violating order of protection after threatening and harassing ex-wife by calling her a "fucking whore" and a "dead bitch" and telling her he had a plot waiting for her); State v. Martinez, 495 N.W.2d 527 (Wis. Ct. App. 1992) (defendant convicted of protection order violation for going to wife's home and threatening the occupants).

2116. State v. Sarlund, 407 N.W.2d 544 (Wis. 1987) (defendant convicted of violating an injunction which was issued pursuant to the harassment injunction statute by writing her letters and contacting people associated with her).

2117. *See, e.g.*, Siggelkow v. State, 731 P.2d 57 (Alaska 1987) (defendant convicted of contempt of no contact order which was issued as part of divorce decree). *But see* State v. Lipcamon, 483 N.W.2d 605 (Iowa 1992) (contempt of no contact order could not lie where wife's contacting husband was necessitated by special circumstances including the parties' unique living arrangements, their mental and physical conditions, defendant's lack of transportation, the husband's acquiescence to the contacts, the necessity of medication for the defendant, and the urgency created by their attorneys' actions and correspondence).

2118. People v. Totten, 514 N.E.2d 959 (Ill. 1987) (trial court found defendant in contempt for having violated the order of protection the court had previously entered in defendant's pending action of dissolution of marriage when he struck and kicked his wife).

2119. State v. Teynor, 414 N.W.2d 76 (Wis. Ct. App. 1987) (defendant convicted of burglary and false imprisonment when, subsequent to wife obtaining domestic abuse injunction prohibiting him from contacting her directly or going to her residence, he went to residence and drove the family to a farm).

2120. Additional cases involving lethal acts of domestic violence include: Buschauer v. State, 804 P.2d 1046 (Nev. 1990) (defendant convicted of involuntary manslaughter with deadly weapon); State v. Walker, 489 A.2d 728 (N.J. Super. Ct. 1985) (defendant charged with manslaughter for the death of his wife); People v. Vaughn, 417 N.Y.S.2d 621 (Dist. Ct. 1979) (wife charged with attempted murder of husband); State v. Johnson, 381 S.E.2d 732

harassing; assaulting;[2122] threatening generally;[2123] striking and beating generally;[2124] attacking;[2125] stabbing;[2126] shooting;[2127]

(S.C. 1989) (defendant convicted of the murder of his estranged wife).

2121. State v. Geiler, Nos. 61660, 62844, 1993 Mo. App. LEXIS 1288 (Mo. Ct. App. Aug. 17, 1993) (affirming defendant's conviction for child abduction while divorce matter pending).

2122. State v. Sullet, No. C1-92-2300, 1993 Minn. App. LEXIS 787 (Minn. Ct. App. Aug. 3, 1993) (affirming conviction of misdemeanor assault for hitting wife in face with fist, beating her with an umbrella, swinging a frying pan at her, and kicking her in the head); State v. Lyons, No. A-92-869, 1993 Neb. App. LEXIS 341 (Neb. Ct. App. Aug. 3, 1993) (sexual assault upon daughter and wife); Byrd v. Brigono, No. CA93-05-045, 1993 Ohio App. LEXIS 5692 (Ohio Ct. App. Nov. 29, 1993) (guilty plea to out-of-state domestic violence assault offense was sufficient basis for parole revocation).

2123. State v. Huletz, 838 P.2d 1257 (Alaska Ct. App. 1992) (defendant convicted of fourth degree assault of girlfriend with whom he was living); People v. Holifield, 252 Cal. Rptr. 729 (Ct. App. 1988) (defendant convicted of inflicting corporal injury on a cohabitant); People v. Falzone, 537 N.Y.S.2d 773 (Crim. Ct. 1989) (defendant charged with threatening and assaulting wife in family court); People v. Singleton, 532 N.Y.S.2d 208 (Crim. Ct. 1988) (defendant charged with harassment and assault in family court); People v. Brady, 283 N.Y.S.2d 125 (Sup. Ct. 1967) (defendant charged with assault in the third degree against his wife); People v. Johnson, 265 N.Y.S.2d 260 (Dist. Ct. 1965) (defendant charged with second degree assault against cohabitant whom he held out to the public to be his wife); People v. Keller, 234 N.Y.S.2d 469 (Dist. Ct. 1962) (defendant charged with assault against mother-in-law in family court); State v. Humphrey, No. 13790, 1993 Ohio App. LEXIS 4374 (Ohio Ct. App. Sept. 10, 1993) (defendant found guilty of domestic violence after threatening wife with an ax); State v. Norton, 1990 Tenn. Crim. App. LEXIS 453 (Tenn. Crim. App. Jul. 12, 1990) (defendant found guilty of assault and aggravated assault against wife).

2124. People v. Wilkins, 17 Cal. Rptr. 2d 743 (Ct. App. 1993) (affirming conviction of wilful infliction of corporal injury on spouse after hitting her in the face and neck); People v. Gutierrez, 217 Cal. Rptr. 616 (Ct. App. 1985) (defendant prosecuted for beating his wife under statute prohibiting either spouse from inflicting corporal punishment resulting in traumatic condition to the other); People v. Dass, 589 N.E.2d 1065 (Ill. App. Ct. 1992) (defendant convicted of battery which constituted domestic violence); People v. Richmond, 559 N.E.2d 302 (Ill. App. Ct. 1990) (defendant who went into victim's apartment and beat her in the head until she died was convicted of first degree murder); State v. Dickson, No. CA-478, 1993 Ohio App. LEXIS 5152 (Ohio Ct. App. Oct. 13, 1993) (defendant convicted of domestic violence upon review of evidence that he had slapped child with an open hand so forcefully that it left a welted hand print); State v. McClure, No. 92-CA-0078, 1993 Ohio App. LEXIS 3060 (Ohio Ct. App. June 17, 1993) (affirming conviction of domestic violence for hitting and kicking adopted daughter and pounding her head against the ground); State v. Amburgey, 621 N.E.2d 753 (Ohio Ct. App. 1993) (reversing for procedural reasons defendant's conviction of domestic violence for allegedly striking former wife); State v. Pargeon, 582 N.E.2d 665 (Ohio Ct. App. 1991) (defendant convicted of two counts of domestic violence); State v. Gressner, 1988 Ohio App. LEXIS 448 (Ohio Ct. App. Feb. 3, 1988) (based on defendant's beating and striking wife, found guilty of domestic violence); State v. McArthur, No. 53087 (Ohio Ct. App. Dec. 17, 1987) (defendant who struck wife found guilty of a fourth degree felony of domestic violence); Jivers v. State, 406 S.E.2d 154 (S.C. 1989) (defendant charged with criminal domestic violence arising from an incident where he physically abused his common-law wife).

2125. State v. Foose, No. 63447, 1992 Ohio App. LEXIS 6501 (Ohio Ct. App. Dec. 24, 1992) (defendant convicted of domestic violence after attacking estranged wife in front of her

beating wife about the face and head with fists and a clothes iron;[2128] pushing and hitting girlfriend;[2129] breaking the jaw and cracking the elbow of wife;[2130] hitting wife on legs and head with a baby bottle, resulting in a large bump on the forehead, a cut above the right eye, a cut on the nose, and a bruised and cut leg;[2131] hitting wife with car and striking her about the head and neck with an opened and closed fist;[2132] beating victim with a chair, threatening her with a gun, and stabbing her with a pair of scissors;[2133] pushing victim into glass, throwing her on ground and then against cement stairs;[2134] splitting lips, breaking ribs, stomping on, striking in the jaw, back, neck, and arms, and flinging into air;[2135] threatening to

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mother's home); State v. Hill, 1991 WL 57186 (Ohio Ct. App. 1991) (defendant who attacked wife and had a firearm with him convicted of domestic violence).

2126. State v. Whitaker, 397 S.E.2d 372 (N.C. Ct. App. 1990) (after seriously harming wife with a butterfly knife, defendant pled guilty to the offense of assault with a deadly weapon); People v. Williams, 248 N.E.2d 8 (N.Y. 1969) (after stabbing his wife, defendant was indicted on two counts of assault and counts of burglary and possession of a dangerous weapon); State v. Kinley, No. 2826, 1993 Ohio App. LEXIS 3272 (Ohio Ct. App. June 24, 1993) (defendant convicted of aggravated murder of girlfriend and her son with a machete); Titus v. State, 1988 Tex. App. LEXIS 677 (Tex. Ct. App. Mar. 31, 1988) (after stabbing girlfriend, defendant convicted of attempted murder; testimony of complainant revealed that she had lived with defendant for approximately four years and at least on one occasion had to leave due to his violence towards her).

2127. *See, e.g.*, State v. Aguilar, 831 P.2d 443 (Ariz. Ct. App. 1992) (defendant fired gun at father of her unborn child and was charged with aggravated assault; conviction reversed due to trial judge's error in not respecting terms of plea agreement); People v. Kluxdal, 586 N.E.2d 701 (Ill. App. Ct. 1991) (defendant convicted of murdering his wife and mother-in-law with a gun during a confrontation regarding daughter amidst divorce proceedings); Sanchez v. State, 841 P.2d 85 (Wyo. 1992) (defendant convicted of attempted murder based on his holding gun to wife's head and discharging it saying "you're dead").

2128. People v. Torres, 581 N.Y.S.2d 869 (App. Div. 1992).

2129. State v. Meese, 1988 Ohio App. LEXIS 1467 (Ohio Ct. App. Apr. 18, 1988) (vacating sentence of defendant, found not guilty of domestic violence but guilty of the lesser included offense of assault, because both the domestic violence and assault offenses are misdemeanors in the first degree so that assault is not a lesser included offense).

2130. State v. Green, 852 P.2d 401 (Ariz. 1993) (defendant pled guilty to aggravated assault).

2131. State v. Lehikoinen, 463 N.W.2d 770 (Minn. Ct. App. 1990) (defendant charged and convicted of fifth degree assault; conviction later reversed due to lack of evidence at trial).

2132. Commonwealth v. Smith, 552 A.2d 292 (Pa. Super. Ct. 1988) (wife filed petition pursuant to Protection From Abuse Act and pressed charges in criminal court; court held that double jeopardy did not bar defendant's assault prosecution based on the incident in which he allegedly struck his wife).

2133. Watkins v. State, 360 S.E.2d 47 (Ga. Ct. App. 1987) (defendant was convicted of aggravated assault and obstructing an officer).

2134. State v. Cababag, 850 P.2d 716 (Haw. Ct. App. 1993) (defendant convicted of abuse of family and household members).

2135. People v. Healy, 18 Cal. Rptr. 2d 274 (Ct. App. 1993) (defendant convicted of of-

kill wife, punching her in the mouth, breaking her tooth, and knocking her to the ground while continuing to hit and threaten her;[2136] kicking wife with boots;[2137] grabbing cohabitant and holding her outside of a window, making her urinate on the floor, and hitting her;[2138] kidnapping at gunpoint;[2139] kidnapping former girlfriend, and then driving car on wrong side of road threatening to kill them both, and eventually running into a telephone pole;[2140] striking wife in face, causing serious bodily harm (wife's nose was pushed over to the side of her face, her eyes were swollen shut, and she had bruises on her shoulder);[2141] and attempting to force entry into the shelter in which wife was staying.[2142]

Rape and sexual assault are common forms of domestic abuse, as evidenced by the volume of case law in this area.[2143] Acts which have constituted domestic sexual assault include: sexual assault of daughter;[2144] forcing oral sex and vaginal intercourse under the threat of a knife;[2145] pulling a gun on estranged wife, ordering her

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fenses under cohabitant abuse and torture statutes).

2136. State v. Wood, 597 A.2d 312 (Vt. 1991) (defendant arraigned on charge of assaulting wife).

2137. State v. Amos, 1988 Ohio App. LEXIS 78 (Ohio Ct. App. Jan. 15, 1988) (defendant, who was previously found guilty of domestic violence, was found guilty of domestic violence as a fourth degree felony as a result of his kicking his wife while wearing boots).

2138. People v. Ballard, 249 Cal. Rptr. 806 (Ct. App. 1988) (defendant was convicted of felony infliction of corporal injury on a cohabitant and misdemeanor battery).

2139. State v. Canitia, No. 62492/62639, 1993 Ohio App. LEXIS 3119 (Ohio Ct. App. June 17, 1993) (defendant convicted of kidnapping ex-wife and other offenses); State v. Hanna, 378 S.E.2d 640 (W. Va. 1989) (defendant convicted of kidnapping, abduction with the intent to defile, and burglary after going to former girlfriend's new boyfriend's home and kidnapping her at gunpoint). *But see* State v. Middleton, 619 N.E.2d 1113 (Ohio Ct. App. 1993) (reversing conviction for burglary where present husband entered wife's residence and beat her because a spouse cannot trespass on another spouse's property).

2140. State v. Hobbs, 801 P.2d 1028 (Wash. Ct. App. 1990) (defendant was convicted of kidnapping in the first degree).

2141. State v. Harper, 761 P.2d 570 (Utah Ct. App. 1988) (defendant convicted of aggravated assault).

2142. State v. Mintz, 598 N.E.2d 52 (Ohio Ct. App. 1991) (defendant who attempted to force his way into domestic violence shelter where wife was staying was charged with attempted domestic violence).

2143. *See supra* part I.C.2 for a discussion on marital rape and sexual assault.

2144. State v. Lyons, No. A-92-869, 1993 Neb. App. LEXIS 341 (Neb. Ct. App. Aug. 3, 1993) (defendant sexually assaulted daughter and wife).

2145. Commonwealth v. Shoemaker, 518 A.2d 591 (Pa. Super. Ct. 1986) (defendant was convicted of spousal sexual assault and involuntary spousal deviate sexual intercourse when, during period of legal separation, defendant came over to plaintiff's home to discuss child custody where an argument ensued in which defendant injured plaintiff and forced her to have oral sex and vaginal intercourse).

to remove clothes, and sexually assaulting her;[2146] sodomizing wife and beating her with a breadboard;[2147] forcing nonconsensual sexual intercourse with girlfriend four times, once under the threat of a knife and other times by physically beating her;[2148] beating and raping wife after making threats to cut out her clitoris with scissors and staple her vagina closed;[2149] and kidnapping and raping cohabitant and mother of child.[2150]

B. Warrantless Arrests and Searches

Warrantless arrests can be made in cases of domestic violence when police have probable cause to believe that the arrestee is guilty of the crime of domestic violence.[2151] Arrest warrants are not constitutionally required,[2152] unless the arrest is to be made in a private home, there are no exigent circumstances, and the occupants have not consented to entry.[2153] Warrantless arrests are proper when the arrest needs to be made immediately due to the seriousness of the crime, or the presence of danger to the victim or the police officers. In domestic violence cases, warrantless arrests are appropriate because requiring the police to leave the abuse victim with the batterer in order to go and obtain a warrant would likely subject the victim to further violence.[2154]

2146. State v. Schackart, 737 P.2d 398 (Ariz. Ct. App. 1987) (defendant was convicted of sexual assault, kidnapping, aggravated assault, and domestic violence for pulling a gun on his estranged wife and ordering her to remove her clothes and then sexually assaulting her); State v. Ulen, 623 A.2d 70 (Conn. App. Ct. 1993) (defendant convicted on similar grounds).

2147. People v. Thompson, 206 Cal. Rptr. 516 (Ct. App. 1984) (after sodomizing wife and beating her with a breadboard, defendant was convicted of spousal abuse).

2148. State v. Ciskie, 751 P.2d 1165 (Wash. 1988) (defendant convicted of first, second, and third degree rape subsequent to forcing nonconsensual intercourse with girlfriend four times).

2149. State v. C.V.C., 450 N.W.2d 463 (Wis. Ct. App. 1989) (husband convicted of false imprisonment and sexual assault).

2150. State v. Bolt, 817 P.2d 1322 (Or. Ct. App. 1991) (defendant convicted of kidnapping and raping victim with whom he previously lived and who was the mother of his child; reversed due to prosecutorial error).

2151. State v. Antill, No. 92 CA 26, 1993 Ohio App. LEXIS 5584 (Ohio Ct. App. Nov. 16, 1993) (holding that police have a reasonable articulable suspicion to stop a person if they receive information from an identified cohabitant who called the police because of a domestic argument); *see also* MODEL CODE, *supra* note 15, §§ 205(A), 205(B).

2152. *See* United States v. Watson, 423 U.S. 411 (1976) (warrants are not constitutionally required as warrantless arrests have always been allowed at common law).

2153. *See* Payton v. New York, 445 U.S. 573 (1980) (Fourth Amendment requires neutral official to make determination that probable cause exists to arrest a person in a private home due to the magnitude of the intrusion on the person's privacy interest).

2154. *See, e.g.*, People v. Wilkins, 17 Cal. Rptr. 2d 743 (Ct. App. 1993) (concluding that

There is a growing national consensus that a violation of a protection order should be a criminal offense for which states and local governments should mandate arrest of the abuser.[2155] Experts also agree that laws and police policies should mandate arrest or permit warrantless misdemeanor and felony arrests of perpetrators of other criminal offenses against family members.[2156]

Many jurisdictions statutorily require mandatory warrantless arrests under circumstances involving some form of domestic abuse. These states have responded to the need to give police officers encountering domestic violence clear guidelines to follow. Mandating arrest is especially useful, as it addresses police officer's reluctance to make arrests in domestic violence cases which too many untrained officers had previously considered to be private matters between spouses, and thus inappropriate for government intervention.[2157] These statutes have been passed to counter a long history of police refusal to intervene on behalf of domestic abuse victims. Police inaction condones batterer's use of violence within the home to maintain control over their family members. The message to abusers and victims has been that violence against family members within the home is not a crime. Mandatory arrest laws have been passed to force police officers to arrest perpetrators of domestic violence just as they would arrest perpetrators of crimes against strangers.[2158] The goal is

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the risk of imminent violence resulting in further physical harm to the victim of domestic abuse was an exigent circumstance requiring immediate action and thus allowing the police to enter defendant's home to make a warrantless arrest; entrance into home was further justified by defendant's wife's consent to the entry).

2155. The Violence Against Women Act of 1993, S. 11, 103d Cong., 1st Sess. (1993), which passed both the House and Senate in November of 1993 and will be conferenced in the spring of 1994, strives to encourage arrest policies which mandate arrest for violation of a civil protection order and provide for mandatory or discretionary warrantless arrest for crimes committed against family members by making mandatory arrest policies a prerequisite to qualification for federal grants.

2156. *Id.*; *see also* NIJ CPO STUDY, *supra* note 19, at 59; Catherine F. Klein, *Domestic Violence: D.C.'s New Mandatory Arrest Law*, WASHINGTON LAWYER 24 (Nov/Dec 1991).

2157. DALE H. ROBINSON, CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS, FAMILY VIOLENCE: BACKGROUND, ISSUES, AND THE STATE AND FEDERAL RESPONSE 22 (1992).

2158. In San Francisco, where 40% of all domestic violence calls each year involve weapons, written reports are filed in only 29% of the cases and arrest are made in only 11% of the cases. *Family Violence Leads Cause of San Francisco Women's Death*, CALIFORNIA PHYSICIAN 23 (Dec. 1993).

The D.C. Coalition Against Domestic Violence (the "DCCADV") conducted a study of D.C. police department practices under a "pro-arrest" policy which found that only 5% of domestic violence calls in the District resulted in arrest. Despite implementation of the D.C. police department's stated "pro-arrest" policy, the DCCADV study found that arrests were

in part to change police officers' attitudes that domestic partners should be left to resolve their disputes privately, and that violence against a family member is not a serious crime.[2159]

Seventeen states and the District of Columbia mandate warrantless arrests when there is probable cause to believe that the offender committed any crime against a family member.[2160] The specific instances under which arrest is mandated differ from state to state. Eleven states require that a warrantless arrest be made when an officer observes a recent physical injury to the victim.[2161] Three jurisdictions mandate arrest where the alleged abusive actions were intended to instill fear of imminent bodily injury or death in the victim.[2162] Louisiana and Wisconsin mandate arrest where there is probable cause of continued violence against the victim.[2163] Hawaii,

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being made in only:

— 13.7% of the cases where the victim was bleeding from her wounds;

— 27.2% of the cases when victims had been threatened or attacked with guns, knives or other weapons that were visible to the police;

— 11% of the cases when the incident included an attack on a child.

The single factor most highly correlated with arrest was whether the abuser insulted the police officer—arrest rate 32%.

Baker et al., *Report on District of Columbia Police Response to Domestic Violence*, D.C. COALITION AGAINST DOMESTIC VIOLENCE (November 3, 1989), *discussed in* Klein, *supra* note 2156.

2159. Mandatory training on domestic violence for law enforcement officers is also necessary to accomplish this goal. MODEL CODE, *supra* note 15, § 509.

2160. ARIZ. REV. STAT. ANN. § 13-3601(B) (1993); CONN. GEN. STAT. ANN. § 46b-38b(a) (West Supp. 1993); HAW. REV. STAT. § 709-906(2) (1992); IOWA CODE ANN. § 236.12(2) (West Supp. 1993); LA. REV. STAT. ANN. § 46-2140(1) (West 1993); ME. REV. STAT. ANN. tit. 19, § 770(5) (West 1993); MASS. GEN. LAWS ch. 209A, § 6(7) (West 1993); MINN. STAT. ANN. § 629.341 (West Supp. 1993) (within four hours); MO. ANN. STAT. § 455.085(1) (Vernon 1993); NEV. REV. STAT. § 171.137 (1992); N.J. STAT. ANN. § 2C:25-21(a) (West 1993); OR. REV. STAT. § 133.310(1) (1991); R.I. GEN. LAWS § 12-29-3(B) (West Supp. 1993); S.D. CODIFIED LAWS ANN. § 23A-3-2.1(2) (1993); UTAH CODE ANN. § 77-36-2 (1993); WASH. REV. CODE ANN. § 10.31.100(2) (West 1993); WIS. STAT. ANN. § 968.075 (West 1993); D.C. CODE ANN. § 16-1031(a)(1) (1993); *see also* Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 63 (1992).

2161. ARIZ. REV. STAT. ANN. § 13-3601(B) (West 1993); IOWA CODE ANN. § 236.12(2) (West Supp. 1993); N.J. STAT. ANN. § 2C:25-21(a) (West 1993); N.D. CENT. CODE § 14-07.1-11(1) (1993); OKLA. STAT. ANN. tit. 22, § 40.3 (West 1993); 23 PA. CONS. STAT. ANN. § 2711(A) (1993); R.I. GEN. LAWS § 12-29-3(B) (1993); S.D. CODIFIED LAWS ANN. § 23A-3-2.1(2) (1993); WASH. REV. CODE ANN. § 10.31.100(2) (West 1993); W. VA. CODE § 48-2A-10(c) (1993); WIS. STAT. ANN. § 968.075(2)(2)(b) (West 1993).

2162. R.I. GEN. LAWS § 12-29-3(B)(3) (1993); S.D. CODIFIED LAWS ANN. § 23A-3-2.1(2) (1993); D.C. CODE ANN. § 16-1031(a)(2) (1993).

2163. LA. REV. STAT. ANN. § 46-2140(2) (West 1993); WIS. STAT. ANN. § 968.075(2)(2)(a) (West 1993).

Rhode Island, and Washington mandate arrest where the batterer is found in violation of a criminal no contact order.[2164] Four jurisdictions mandate arrest where the arrest can be accomplished within a certain period after the violent incident.[2165] Six states mandate arrest where a felonious assault or other crime has transpired.[2166] Arizona and Iowa mandate arrest where the batterer used a dangerous or deadly weapon.[2167]

There is a growing national consensus that mandatory warrantless arrests must be required where there is probable cause to believe there has been a civil protection order violation.[2168] Twenty-five states and Puerto Rico express by statute that the police must make a warrantless arrest where there exists probable cause to believe a protection order has been violated.[2169] Two of these states limit this warrantless arrest to where the protection order violation occurs in the officer's presence.[2170]

2164. HAW. REV. STAT. § 709-906(4)(e) (Supp. 1992); R.I. GEN. LAWS § 12-29-3(B)(5) (Supp. 1993); WASH. REV. CODE ANN. § 10.31.100(2) (West 1990); *see also* MODEL CODE, *supra* note 15, § 209 (mandatory arrest for violation of conditions of release).

2165. MINN. STAT. ANN. § 629.341 (West Supp. 1993) (mandating arrest if abuse occurred within four hours of arrest); MO. ANN. STAT. § 455.085(1) (Vernon Supp. 1993); R.I. GEN. LAWS § 12-29-3(B) (Supp. 1993); S.D. CODIFIED LAWS ANN. § 23A-3-2.1(2) (Supp. 1993); WIS. STAT. ANN. § 968.075(2)(b) (West Supp. 1993).

2166. IOWA CODE ANN. § 236.12(2) (West Supp. 1993); LA. REV. STAT. ANN. § 46-2140(1) (West Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 770(5) (West 1992); R.I. GEN. LAWS § 12-29-3(B)(1) (Supp. 1993); S.D. CODIFIED LAWS ANN. § 23A-3-2.1(2) (Supp. 1993); WASH. REV. CODE ANN. § 10.31.100(2)(b) (West 1990).

2167. ARIZ. REV. STAT. ANN. § 13-3601(B) (Supp. 1993); IOWA CODE ANN. § 236.12(2) (West Supp. 1993).

2168. *See* MODEL CODE, *supra* note 15, § 206.

2169. CONN. GEN. STAT. ANN. § 46b-38b (West Supp. 1993); COLO. REV. STAT. ANN. § 14-4-104(1) (West Supp. 1993); IOWA CODE ANN. § 236.12 (West Supp. 1993); KY. REV. STAT. ANN. § 403-760(2) (Baldwin 1992); LA. REV. STAT. ANN. § 46-2140(1) (West Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 770(5) (West 1992); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West Supp. 1993); MINN. STAT. ANN. § 518B-01.4(b) (West Supp. 1993); MO. ANN. STAT. § 455.085(1) (Vernon Supp. 1993); NEB. REV. STAT. § 42-928 (1992); NEV. REV. STAT. ANN. § 171.136 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 173-B:8 (1992); N.J. STAT. ANN. § 2C:25-21(3) (West 1992); N.M. STAT. ANN. § 40-13-6(c) (1992); N.C. GEN. STAT. § 50B-4b (1989); OR. REV. STAT. § 133.310(3)(a-c) (1991); R.I. GEN. LAWS § 12-29-3(B) (Supp. 1993); S.C. CODE ANN. § 16-25-70 (Law Co-op. 1991); S.D. CODIFIED LAWS ANN. § 23A-3-2 (Supp. 1993); TENN. CODE ANN. § 36-3-611(a)(2) (1991); TEX. CRIM. PROC. CODE ANN. § 14.03(b) (West Supp. 1993); UTAH CODE ANN. § 30-6-8 (Supp. 1993); VA. CODE ANN. § 19.2-81.3 (Michie Supp. 1993); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West 1990); WIS. STAT. ANN. §§ 813.125(b), 813.12(7) (West Supp. 1993); P.R. LAWS ANN. tit. 8, § 628 (Supp. 1990).

2170. NEV. REV. STAT. ANN. § 171.136 (Michie Supp. 1993); TEX. CRIM. PROC. CODE ANN. § 14.03(b) (West Supp. 1993).

Many other states provide for discretionary warrantless arrests in similar instances. Twenty-one states authorize a warrantless arrest when there is probable cause to believe a protection order has been violated.[2171] Twenty-two states allow a discretionary warrantless arrest when there is probable cause to believe physical abuse has occurred.[2172] Four states authorize discretionary warrantless arrests in

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2171. ARIZ. REV. STAT. ANN. § 13-3602(L) (Supp. 1993); COLO. REV. STAT. ANN. § 14-4-104(1) (West Supp. 1993); FLA. STAT. ANN. § 784.048 (West Supp. 1993); GA. CODE ANN. § 19-13-4(d) (1992); 725 ILCS 5/112A-26(a) (Supp. 1993); MD. CODE ANN., FAM. LAW § 4-509(b) (Supp. 1993); MISS. CODE ANN. § 99-3-7 (Supp. 1993); NEV. REV. STAT. ANN. § 171.136 (Michie Supp. 1993); N.H. STAT. ANN. § 594.10 (Supp. 1992); N.J. STAT. ANN. § 2C:25-21(3) (West 1992); N.M. STAT. ANN. § 40-13-7(B)(5) (Michie 1989); N.D. CENT. CODE § 14-07.1-11(1)(a) (Supp. 1993); 23 PA. CONS. STAT. ANN. § 6113(a) (1992); TEX. CRIM. PROC. CODE ANN. § 14.03(a)(3) (West Supp. 1993); W. VA. CODE § 48-2A-10(c) (Supp. 1993); WYO. STAT. § 7-20-102(a) (1992); *see also* ALASKA STAT. §§ 25.35.010-.060 (1991 & Supp. 1993); IDAHO CODE §§ 39-6301-6317 (1993); KAN. STAT. ANN. §§ 60-3101-3111 (Vernon 1983 & Supp. 1992); OHIO REV. CODE ANN. § 3113.31 (Anderson Supp. 1992); VT. STAT. ANN. tit. 15, §§ 1101-09 (1989 & Supp. 1993), *cited in* NIJ CPO STUDY, *supra* note 19, at 54-55.

However, since 1985 the clear trend is to move from discretionary arrest for violation of civil protection orders to mandatory arrest. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 46b-15, 46b- 38a-f (West Supp. 1993); KY. REV. STAT. ANN. §§ 403.715-.785 (Baldwin 1984 & Supp. 1992); LA. REV. STAT. ANN. §§ 46:2131-2142 (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 19, §§ 761-70 (1981 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, §§ 6-9 (Supp. 1993); MICH. COMP. LAWS ANN. § 764.15(b) (West Supp. 1993); MO. ANN. STAT. §§ 455.010-.230 (Vernon 1986 & Supp. 1993); S.C. CODE ANN. § 16-25-70 (Law. Co-op. 1985); TENN. CODE ANN. §§ 36-3-601-614 and § 40-7-103 (1990 & Supp. 1993); UTAH CODE ANN. § 30-6-8 (1953), *as amended by* § 30-6-8 (Supp. 1993).

2172. ARK. CODE ANN. § 16-81-113 (Michie Supp. 1993); 725 ILCS 5/112A-26(a) (Supp. 1993); MICH. COMP. LAWS ANN. 764.15(b) (West Supp. 1993); MINN. STAT. ANN. § 629.341 (West Supp. 1993); MISS. CODE ANN. § 99-3-7 (Supp. 1993); N.H. REV. STAT. ANN. § 173-B:9 (Supp. 1992); N.M. STAT. ANN. § 40-13-7(B)(5) (Michie 1989); N.D. CENT. CODE § 14-07.1-11(1)(b) (Supp. 1993); OHIO REV. CODE ANN. § 2935.03 (Anderson Supp. 1993); OKLA. STAT. ANN. tit. 22, § 40.3(B) (Supp. 1994); WYO. STAT. § 7-20-102(b) (Supp. 1993); *see also* NIJ CPO STUDY, *supra* note 19, at 54-55 (citing ALASKA STAT. §§ 25.35.010-.060 (1991 & Supp. 1993); FLA. STAT. ANN. § 901.15(70) (West Supp. 1993); GA. CODE ANN. § 17-4-20(b) (Supp. 1993); IDAHO CODE §§ 39-6301-6317 (1993); IND. CODE ANN. §§ 35-33-1-1 (West Supp. 1993) (authorizing arrest if probable cause that battery with bodily injury has occurred); KAN. STAT. ANN. §§ 60-3101-3111 (1983 & Supp. 1992); KY. REV. STAT. ANN. §§ 403.715-.785 (Baldwin 1984 & Supp. 1992); 18 PA. CONS. STAT. ANN. § 2711(a) (Supp. 1993); S.C. CODE ANN. § 16-25-70 (Law Co-op. 1985); TENN. CODE ANN. §§ 36-3-601-614 and § 40-7-103 (1990 & Supp. 1993); TEX. CRIM. PROC. CODE ANN. § 14.03 (West 1993)).

Maryland does not have a specific warrantless arrest provision in its family law code, but a criminal law statute authorizes warrantless arrest when: (a) the violence involves spouses, (b) there is evidence of physical injury, (c) the incident is reported to the police within two hours, and (d) unless there is an arrest, there will be further harm to the victim, the assailant will get away or evidence will be destroyed. MD. CODE ANN., CRIM. LAW § 594(B)(d)—(e) (Supp. 1993). Since the mid-1980s, states have been moving from discre-

some circumstances and mandate arrests in others.[2173] Wisconsin stipulates that a police officer's decision not to arrest cannot be solely based on an absence of visible injury or impairment.[2174] Tennessee specifies that an officer can make a discretionary arrest without a warrant if the plaintiff and defendant are present and the police officer sees the violence or has probable cause to believe there will be continued violence.[2175] Texas allows a discretionary warrantless arrest if there is probable cause of assault resulting in bodily injury.[2176]

Warrantless arrests of domestic violence perpetrators are consistently upheld when challenged in court.[2177] In *Watkins v. State*,[2178] the court, in interpreting the meaning of "probable cause" in the Georgia Code, which provides that "an arrest for a crime may be made by a law enforcement officer . . . without a warrant . . . if the officer has probable cause to believe that an act of family violence . . . has been committed," held that a warrantless arrest was proper where petitioner made an uncontradicted statement that she had been beaten with a chair, threatened with a gun, and stabbed with a scissor and the officers saw a fresh stab wound, found weapons in the house, and viewed the disordered condition of the residence.[2179] The petitioner's statement and the officer's observances gave the officer the requisite probable cause to believe that an act of family violence was committed. The court in *LeBlanc v. State*,[2180] which also involved a warrantless arrest of a domestic abuse perpetrator, held that the state statute authorizing warrantless arrests where the officer has probable cause to believe defendant beat his wife, based

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tionary to mandatory arrest for crimes committed against family members, because discretionary arrest procedures were not resulting in arrests. *See, e.g.*, prior statutes in ARIZ. REV. STAT. ANN. §§ 13-3602 (Supp. 1987-88); LA. REV. STAT. ANN. §§ 46:2131-2142 (West 1982 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 209A, §§ 6-9 (Supp. 1986); UTAH CODE ANN. § 30-6-8 (1953), *as amended by* § 30-6-8 (Supp. 1993).

2173. HAW. REV. STAT. § 709-906(2) (Supp. 1993); IOWA CODE ANN. § 236.12.2(a) (West Supp. 1993) (mandating arrest if injury occurs); MO. REV. STAT. § 455.085(1) (Vernon Supp. 1993); N.J. STAT. ANN. § 2C:25-21(a-b) (West Supp. 1993).

2174. WIS. STAT. ANN. § 968.075 (West Supp. 1993).

2175. TENN. CODE ANN. § 40-7-103(7)(A) (Supp. 1993).

2176. TEX. CRIM. PROC. CODE ANN. § 14.03(a)(4) (West Supp. 1993).

2177. *See* State v. Miller, No. 8-93-11, 1993 Ohio App. LEXIS 5477 (Ohio Ct. App. Oct. 26, 1993) (holding that probable cause exists for arrest when defendant admits in writing to domestic violence offense).

2178. 360 S.E.2d 47 (Ga. Ct. App. 1987).

2179. *Id.* at 49-50 (quoting GA. CODE ANN. § 17-4-20(a) (Supp. 1993)).

2180. 382 So. 2d 299 (Fla. 1980).

on evidence of bodily harm or reasonable belief that the victim is in danger, is constitutional.[2181]

To the contrary, warrantless dual arrest of the victim and her abuser have not been upheld.[2182] In *Gurno v. Town of Laconner*,[2183] the police arrested both the victim and perpetrator of

2181. *Id.* at 300 (discussing FLA. STAT. ANN. § 901.15(b) (West Supp. 1993)); *see also* People v. Wilkins, 17 Cal. Rptr. 2d 743, 754 (Ct. App. 1993) (officers had probable cause to arrest defendant on charge of wilful infliction of corporal injury when upon responding to a domestic violence report, they discovered the victim waiting for them on the porch having just been assaulted and injured by her husband still in the house); City of Grafton v. Swanson, 497 N.W.2d 421 (N.D. 1993) (officer was justified in stopping defendant, convicted of driving under the influence of alcohol, due to his concern that domestic violence was imminent based on his being called to the residence four hours earlier to investigate a potential domestic matter, and his knowledge of the woman's statements that she had argued with the defendant who damaged her property and was drunk, and that she did not want him to return); District of Columbia v. Murphy, No. 92-CV-283, 1993 D.C. App. LEXIS 324 (D.C. Dec. 29, 1993) (explaining that police may arrest a party whom they have probable cause to believe has unlawfully entered the apartment of a woman with whom he is in an abusive relationship); State v. Naegele, No. 920, slip op. (Ohio Ct. App. Nov. 19, 1980) (holding that police can arrest an accused defendant solely on the basis of reasonable cause without violating the constitutional principle that the defendant is innocent until proven guilty). *But see* State v. Scott, 555 A.2d 667 (N.J. Super. Ct. App. Div. 1989) (holding that a warrantless arrest for violation of protection order and possession of marijuana was unlawful where officer who made arrest found marijuana while making arrest for violation of protection order and did not know the contents of the order).

2182. As many states have instituted mandatory arrest, some untrained police officers, unwilling to make arrests at all, have retaliated against victims who called for help by making dual arrests. A study in Connecticut found that in 37.7% of family violence incidents involving arrest, both parties were arrested. STEVEN D. EPSTEIN, THE PROBLEM OF DUAL ARREST IN FAMILY VIOLENCE CASES 1 (Discussion Paper prepared for the Connecticut Coalition Against Domestic Violence).

With proper training, police can learn that in order to arrest either party, the officer must be able to make a probable cause determination as to each party independently. If, for example, the officer finds cuts and bruises on the woman, and the batterer says that she started it or slapped him first, and there is no evidence corroborating his bald statement, only he should be arrested. In order to address the serious problem of dual arrests, some states have included "primary aggressor" language in their statutes requiring the police to determine which party is the primary aggressor and mandating arrest only of the primary aggressor. *See, e.g.*, GA. CODE ANN. § 17-4-20.1(B) (Supp. 1993); MO. ANN. STAT. § 455.085(3) (Vernon Supp. 1993); NEV. REV. STAT. ANN. § 171.137(2) (Michie 1992); N.H. REV. STAT. ANN. § 173-B:9 (Supp. 1992); WASH. REV. CODE ANN. § 10.31.100(2)(b) (West 1990); WIS. STAT. ANN. § 968.075 (West Supp. 1993). Other state statutes discourage dual arrests and order the police to consider possible self-defense by one party. *See* MINN. STAT. ANN. § 629.342 (West Supp. 1993); N.J. STAT. ANN. § 2C:25-21 (West Supp. 1993). In order to encourage the proliferation of these statutes, adoption of laws that preclude dual arrest and encourage arrest of only a primary aggressor will be a prerequisite for federal funding under the Violence Against Women Act. H.R. 1133, 103d Cong., 1st Sess., Title II, Subtitle B, § 1901(b) (1993).

2183. 828 P.2d 49 (Wash. Ct. App. 1992).

abuse after arriving upon the scene of violence. The court held that a warrantless arrest of a domestic violence victim for "provoking" an assault by arguing with the perpetrator of the violence was invalid.[2184] Where police make a dual arrest of a victim they did not have probable cause to arrest, an action against the police for false arrest will be successful. *Gurno* illustrates the need for the police to understand the dynamics of domestic violence and not approach domestic violence calls with the assumption that both parties must be responsible for the violence. Mandatory arrest policies based on probable cause with police training and proper implementation would help prevent dual arrests. The police could arrest both parties and be safe from a successful false arrest lawsuit only if each individual arrest was premised on a separate finding of probable cause. Police need to understand, whatever their personal beliefs are on the propriety of using violence at home, that dual arrests in domestic violence cases can leave them open to liability.

Warrantless searches are proper when the police respond to a domestic violence call.[2185] There are several exceptions to the warrant requirement of the Fourth Amendment. Warrantless searches are constitutionally sound when there are exigent circumstances. Courts have consistently ruled that domestic violence presents exigent circumstances sufficient to sustain a warrantless search, particularly since batterers are often extremely volatile and violent actions recur frequently.[2186] Additionally, it is well documented that as domestic violence escalates, batterers often begin using weapons against their victims.[2187] Therefore, it may be necessary for the police to search the home of a domestic violence victim or perpetrator or the perpetrator's person to ascertain whether the officer or the victim are in present jeopardy due to the presence of weapons on the premises.[2188]

2184. *Id.* at 54.

2185. *See* MODEL CODE, *supra* note 19, § 207; *see also supra* notes 1333-43 and accompanying text.

2186. Forty-seven percent of husbands who beat their wives do so three or more times a year. Martin E. Wolfgang, *Interpersonal Violence and Public Health Care: New Directions, New Challenges*, *in* SURGEON GENERALS WORKSHOP ON VIOLENCE AND PUBLIC HEALTH SOURCE BOOK 19 (1985). Forty percent of abused women who killed their spouses report being battered at least once a week. EWING, *supra* note 180, at 35.

2187. GOOLKASIAN, *supra* note 780, at 2 (over 1.7 million Americans face a spouse wielding a knife or a gun); KLAUS & RAND, *supra* note 3, at 4 (explaining that weapons are used in 26% of violence crimes committed by spouses).

2188. *See, e.g.*, State v. Noakes, No. 92-3020-CR, 1993 Wis. App. LEXIS 1604 (Wis. Ct.

Warrantless searches are also permissible when one who has authority to do so consents to the search. In *Commonwealth v. Rexach*,[2189] the court demonstrated an in depth understanding of the dynamics of domestic violence when it upheld a warrantless search of a batterer's residence. In *Rexach*, the police responded to the wife's call on a domestic violence matter, and upon arrival found the defendant holding his wife and shouting threats at her. She was screaming and had two black eyes. In the presence of the police, the defendant continued to shout, threatened to kill his wife, and told the officers he had broken her nose two weeks earlier. After some discussion, the police convinced the defendant to leave the home, and one officer followed him into his bedroom where he commenced packing his belongings. Upon entry into the bedroom, the officer saw and seized narcotics, which eventually led to defendant's drug convictions. Defendant appealed the convictions, claiming that the search of the bedroom was a violation of the Fourth Amendment protection against warrantless searches and seizures. The court held that the warrantless search was valid on the wife's consent to the police entry into the home.[2190] Further, the officer's act of following the defendant into the bedroom was justified by the exigent circumstances exception to the warrant requirement.[2191] The court held that Fourth Amendment issues have unique dimensions in cases of domestic abuse as the domestic violence statute requires that officers use all reasonable means to prevent further abuse.[2192] The officer, therefore, had a duty to use his best judgment to protect the wife. Where the defendant continued to behave in an alarming manner after the police arrived in his home, the officer could reasonably conclude that in order to adequately protect the wife and maintain safety in the household, he

App. Dec. 14, 1993) (upholding warrantless search of defendant's home where defendant was alleged to have pointed gun at live-in girlfriend threatening to kill her). *But see* State v. White, 856 P.2d 656 (Utah Ct. App. 1993) (officer not justified in immediate frisk of defendant when responding to domestic violence call absent suspicion of present danger).

2189. 478 N.E.2d 744 (Mass. App. Ct. 1985).

2190. *Id.* at 746; *see also* State v. McGee, 757 S.W.2d 321, 324 (Mo. Ct. App. 1988) (upholding warrantless entry on grounds that a co-occupant has equal authority as defendant, who was arrested for domestic violence, to allow police access to apartment).

2191. *Id.* In fact, when police officers assist a domestic violence victim in her home and fail to undertake actions while in the home to protect the victim like following the batterer into the bedroom, if the victim is harmed or murdered by the batterer while police are present, the police officer has no immunity from a negligence suit brought against him by the victim. *See, e.g.*, Losinski v. County of Trempealeau, 946 F.2d 544, 553 (7th Cir. 1991).

2192. *Id.*

should follow the defendant. Therefore, the officer's entrance into the bedroom fell within the scope of consent given him, and the evidence discovered as a result of his entrance was admissible in court against the defendant. The court noted that "the salutary purpose underlying the family abuse law would be frustrated if it were to be interpreted in an overly restrictive manner."[2193]

Exigent circumstances which give rise to warrantless searches, such as those in *Rexach*, are frequently found in cases of domestic violence. In *People v. Johnson*,[2194] the court held that where police officers were dispatched to a residence to investigate a complaint of domestic violence and upon arriving heard a woman scream not to shoot a gun, the police officers were justified in making a limited search for the gun without a warrant.[2195] In *State v. Lynd*,[2196] the court held that the warrantless search of defendant's home which led to discovery of marijuana was justified under the emergency exception since, among other things, an incident of domestic violence had just occurred.[2197] In *Johnson v. State*,[2198] the defendant appealed from a decision denying his motion to suppress a handgun seized without a warrant prior to his arrest for possession of a firearm by a convicted felon. The district court of appeals in *Johnson* held that the officer was acting within his authority when he saw the gun in plain view in defendant's van, thus justifying detention to check the defendant's criminal record.[2199] Further, the officer had probable cause to arrest the defendant for violation of a domestic violence injunction at the time the gun was seized, since the officer was responding to a call from the defendant's ex-wife, who had obtained the injunction.[2200] The search and seizure of the gun, therefore, was

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2193. *Id. But see* State v. Gissendaner, No. 1CA-CR 92-1500, 1993 Ariz. App. LEXIS 124 (Ariz. Ct. App. June 24, 1993) (affirming suppression order because authorization to search extends only to victim's residence, and when police left the scene of the battering incident, entered an adjacent open door to locate defendant, and found him with drug paraphernalia there were no exigent circumstances to conduct a warrantless search); State v. Scott, 555 A.2d 667 (N.J. Super. Ct. App. Div. 1989) (holding that to sustain a warrantless search, the officer must know the contents of the restraining order he believes he violated).

2194. 585 N.Y.S.2d 851 (App. Div. 1992).

2195. *Id.* at 853.

2196. 771 P.2d 770 (Wash. Ct. App. 1989).

2197. *Id.* at 773.

2198. 567 So. 2d 32 (Fla. Dist. Ct. App. 1990).

2199. *Id.* at 33.

2200. *Id.* at 32-33; *see also* State v. Nakachi, 742 P.2d 388 (Haw. Ct. App. 1987) (holding that police did not violate state constitutional protection against unreasonable seizures when they discovered a weapon in a car after ordering the occupants out of the car on the

justifiable as incidental to an arrest.[2201]

C. Right to Counsel

Defendants prosecuted for domestic violence crimes and for misdemeanor violations of civil protection orders have a Sixth Amendment right to counsel, a right made applicable to the states via the Fourteenth Amendment in *Gideon v. Wainwright*.[2202] The right may attach at different points in the proceedings. Case law supports the defendant's right to counsel whenever the sentence that will be ultimately imposed is greater than a minimal fine, including jail time and probation. In *People v. Dass*,[2203] for example, the defendant charged with battery requested counsel and was denied. The trial court reasoned that it would not sentence defendant to jail, but to one year of court supervision conditioned upon completion of a domestic violence program, and therefore he was not entitled to counsel. The appellate court held, however, that there is a right to counsel in all criminal cases except where the penalty is a fine only.[2204] Thus, indigent defendants are entitled to appointed counsel.

Defendants in domestic violence criminal prosecutions not only have a right to counsel, but to effective counsel. Several cases in which battered women who killed their spouses were prosecuted for murder illustrate the threshold for effective assistance of counsel in domestic violence cases. The court in *State v. Felton*[2205] specifically defined what constitutes effective counsel for a battered woman charged with killing her abuser. Where petitioner was charged with first degree murder for shooting her husband while he slept, and her defense was that she was a battered spouse and acted in self-defense, the trial lawyer's failure to inform himself of statutes authorizing a heat-of-passion manslaughter defense to the charge of first degree murder, to give due consideration to the defense of not guilty by reason of mental disease or defect, and to make any meaningful investigation of the facts with respect to this defense constituted inef-

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basis of information that the occupants were involved in a domestic dispute and that one of them possessed a gun).

2201. *See* Chimel v. California, 395 U.S. 752 (1969) (holding that a warrantless search of the area within defendant's immediate control may be conducted when incidental to a legal arrest).

2202. 372 U.S. 335 (1963).

2203. 589 N.E.2d 1065 (Ill. App. Ct. 1992).

2204. *Id.* at 1067.

2205. 329 N.W.2d 161 (Wis. 1982).

fective assistance of counsel entitling defendant to a new trial.[2206] *Commonwealth v. Stonehouse*[2207] presents a similar situation in which counsel did not sufficiently address defendant's contention that she was a battered woman and had killed her batterer in self-defense. Here, trial counsel was deemed ineffective for failing to request a jury instruction on the cumulative effect of the three years of physical and psychological abuse suffered by the defendant; specifically, counsel failed to present expert testimony on battered woman syndrome as evidence of self-defense.[2208]

These cases show that it is essential for all counsel representing battered women to be schooled in issues of domestic violence. This is equally true whether counsel is representing a batterer, or a battered woman who killed or assaulted her abuser, who is seeking a civil protection order, who is prosecuting her batterer for contempt, or who is seeking child custody. It is especially imperative that counsel adequately inform the trier of fact about "battered woman syndrome."[2209] The dynamics of domestic violence underscore the importance of taking evidence on and considering the entire history of abuse within the relationship. This history often reveals why a battered woman justifiably feels she is in imminent danger at the time she performs an act of self-defense against her abuser. It will also explain the battered woman's demeanor when testifying, and help the trier of fact understand why a victim delayed reporting the violence or stayed with her batterer. If the trier of fact does not have access to this information and the psychological profile, it could be left with a severe misunderstanding of the battered woman and may attempt to measure her behavior against personal experiences that are out of the context of domestic abuse.[2210] Without expert testimony, the battered woman's ability to present an effective case or defense is likely to be completely ineffective leading to loss of custody, a guilty verdict, or denial of a much needed protection order.

2206. *Id.* at 165-67, 169.

2207. 555 A.2d 772 (Pa. 1989).

2208. *Id.* at 784.

2209. *See infra* section III.D.2.

2210. ORLOFF & KLEIN, *supra* note 26, at 26. "Furthermore, victims may be traumatized, withdrawn and non-responsive. Many suffer from low self-esteem and have developed short-term coping patterns which . . . limit their freedom . . . . All of these factors . . . may . . . explain behavior of the victim that would not make sense against another background." *Id.*

D. Defenses

1. Defenses in Cases Where the Defendant Has Been the Primary Perpetrator of Violence in the Relationship

Perpetrators of domestic violence have consistently raised a broad variety of "defenses" to explain or justify the crimes they commit against family members which have been rejected by the courts.[2211] That the protection order was vacated after a violation of the order is not a defense to the violation.[2212] Additionally, domestic violence statutes that permit prosecutors to charge protection order violations as either misdemeanors or contempt have withstood equal protection challenges.[2213] Maine provides by statute that voluntary intoxication is not a defense to a domestic violence offense.[2214] Provocation is not a defense to the crime of domestic violence.[2215] Finally, a spouse who forces another spouse to have intercourse and is prosecuted for spousal sexual assault cannot argue in defense that in light of the parties' marital relationship, there was implied consent to the intercourse.[2216]

2211. However, some courts acknowledge the affirmative defense of proper parental discipline to a charge of domestic violence against one's child. *See, e.g.*, State v. Kaimimoku, 841 P.2d 1076 (Haw. Ct. App. 1992) (reversing domestic violence conviction on grounds that father-defendant was exerting proper parental discipline over seventeen-year-old daughter during alleged abuse incident); State v. Hicks, 624 N.E.2d 332 (Ohio Ct. App. 1993) (noting that "proper and reasonable parental discipline" does not include corporal punishment which creates a substantial risk of serious physical harm to child).

2212. *See, e.g.*, State v. Andrasko, 454 N.W.2d 648 (Minn. Ct. App. 1990) (upholding conviction of defendant for violation of protection order, even though the order was vacated after the violation).

2213. *See, e.g.*, State v. Horton, 776 P.2d 703 (Wash. Ct. App. 1989) (holding that prosecutorial discretion in bringing either misdemeanor or contempt charges for protection order violation did not violate defendant's right to equal protection).

2214. ME. REV. STAT. ANN. tit. 19, § 768.34 (1992). Not only is intoxication not a defense to domestic violence, but courts have used evidence of drug and alcohol abuse to justify enhanced sentences for domestic violence offenders. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 139.

2215. *See* Tandy v. Tandy, 355 N.E.2d 585 (Ill. App. Ct. 1976) (noting that wife's provocative, abusive, or insulting language without overt act did not justify physical assault by husband); State v. Carrion, 616 N.E.2d 261 (Ohio Ct. App. 1992) (noting that provocation is not a valid defense to an act of domestic violence).

2216. *See, e.g.*, Commonwealth v. Shoemaker, 518 A.2d 591 (Pa. Super. Ct. 1986) (holding that withdrawal of implied consent defense merely puts the married accused on the same footing as the unmarried accused and thus is not a violation of equal protection right, and that spousal sexual assault statute does not violate individual's right to privacy).

2. Battered Woman Syndrome[2217]

By admitting evidence which may prove that a victim or defendant in a domestic violence prosecution is experiencing "battered woman syndrome," the courts reflect their understanding of the justifiably fearful state of mind of a person who has been cyclically abused and controlled over a period of time. As suggested in *Domestic Violence, The Crucial Role of the Judge in Criminal Court Cases: A National Model for Judicial Education*:

> The court should examine the perpetrator's patterns of violence and control of the victim, the perpetrator's belief systems that support the violence, the impact of the violence and abuse on the victim, how the victim has attempted to protect herself and the children from the violence in the past, the reasons the victim stayed in the relationship or returned to it, and the reasonableness of the victim's belief or apprehension that the perpetrator is going to inflict serious bodily injury or death. It is important that the court view the victim's behavior within the context of the impact of the violence on the victim.[2218]

Testimony concerning battered woman syndrome can assist courts that issue civil protection orders, decide custody matters, hear contempt proceedings, and, preside over domestic violence criminal prosecutions. Such testimony may help courts understand the dynamics of domestic violence and psychological factors affecting the parties coming before them.

Expert testimony concerning battered woman syndrome has been used in many types of cases to bolster and bring understanding to the testimony of a victim of abuse.[2219] In *State v. Frost*,[2220] the court held that battered woman syndrome evidence was admissible to bolster the victim's credibility in a prosecution for assault.[2221] The prosecutor was allowed to use a series of prior assaults on the victim, calls to the police, and reconciliations over a period of time to ex-

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2217. *See also infra* part V.A.

2218. DOMESTIC VIOLENCE IN CRIMINAL COURT CASES, *supra* note 23, at 117.

2219. The importance of the self-defense claim and expert testimony is not limited to criminal cases. A battered woman may need to prove self-defense using battered woman syndrome testimony in civil protection order cases when her batterer petitions for a civil protection order based on an incident when she used violence to fend off his attacks. This testimony may also be extremely important for victims who face judges who might wrongly consider issuing mutual protection orders.

2220. 577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990).

2221. *Id.* at 1288.

plain why the victim remained with the defendant and visited him in jail. In *State v. Cababag*,[2222] expert testimony on battered housemate/spouse syndrome was admitted into the trial of an alleged male batterer of a woman with whom he was living, in order to explain why the woman had recanted her pretrial accusations that she was battered by the defendant. The testimony could be used to assist the jury in assessing the woman's credibility.[2223] As the court stated, "th[e] seemingly bizarre behavior [recantation, minimization, and other related behavior] of alleged victims is beyond the knowledge or understanding of lay persons who normally serve on juries . . . and does require a special expertise to understand."[2224] In *State v. Ciskie*,[2225] the court held that the state's expert testimony on battered woman syndrome was admissible to assist the jury in understanding the victim's delay in reporting the alleged rape and failing to discontinue her relationship with the defendant.[2226]

Expert testimony on battered woman syndrome may also be considered in custody cases, and as self-defense evidence in criminal prosecutions of battered women who have killed or severely injured their perpetrators. In *Knock v. Knock*,[2227] the court found that the trial court properly considered expert testimony on battered woman syndrome in making its custody determination. In *McMaugh v. State*,[2228] the defendant appealed a murder conviction and the court found, based on evidence of abuse and expert testimony on battered woman syndrome, that her husband's infliction of severe mental and physical abuse upon her coerced her into describing the homicide in a way that would be favorable to him but prejudicial to her own best interests. The court concluded that the evidence indicated that the husband's domination through a focused pattern of abuse prevented the defendant from assisting her attorney and presenting a reasonable defense.[2229]

2222. 850 P.2d 716 (Haw. Ct. App. 1993).

2223. *Id.* at 722.

2224. *Id.* at 719.

2225. 751 P.2d 1165 (Wash. 1988).

2226. *Id.* at 1171. Testimony on battered woman syndrome has also been offered as evidence of mental illness. *See* People v. Gindorf, 512 N.E.2d 770 (Ill. App. Ct. 1987) (describing expert testimony that a defendant who murdered her children suffered from an affective disorder that could have been caused by extensive physical abuse by her spouse).

2227. 621 A.2d 267 (Conn. 1993).

2228. 612 A.2d 725 (R.I. 1992).

2229. *Id.* at 733. *But see* Cox v. State, 843 S.W.2d 750 (Tex. Ct. App. 1992) (upholding trial court's decision to exclude evidence on battered spouse syndrome as not relevant in

As the *McMaugh* case illustrates, battered women who resort to killing their batterers because they have found no other way to put an end to the abuse are prosecuted as perpetrators of domestic violence. In these prosecutions, testimony on battered woman syndrome is presented as evidence that the killing was done in self-defense.[2230] There is a wealth of scholarly research written on battered women who kill.[2231] Rather than duplicate those efforts here, we have cho-

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murder conspiracy prosecution where defendant testified she was not in danger when accompanying husband to meet undercover agent before arrest).

2230. *See, e.g.*, State v. Gallegos, 719 P.2d 1268 (N.M. Ct. App. 1986) (holding that evidence of abuse warranted submission of self-defense instruction); People v. Torres, 488 N.Y.S.2d 358 (Crim. Ct. 1985) (holding that expert testimony on battered woman syndrome was admissible where defendant shot her husband three times as he sat in a chair in their apartment); People v. Emick, 481 N.Y.S.2d 552 (App. Div. 1984) (holding that admission of evidence of defendant's history as a battered woman was proper where defendant shot and killed her husband in his sleep); Betchel v. State, No. F-88-887, 1992 Okla. Crim. App. LEXIS 73 (Okla. Crim. App. Sept. 2, 1993) (holding that the trial court erred in not allowing battered woman syndrome testimony); Commonwealth v. Dillon, 598 A.2d 963 (Pa. 1991) (holding that defendant, convicted of murder, was entitled to admit evidence of abuse to support self-defense claim); State v. Gibson, 384 S.E.2d 358 (W. Va. 1989) (affirming second degree murder conviction of battered woman who killed her husband when he came to her apartment in violation of protection order); State v. Felton, 329 N.W.2d 161 (Wis. 1982) (holding that battered woman syndrome testimony could be offered where defendant shot and her husband in his sleep). *But see* State v. Burtzlaff, 493 N.W.2d 1 (S.D. 1993) (affirming trial court's decision not to allow defendant, who killed her husband alleging he abused her over a long period of time, to admit expert testimony that she was a battered woman because the testimony went to the heart of the ultimate issue of self-defense and therefore invaded the jury's province).

2231. GILLESPIE, *supra* note 124; LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984); Erich P. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363 (1992); Julie Blackman, *Potential Uses For Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227 (1986); Rocco C. Cipparone, Jr., *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427 (1987); Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579 (1990); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989); Rebecca Hudsmith, *The Admissibility of Expert Testimony on Battered Woman Syndrome in Battered Women's Self-Defense Cases in Louisiana*, 47 LA. L. REV. 979 (1987); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393 (1988); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting A Historical Accident on Behalf of Battered Women who Kill*, 36 AM. U.L. REV. 11 (1986); Richard Rosen, *On Self-Defense, Imminence, and Women Who Kill their Batterers*, 71 N.C. L. REV. 371 (1993); Elizabeth M. Schneider, *Equal Rights to Trial For Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. REV. 623 (1980); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978); Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom*, 16 LAW & HUMAN BEHAV. 273 (1992); Jeanne-Marie Bates, Comment, *Expert*

sen to focus our research on other aspects of domestic violence law, and refer the reader to these sources for further discussion on battered women's self-defense. In reading this Article together with those materials, it is important to remember that early identification of battered women and early justice and social service system intervention can grant many battered women a way out of a violent relationship *before* the violence escalates to such a point where killing the batterer is seen as the only means to stop the violence. There is a direct correlation between increased services to battered women and a reduction in the numbers of women who resort to killing their husbands in order to bring an end to the violence.[2232] Research indicates that from 1979 through 1984, the period of time in which there was a dramatic increase in shelters and other resources available to assist battered women, the rate of homicides committed by women against male intimates declined by twenty-five percent.[2233]

E. Procedure in Domestic Violence Criminal Prosecutions

Numerous courts have delineated the appropriate actions prosecutors may undertake in domestic violence criminal prosecutions. Courts have allowed prosecutors to make general statements about the domestic violence crisis, but have limited their ability to make specific reference to other unrelated notorious crimes. In *Titus v. State*,[2234] the Texas Appeals Court upheld a prosecutor's reference, in closing argument, to the domestic violence epidemic reasoning that a prosecutor may properly "refer to the crime problem in general terms . . .

Testimony on the Battered Woman Syndrome in Maryland, 50 MD. L. REV. 920 (1991); Thomas N. Bulleit, Jr., Note, *The Battering Parent Syndrome: Inexpert Testimony as Character Evidence*, 17 U. MICH. J.L. REF. 653 (1984); *Developments in the Law—Legal Responses to Domestic Violence: V. Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574 (1993); Sarah Crippen Madison, Comment, *A Critique and Proposed Solution to the Adverse Examination Problem Raised by Battered Woman Syndrome Testimony in* State v. Hennum, 74 MINN. L. REV. 1023 (1990); Mira Mihajlovich, Note, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253 (1987); Kerry A. Shad, Note, State v. Norman: *Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C.L. REV. 1159 (1990); Elizabeth Topliffe, Note, *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protective Orders are Not*, 67 IND. L.J. 1039 (1992); Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430 (1990) (reviewing GILLESPIE, *supra* note 124).

2232. Browne & Williams, Resource Availability for Women at Risk: Its Relationship to Rates of Female-Perpetrated Homicide, Paper Presented at the American Society of Criminology Annual Meeting (November 11-14, 1987).

2233. *Id.*

2234. No. 01-87-00177-CR, 1988 Tex. App. LEXIS 677 (Tex. Ct. App. Mar. 31, 1988).

[and] make inferences about the relationship of the defendant's conduct to that problem so long as he does not depart from reasonable deductions or common knowledge."[2235] However, in *State v. Bolt*,[2236] the Oregon Appeals Court reversed a domestic violence conviction for kidnapping and rape where the prosecutor, in closing arguments, made reference to many unrelated and yet notorious crimes against women.[2237] These cases suggest that while a prosecutor may inform a jury about the magnitude of the domestic violence crisis, they may not refer to specific notorious crimes committed by other individuals.

In criminal domestic violence actions, case law conflicts on the question of whether prosecutors need to identify a specific act on which the conviction must rest. In *People v. Thompson*,[2238] the California Court of Appeals held that where the defendant sodomized his wife and beat her with a breadboard, neither the prosecutor nor the jury had to elect which specific act formed the basis of the domestic violence conviction because domestic violence acts are so closely connected that they form part of the same transaction, and thus fall within the continuous course of conduct exception.[2239] However, in *People v. Salvato*,[2240] the court of appeals reversed the defendant husband's conviction for dissuading a witness, his wife, by threat of violence, terroristic threats, obtaining signatures by extortion, and sending extortionate letters, when the prosecutor did not elect which of a series of distinct acts he relied on in charging the defendant.[2241]

Courts have upheld convictions for both the crime of domestic violence and for lesser included offenses. In *State v. Amos*[2242] and

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2235. *Id.* at *6-*7.

2236. 817 P.2d 1322 (Or. Ct. App. 1991).

2237. *Id.* at 1325.

2238. 206 Cal. Rptr. 516 (Ct. App. 1984).

2239. *Id.* at 518-19. Note that *Thompson* "did not concern the prosecutor's power to charge multiple offenses where the victim has suffered multiple criminal acts at one time" or the number of convictions a defendant could suffer, but it dealt with the issue of jury unanimity where the prosecutor charged only one count of abuse but the victim testified to multiple incidents. People v. Healy, 18 Cal. Rptr. 2d 274, 276 (Ct. App. 1993) (noting that the prosecutor may charge defendant with multiple offenses for the same act when defendant subjected cohabitant to multiple injuries over time).

2240. 285 Cal. Rptr. 837 (Ct. App. 1991).

2241. *Id.* at 842; *see also* State v. Larson, 764 P.2d 749 (Ariz. Ct. App. 1988) (holding that a judge may not grant a misdemeanor compromise in a domestic violence case without the prosecutor's recommendation).

2242. No. 12-088, 1988 Ohio App. LEXIS 78 (Ohio Ct. App. Jan. 15, 1988).

State v. Shuber,[2243] the courts upheld convictions of both domestic violence and the lesser included offense of disorderly conduct. The court in *Amos* concluded that the purpose of the domestic violence statute—to protect family and household members from violence—does not mean the court could not instruct the jury as to the lesser included offense of disorderly conduct.[2244] In defining which acts may be considered as lesser included offenses of domestic violence, the court in *State v. Meese*[2245] held that assault could not be characterized as a lesser included offense of the offense of domestic violence.[2246]

The speedy trial acts may also affect domestic violence prosecutions. In *State v. Mintz*,[2247] the court held that the defendant's right to a speedy trial was not violated where he conditionally waived his right to trial for attempted domestic violence upon entry into a domestic violence diversion program.[2248] Entry into the programs tolled the time for a speedy trial. However, in *People v. Denman*,[2249] the appeals court reversed the defendant's battery conviction where he waived his speedy trial rights by entering into a domestic violence diversion program, was then denied entry into the program, and yet still was not brought to trial within the statutorily required 30 days. The speedy trial time began to run again once the defendant was refused entry into a diversion program.[2250] Thus, the *Denman* case provides a further example of why diversion is not advisable in domestic violence cases. Ordering domestic violence perpetrators into diversion programs leaves the victim open to the risk that if her batterer fails to comply with the terms of the diversion, he might also avoid prosecution if the prosecutor does not learn of his failure to comply and does not act to bring the case to trial in a timely manner.[2251] Acknowledging the problem, the court in *Clark*

2243. No. 1-89-64, 1990 WL 352454 (Ohio Ct. App. Dec. 31, 1990).

2244. *Amos*, 1988 Ohio App. LEXIS 78, at *9.

2245. No. 87AP120096, 1988 Ohio App. LEXIS 1467 (Ohio Ct. App. Apr. 8, 1988).

2246. *Id.* at *2.

2247. No. WD-90-4, 1991 WL 334942 (Ohio Ct. App. May 10, 1991).

2248. *Id.* at *4.

2249. 193 Cal. Rptr. 863 (App. Dep't Super. Ct. 1983).

2250. *Id.* at 866; *see also* MODEL CODE, *supra* note 15, § 218.

2251. The National Council of Juvenile and Family Court Judges recommends against diversion in domestic violence cases. "Alternative dispositions and diversion in family violence cases are frequently inappropriate, and send a message to both, the victim and the offender, that the crime is less serious than comparable crimes against non-family members. When these alternatives are proposed, judges should ascertain that they are in the interest of

v. State[2252] ruled that the action was not barred under the speedy trial doctrine where the defendant caused delay by coercing the victim not to testify.[2253]

Trial courts and defense attorneys have also been found to commit errors in criminal domestic violence prosecutions. In *People v. Darnell*,[2254] the court reversed a domestic violence conviction for harassment where the trial judge's interruption of the prosecution to initiate plea discussions denied the defendant a fair trial.[2255] In *People v. Torres*,[2256] the appellate court held that since the defendant failed to object at his criminal domestic violence trial to evidence that he laughed at the degree of the injuries he inflicted on his wife, he failed to preserve the issue for appeal.[2257]

F. Bail Issues

Judicial authorities, recognizing the danger release from custody or incarceration can pose to domestic violence victims, recommend that prosecutors, courts, and correctional facilities notify victims of batterers' impending release.[2258] In an effort to provide even greater protection to abuse victims, states are increasingly placing conditions on bail and pretrial release for domestic violence perpetrators.[2259] These conditions on the batterer's bail and release include no contact with the petitioner at her home, work, or school,[2260] no harassment

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justice and not simply devices for docket management or unsuitable use of diversion." FAMILY VIOLENCE PROJECT, *supra* note 687, at 14; *see also* MODEL CODE, *supra* note 15, § 213.

2252. 629 A.2d 1322 (Md. Ct. Spec. App. 1993).

2253. *Id.* at 1327.

2254. 546 N.E.2d 789 (Ill. App. Ct. 1989).

2255. *Id.* at 791.

2256. 581 N.Y.S.2d 869 (App. Div. 1992).

2257. *Id.* at 868-69.

2258. *See* MODEL CODE, *supra* note 15, §§ 211, 222.

2259. *See, e.g.*, 725 ILCS 5/112A-2 (Supp. 1993); NEB. REV. STAT. § 42-929 (Supp. 1992); OHIO REV. CODE ANN. § 2919.26 (Baldwin 1992); 18 PA. CONS. STAT. ANN. § 2711 (Supp. 1993); S.D. CODIFIED LAWS § 23A-43-4.2 (1988); UTAH CODE ANN. § 77-36-3 (1990) (criminal statute); P.R. LAWS ANN. tit. 8, § 637 (Supp. 1990); *see also* Pelekai v. White, 861 P.2d 1205 (Haw. 1993) (holding that a trial judge improperly relied on bail schedule as the standard to determine bail amounts in domestic violence case); MODEL CODE, *supra* note 15, §§ 208, 220, 221.

2260. ARIZ. REV. STAT. ANN. § 13-3602(M) (Supp. 1993); 725 ILCS 5/110-10 (Supp. 1993) (criminal protection order statute conditioning bail on no contact and staying away from the petitioner's residence); NEB. REV. STAT. § 42-929 (Supp. 1992); N.J. STAT. ANN. § 2C:25-26(a) (West 1992); N.D. CENT. CODE § 14.07.1-13(1) (1991); OR. REV. STAT. § 107.720(4) (1991); S.D. CODIFIED LAWS ANN. § 23A-43-4.2 (1988); UTAH CODE ANN. § 77-36-3 (1992) (criminal statute); WASH. REV. CODE ANN. § 10.99.040(2) (West Supp.

of the petitioner or her relatives,[2261] no weapons possession,[2262] counseling,[2263] issuance of a temporary protection order,[2264] and a mental health examination if there have been prior violations of civil protection orders.[2265] The new Delaware statute requires a court to consider prior violations of protection orders before granting bail.[2266] New Jersey specifically requires conditions on bail to be in writing, and mandates that once bail is set it may not be reduced without prior notice to the petitioner and the prosecutor.[2267] In addition to placing conditions on a batterer's bail and pretrial release, some statutory codes will reject bail and pretrial release entirely under certain circumstances.[2268] Six states disallow bail or bond prior to the batterer's arraignment.[2269] Minnesota denies bail if the respondent's release poses a threat of bodily injury to any party.[2270] A Minnesota court may also require a maximum bond of $10,000 to deter further civil protection order violations.[2271]

Like the numerous state statutes, case law also supports the issuance of temporary protection orders as a condition of pretrial release.[2272] In *State v. Naegele*,[2273] the court of appeals sustained

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1993) (criminal procedure statute); WIS. STAT. ANN. § 968.075 (West Supp. 1993); D.C. CODE ANN. § 16-1005(c)(1) (1989).

2261. N.J. STAT. ANN. § 2C:25-26(a) (West 1992).

2262. N.J. STAT. ANN. § 2C:25-26 (West 1992); WASH. REV. CODE ANN. § 10.99.040 (West Supp. 1993) (criminal procedure statute).

2263. ARIZ. REV. STAT. ANN. § 13-3602(M) (Supp. 1993); NEB. REV. STAT. § 42-929 (Supp. 1992); OR. REV. STAT. § 107-720(4) (1992); D.C. CODE ANN. § 16-1002(b) (1992).

2264. 725 ILCS 5/112A-2(a) (Supp. 1993); N.Y. CRIM. PROC. LAW § 530.12(1)(a) (McKinney Supp. 1994); N.C. GEN. STAT. § 15A-534.1(2) (1993); UTAH CODE ANN. § 77-36-3.2(a) (1990) (criminal statute).

2265. OHIO REV. CODE ANN. § 2937.23(b) (Anderson 1993) (allowing a court to order a mental health examination prior to setting bail if respondent has previously violated protection order).

2266. DEL. CODE ANN. tit. 10, § 940(g) (Supp. 1992).

2267. N.J. STAT. ANN. § 2C:25-26(e) (West 1992).

2268. P.R. LAWS ANN. tit. 8, § 637 (1993) (court may refuse bail); UTAH CODE ANN. § 77-36-3.1 (1993) (court may refuse bail on clear and convincing evidence of substantial danger to petitioner).

2269. ARIZ. REV. STAT. ANN. § 13-3602(M) (1993); COLO. REV. STAT. § 14-4-104 (1993); IOWA CODE ANN. § 236.14 (West 1993); NEB. REV. STAT. § 42-929 (1992); 23 PA. CONS. STAT. ANN. § 6113 (1992); TENN. CODE ANN. § 36-3-612 (1993). Many other jurisdictions adopt this approach by structuring court procedures and police department guidelines in a manner that provides no opportunity for release prior to arraignment.

2270. MINN. STAT. ANN. § 629.72 (West 1993).

2271. MINN. STAT. ANN. § 518B.01.14(d) (West 1993).

2272. *See* People v. Derisi, 442 N.Y.S.2d 908 (Dist. Ct. 1981) (holding that protection orders may be condition of release on bail); State v. Dawson, No. 79AP-565 (Ohio Ct. App. Oct. 18, 1979) (conditioning domestic violence pretrial release of defendant on a temporary

the issuance of a temporary protection order as a condition of pre-trial release, holding that attachment of a nonmonetary condition to pretrial release does not violate a defendant's right to bail where the state has a strong interest in protecting the defendant's family from further violence.[2274] In *Commonwealth v. Allen*,[2275] an alleged contemnor was properly held pre-trial on a contempt charge for nine days and then, upon conviction, sentenced to time served plus a $750 fine and costs.[2276] This approach has the added benefit of offering a victim the immediate protection she needs during the very dangerous pre-trial period.[2277]

IV. NEGLECT AND TERMINATION OF PARENTAL RIGHTS[2278]

Living with a violent parent is an abusive and frightening experience for a child, even when the child is not the target of the violence.[2279] Studies reveal that between seventy-five and eighty-seven percent of children from violent homes witness the abuse.[2280] Social science research on children of batterers indicate that these children are at greater risk of substance abuse, juvenile delinquency,[2281] and suicide. In addition to psychological and behavioral problems, children who witness violence in the home are seventy-four percent more

protection order which prevented him form entering his home). *But see* State v. Beauchamp, 621 A.2d 516 (N.J. Super. Ct. App. Div. 1993) (holding that the trial court may not impose conditions on parole but may impose a protection order that is valid during incarceration and remains in effect upon release).

2273. No. 920 (Ohio Ct. App. Nov. 19, 1980).

2274. *Id.* at n.1. *But see* State v. Wood, 597 A.2d 312, 313 (Vt. 1991) (holding that the trial court could not impose a cash bail solely because the defendant was found to be a threat to the integrity of the judicial process and a danger to the particular victim, but rather cash bail can only be imposed to address the risk that the defendant would not appear).

2275. 486 A.2d 363 (Pa. 1984).

2276. *Id.* at 365.

2277. Ganley, *supra* note 21, at 43-44; *see also supra* note 1582.

2278. For a full discussion of the nexus between child abuse and neglect cases and domestic violence, see Jacqueline Agtuca et al., *Child Abuse, Neglect and Termination of Parental Rights Cases Where One Parent Abuses the Other, in* DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note 21, at 224.

2279. Child abuse and neglect often co-exist with spouse abuse. FREDERIC J. COWAN, ADULT ABUSE, NEGLECT, AND EXPLOITATION: A MEDICAL PROTOCOL FOR HEALTH CARE PROVIDERS AND COMMUNITY AGENCIES 39 (1991).

2280. BATTERED WOMAN, *supra* note 4, at 59.

2281. Sherry Ford, *Domestic Violence: The Great American Spectator Sport*, OKLA. COALITION ON DOMESTIC VIOLENCE & SEXUAL ASSAULT 3 (Jul.-Aug. 1991); Peter G. Jaffe et al., CHILDREN OF BATTERED WOMEN 28-29 (1990).

likely to commit violent crimes.[2282] Studies also indicate that there is intergenerational continuity in family violence. One study reveals that boys who witness the abuse of their mothers are ten times more likely to batter their female partners as adults.[2283] While witnessing one parent batter another is traumatic enough, studies also strongly indicate the significant coincidence of child and spousal abuse. Several national studies found that in seventy percent of families where the woman is battered, children are battered as well.[2284] Another study found that fifty percent of mothers of abused children are battered women.[2285] The researchers concluded that wife "battering is the most common context for child abuse."[2286] Some researchers conclude that a batterer may abuse a child to maintain coercive control over the abused parent.[2287]

Experts on child and spousal abuse conclude that in light of the evidence of the coincidence of abuse against children and the other parent "the most effective means of protecting child[ren] may be to fashion remedies that protect both the abused parent and the child[ren] from the perpetrator."[2288] Protection of the battered parent is a critical means of protecting an abused child.[2289] Indeed, research indicates that child abuse, by fathers or mothers, is likely to decrease once the battered parent separates from the violent parent and receives protective services.[2290] Consequently, the experts on spousal and child abuse urge early court intervention aimed at inquiring about both spouse abuse and child abuse in child abuse and neglect cases, and recommend carefully considering spousal abuse in crafting remedies.[2291] This early intervention aimed at protecting both the abused child and parent will halt the escalation of violence

2282. *Women and Violence, supra* note 789, at 131.

2283. *Id.* at 93.

2284. BROKEN BODIES AND BROKEN SPIRITS: FAMILY VIOLENCE IN MARYLAND AND RECOMMENDATIONS FOR CHANGE (Family Violence Coalition, Maryland, June 1991).

2285. Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective of Child Abuse*, 18 INT'L J. HEALTH SERV. 97, 104 (1988).

2286. *Id.* at 97.

2287. *See id.* at 111-12.

2288. Agtuca et al., *supra* note 2278, at 245.

2289. Ganley, *supra* note 21, at 19, 53; DePanfilis et al., CHILD MALTREATMENT AND WOMAN ABUSE: A GUIDE FOR CHILD PROTECTIVE SERVICES INTERVENTION (NWAPP ed., 1989).

2290. Jean Giles-Sims, *Longitudinal Study of Battered Children of Battered Wives*, 34 FAM. RELATIONS 205, 209 (1985).

2291. Agtuca et al., *supra* note 2278, at 247; *see also* MODEL CODE, *supra* note 15, § 409.

and facilitate child adjustment.[2292] In abuse and neglect proceedings brought against abused spouses, courts have held that when a state agency is allowed to psychologically examine the mother, she is entitled to psychological examination by her own psychologist at the state's expense.[2293]

Clearly, witnessing violence in the home has a profoundly disturbing affect on children. Consequently, courts have consistently terminated batterer's parental rights in homicide cases. These cases include when the batterer committed acts of spousal abuse and stabbed the mother to death in front of the children,[2294] when the batterer repeatedly abused the mother during a six year marriage and ultimately plead guilty to murdering her,[2295] and when the defendant was acquitted of murdering his wife but his son firmly believed his father was guilty and testified as such.[2296] Specifically, in *Kenneth B. v. Elmer S.*,[2297] the court concluded that spousal abuse is a factor in determining parental fitness, and upheld the termination of parental rights of a father, convicted of murdering his wife, in light of his conviction and history of spousal abuse.[2298]

For the same reasons, courts have terminated parental rights and denied custody in non-homicide spousal abuse cases. In *In re*

2292. Agtuca et al., *supra* note 2279, at 247. The authors of the State Justice Institute funded DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note 21, recommend a number of remedies a court should consider in cases where both a child and parent is abused. These remedies include: require Child Protective Services to investigate alleged spousal abuse; order Child Protective Services to work with abused parent to develop a safety plan to protect parent and child from offender; order stay away and vacate orders against abusive parent; order abusive parent to attend domestic violence counseling before permitting contact with the children; and order counseling for children who have witnessed the violence. *See id.*; *see also* MODEL CODE, *supra* note 15, §§ 409, 511, 514. School personnel and state, county, and city educators must also receive domestic violence training. *Id.* §§ 513, 514.

2293. *In re* Stanley, No. 93AP-972, 1993 Ohio App. LEXIS 5848 (Ohio Ct. App. Dec. 7, 1993).

2294. *In re* Sean H., 586 A.2d 1171 (Conn. App. Ct. 1991) (terminating parental rights of father who abused and then stabbed to death the children's mother even though he only physically abused one child, since his conduct denied the children the care, guidance, and control needed for their physical and emotional well-being).

2295. Nancy R. v. Randolph W., 356 S.E.2d 464 (W. Va. 1987) (upholding finding that father was unfit to be a parent and denial of custody where he repeatedly abused the mother during six year marriage and plead guilty to murdering her).

2296. T.V.N. v. State Dep't of Human Resources, 586 So. 2d 227 (Ala. Civ. App. 1991) (terminating father's parental rights where he was acquitted of murdering his wife but where his son believed he was guilty and testified to his belief).

2297. 399 S.E.2d 192 (W. Va. 1990).

2298. *Id.* at 195.

Theresa,[2299] the court terminated the parental rights of both parents after it found that the respondents had continuously engaged in mutual domestic violence in front of the children for over ten years.[2300] In *Kimmel v. Kimmel*,[2301] the court reversed a custody award to the mother after she ignored an existing protection order by allowing her abusive partner back into the residence and leaving her son in the abusive partner's care, thereby placing his welfare in jeopardy.[2302]

V. EVIDENCE

It is important that we examine the evidentiary issues which arise in civil protection order and domestic relations cases, contempt proceedings, and criminal cases involving domestic violence. The evidentiary issues raised in criminal domestic violence cases can be very relevant in civil protection order, domestic relations, and contempt cases. The evidence typically presented in domestic violence cases may include only the victim's testimony,[2303] which courts have found to be sufficiently credible to meet a "beyond a reasonable doubt" standard of proof in a criminal domestic violence case.[2304] Other forms of evidence frequently offered include witness testimony regarding injuries, medical records, police reports, photographs,[2305] protection orders from other jurisdictions, or expert witnesses. Cases confirm that in all civil protection order trials, whether for issuance of a civil protection order or for contempt hearings, both parties must

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2299. 576 N.Y.S.2d 937 (App. Div. 1991).

2300. *Id.* at 938-39.

2301. 392 N.W.2d 904 (Minn. Ct. App. 1986).

2302. *Id.* at 908; *see also In re* The Appeal in Pima County Juvenile Severance Action No. S-113432, No. 2 CA-JV 93-0003, 1993 Ariz. App. LEXIS 196 (Ariz. Ct. App. Sept. 9, 1993) (upholding termination of abusive father's parental rights); Cote v. Henderson, 267 Cal. Rptr. 275 (Ct. App. 1990) (noting prior civil court action ruling that a man has no parental rights to a child conceived by rape); People in Interest of J.E.B., 854 P.2d 1372 (Colo. Ct. App. 1993) (affirming termination of mother's parental rights based upon her involvement in domestic violence and showing that counseling was ineffective in helping her avoid domestic violence); *In re* R.J., 495 N.W.2d 114 (Iowa Ct. App. 1992) (terminating battered woman's parental rights where she continued to permit her abusive boyfriend to abuse her sons); *In re* J.M. v. D.M., No. A-92-270, 1993 Neb. App. LEXIS 371 (Neb. Ct. App. Sept. 7, 1993) (affirming termination of battered woman's parental rights because she would not leave her batterer and would not protect her children).

2303. Judicial authorities emphasize that spousal privilege is inapplicable in family violence cases. *See* MODEL CODE, *supra* note 15, § 215.

2304. *See* People v. Williams, 248 N.E.2d 8 (N.Y. 1969).

2305. *See, e.g.*, Zuccaro v. Zuccaro, No. 0058468, 1993 Conn. Super. LEXIS 1750, at *2 (Conn. Super. Ct. Jul. 16, 1993) (photographs offered to support victim's testimony); *see also infra* notes 2339-40 and accompanying text.

be allowed to testify fully.[2306] It is important that courts and attorneys hearing or presenting evidence in domestic violence cases be aware that the cycles of violence and the power dynamic in abusive relationships can dramatically affect the type, quality, and quantity of evidence available to the court.

When battered women present testimony, particularly those who have been victimized over a long time, research indicates that they will tend to underestimate both the frequency and the severity of the violence they experience.[2307] Other battered women, out of fear of their batterer's retaliation, will minimize and deny the violence, request that court proceedings be dismissed, or accept the batterer's promises to stop further violence from occurring.[2308] All of this will flavor the evidence presented at trial. Judges and attorneys who have been schooled in the dynamics of domestic violence will be best able to understand the testimony and judge its credibility. For example, frequently a batterer will testify about "justifications" for the battering that can provide a fact finder important insight into the existence of power and control in the relationship.[2309]

The vast majority of batterers are only abusive or violent to their wives and lovers or children. Only twenty-eight percent of men who batter are violent both within and outside the home.[2310] Experts working with abusive men[2311] agree that batterers greatly underreport their violent actions, minimize or deny assaultive behavior against their wives, and claim more involvement by the victim of

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2306. Betts v. Floyd, No. CX-91-2155, 1992 Minn. App. LEXIS 257 (Minn. Ct. App. Mar. 12, 1992) (reversing issuance of civil protection order where trial judge prevented respondent from completing his testimony); State v. Wiltse, 386 N.W.2d 315 (Minn. Ct. App. 1986) (holding that in a contempt proceeding respondent must be allowed to explain his presence at the petitioner's home in violation of the civil protection order).

2307. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 10 (1987) (police reports, hospital records, and witness statements reveal much more violence than women are willing to admit).

2308. Ganley, *supra* note 21, at 41-47 (discussing how power and control affects domestic violence victims in the court system).

2309. Batterers will minimize or deny that the violence occurred. They might attempt to explain their behavior, focusing on actions by the victim that supposedly caused the violence. Focusing on the specific incidents of violence rather than what led up to or followed them will help focus the case on the violence rather than the excuses for it. *Id.* at 36-38, 40 (Ganley provides a useful list of procedural tactics batterers typically use to control court proceedings).

2310. James Ptacek, *Why Do Men Batter Their Wives?*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 133, 143 (Kersti Yllo & Michele Bograd eds., 1988).

2311. *See* Ganley, *supra* note 21, at 21-41 (for a full discussion of the cycle of violence and the dynamics of power and control as they affect abusers).

their violence than witness or police reports would support.[2312] Few men, even the most severe batterers, think of themselves as men who beat their wives. The abuser's tendency to minimize problems is comparable to the denial by alcohol and drug abusers.[2313] Courts have noted the importance of expert testimony on the dynamics of domestic violence.

Many battered women who have suffered violent injuries at the hands of their abusers may not have medical records to help document these injuries. Battered women who are injured do not necessarily seek the medical treatment they need. Only about two-thirds of the battered women who need medical assistance seek treatment.[2314] Following the worst incident of abuse, forty-five percent of battered women felt they needed medical attention. Yet, only thirty-two percent sought medical treatment and only twenty-two percent actually told the doctor the cause of their injuries. Twenty percent of battered women believed they needed medical treatment but did not seek it, mostly out of fear of retaliation from their batterers.[2315] Proof of the violence becomes more difficult to obtain when so few seek medical treatment and present medical records to help substantiate their cases.

A. Dynamics of Domestic Violence: Battered Woman Syndrome and Other Expert Testimony[2316]

Increasingly, courts admit expert testimony on the battered woman syndrome into domestic violence criminal trials.[2317] In civil protection order cases or in custody and divorce actions where there has been domestic violence between the parties, introduction of expert testimony on battered woman syndrome and the dynamics of domestic violence may be useful as well. This evidence helps courts better understand the dynamics of the relationships in question, and can

2312. Frieze & Browne, *supra* note 304. Dobash and Dobash interviewed battered women to identify the main source of conflict in the typical battering incident. Forty-four percent stated possessiveness and sexual jealousy on the part of the batterer, 17% reported arguments over money, and 16% cited husband's expectations about domestic work. NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET 38 (1990).

2313. David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON B.J. 23, 24 (1989).

2314. BATTERED WOMAN, *supra* note 4, at 25.

2315. Daniel G. Saunders & Karla Rose, *Attitudes of Psychiatric and Non-psychiatric Medical Practitioners Toward Battered Women: An Exploratory Study*, *in* STATISTICS 78 (National Clearinghouse for the Defense of Battered Women, 1990).

2316. *See infra* notes 2218-30 and accompanying text.

2317. *See* sources cited *supra* note 2231.

provide the basis on which to properly evaluate the evidence presented. In both criminal and civil court cases, this testimony must be admissible to support a domestic violence victim's self-defense claim. However, it is equally important that this testimony be admissible to explain a victim's reticence to testify, reluctance to follow through with a protection order, reunification with her batterer, or emotional state at trial to judges and jurors in both civil and criminal actions whenever domestic violence is an issue.

Prosecutors have been allowed to present expert testimony on battered woman syndrome in criminal prosecutions of batterers. In *State v. Ciskie*,[2318] *State v. C.V.C.*,[2319] and *State v. Frost*,[2320] the courts admitted testimony on the "battered woman syndrome" in criminal prosecutions of alleged batterers to bolster the credibility and explain the actions of the victim witness. In *Ciskie*, the court admitted evidence on the battered woman syndrome to help the jury understand the victim's delay in reporting four rapes by her batterer during their twenty three month relationship and her failure to end the relationship.[2321] In *C.V.C.*, the court held that the wife's failure to report the domestic violence at her first opportunity did not make her testimony inconsistent or incredible.[2322] The court in *Frost*, recognizing the lack of societal awareness of domestic violence issues, held that "battered woman syndrome" evidence is admissible to bolster the credibility of the victim witness in her batterer's prosecution for assault.[2323] Indeed, the court specified that the prosecutor may properly use a series of prior assaults on the victim, calls to the police, and reconciliations over a period of time to explain why the victim remained with the batterer and visited him in jail.[2324]

The battered woman syndrome has also played an important role in criminal prosecutions of battered women who kill their batterers in self-defense.[2325] In *State v. Gallegos*,[2326] the court not only admit-

2318. 751 P.2d 1165 (Wash. Ct. App. 1988).
2319. 450 N.W.2d 463 (Wis. Ct. App. 1989).
2320. 577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990).
2321. *Ciskie*, 751 P.2d at 1165.
2322. *C.V.C.*, 450 N.W.2d at 463.
2323. *Frost*, 577 A.2d at 1282.
2324. *Id.*; *see also* State v. Bednarz, 507 N.W.2d 168 (Wis. Ct. App. 1993) (holding that the trial court properly admitted expert testimony on battered woman syndrome in batterer's trial for battery to provide an explanation for the victim's recantation of her original battery complaint).
2325. State v. Gallegos, 719 P.2d 1268 (N.M. Ct. App. 1986) (admitting testimony on battered woman syndrome in manslaughter trial in which defendant killed her former husband

ted evidence of the battered woman syndrome and a self-defense instruction, but it also admitted the deceased's former wife's testimony that the deceased had subjected her to sexual and physical abuse.[2327] In *People v. Torres*,[2328] the court held that the defendant who killed her batterer could introduce testimony on the battered woman syndrome as evidence bearing substantially on her justification defense. The court concluded that testimony on the battered woman syndrome is beyond the experimental stage and meets the standard for presenta-

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and claims self-defense); People v. Torres, 488 N.Y.S.2d 358 (Sup. 1985) (holding that testimony on battered woman syndrome is admissible as a defense and meets standard for admissibility as expert scientific evidence); Bechtel v. State, 840 P.2d 1 (Okla. Crim. App. 1992) (noting that a trial court must admit expert testimony on battered woman syndrome); Commonwealth v. Dillion, 598 A.2d 963 (Pa. 1991) (holding that it was reversible error to exclude defendant's testimony of violence inflicted on her by the murder victim); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989) (holding that battered woman syndrome is a defense to a charge of homicide, and trial counsel was ineffective in failing to present expert testimony on the syndrome); McMaugh v. State, 612 A.2d 725 (R.I. 1992) (holding that post conviction relief is available based on expert testimony that the murder defendant suffered from battered woman syndrome). This approach has been supported by Congress. *See* DOMESTIC VIOLENCE IN CIVIL COURT CASES, *supra* note 23, at 118 (quoting the Attorney General's Task Force on Family Violence recommendation that courts permit expert testimony on the battered woman syndrome in order to provide the judge and jury with a clear understanding of the dynamics and complexities of family violence). *But see* People v. Gindorf, 512 N.E.2d 770 (Ill. App. Ct. 1987) (holding that while trial judge acknowledged evidence of physical abuse against defendant by her former husband in her trial for murdering her two children, it was harmless error for the judge not to take judicial notice of *ex parte* protection orders against the defendant's former husband); People v. Emick, 481 N.Y.S.2d 552 (App. Div. 1984) (holding that where defendant who murdered her batterer alleged fear of immediately being killed when he awoke, the prosecutor could show how defendant ignored offers of help during this time and evidence of available alternatives); State v. Pargeon, 582 N.E.2d 665 (Ohio Ct. App. 1991) (holding that evidence of battered woman syndrome is admissible only to establish imminent danger of death as an affirmative defense of self-defense); Commonwealth v. Miller, No. 01210, 1993 Pa. Super. LEXIS 3878 (Pa. Super. Ct. Nov. 18, 1993) (holding that expert testimony on the battered woman syndrome is relevant and admissible to show the defendant's state of mind when she killed her boyfriend, but her attorney's failure to present such evidence is not per se ineffectiveness of counsel).

2326. 719 P.2d 1268 (N.M. Ct. App. 1986).

2327. *Id.*; *see also* Register v. State, No. CR 92-179, 1993 Ala. Crim. App. LEXIS 882 (Ala. Crim. App. May 28, 1993) (holding that evidence of prior sexual conduct involving natural daughter is admissible in sexual assault case where victim was defendant's step-daughter); *In re* Pima County Juvenile Severance Action No. S-113432, No. 2 CA-JV 93-0003, 1993 Ariz. App. LEXIS 196 (Ariz. Ct. App. Sept. 9, 1993) (affirming the admittance of prior bad acts to establish a pattern of behavior). *But see* State v. Steele, 359 S.E.2d 558 (W. Va. 1987) (expert testimony about individual incidents of violence committed against the defendant by the murder victim was not admissible under the battered woman syndrome theory and the testimony of the mother of the decedent's former wife on specific incidents of violence by the decedent were too remote in time).

2328. 488 N.Y.S.2d 358 (Sup. Ct. 1985).

tion of expert scientific evidence.[2329] This same standard would allow for introduction of this evidence in civil cases. Following the lead of criminal courts who admit evidence of battered woman syndrome in cases where the standard of proof is higher and the due process rights of the batterer are highly protected, the evidence should also be admissible in any civil action for a protection order or custody.

Courts agree that expert testimony on battered woman syndrome should not be confined to criminal prosecutions of the batterer or defense cases of the abuse victim, but rather it should also play a significant role in civil protection order and custody hearings. As the Pennsylvania Court of Common Pleas noted in *Popeski v. Popeski*,[2330] "[t]he protection from abuse statute was enacted to alleviate the 'battered wife syndrome' and has been expanded to protect parties in other close relationships."[2331] Therefore, when seeking civil protection orders, particularly in cases where custody is contested, attorneys should present evidence on the effect of prolonged abuse on the petitioner. In cases where this evidence will help explain petitioner's failure to come forward sooner, or in which petitioner attempted to defend herself in one of the key incidents underlying the petition, expert testimony can be valuable in assuring that petitioner receives the protection order. Attorneys must emphasize that a court's denial of a civil protection order reinforces the senses of isolation and subordination which contribute to the battered woman syndrome.

In addition to evidence on the battered woman syndrome, courts should admit expert testimony regarding the physical and emotional trauma sustained by an abuse victim and her children as a result of ongoing physical abuse.[2332] This information is particularly valuable in determining whether joint custody or unsupervised visitation may have detrimental effects on the children. While psychological experts are very valuable and relevant to a court's decision in both criminal

2329. *Id.*; *see also* Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979) (reversing trial court's refusal to admit expert testimony on the battered woman syndrome in the murder prosecution of a battered woman); McMaugh v. State, 612 A.2d 725 (R.I. 1992) (granting a petition for post-conviction relief after petitioner sustained her affirmative defense based on the battered woman syndrome). *But see* State v. Burtzlaff, 493 N.W.2d 1 (S.D. 1992) (holding that the trial court properly refused to admit expert testimony, which went toward her self-defense claim, that defendant, convicted of killing her husband, was a battered woman).

2330. 3 Pa. D. & C.4th 200 (Pa. Ct. C.P. 1989).

2331. *Id.* at 204.

2332. Nancy K.D. Lemmon, *Custody and Visitation*, *in* DOMESTIC VIOLENCE IN CIVIL COURT CASES 216 (The Family Violence Prevention Fund ed., 1992).

and civil cases, such experts should be schooled in the dynamics of domestic violence. In *Bruscato v. Avant*,[2333] the court reversed a custody award to a batterer, in part, because the only psychologist to interview and evaluate both parties admitted that she was not trained in the dynamics of domestic violence. The Louisiana Court of Appeals concluded that absent testimony from a trained domestic violence expert, the trial court did not have enough evidence to determine the child's best interests.[2334]

B. Admissible Evidence

A wide range of categories of evidence is admissible in protection order, domestic relations, contempt, and criminal domestic violence cases. Evidence of an alleged batterer's history of abuse and prior protection orders are relevant and should be admitted to support issuance of a civil protection order. The New Jersey civil protection order statute is illustrative. It admits into evidence, in a civil protection order hearing, the batterer's history of domestic violence and the existence of a protection order in another jurisdiction.[2335] The courts in civil protection order cases have also routinely admitted evidence of past abuse[2336] and prior protection orders[2337] to support the

2333. 593 So. 2d 838 (La. Ct. App. 1992).

2334. *Id.*; *see also In re* The Appeal in Pima County Juvenile Severance Action No. S-113432, No. 2 CA-JV 93-0003, 1993 Ariz. App. LEXIS 196 (Ariz. Ct. App. Sept. 9, 1993) (affirming the admission of expert testimony presented by two social workers and a psychologist in a termination of parental rights case); State v. Borrelli, 629 A.2d 1105 (Conn. 1993) (holding that expert testimony may be offered to assist the jury in interpreting the facts in a domestic violence case; expert need not have degree in psychology or psychiatry, but an extensive educational background, work experience, and research in the area of battered woman syndrome is sufficient).

2335. N.J. STAT. ANN. § 2C:25-29 (West 1992).

2336. Boniek v. Boniek, 443 N.W.2d 196 (Minn. Ct. App. 1989) (evidence of past abuses admissible to show present intent to inflict fear of imminent physical harm, bodily injury or assault); Hall v. Hall, 408 N.W.2d 626 (Minn. Ct. App. 1987) (husband made threats about killing wife if she "jerks him around with custody" after the filing of a divorce occurred; court held that the record of verbal threats in the context of past abuse can inflict fear of imminent physical harm, bodily injury or assault and is sufficient to support issuance of a protection order); Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992) (affirming the admission prior acts of domestic violence to support issuance of a civil protection order); Steckler v. Steckler, 492 N.W.2d 76 (N.D. 1992) (holding that past abusive actions of the defendant are admissible and can assist the court in determining whether domestic violence is actual or imminent for the purposes of issuing a temporary protection order); Snyder v. Snyder, 629 A.2d 977 (Pa. Super. Ct. 1993) (upholding trial court's discretion in admitting evidence of recent prior abuse in protection order hearing to show the history and escalation of the violence); Wippel v. Wippel, No. 7230, 1992 Phila. Cty. Rptr. LEXIS (Commw. C.P.

issuance of a civil protection order.

In criminal domestic violence or homicide cases, courts have admitted physical evidence including photographs of the scene,[2338] photographs of the victims's injuries,[2339] physical evidence of the victim's injuries,[2340] a blood stained shirt,[2341] and the defendant's history of victim abuse when he raised a self-defense claim.[2342] In *People v. Torres*,[2343] the trial court admitted evidence that the defendant was laughing about the injuries he caused his wife when he was arrested for beating her about the face with his fists and a steam iron. In *Rodriguez v. State*,[2344] the court in a criminal domestic violence trial held that it was not prejudicial error for the prosecutor to refer to the victim's shaking and crying while testifying to show the victim's fear.

Criminal courts also routinely admit evidence of prior civil protection orders,[2345] prior contempts of civil protection orders,[2346]

Ct. Dec. 24, 1992) (holding that where defendant, in a protection order proceeding, put his intent at issue, evidence of his past abusive behavior is admissible to show his intention in making the threat in question); Boyle v. Boyle, 12 Pa. D. & C.3d 767 (Pa. Ct. C.P. 1979) (holding that a court can consider past incidents of abuse to add weight to the possible development of a trend culminating in the recent acts which give rise to a petition for protection).

2337. *See, e.g., Boniek*, 443 N.W.2d at 196.

2338. State v. Norton, No. 319, 1990 Tenn. Crim. App. LEXIS 453 (Tenn. Crim. App. Jul. 12, 1992) (holding that evidence of physical trauma to victim's body and photographs of the scene of the crime is admissible in a criminal trial for aggravated assault).

2339. State v. Syriani, 428 S.E.2d 118 (N.C. 1993) (holding that, in a capital murder prosecution, six photographs of murder victim taken shortly after her arrival at hospital, intubated, connected to a ventilator, and covered by hospital sheets, were properly admitted to illustrate neighbor's testimony about wounds and show the manner in which the defendant husband killed his wife); State v. Kinley, No. 2826, 1993 Ohio App. LEXIS 3272 (Ohio Ct. App. June 24, 1993) (admitting photographs of the victim's injuries in a domestic violence criminal trial); State v. Gressner, No. 87-193-111, 1988 Ohio App. LEXIS 448 (Ohio Ct. App. Feb. 3, 1988) (same).

2340. *Norton*, 1990 Tenn. Crim. App. LEXIS 453.

2341. Rodriguez v. State, 588 So. 2d 1031 (Fla. Dist. Ct. App. 1991) (holding that it was harmless error for prosecutor to display blood stained shirt to size against the defendant's frame).

2342. Garibay v. United States, No. 92-CM-1497, 1993 D.C. App. LEXIS 303 (D.C. Dec. 6, 1993).

2343. 581 N.Y.S.2d 869 (App. Div. 1992).

2344. 588 So. 2d 1031 (Fla. Dist. Ct. App. 1991).

2345. Brown v. State, 611 So. 2d 540 (Fla. Dist. Ct. App. 1992) (no discovery violation when defendant was cross-examined, in his sexual battery and attempted second-degree murder trial, concerning previous *ex parte* injunction against domestic violence); People v. Seaman, 561 N.E.2d 188 (Ill. App. Ct. 1990) (prior civil protection order admissible in criminal trial for attempted murder of the domestic violence victim); People v. Richmond, 559 N.E.2d 302 (Ill. App. Ct. 1990) (prior civil protection order admissible in trial for murder of domestic

prior domestic violence convictions,[2347] prior bad acts in criminal trials,[2348] and the batterer's history of domestic violence[2349] in criminal domestic violence and murder trials. In *People v. Richmond*,[2350] the court admitted prior acts of domestic violence in a criminal murder trial because the "[e]vidence that the defendant was

violence victim); People v. Gindorf, 512 N.E.2d 770 (Ill. App. Ct. 1987) (noting that court should take judicial notice of *ex parte* protection orders); Commonwealth v. Gil, 471 N.E.2d 30 (Mass. 1984) (holding that in a spousal murder case, trial court, which admitted evidence of prior restraining order issued against husband to show status of marital relationship and husband's motive for murder, has discretion to determine whether order was too remote in time from killing to be admissible); State v. Johnson, 381 S.E.2d 732 (S.C. Ct. App. 1989) (holding that it was harmless error for court to admit prior civil protection order into evidence in trial for murder of defendant's wife).

2346. Holt v. State, 774 P.2d 476 (Okla. Crim. App. 1989) (upholding trial court's admission of evidence pertaining to defendant's prior contempt of protection order).

2347. State v. Curtis, No. C1-92-2247, 1993 Minn. App. LEXIS 864 (Minn. Ct. App. Aug. 24, 1993) (holding that prior domestic violence conviction is admissible in assault case where the victim was the same); State v. Wendling, No. 12015, 1990 WL 197957 (Ohio Ct. App. Dec. 6, 1990); State v. McArthur, No. 53087 (Dec. 17, 1987).

2348. Mitchell v. United States, No. 91-CF-705 (D.C. App. Jul. 22, 1993) (holding that testimony of defendant's prior misconduct toward his wife was admissible to show motive in murder case where victim is third party with clear nexus to initial misconduct); State v. Davi, 504 N.W.2d 844 (S.D. 1993) (holding that trial court properly admitted evidence of prior bad acts, including physical confrontation between the decedent and defendant, in the defendant's trial for murdering his former wife).

2349. Brown v. State, 611 So. 2d 540 (Fla. Dist. Ct. App. 1992) (victim's testimony concerning rocky relationship with defendant and his past threats were admissible as relevant to show motive in committing sexual battery and attempted second degree murder); Young v. State, 348 S.E.2d 135 (Ga. Ct. App. 1986) (victim's mother was properly allowed to testify about prior incident of violence to rebut the defendant's testimony that he had never struck his wife before the episode leading to the instant charges); People v. Williams, 582 N.E.2d 1158 (Ill. App. Ct. 1991) (in criminal domestic violence trial defendant's intent to unlawfully restrain petitioner inferred from history of violence toward victim); People v. Richmond, 559 N.E.2d 302 (Ill. App. Ct. 1990) (evidence of past abuse admissible in criminal murder trial); People v. Folk, 574 N.Y.S.2d 1006 (App. Div. 1991) (in a manslaughter case, trial court properly admitted defendant's girlfriend's testimony that the defendant abused her and attempted to strangle her in the same manner as he allegedly strangled the murder victim); State v. Hanna, 378 S.E.2d 640 (W. Va. 1989) (court admitted evidence that defendant had committed acts of domestic violence against victim in the past in a domestic violence criminal trial for kidnapping and abduction with intent to defile); State v. Kinley, No. 2826, 1993 Ohio App. LEXIS 3272 (Ohio Ct. App. June 24, 1993) (testimony concerning defendant's past abuse and threats to girlfriend-victim admitted to demonstrate motive in murder trial); State v. Hill, 1991 Ohio App. LEXIS 1649 (Ohio Ct. App. Apr. 11, 1991) (in criminal domestic violence case the court admitted evidence of prior violence); State v. C.V.C., 450 N.W.2d 463 (Wis. Ct. App. 1989) (evidence concerning an incident two years prior was properly admitted for the limited purpose of showing the wife's state of mind). *But see* State v. Taylor, 1990 Ohio App. LEXIS 4749 (Ohio Ct. App. Nov. 1, 1990) (holding that the defendant was not denied a fair trial when the court admitted evidence of alleged other acts of violence by the defendant).

2350. 559 N.E.2d 302 (Ill. App. Ct. 1990).

involved in prior incidents in which the decedent suffered similar injuries was admissible to show the presence of intent and the absence of accident."[2351]

In divorce and custody cases, courts will admit photographs of an abused party's injuries,[2352] evidence of past abuse,[2353] and evidence of a party's plea in a murder trial.[2354] Courts have also admitted the testimony of other witnesses. In *Taylor v. Taylor*,[2355] the court admitted the testimony of the battered woman's mother about the past history of abuse in the parties' relationship to show the extreme cruelty in a divorce action.

In protection order contempt proceedings, courts have also addressed a number of evidentiary issues. In *Commonwealth v. Gordon*,[2356] the Supreme Court of Massachusetts held that evidence of a prior confrontation between the parties, during which the defendant called his wife abusive names, was admissible in the defendant's contempt trial. Evidence that the petitioner and her children stayed in a domestic violence shelter prior to the civil protection order violation is also admissible evidence. In *People v. Zarebski*,[2357] the appellate court held that the defendant was not denied a fair jury trial when the state questioned the petitioner as to her and her children's whereabouts at a domestic violence shelter prior to the incident that violated the protection order.

Spontaneous or excited utterances may be admitted into evidence in domestic violence criminal prosecutions and should also be admissible in civil cases. In *State v. Gibson*,[2358] where a battered woman

2351. *Id.* at 306.

2352. Taylor v. Taylor, 1989 Ohio App. LEXIS 2313 (Ohio Ct. App. June 7, 1989) (photographs of battered spouse admissible to show gross neglect and extreme cruelty in a divorce action).

2353. *Id.* (testimony of battered spouse's mother about abuse of battered spouse admissible to show gross neglect and extreme cruelty in a divorce action); Manz v. Manz, 805 S.W.2d 183 (Mo. Ct. App. 1990) (judicial notice could be taken of prior adult abuse proceedings in an action for divorce); Nancy R. v. Randolph W., 356 S.E.2d 464 (W. Va. 1987) (admitting evidence of spouse abuse during six year marriage in a custody hearing). *But see* F.T. v. State, 862 P.2d 857 (Alaska 1993) (court may not take judicial notice of protection order as evidence of father's history of abuse in custody case where no testimony or orders were actually entered into evidence).

2354. *Nancy R.*, 356 S.E.2d at 464 (evidence of father's plea in murder trial to first degree murder of child's mother is admissible in a custody hearing).

2355. 1989 Ohio App. LEXIS 2313 (Ohio Ct. App. June 7, 1989).

2356. 553 N.E.2d 915 (Mass. 1990).

2357. 542 N.E.2d 445 (Ill. App. Ct. 1989).

2358. 384 S.E.2d 358 (W. Va. 1989).

met her initial burden of producing evidence of self-defense when she killed her husband, the state could introduce spontaneous statements which reflect on her motive to overcome her self-defense claim.[2359]

In addition to expert witnesses, other witnesses may also testify in criminal domestic violence and civil protection order trials.[2360] In *People v. Woodson*,[2361] a domestic violence prosecution for the murder of the abuse victim and her daughter, the court held that the trial judge properly admitted the testimony of the victim's sisters. Similarly, in *Young v. State*,[2362] the court admitted the deceased victim's mother's testimony that the defendant had battered the victim in the past, had threatened the mother and victim with a straight razor, and that the defendant's child now suffers from a nervous condition after witnessing the brutal assault on her mother. In the same case, the court also admitted testimony by the victim's cousins regarding the defendant's prior acts of violence and testimony by the defendant's child, who witnessed the violent assault at issue.[2363] In *Snyder v. Snyder*,[2364] the court issued a protection order based on evidence that included the testimony of the victim's mother and pastor concerning the victim's injuries from the abuse. Courts generally

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2359. *But see* State v. Ortiz, 845 P.2d 547 (Haw. 1993) (holding that wife's statement that husband struck her was not an admissible "excited utterance" as it was made more than twenty minutes after alleged incident so it was not reasonably contemporaneous with startling event); State v. Baker, 822 P.2d 519 (Haw. 1991) (holding that statement made by an abused family member as a result of police interrogation was not admissible as an excited utterance where the statement was not reasonably contemporaneous with the alleged abusive incident to be either proximately caused by the event or spontaneous); State v. Walker, 489 A.2d 728 (N.J. Super. Ct. App. Div. 1985) (holding that, in a criminal manslaughter trial where the defendant killed an abuse victim, the victim's statement, "Don't hit me John," made by the victim weeks after the attack but shortly before her death, was not admissible as a spontaneous utterance because the court could not determine if the victim was reliving the assault at the time she made the statement).

2360. Courts should take special care to protect all witnesses who testify as to a defendant's violent behavior. As a recent appellate decision in California notes,

> [a]s our society becomes increasingly violent in its daily human interactions, more and more people are called upon to be witnesses in the prosecution of those causing the violence. Yet, as the number of these potential witnesses grows, so also does the likelihood that they, or their families, will be subjected to violence by the very criminal defendants against whom they will give testimony.

Wallace v. City of Los Angeles, 16 Cal. Rptr. 2d 113 (Ct. App. 1993).

2361. 581 N.E.2d 320 (Ill. App. Ct. 1991).

2362. 348 S.E.2d 135 (Ga. Ct. App. 1986).

2363. For a discussion of creative ways to use child witnesses or to avoid having to make children testify in domestic violence cases, see *supra* notes 1981-88 and accompanying text; *see also infra* notes 2392-97 and accompanying text.

2364. 629 A.2d 977 (Pa. Super. Ct. 1993).

admit children's testimony in civil domestic relations cases[2365] and in criminal prosecutions.[2366]

A variety of witnesses may testify at civil protection order hearings. The District of Columbia's domestic violence statute provides that the court may secure the petitioner's or the respondent's family as witnesses by providing a notice of hearing.[2367] West Virginia will allow a witness to testify unless there is a finding of disruptiveness or a court rule prohibits it.[2368] Courts will also admit expert testimony. In *Cooke v. Naylor*,[2369] the court issued a civil protection order on behalf of a minor child against an allegedly sexually abusive father based, in part, on expert testimony as to the child's physical and psychological state. The court ruled that the evidence was well grounded in established authority and sufficiently reliable.[2370] Similarly, in *State v. Harper*,[2371] the court issued a civil protection order based on a physician's testimony regarding the severity of the petitioner's injuries.

C. *Inadmissible Evidence*

Several categories of evidence are often inadmissible in criminal and civil domestic violence cases.[2372] Courts have been reluctant to

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2365. *Ex parte* Harris, 461 So. 2d 1332 (Ala. 1984) (holding that it was reversible error to disallow children's testimony in divorce case); Jarman v. Jarman, 540 So. 2d 444 (La. Ct. App. 1989) (citing with approval the daughter's testimony in divorce proceeding based on cruelty); *In re* Luz P., 595 N.Y.S.2d 541 (App. Div. 1993) (child diagnosed as autistic and classified as retarded allowed to testify as to sexual abuse by her parents in a child protective proceeding against her parents); Desmond v. Desmond, 509 N.Y.S.2d 979 (Fam. Ct. 1986) (approving the use of a park to lesson the emotional distress of testifying for children in domestic violence custody case); Jethrow v. Jethrow, 571 So. 2d 270 (Miss. 1990) (child's testimony admitted in divorce case where cruel and inhumane treatment was the ground for divorce); Kreutzer v. Kreutzer, 359 P.2d 536 (Or. 1961) (child's testimony admitted in custody modification case); Nichols v. Fleischman, 677 P.2d 731 (Or. Ct. App. 1984) (child's testimony admitted in divorce case where cruel and inhumane treatment was the ground for divorce).

2366. State v. Paolella, 561 A.2d 111 (Conn. 1989) (child competent to testify against father in kidnapping and assault case involving mother); State v. Syriani, 428 S.E.2d 118 (N.C. 1993) (children's testimony regarding defendant's specific instances of prior misconduct toward them and their mother was properly admitted to show motive, opportunity, intent, and preparation in absence of mistake or accident in trial in which defendant was found guilty of first degree murder of his wife).

2367. D.C. CODE ANN. § 16-1004(b) (1992).

2368. W. VA. CODE § 48-2A-5(c) (1992).

2369. 573 A.2d 376 (Me. 1990).

2370. *Id.* at 378.

2371. 761 P.2d 570 (Utah Ct. App. 1988).

2372. *See, e.g.*, Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992) (holding

admit evidence of a party's unsuccessful civil protection order petition to weigh against granting custody to that party in a divorce proceeding. In *Campbell v. Campbell*,[2373] the Supreme Judicial Court of Maine held that a trial court awarding parental rights in a divorce case may consider one parent's unsuccessful petition for a protection order against the other only if the court finds by clear and convincing evidence that (1) the parent willfully misused the protection order process in order to gain a tactical advantage in the divorce proceeding, and (2) in the particular circumstances, the willful misuse tends to show that the acting parent will have a lessened ability and willingness to work with the other parent in sharing joint responsibilities for the children.[2374] The court noted that the heightened standard of clear and convincing evidence was required to prevent a chilling effect on the protection order process, and that a trial court must carefully weigh the public interest served by protection orders in preventing domestic violence against the private interest in the admission of relevant evidence in a parental rights determination.[2375] Ultimately, the court warned that a trial court should arrive at its decision in a manner that does the least damage to the strong public interest in an accessible and expeditious protection order process.[2376]

A number of state statutes protect confidential communications between an abuse victim and her domestic violence counselor from forced disclosure over the victim's claim of privilege.[2377] In *Eichenberger v. Eichenberger*,[2378] the Ohio Appeals Court held that there was no prejudice when, in a contempt proceeding, the trial judge permitted the petitioner to invoke a confidentiality privilege and thereby prevent the parties' marriage counselor from testifying about the petitioner's mental state. The court explained that where the peti-

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that in a civil protection order case, an entry in a diary the wife's lawyer directed her to keep, fell within the work product doctrine and did not have to be produced to her husband).

2373. 604 A.2d 33 (Me. 1992).

2374. *Id.* at 34.

2375. *Id.* at 37.

2376. *Id.*; *see also* State v. Knotts, No. 8-93-8, 1993 Ohio App. LEXIS 5475 (Ohio Ct. App. Oct. 19, 1993) (holding that the trial court did not abuse its discretion by limiting the number of questions directed toward the domestic violence victim about her marijuana test).

2377. *See, e.g.*, CAL. EVID. CODE § 1037 (West 1992); CONN. GEN. STAT. ANN. § 46b-38c (1992); FLA. STAT. ANN. § 415.608 (West 1992); 40 ILCS 2312-27 (Smith-Hurd 1992); IOWA CODE ANN. § 236A.1 (West 1992); MICH. COMP. LAWS ANN. § 27A-2157 (West 1992); N.H. REV. STAT. ANN. § 173-C:1, 2 (1992); N.J. STAT. ANN. § 2A:84A-22.15 (West 1992); N.D. CENT. CODE § 14-07.1 (1992); 23 PA. CONS. STAT. § 6102 (1992); WIS. STAT. ANN. § 70.123.075 (West 1992); WYO. STAT. § 1-12-116 (1992).

2378. 613 N.E.2d 678 (Ohio Ct. App. 1992).

tioner does not waive the confidentiality present in such relationships, the privilege must be affirmed absent demonstrated prejudice.[2379] The court acknowledged the fact that the problems of domestic abuse arise from the batterer and are not related to the relationship, marital or otherwise, between the batterer and the victim.[2380] In *State v. Kilponen*,[2381] the court of appeals held that the marital privilege in the statute, which governed the testimony by a spouse in a criminal prosecution, did not apply to a case in which there was evidence that the defendant intended to commit a violent crime against his wife.[2382]

Courts have limited the context in which victim impact statements may be used in domestic violence cases. In *Buschauer v. State*,[2383] the court held that a victim impact statement given by the defendant's mother-in-law during the defendant's manslaughter trial violated due process where the defendant received no notice, the

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2379. *Id.* at 681.

2380. *Id.*; *see also In re* Marriage of Lambaer, 558 N.E.2d 388 (Ill. App. Ct. 1990) (finding that absent a waiver of privilege, the trial court improperly ordered deposition of mother's psychiatrist and release of hospital records). Several criminal cases have addressed this issue. *See* Lovett v. The Super. Ct. of Fresno County, 250 Cal. Rptr. 25 (Ct. App. 1988) (holding that, in a rape trial, the communication between the rape victim and the sexual assault counselor was privileged where the defendant failed to establish good cause for discovery of that information or show that his constitutional right of confrontation overrode the privilege); State v. Lizotte, 517 A.2d 610 (Conn. 1986) (holding that the communications between the victim and the sexual assault counselor were privileged because the act was not retroactive); State v. Magnano, 528 A.2d 760 (Conn. 1987) (holding that, in a battered woman's murder trial, it was harmless error for the trial court to admit privileged communications between the defendant and battered woman's counselor since testimony by other witnesses clearly established occurrence of domestic violence); State v. J.G., 619 A.2d 232 (N.J. Super. App. Div. 1993) (concluding that the victim-counselor privilege extends not only to victims of violent crime but also to indirect victims such as the victim's mother; privilege is absolute and communications between victim and counselor should not be examined by judge in camera); Commonwealth v. Wilson, 602 A.2d 1290 (Pa. 1992) (holding that, in rape trial, the rape victim's records kept at a rape crisis center where she sought counseling are protected against discovery).

2381. 737 P.2d 1024 (Wash. Ct. App. 1987).

2382. *See also* People v. Scull, 340 N.E.2d 466 (N.Y. 1975) (holding that the spousal privilege relates to testimony, not to communications between spouses occurring in a non-testimonial setting); People v. Kemp, 399 N.Y.S.2d 879 (App. Div. 1977) (applying *Scull* and finding that the marital privilege did not apply in a suppression hearing or to wife's disclosure to police of physical evidence when police responded to a domestic violence call, even though wife could be barred from testifying at trial concerning the privileged communications). *But see* State v. Tripp, 795 P.2d 280 (Haw. 1990) (while no absolute disclosure privilege attached to welfare benefits records, the court, after examining them in camera, refused to admit them into evidence to attack a domestic violence victim's credibility where she claimed that she was injured by the defendant and not by an accidental fall).

2383. 804 P.2d 1046 (Nev. 1990).

statement was not under oath, and there was no opportunity for cross-examination.

D. *Sufficient Evidence*

Case law also addresses the sufficiency of evidence in domestic relations cases[2384] and criminal domestic violence prosecutions. In *People v. Williams*,[2385] a criminal prosecution, the court held that a former wife's testimony that her former husband approached her on the street and punched and kicked her was sufficient to find him guilty of assault. In *Young v. State*,[2386] the court held that a police officer's testimony regarding the defendant's oral statement following the violent assault on his wife, the deceased victim's mother's and cousin's testimony as to the defendant's prior violence, and the parties' child's testimony as to the violence at issue was sufficient to find the defendant guilty of aggravated assault beyond a reasonable doubt.[2387] In *State v. Amos*,[2388] the court held that the petitioner's testimony that she felt pain when the respondent kicked her was sufficient, without evidence of an outward physical manifestation, to establish the "physical harm" needed to sustain a domestic violence conviction.[2389]

Criminal domestic violence prosecutions also provide insight. The court of appeals in *State v. Gallegos*[2390] addressed the sufficiency of evidence needed to warrant submitting the abused party's self-defense

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2384. *See, e.g.*, Anderson v. Anderson, 600 S.W.2d 438 (Ark. Ct. App. 1980) (holding that a wife's allegations that during the marriage her husband scratched her television set, whipped her as a religious ritual, and poured water on her hair was insufficient in a divorce action and must be corroborated by another witness); Eichenberger v. Eichenberger, No. 93AP-840, 1993 Ohio App. LEXIS 5282 (Ohio Ct. App. Nov. 2, 1993) (holding that petitioner's testimony that the respondent threatened to kill her, and that she feared he would carry out the threat was sufficient to issue a protection order).

2385. 248 N.E.2d 8 (N.Y. 1969).

2386. 348 S.E.2d 135 (Ga. Ct. App. 1986).

2387. *Id.* at 136; *see also In re* Daniel "R." v. Noel "R.", 600 N.Y.S.2d 314 (App. Div. 1993) (noting that a child's out of court statements may be adequately corroborated by expert testimony); *In re* Branden "UU", 597 N.Y.S.2d 525 (App. Div. 1993) (same); Jackson v. Jackson, Nos. 64284, 64873, 1993 Ohio App. LEXIS 5992 (Ohio Ct. App. Dec. 16, 1993) (noting that the court is not required to compel a child's testimony in a domestic violence case).

2388. No. 12-088, 1988 Ohio App. LEXIS 78 (Ohio Ct. App. Jan. 15, 1988).

2389. *See also* Betts v. Floyd, No. CX-91-2155, 1992 Minn. App. LEXIS 257 (Minn. Ct. App. Mar. 12, 1992) (upholding civil protection order based on petitioner's testimony, despite respondent's allegation that she was not credible because she did not report the abuse to the police when they were called).

2390. 719 P.2d 1268 (N.M. Ct. App. 1986).

claim to the jury when she killed her batterer. The court held that evidence regarding the events of the day when the abuse occurred was sufficient, given the history of domestic violence, to warrant submission of the defendant's tendered self-defense instruction to the jury.[2391]

E. Need for Victim's Testimony at Criminal Domestic Violence Trials

Another issue courts have addressed is the need for the victim's testimony at criminal domestic violence trials. Domestic violence victims may have well-founded fears and reasons for not wanting to testify against their batterers. Progressive, successful domestic violence prosecutors no longer require victim cooperation in order for the state to bring charges against batterers.[2392] Therefore, courts should not dismiss cases based solely on a victim's refusal to testify if other evidence is available.[2393]

In *Commonwealth v. Hatfield*,[2394] the wife called her employer to ask for help after her husband had beaten her and left her with a bloody nose, a black eye, and multiple contusions. The husband was

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2391. *Id.* at 251.

2392. *See, e.g.*, DOMESTIC VIOLENCE PROSECUTION PROTOCOL, OFFICE OF THE CITY ATTORNEY CITY OF SAN DIEGO DOMESTIC VIOLENCE UNIT 9-10 (Apr. 1993).

> Criminal charges should be filed in domestic violence cases, irrespective of the desires of a victim, where the evidence presented satisfies the elements of the crime, includes photographed visible injuries or documented medical treatment, and there is independent corroboration sufficient to prevail on a motion in a jury trial of the matter. Independent corroboration may include:
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> 1. Injuries observed by a person other than the victim;
> 2. A medical report that indicates injuries;
> 3. Witnesses who saw the actual crime take place;
> 4. Witnesses who heard noises indicating that a domestic violence incident was taking place, i.e., screams, furniture being thrown, etc.;
> 5. A 911 tape with the victim/witness/suspect's statements;
> 6. Physical evidence present, i.e., weapon, broken furniture, disarray, torn clothes;
> 7. Admission by the defendant.

Id.; *see also* MODEL CODE, *supra* note 15, § 212.

2393. *See* State v. Johnson, Nos. C4-92-2517, C6-92-2518, 1993 Minn App. LEXIS 619 (Minn. Ct. App. June 15, 1993) (holding that a court should not automatically dismiss domestic violence case where victim does not wish to pursue prosecution). *But see* People v. Siravo, 21 Cal. Rptr. 2d 350 (Ct. App. 1993) (holding that, in a sexual assault case, defendant's wife could be compelled to testify against him where victim was wife's roommate, despite claim of marital privilege).

2394. 593 A.2d 1275 (Pa. Super. Ct. 1991).

charged but the wife refused to provide evidence against him. The trial court held that the interests of justice would best be served by nullifying the prosecution.[2395] This unfortunate decision could have been avoided if the *Hatfield* court addressed the possibility that other witnesses, such as an examining doctor or her employer, could provide sufficient evidence to support a conviction. Following this more enlightened approach, in *Watkins v. State*,[2396] the Georgia Court of Appeals held that the trial court properly found that the defendant beat the petitioner with a chair, threatened her with a gun, and stabbed her with scissors, even though the victim recanted earlier statements at trial. The trial court based its findings on a police officer's testimony regarding the victim's statements at the time of the assault, the presence of fresh puncture wounds, the presence of weapons in the house, and the general disarray of the scene. The court specifically held that the petitioner's statements to the police at the time of the respondent's arrest are substantive evidence of the defendant's guilt in a criminal trial.[2397]

CONCLUSION

In order to reduce the devastating social cost of domestic violence, every part of our society, including the justice system, the health care system, schools, churches, and neighborhood groups, must play a strong role in stopping and condemning violence between intimates. The civil and criminal courts play a critical role in framing society's response to family violence. These courts are in a unique position to provide victims the necessary protection and strongly convey the message that violence in the home will not be tolerated. The existence of strong legislative remedies and punishments, combined with the manner in which the judiciary handles domestic violence cases of persons seeking relief pursuant to these laws, will ultimately determine the effectiveness of the justice system in ending domestic violence.

Civil domestic violence statutes and case law have been develop-

2395. *Id.* at 1276.

2396. 360 S.E.2d 47 (Ga. Ct. App. 1987).

2397. *Id.* at 48; *see also* State v. Borrelli, 629 A.2d 1105 (Conn. 1993) (holding that the victim's prior inconsistent statement was admissible); Dawson v. Commonwealth, No. 92-CA-001840-DG, 1993 Ky. App. LEXIS 159 (Ky. Ct. App. Dec. 3, 1993) (concluding that, where the victim declined to testify, the police officer's testimony as to the victim's statement coupled with the police report were sufficient to uphold the conviction).

ing at an astonishing pace. This is true despite the fact that the dynamics of domestic violence often leads battered women to return to their batterers rather than appeal an unfavorable decision. However, as more and more victims of family violence come forward and are offered better sources of support from domestic violence advocates and attorneys, greater numbers have been willing to pursue appeals. In our overview of national case law, we found courts appropriately addressing many issues that arise every day in civil protection order, criminal, custody, and divorce courtrooms across the country. There is much that advocates and courts can learn from decisions being issued in other jurisdictions. A central goal of this Article has been to create a resource that makes domestic violence decisions readily accessible to all, so that judges and attorneys facing important questions for the first time can learn from the experiences of courts in other jurisdictions.

In addition, there is a critical need for continued expansion and refinement of domestic violence statutes. No jurisdiction has yet designed the perfect model, although there are innovative pieces of legislation in many jurisdictions. The research and analysis in this Article should enhance the deliberations of those contemplating legislative reform and assist creative advocates seeking to obtain effective, comprehensive relief for domestic violence victims in their jurisdictions.