**SYMPOSIUM ON DOMESTIC VIOLENCE: ARTICLE: PROVIDING LEGAL PROTECTION FOR BATTERED WOMEN: AN ANALYSIS OF STATE STATUTES AND CASE LAW**

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The authors wish to express their gratitude to their research assistants, Mary Ellen Droll and Jennifer Ferrante, without whose tireless efforts this Article never could have been completed, and to the staff of the Hofstra Law Review for their diligence in editing. All errors are, of course, our own.

**SUMMARY:**

... Domestic violence occurs among all races and socioeconomic groups. ... 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. ... The Ohio criminal domestic violence statute and civil protection order statute contain identical definitions of "person living as a spouse." ... 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. ... Criminal domestic violence cases also illustrate criminal acts which could warrant and support issuance of a civil protection order. ... The Minnesota and Texas statutes specify that a prior civil protection order prevails over a subsequent domestic relations case on issues of domestic violence. 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. ... 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. ...

**TEXT:**

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Introduction

Domestic violence occurs among all races and socioeconomic groups. n1 An estimated four million American women are battered

[*808] each year by their husbands or partners. n2 Approximately ninety-five percent of all adult domestic violence victims are women. n3 An estimated fifty percent of all American women are battered n4 at some time in their lives. n5 According to one national survey, violence will

[*809] occur at least once in twenty-eight percent of all marriages. n6 Among intact couples, one of every eight
husbands carries out one or more acts of physical aggression against his wife each year. n7 Repeated severe violence occurs in one out of every fourteen marriages. n8 In a survey of American college students, twenty-one to thirty percent reported at least one occurrence of physical assault with a dating partner. n9 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. n10 Therefore, some have estimated that the number of women battered each year is closer to six million. n11

Domestic violence is the single largest cause of injury to women in the United States—more significant than auto accidents, rapes, and muggings combined. n12 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.” n13 According to the Attorney General’s [*810] Task Force on Family Violence, “the 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.” n14

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. n15 In addition, an unprecedented number of appellate decisions involving domestic violence have been reported during this same period.

Domestic violence advocates, n16 judges, n17 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. n18 We examine recent developments and trends, and highlight innovations. We include recommenda [*811] 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. n19 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. n20 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 n21—in short, as a violent crime as serious as any other assault [*812] and battery. n22 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. n23

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. n24 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. n25 However, the numbers
of attorneys
[*813] 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. n26

Protection orders, when properly drafted and enforced, are effective in eliminating or reducing domestic abuse. n27 The effectiveness of protection orders may, however, "depend on whether they provide the requested relief in sufficient detail." n28 The effectiveness of protection orders is also "determined largely by whether they are consistently enforced." n29 Unfortunately, widespread enforcement of civil protection orders is lacking. n30 This severe problem can be reduced by increasing judicial and lawyer education, and by increasing representation of petitioners in civil protection order cases. n31 Studies demonstrate that offering protection and services to battered women significantly reduces the number killed by their batterers, n32 while at the same time reducing the numbers of women who find no other way to stop the violence but to kill their batterers. n33

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 n34 or may enter into mediated agreements that are dangerous to the client because of the history of abuse. n35 Few family lawyers have been specifically trained on domestic violence and the use, effectiveness, and enforcement of civil protection orders. n36 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 n37

1. Spouses and Former Spouses

The overwhelming trend in both state statutes and case law is to grant protection orders against former spouses. n38 Forty-six states, as well as the District of Columbia and Puerto Rico, embrace this approach n39 Moreover, New York, Pennsylvania, Maryland, and Ohio n40 have statutorily overruled cases that denied protection orders against former spouses. n41 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. n42 Violence is often triggered by the anger aroused by threatened loss and excessive feelings of dependency—making the period during and after separation an extremely dangerous time. n43 Women who are divorced or separated are at higher risk of assault than married women. n44 The risk of assault is greatest when a woman leaves or threatens to leave an abusive relationship. n45 Nonfatal violence often escalates once a battered woman attempts to end the relationship. n46 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. n47 Another twenty-nine percent of women were murdered during the separation or divorce process. n48 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. n49 Case law [*815] 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, n50 a step-sibling, n51 a parent, n52 a step-parent, n53 and an in-law. n54

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Data from the Bureau of Justice Statistics supports this approach. n55 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 n56 than were battered by current spouses. n57 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. n58

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 both economic and emotional needs. n59 This is particularly true for various racial and ethnic communities in the United States who consistently embrace the extended family model. n60 For example, the Latino community, which is the fastest growing segment of the American population, relies heavily on extended family relationships. n61

The Supreme Court has recognized the significant role extended families play in American life. In Moore v. East Cleveland, n62 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. n63 The Court held that the Constitution protects this larger conception of family, n64 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. n65

Justices Brennan and Marshall, in their powerful concurrence, focused on the "cultural myopia" of the arbitrary line drawn by the zoning ordinance. n66 These Justices concluded that the ordinance displayed a "depressing insensitivity toward the economic and emotional needs of a very large part of our society.” n67 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. n68 The extended family remains a vital and indeed growing part of American society which the state may not arbitrarily restrict. n69

Both the majority opinion and the concurrence in Moore demonstrate 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. n70 Moreover, protection orders may be issued to children as household members related by blood or marriage. n71 In several states, emancipated minors may petition for their own protection order. n72 Furthermore, most courts issue civil protection orders based on petitions filed by parents or other adults on behalf of children. n73 A protection order for an abused mother may also include protection for her children, who are not abused themselves. n74 The District of Columbia Court of Appeals' reasoning in Cruz-Foster v. Foster n75 would support the granting of protection orders to children in such cases, even where no recent physical or sexual abuse exists. n76 The Cruz-Foster decision requires court consideration of the "entire mosaic" of past abuse to adequately determine the need for protection. n77

In Missouri, children may receive a civil protection order separate from that issued to the petitioning parent. n78 Case law also supports the issuance of civil protection orders based on sexual abuse of minor children. n79 In S. v. S., n80 the court issued a civil protection order to a minor sister against her minor brother who raped and impregnated her. n81 Some courts have, however, limited the forum in which civil protection orders issued against minors may be enforced. In Diehl v. n82 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. n84 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. n85 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. n86 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, 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.

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, and for harassment of an adult child. Courts have also issued civil protection orders to an adult child who was injured as a result of an attempted assault by her step-father on her mother.

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., 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.

4. Parents of a Child in Common

Unmarried parties who share a child in common are frequently eligible for protection orders. Forty-one states, the District of Columbia, and Puerto Rico issue civil protection orders between parents of a child in common. 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, the court held that a protection order may issue on behalf of 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 two children in common.

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. In other states, case law addresses this concern. In Lydia B. v. Pedro G., 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. 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. 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.

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 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. In Gloria C. v. William C., 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. The child's birth was not a condition precedent to the order's enforcement. 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.

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, and Gina C. v. Stephen F., the courts, through very strict statutory interpretation, reluctantly denied standing to obtain civil protection orders to petitioners who were pregnant with the respondents' children. The courts concluded that an unborn child was not a child within the meaning of the statutes. However, in each case the court recognized that this interpretation left a dangerous gap in the statute. 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.

In Woodin specifically noted its concern about the continuing relationship between the parents of an unborn child in common, which leads to continuing risk. The Woodin court concluded that the legislature may wish to extend protection to the petitioner. Moreover, the court in Gina C. specifically called on the legislature to remedy the statutory oversight and confer civil protection order protection to a pregnant woman.
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. Data gathered on pregnancy and battering reveal that pregnant women face significant and increased risk of physical abuse. Recent research indicates that 37% of all obstetrical patients across race, class, and educational lines are physically abused while pregnant. Abuse often begins or escalates during pregnancy. Among battered women, 17% have been physically abused during pregnancy, with 60% of those women reporting more than one incident. 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. Often the worst abuse can be associated with pregnancy. Battering during pregnancy increases the risk of miscarriage and low-birth weight births. 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.

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 Rico. 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. 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. In 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.

Weighing various factors, courts have concluded that maintenance of a separate residence does not bar a finding of "residing together." In Yankoskie, the court held that the parties, a boyfriend and girlfriend, did live as spouses even though they maintained separate residences. 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. In Sapon v. Fisher, the court found a 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. In State v. Tripp, 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. In a criminal domestic violence case, People v. Holifield, 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.

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, and in criminal prosecutions, even absent a finding of any sexual relationship. In People v. Ballard, the court held that for purposes of a criminal felony cohabitant abuse statute, it need not find a sexual relationship to establish jurisdiction. The court noted that "cohabitation means simply to live or dwell together in the same habitation; evidence of lack of sexual relations is irrelevant."
Courts should issue civil protection orders even where the defendant will be incarcerated for the duration of the protection order. In Maldonado v. Maldonado, n144 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. n145 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. n146 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, n147 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. n148 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." n149

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. n150 Other jurisdictions offer [*833] this relief by case law and statutory interpretation by trial courts. In Bryant v. Bryant, n151 the New Jersey Supreme Court expressly interpreted their amended statute as applying to homosexual relationships which turn violent. n152

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, n153 the appellate court vacated a trial court's decision to dismiss a domestic violence prose [*834] cution where one woman bit the hand of another woman with whom she was "living as a spouse," remanding the case. n154 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. n155 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. n156 The Ohio criminal domestic violence statute and civil protection order statute contain identical definitions of "person living as a spouse." n157 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, n158 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. n159 The lower court granted the protection order after an analysis of the parties' living arrangements. n160 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. n161

The policy considerations which compel the state to act to protect victims of domestic violence in heterosexual relationships are equally applicable to homosexual relationships. n162 Domestic violence exists in homosexual as well as heterosexual relationships. n163 The [*835] 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. n164 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. n165 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. n166 Significant separation violence during and closely following the end of the relationship also exists in abusive homosexual and lesbian relationships. n167 Finally, homosexual and lesbian victims, like their heterosexual counterparts, also typically make several attempts before they are successful and finally leave their batterer. n168 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. n169 Courts in Wisconsin, Pennsylvania, and Oklahoma support this innovative approach of issuing civil protection orders based on a dating relationship. n170

Social science research that documents violence in dating relationships supports offering broader civil protection order coverage to dating partners and adolescents. n171 A study of teen dating violence found that roughly one in four students experienced actual violence, either as victims or as perpetrators. n172 A 1985 survey at a midwest university found higher rates of violence in dating relationships than between married couples. n173 Another study reported that 32% of domestic violence offenders are boyfriends or ex-boyfriends. n174

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. n175 California case law also supports this approach. n176 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. n177 By 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. n178 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. n179 The stalking and harassment may continue for months, or even years, after separation. n180 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. n181

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 example, Florida and Oklahoma protect the present spouse of the batterer's ex-spouse. n182 Forty states and the District of Columbia protect persons who formerly lived as spouses. n183 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. n184 To ensure a safe living environment for women whom shelters cannot accommodate, n185 these states grant civil protection order coverage to unrelated household members. n186 Four states limit this protection to unrelated household members who are present or past sexual partners. n187 Thirty-five states extend civil protection order coverage to former unrelated household members. n188 The New Mexico statute provides for issuance of a civil protection order to a person with whom the petitioner has a continuing relationship. n189 and North Dakota offers protection to a member of any "sufficient" relationship with the abuser. n190 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. n191 Finally, Illinois recognizes the increased vulnerability of persons with disabilities, and therefore explicitly extends coverage to the
assistants of dependent adults. n192

In Sandoval v. Mendez, n193 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. n194 She filed for a civil protection order against the boyfriend of her boyfriend's cousin. n195 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 [*$842] tionship. n196 It concluded that the trial court's failure to consider whether an intimate relationship required a sexual relationship was harmless error. n197 The strong dissent, however, argued that the majority ignored the issue of law of what constitutes an "intimate relationship." n198 The dissent argued that the trial court had indeed concluded that an intimate relationship within the meaning of the statute requires a sexual relationship. n199 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. n200

The Sandoval majority failed to recognize the danger present in household relationships which are neither familial or sexual in nature. n201 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. n202 Extending the Supreme Court's ruling in Moore v. East Cleveland n203 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 [*843] order of protection. n204 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. n205 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. n206 Several states al [*844] low an emancipated minor to file on his or her own behalf, n207 and most state courts allow a parent or other adult to file for a civil protection order on behalf of a minor child. n208

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. n209 Of those few jurisdictions that originally required a government attorney to file the petitioners' protection orders, most have now adopted a pro se process. n210 Although [*845] 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 "pro 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." n211

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. n212 Ideally, the country needs more attorneys who are able and willing to act as battered women's advocates. n213

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. [*846] 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. n214 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. n215

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. n216 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. n217 This statute expands upon the Ohio appellate court's finding in Carney v. Pankey n218 that the mother of an adult victim can petition for a civil protection order on the victim's behalf. n219

Most states, either by case law, statute, n220 or practice, routinely permit adult household members or other adults to file for a protection order on behalf of a minor child or incompetent. n221 Courts have [*847] allowed both custodial and noncustodial parents to file for civil protection orders on behalf of their children against the other parent, n222 the boyfriend of the other parent, n223 step-siblings or half-siblings, n224 or the child's paternal aunts. n225 Statutes also authorize government attorneys to file for civil protection orders on behalf of domestic violence victims. n226

C. Conduct Sufficient to Support Issuance of a Civil Protection Order n227

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, n228 the Minnesota Court of Appeals discussed generally the broad range of acts which may warrant a civil protection order. n229 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. n230 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. n231 A verbal threat can be sufficient to inflict fear of imminent physical harm. n232 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. n233 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. n234 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. n235 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. n236 [*849]

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, n237 including physical abuse of the petitioner or a child, n238 criminal trespass, n239 kidnapping, n240 [*850] burglary, n241 malicious mischief, n242 interference with child custody, n243 and reckless endangerment. n244

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. n245 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. n246 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. n247 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. n248 Epidemiologic surveys found that abuse ranged from being slapped, punched, kicked, or thrown bodily to being scalded, choked, smothered, or bitten. n249 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. The injury rate is only 54% for victims of stranger violence. 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, breaking an infant's leg, shoving an infant's face against a door, yanking the petitioner by the hair, pulling out the petitioner's hair, throwing the petitioner on the floor, breaking a child's head, legs, and buttocks, physically restraining the petitioner, twisting the petitioner's wrist, bouncing the petitioner's head on the floor, choking the petitioner, slapping the petitioner on the face and neck, attempting to push the petitioner's face in the toilet, throwing cold water on the petitioner, yanking at the petitioner's pubic hair, punching a pregnant petitioner in the stomach, and ordering trained dogs to attack the petitioner.

Other criminal acts which are grounds to issue a civil protection order include: firing shots into the petitioner's home, assaulting the petitioner's friend, forcibly or unlawfully entering the petitioner's home, breaking down petitioner's door. Several courts have specifically issued civil protection orders based on criminal acts involving a motor vehicle. These have included striking the petitioner with a car, pursuing the petitioner in a high speed chase, attempting to pull the petitioner from her car, and driving away quickly while the petitioner had her hands on the car, causing her to be thrown into a tree. In Christenson v. Christenson, 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. The court liberally construed the domestic violence act, noting that it served a protective, rather than punitive, function. 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.

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, the court issued a civil protection order where a step-father physically injured his step-daughter during an attempt to injure her mother. The court noted that:

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

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.

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, stabbed the victim, punched the victim in the face resulting in memory loss, sodomized the victim, held the victim outside of a window, forced the victim to urinate on the floor, assaulted the victim, forced the victim onto a dirt road, pulled out a knife, and ordered her to strip.

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 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. In five additional states, the rape of a spouse or a cohabitant is a violation of the criminal code, and thus is a criminal act which supports the issuance of a civil protection order. Only seven states define a rape or sexual assault sufficient to issue...
a civil protection order as narrowly as they do criminal rape. n299

Twenty-nine states and the District of Columbia have statutes authorizing civil protection orders based on sexual abuse of a child. n300 Courts have also issued civil protection orders based on sexual abuse of the petitioner's child. n301 Defendants have been convicted for sexual assault of their wives. n302 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. n303 Numerous studies confirm that between 33% and 46% of battered women are raped and/or sexually assaulted by their abusive partners. n304 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. n305 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 other abused women. n306 Approximately 75% of battered women who killed or tried to kill their abusers had been raped by them. n307 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. n308 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, n309 locking the petitioner out of the marital home and threatening to physically remove her, n310 physically restraining petitioner from leaving her home or calling the police, n311 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. n312 An Illinois court criminally convicted a man for unlawful restraint of his wife, based on a violation of an existing order of protection. n313

Indeed, many states' statutes will specifically issue protection orders based on false imprisonment. n314 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. n315

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. n316 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, n317 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. n318 Many battered women's lives are threatened. n319 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. n320 Threats are often effectively used by batterers to secure the return of battered women to abusive homes. n321

Consequently, nearly all states, the District of Columbia, and Puerto Rico issue civil protection orders based on threats of physical abuse. n322 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. n323 In Pendleton v. Minichino, n324 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 "this time I'm not going alone. You better watch your back." n325 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. n326 Other conduct which courts have held constitutes a threat sufficient to support a civil protection order includes threats of violence, n327 threatening and following the petitioner, n328 leaving a threatening note, n329 threatening to
physically remove petitioner from the home if she did not voluntarily leave, n330 threatening to burn down petitioner's home with her in it, n331 threatening to get the petitioner fired from her job, n332 and verbally and physically abusing the petitioner in front of their child. n333 Courts have also perceived intimidating threats in acts such as leaving a shredded marriage certificate n334 or, in the criminal context, tomato juice covered clothes, on the victim's doorstep. n335

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, n336 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. n337 In Cruz–Foster v. Foster, n338 the District of Columbia Court [*862] 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. n339 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. n339 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. n341

In Maldonado v. Maldonado, n342 the District of Columbia Court of Appeals recognized the seriousness of threats made by an incarcerated defendant. n343 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. n344 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. n345

A California court has also criminally convicted a defendant for [*863] acts which included making threats over the telephone to his wife. n346 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. n347 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, n348 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. n349

In Hayes v. Hayes, n350 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. n351 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, n352 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. n353 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. [*864]

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. n354

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. n355 Attempts are punished as crimes under criminal codes because a defendant who attempts to commit a crime "has sufficiently manifested his dangerousness." n356 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. n357 Case law illustrates the variety of behavior that 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; n358 the respondent attempting to have an incestuous relationship with his eighteen-year-old daughter; n359 and the respondent attempting to assault the petitioner. n360 Courts have identified why attempts to harm are sufficient to find domestic violence. In Ickes, n361 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 "because the inquiry focuses on the fear generated in plaintiff and not on any actual injury inflicted." n362 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. n363 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 furtherance of the intent. n364

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. n365 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. n366

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. n367 Some women have been followed and harassed for months, even years, after leaving an abusive partner. n368 The longer that violence continues in a relationship the more serious and dangerous it becomes. n369 Moreover, batterers feel less remorseful and more justified in their violence as the abuse continues. n370 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, n371 and courts in many states have interpreted a wide range of behavior to constitute harassment sufficient to issue a civil protection order. Harassing behavior includes following the petitioner, n372 threatening the petitioner, n373 calling the petitioner a "bitch," n374 preventing the petitioner from leaving a room, n375 pulling telephone cords out of the wall to prevent the petitioner from calling the police, n376 driving around the petitioner's home, n377 cutting up the parties' marriage certificate and leaving it with a threatening note on petitioner's doorstep, n378 initiating a high speed car chase, n379 interfering with petitioner's living, n380 calling the petitioner at work seventy-five times within a period of a month, n381 filing frivolous legal actions against the petitioner, n382 moving within two blocks of the petitioner's house, n383 loitering in front of the battered women's shelter where the petitioner stayed, n384 pounding nails into the petitioner's car tires, n385 opening the petitioner's mail, n386 making unwanted telephone calls to the petitioner, n387 constantly writing the petitioner letters, n388 meeting with the petitioner's friends and dates, n389 contacting the petitioner's parents and employers, n390 repeated calls and letters implying that force would be used in an effort to visit with the parties' child, n391 entering the petitioner's car, n392 entering the petitioner's home, n393 standing outside the...
petitioner's apartment three or four times a day screaming curses at her, n394 sending the petitioner unwanted pizza and service calls, n395 throwing things at the petitioner, n396 and pushing the petitioner down stairs and out the door. n397

The court's decision in Traiforos v. Mahoney n398 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. n399 The trial court, applying its broad discretionary powers, converted an action for domestic abuse to one for harassment, and issued a no harassment order. n400 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. n401

Courts have placed some reasonable limits on the issuance of civil protection orders based on harassment. For example, in Didonna v. Didonna, n402 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. n403 The court found these discussions to be the unfortunate, albeit annoying, result of the marriage break up. n404 In Rouse v. Rouse, n405 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. n406

7. Emotional Abuse

Thirteen innovative state statutes recognize some forms of emotional abuse as bases to issue a protection order. n407 The Immigration [*870] and Naturalization Act's Battered Spouse Waiver provisions recognize that emotional abuse is a form of spousal abuse. n408 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. n409

Case law supports recognizing both mental and physical abuse. In Lucke v. Lucke, n410 the court held that adult abuse was not limited to physical abuse or the threat of imminent physical harm, but also included mental abuse. n411 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. n412 In Boniek v. Boniek, n413 the court considered evidence of mental abuse during twenty-five years of marriage to support the issuance of a civil protection order. n414 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. n415 The court concluded that “viewing the evidence in its totality, and in light of $(respondent's)$ history of abusive behavior, sufficient evidence exists [*871] to infer present intent to inflict fear of imminent physical harm.” n416 The court further noted that the history of abuse included both physical and mental abuse. In Melora v. Melora, n417 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. n418 In Tillman v. Snow, n419 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." n420 The aunts called and stated that the father would come to see the children and would not be stopped. n421 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. n422 In Gasaway v. Gasaway, n423 the court issued a protection order based on harassment and emotional distress where the respondent attempted to improperly remove and conceal the parties' child. n424

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, n425 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. n426

Social science research indicates that battered women often suffer extreme psychological abuse, including forced isolation from [^872] friends n427 and actual confinement in their homes. n428 One survey reports that 72% of battered women indicate that the emotional abuse had a more severe impact on them than the physical abuse. n429 Escalating emotional abuse was an indicator of forthcoming physical abuse for 54% of battered women. n430 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. n431 Among women who are physically abused, 98% report incidences of emotional abuse as well. n432 Further, verbal and emotional abuse often escalate into more violent behavior. n433

Despite this evidence, some courts underestimate the seriousness of emotional abuse. In Keith v. Keith, n434 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. n435 In dicta, a Connecticut superior court in Pendleton v. Minichino n436 concluded that verbal abuse or argument minus any present danger or likelihood of physical violence does not [*873] constitute family violence for purposes of issuing a civil protection order. n437 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. n438 Consequently, nine progressive state statutes issue civil protection orders based on malicious property damage. n439 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, n440 destroying furniture, breaking a window and skylights, chopping holes in roof with an axe, and driving a truck through a garage wall, n441 damaging the petitioner's car, n442 and destroying jointly owned household property. n443 Other property damage which should serve as a basis for the issuance of a civil protection order includes injuring or killing a family pet, n444 damaging the [*874] 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. n445 Courts have issued civil protection orders on behalf of petitioners who are stalked by their intimates. Stalking includes following and threatening the petitioner, n446 cutting up the parties' marriage certificate and leaving it with a threatening note on the petitioner's doorstep, n447 driving around the petitioner's house, n448 moving within two blocks of the petitioner's house, n449 and loitering in front of the battered women's shelter where petitioner stayed. n450 Like harassing and threatening behavior, stalking often escalates into more violent conduct. n451 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. n452 A [*875] federally funded task force on anti-stalking legislation, created by Congress in 1992, recommends that states amend their statutes to make stalking a felony. n453 The task force, operating under the auspices of the Department of Justice's Office of Justice Programs, is developing a model anti-stalking statute. n454 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.” n455 To achieve this preventive goal, the task force recommends that stalking victims receive civil protection orders. n456 The task force predicts that protection orders will provide early intervention in stalking cases and prevent later violence. n457

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 [*876] utes. n458 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." n459 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. n460 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. n461 Many state codes also provide both misdemeanor and felony classifications for stalking. n462 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. n463
Six states provide for conditions for pre-trial release including no contact with the victim. n464 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. n465

D. Jurisdiction and Venue/Choice of Forum

1. Subject Matter and Personal Jurisdiction n466

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. n467 Personal jurisdiction over the
[*877] 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, n468 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. n469 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. n470

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. n471 Nineteen states and the District of Columbia
specifically require personal service upon the defendant. n472 Texas requires service to be made more
[*878] than forty-eight hours before the hearing. n473 Ten states require at least five days notice n474 and Alaska
requires at least ten days notice. n475 Three states condition effective service upon summons to the defendant issued by a
clerk of the court. n476 Nineteen states authorize valid service by the police. n477 Illinois stipulates that service can be
[*879] performed by a hired special process server n478 and Minnesota, West Virginia, and Washington authorize
service by published notice. n479 Additionally, the new Delaware statute states that where an order recites that defendant
appeared in person the need for further service is waived. n480

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, n481 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. n482 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. n483 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
[*880] minimum contacts with the state. n484

In re Marriage of Lenhardt n485 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. n486 It contrasted this to a limited appearance
in which the defendant comes to court for the limited purpose of contesting jurisdiction. n487 The appellate court held such
a limited appearance does not automatically provide a court with jurisdiction. n488

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. n489 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. n490

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. n491 Each tribe determines whether its tribal code allows for protection orders. n492 While theoretically state and tribal courts may respect and enforce the other's laws 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. n493 The court explained that the State's jurisdictional exercise violated the tribe's right to tribal government, and that the existence of a tribal domestic abuse ordinance nearly identical to the state statute gave the tribe exclusive jurisdiction. n494 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. n495

The full faith and credit provisions of the Violence Against Women Act n496 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. n497 In addition to being available from a civil protection order court, civil protection orders are available upon the petitioner's filing for divorce. n498 When a divorce is pending in either the same or a [*881] distinct proceeding n499 or after a divorce has been finalized. n500 Protection orders can be made part of a divorce decree. n501 Further, civil [*882] 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. n502 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, n503 constructive desertion, n504 to overturn a prenuptial agreement and to [*883] establish fault for property distribution, n505 that the marriage has been irretrievably broken, n506 debt assignment, n507 award exclusive use of marital home to abused spouse, n508 and support. n509 A Minnesota 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. n510 A Pennsylvania court held that separation under a civil protection order can count toward separation required for divorce. n511 A Missouri court ruled that a divorce court may take judicial notice of a civil protection order action. n512 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. n513

Civil protection orders can also be granted in conjunction with custody proceedings. n514 and custody orders may be issued as part of a civil protection order. n515 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 custody [*884] order and/or visitation provisions of that pre-existing order. n516 The court in Sparks v. Sparks n517 confirmed that when a civil protection order custody award expires, custody does not automatically revert back to the parent who had lost custody. n518 In Sparks, the civil protection order provided that the father had custody, following the mother's attempts to kill him. n519 The court held that upon expiration of the protection order, custody did not revert to the mother. n520 Other courts have placed some limits on what additional claims the civil protection order court can hear. For example, in
Basile v. Basile, n521 the court held that the respondent may not file a counterclaim in a protection order case to have child's name changed. n522

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. n523 Twelve states provide that a subsequent domestic relations case supersedes portions of a prior civil protection order. n524 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. n525 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

[*887] authorize the superseding case to control on issues of child support; n526 ten of these states authorize the superseding domestic relations case to control issues of child custody; n527 and three authorize the superseding domestic relations case to control on issues of child visitation. n528

Kansas and Nebraska alternatively provide that a civil protection order controls when in conflict with another court order. n529 Texas and Wyoming have a general provision that a civil protection order or temporary protection order prevails over domestic relations cases. n530 The Minnesota and Texas statutes specify that a prior civil protection order prevails over a subsequent domestic relations case on issues of domestic violence. n531 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. n532 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 order court is bound by a prior custody award n533 and only two preclude a civil protection order from superseding an order on child support. n534 New Hampshire alone bars a civil protection order from prevailing over an order concerning possession of a residence or furniture. n535 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. n536 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, n537 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. n538 In Campbell v. Campbell, n539 the petitioner obtained a temporary injunction against her ex-husband prohibiting him from visiting their child because she feared additional violence. n540 She obtained the injunction pursuant to a Florida Rule of Civil Procedure. n541 Her ex-husband appealed the order on the ground that the rule was not intended for such use. n542 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 [*889] lined in Florida's domestic violence statute and therefore considered it to be a petition filed under that statute. n543 The court added that "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." n544 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., n545 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. n546 In Duello v. Hoester, n547 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. n548 In Story v. Story, n549 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. n550

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. n551 Judicial authorities recommend consolidation of separate actions such as civil protection order, divorce, child support [*890] and child custody before a single judge to the greatest extent possible. n552 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. n553 Six of these jurisdictions provide that a civil protection order case may be consolidated with other civil actions. n554 In two of these jurisdictions, a civil protection order must be consolidated with divorce, legal separation, or annulment action. n555 One jurisdiction, North Dakota, allows the same judge presiding over civil protection order hearings to preside over divorce proceedings. n556

The trend in case law parallels that found in these statutes. n557 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 [*891] 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. n558

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. n559 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 [*892] 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. n560

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. n561 Three states further assert that notification is a continuing duty throughout protection order proceedings, n562 while another three states specifically require disclosure when a divorce is pending. n563 Only two states require the petitioner who seeks child custody to meet UCCJA reporting requirements. n564 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. n565 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 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, the defendant was convicted of violating a temporary protection order. He failed to vacate the residence he shared with his victim and under a city ordinance, such a violation was a misdemeanor. 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.

6. Venue

Among various courts within a state, venue generally lies where the petitioner resides, where she is currently living, either permanently or temporarily in a shelter, where the respondent resides, where either party resided at the time of the civil protection order violation or incident giving rise to the request for a civil protection order, whether temporarily or permanently, and where a divorce action may be brought. Twenty jurisdictions statutorily authorize the petitioner to file for a civil protection order in any general court; six jurisdictions authorize filing in circuit court; ten in district court; six in family court; and one in family or juvenile court. 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.

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. She is barred from seeking relief in both courts. After three days, her election is permanent and may not be changed. 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. One New York court 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.

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. Oklahoma 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. 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. 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.

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. n590
[*898] Twenty-four of those states enforce a civil protection order by civil or criminal contempt. n591 Three states
will hold a respondent in civil contempt only. n592 and five states only enforce civil protection orders through criminal
contempt. n593

Thirty-seven states prosecute a violation of a protection order as a misdemeanor. n594 Twenty-four states enforce
civil protection orders
[*899] through either contempt proceedings or as a misdemeanor. n595 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. n596 The
Supreme Court, in United States v. Dixon, n597 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. n598

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, n599 introduction of evidence of the relationship’s history of abuse
and patterns of power and control n600 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. n601 Since violence often escalates in a relationship n602 and increases
in frequency and severity over time, n603 evidence of past abuse is rele [*901] vant to a court’s determination of both
the need for a protection order and the type of remedies required to stop the violence. n604 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. n605 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. n606

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
[*902] in the past. Courts have considered evidence of past abuse when the petitioner has present fear of harm; n607
evidence of prior protection orders; n608 evidence of incidents of abuse which occurred prior to the domestic violence
act’s enactment, to show a trend toward the current violence; n609 the history of past altercations, to evaluate present
threats; n610 evidence of a prior domestic violence conviction when it is an element of the aggravated crime charged;
and past abuse is relevant, and can assist the court in determining imminent danger and predicting violence in the future.

Specifically, in Pendleton v. Minichino, n621 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 “this time I’m not going alone. You better watch your back.” n622 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. \footnote{23 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.}

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. \footnote{25 In Smittle, the court held that because the Protection From Abuse Act 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.}

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. \footnote{33 In Johnson v. Cegielski, 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.}

Courts have generally determined that the language in domestic violence statutes, civil protection orders, and harassment statutes is not unconstitutionally vague. \footnote{38 In Kreitz v. Kreitz, the court held that a 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.}

Courts have also routinely upheld statutes which proscribe "harassing" behavior as not unconstitutionally vague. \footnote{45 Only orders containing the phrase "abstain from offensive conduct against" have been held to be unconstitutionally vague.}

They have specifically held that the term "cohabitating" in those statutes is not constitutionally infirm. \footnote{57 They 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, do not deprive the respondent of liberty interests in his home, do not deprive the respondent of his family or his reputation, do not inflict cruel and unusual punishment, do not violate equal protection and due process rights, do not violate freedom of association rights, and do not violate free speech. In Gilbert v. State, the court held that the defendant's right to free speech was not violated when he was held in contempt for violating a protection order. 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. In Commonwealth v. Rexach, 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.

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, the Supreme Judicial Court of Maine held that the Protection From Abuse Act 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. In Eichenlaub v. Eichenlaub, the court held that the section of the Prevention From Abuse Act 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.

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, the Supreme Court of Minnesota held that subsections of the Domestic Abuse Act which required court employees to assist petitioners with writing and filing petitions for protection orders do not violate the constitutional doctrine of separation of powers.

Courts have also addressed the issue of the constitutionality of marriage license fees and divorce surcharges to fund domestic violence programs and victim services. In Browning v. Corbett, 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. The court explicitly found a rational relationship between domestic violence victims and fees on applicants for divorce and for marriage licenses. 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.

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. A plaintiff with standing has a protectable interest in the legal outcome of a case. In Sweep v. Sweep, 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. The court specifically found a rational relationship between domestic violence victims and fees on applicants for divorce and for marriage licenses. 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.

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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 Protection Order Study, the vast majority of jurisdictions 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.

The National Council of Juvenile and Family Court Judges recommends that judges employ any constitutionally defensible relief that is warranted. 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, 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.

2. Catch-all Provisions

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. These 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, the permanent transfer of jointly owned real estate, the removal of a family dog, and compensatory and punitive damages. The court in Powell confronts a situation in which it was necessary to utilize the catch-all provision, and demonstrates how and why these provisions work in the context of domestic violence. 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 specifically provided for by statute. 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. 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. 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.

The case of Anne B. v. State Board of Control 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. 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. 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. 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.

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. Of the remaining states, South Carolina and Wisconsin 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.
many actions that respondents direct toward petitioners, n716 petitioners' children, n717 and petitioner's other family n718
[*916] or household members. n719 They can command respondents not to act recklessly, n720 not to perform conduct intended to cause physical or emotional harm, n721 not to disturb the peace by telephone, n722 and not to threaten, n723 harass, n724 intimidate, n725 stalk, n726 attack or
[*917] strike, n727 contact, n728 approach, n729 molest, n730 interfere with, n731 infringe upon the personal liberty of, n732 follow, n733 assault, n734 sexually assault, n735 and/or physically abuse n736 protected persons.

No further abuse clauses have survived constitutional challenge. In Banks v. Pelot, n737 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. n738 The court held that the statute, which allows courts to issue injunc *918* tions against harassment of individuals, is understandable and comprehensive. n739 The court explained that "where the purpose of the injunction is clear, the injunction has little chance of infringing upon constitutionally protected speech." n740 In Gilbert v. State, n741 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. n742 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. n743


Stay away provisions are standard in virtually every state's civil protection order statute. n744 The National Council of Juvenile and
[*919] 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." n745 Courts and legislatures have ordered the respondent to stay away from the petitioner, n746 petitioner's children, n747 family members or
[*920] household members, n748 the general location of the petitioner, n749 petitioner's property, n750 petitioner's residence, n751 the parking lot of petitioner's apartment building, n752 the hallways of petitioner's apart [*921] ment, n753 the areas of petitioner's apartment that she has a right to use in common with other tenants, n754 the marital or family home, n755 petitioner's work-place, n756 petitioner's business, n757 petitioner's school, n758 petitioner's church, n759 the day care center where the petitioner's children stay, n760 and the homes, schools, and work-places of other family or household members. n761 In Johnson v.
[*922] Miller, n762 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. n763

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. n764 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. n765 Battered women who are victims of sexual abuse by an intimate partner are at risk for contracting HIV infection from their batterers. n766 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
[*923] 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. n767 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. n768

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, n769 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. n770

The courts also regularly include minimum distances that the respondent must keep away from the petitioner. In Lee v. State, n771 the order prohibited respondent from going within 200 yards of his former wife’s home or work-place. n772 In Harris v. Corley, n773 the [*924] 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. n774 The Texas statute has a provision for specifying the minimum distance that respondent must stay away from petitioner. n775

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, n776 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. n777 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. n778 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. n779

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. n780 “In a study of domestic homicides committed in Chicago and Philadelphia, researchers found that over twenty-eight percent of women killed by their [*925] male partners were attempting to end the relationship at the time of their murder.” n781 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.” n782

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. n783 Some states have made their statutes more detailed: fifteen states specify no contact with petitioner; n784 twelve states specify no [*926] contact with petitioner’s children; n785 seven states provide for no contact with petitioner’s household members; n786 and six states require no contact with petitioner’s family. n787

Nevada and New Jersey statutes adopt a very enlightened approach by also requiring no contact with petitioner’s employer, employees, or coworkers. n788 Nationally, worker absenteeism due to domestic violence costs employers three to five billion dollars annually, n789 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. n790 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. n791 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. n792 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. n793 [*927]

Courts have generally granted no contact provisions in civil protection orders, n794 and have uniformly upheld no contact orders with a spouse, n795 former spouse, n796 the co-parent of respondent’s children, n797 petitioner’s children, n798 and members of the petitioner’s household. n799 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. n800
Statutes and case law show that the courts can enjoin the respondent from communicating with the petitioner, and from contacting the petitioner generally, verbally, by phone, through third parties, and in writing. No contact provisions have been properly included in divorce decrees. Those jurisdictions which have barred respondents from third party contact with petitioners 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 petitioners' attorney or a court appointed person.

The court in State v. Moore in a civil protection order by stating that contact includes contact at work, school, and in public places. 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. Statutory provisions include no contact at petitioner's home, work, school, children's school, or other specified or regularly visited places. 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 order.

No contact orders, even those issued ex parte, have survived constitutional challenges. In Marquette v. Marquette, the court held that an ex parte order cutting off batterer's visitation rights for ten days does not violate due process. The court, relying on Matthews v. Eldrige, 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.

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. 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. 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. The two states without such statutes, Michigan and New York, issue vacate orders under the authority of their catchall provisions or case law. Some statutes list the places from which respondent can be ordered to vacate, and include the household, multi-family dwelling, petitioner's work place, petitioner's school, jointly owned property, and leased property.

Courts consistently have upheld the issuance of a civil protection order with a vacate order. In Merola v. Merola, 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. 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. 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
In Jane Y. v. Joseph Y., the court ordered not only the husband who perpetrated the violence but also the family dog to vacate the parties' home. 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 children. 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."

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, 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. 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. For many who are willing to seek shelter, there are no shelter beds available. If they have children, finding alternative shelter becomes even more difficult. After being sheltered, thirty-one percent of abused women return to their batterers, primarily because they could not locate permanent housing.

When vacate orders are entered, it is important that the civil protection order also specifies how it will be implemented. Smart v. Smart 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. 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. Eleven states and Puerto Rico require the police to accompany a domestic violence victim to retrieve her personal property. 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, 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. State courts rely on the line of decisions handed down by the United States Supreme Court on ex parte relief, and apply the Matthews v. Eldridge 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.

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. Twenty-six state statutes specifically state that the issuance of a civil protection order does not affect title to personal property, a notion upheld in case law. Seventeen state statutes stipulate that the court can grant exclusive possession of personal property in the protection order, and eighteen states and the District of Columbia provide that the order can determine who has the right to use certain property. Some statutes delineate clearly that checkbooks, keys and personal effects, household furniture, and cars are among the items of personal property which can be disposed of in the order. Case law consistently supports this approach.
Fitzgerald v. Fitzgerald ruled that the petitioner may obtain personal property from respondent, even if a divorce decree has already addressed property issues. 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. These provisions have developed due to the realization that batterers are often destructive, not only of their victims, but of things associated with their victims, including pets. Destroying a victim's possessions is another method of gaining and maintaining control over her. Some states specify that the order can stipulate no disposing, no taking, no transferring, no encumbering, and no damaging or destroying real or personal property. Some statutes make an exception to these rules where tampering with property is in the ordinary course of business, or expenses of a minor child, or for necessities of life. 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.

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. 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. In cases where the parties should have no contact 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 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.

8. Orders Concerning Weapons

Each year, over 1.7 million Americans face a spouse wielding a knife or a gun. Forty percent of the domestic violence calls received by the San Francisco Police Department each year involve the use of weapons. Weapons are used in twenty-six percent of violence crimes committed by spouses. Although over thirty-three percent of assaults by intimates involve the use of guns, bludgeons, or other weapons, in only forty-one percent of these cases is the batterer arrested. Even where the batterer is arrested, these cases are prosecuted as misdemeanors rather than felonies.

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. 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 for the residence for that weapon and confiscate it. A judge can order the police to perform this search in the temporary or civil protection order. The court issuing a civil protection order may also prohibit the respondent's possession of weapons, order the revocation of respondent's weapons license, order the respondent to turn over or surrender all weapons, or prohibit the respondent from purchasing or receiving additional firearms for the duration of the order. California prohibits a respondent who has a protection order issued against him from purchasing, receiving, or attempting to purchase a firearm. In New Hampshire and New Jersey additionally provide that after an arrest for a civil protection order violation, the police may seize defendant's weapons. Additionally, 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.

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.

Case law expands upon these statutory provisions. The court in Hoffman v. Union County Prosecutor 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. n904 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. n905

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. n906 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. n907 A Pennsylvania study reveals that a woman or child is murdered every three days by husbands or male partners in that state. n908 In light of this research, the National Council of Juvenile and Family Court Judges recommends that civil protection orders specifically address weapons in the home or in the possession of the abuser. n909

9. Treatment and Counseling

a. Authority to Order Treatment for Domestic Violence Perpetrators n910

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. n911 Thirty-three jurisdictions statutorily authorize the court to order counseling and treatment for domestic violence perpetrators in protection orders. n912 Progressive jurisdictions order the defendant into a certified batterers program. n913 California, Illinois, and Massachusetts explicitly provide for the inclusion of substance abuse treatment in the treatment order. n914 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 treatment not exceed ninety days. n915 Case law reflects a trend toward courts ordering batterers into treatment. Courts have held batterers for psychiatric examinations, n916 risk assessment, n917 and domestic abuse counseling. n918 Where domestic violence is an issue, the batterer husband can be ordered to undergo psychiatric examination in a custody case. n919

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. n920

Generally, counseling programs for abusers have a thirty-three to fifty percent dropout rate. n921 At least half of the men who complete court ordered treatment programs are nonviolent during the following year. n922 Even these limited results must be evaluated in light of research which demonstrates a decline in violence following court intervention even when treatment is not sought or ordered. n923 Studies of court intervention based on victim interviews have found that sixty percent of batterers who experienced court intervention remained nonviolent for six months. n924 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. n925 Therefore, leading researchers have concluded that court intervention is the best deterrent to continued domestic abuse. n926

Many batterers attempt to excuse their violence against family members by blaming it on their alcohol or drug use. n927 Research indicates, however, that substance use or abuse does not cause domestic violence. n928 There are many substance abusers who do not batter their partners. n929 There are abusers who batter when they are under the influence and batter when they are sober. n930 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. n931 When a batterer also abuses substances, any treatment plan must include treatment of the substance abuse problem prior to treatment for domestic violence. n932

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. n933 The court should:
1) Assess the respondent's suitability for domestic violence treatment. n934 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. n935

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. n936

3) Determine whether an appropriate batterer's treatment program exists in the community, i.e. one that will specifically address the violent behavior. n937

4) Ensure that there will be adequate monitoring of defendant's progress in the counseling program by court probation. n938

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. n939

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State v. Sutley n940 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. n941 The Council further states: "it is paramount that these programs ensure the ongoing safety of the victim and other family members." n942

b. Treatment for the Abused Party n943

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. n944

Ordering victims into counseling programs confirms the batterer's belief that the victim, rather than he, caused, and is responsible for, the violence. n945 Alaska provides for family counseling if it will not result in more domestic violence. n946 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 [*949] batterer. n947

Case law supports the position that the court can appropriately refuse to order a mental examination of the petitioner who received the protection order. n948 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. n949 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. n950

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

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. n951

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. n952 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. n953 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. n954 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. n955

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. n956

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:

Family violence is a factor the court must consider in all legal decisions relating to the family and especially custody and visitation. n957

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

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. n958

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. n959

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 . . . . n960

. . . 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. n961

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

adverse consequences for children of any custody option. The longterm 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. n962

. . . Recent studies have found a 60-70% correlation between spouse and child abuse. n963 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. n964

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. n965 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. n966

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. n967

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. n968 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. n969 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. n970 Another
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. Several other national studies found that in seventy percent of families where the woman is battered, children are battered as well. Where there is child abuse concurrent with spouse abuse, seventy percent of the child abuse is committed by men. Many batterers use abuse of children as a weapon to control battered women. "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." 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. Children of abused women are also often injured accidentally when they intervene to try to protect their mothers.

Social science research strongly confirms that spousal abuse has profoundly negative affects on a child's mental and physical wellbeing. Children who witness violence between parents often suffer emotional trauma, which results in behavioral and emotional problems ranging from depression and withdrawal to violence toward others and suicide. Studies also reveal that children from abusive homes repeat patterns of abuse. One study showed that eighty-one percent of abusive husbands and thirty-three percent of abused wives came from violent families. 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." 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.

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 and the National Council of Juvenile and Family Court Judges, create a presumption of awarding custody to the non-abusive parent. Pennsylvania's civil protection order statute specifically provides that the respondent may not receive custody if he abused the children. A Pennsylvania court may also impose conditions on a custody award necessary to assure the safety of the petitioner and child. 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.

State custody statutes, independent of domestic violence codes, also address abuse issues. Nine state custody codes articulate a rebuttable presumption against joint or sole custody to, or unsupervised visitation with, an abusive parent. The newly enacted Louisiana statute 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. 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.

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.” 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. 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. 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. 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 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.
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, n1001 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. n1002 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. n1003 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. n1004

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. n1005 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. n1006 and child support was ordered in only 4.9% of the cases with a custody order. n1007 In the most severely violent cases, when a civil protection order was issued, the probability that judges would order custody was even less. n1008 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. n1009 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. n1010 The report also reveals that there is a high correlation between ineffective custody and visitation provisions and contempt of the court order. n1011 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. n1012 In most cases where the abuser was found in contempt, the court amended reasonable visitation provisions to provide for structured or supervised visitation. n1013

Appellate courts consistently uphold awards of temporary custody to a petitioner in protection order proceedings. n1014 The reason for [*_961_] this approach was articulated in Campbell v. Campbell. n1015 a visitation case where the court noted the harmful impact spousal abuse has on the children. n1016 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 noncustodial parent constitutes an act of domestic violence as to their child." n1017

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, n1018 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. n1019 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. n1020

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. n1021 In the vast majority of reported decisions, courts consider domestic violence to be a significant factor in [*_962_] custody determinations. Courts have held that spousal abuse is very relevant to the best interests of the child determination, n1022 and that domestic violence is a factor in determining parental fitness. n1023 [*_963_]

Higher courts have reversed custody awards to batterers where the trial court refused to hear or made light of evidence of spousal abuse. n1024 In Bertram v. Kilian, n1025 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:

Requires 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. n1026

In Marchant v. Marchant, n1027 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. n1028 The court held that such violent acts were clearly relevant to a best interests of the child determination. n1029 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. n1030 The court concluded that, "while 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 ["*964"] ers." n1031 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." n1032

Courts should also consider evidence of spousal abuse even where abuse was not directed against the children. n1033 In the case of In re Marriage of Wiley, n1034 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. n1035 In Williams v. Williams, n1036 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. n1037 Finally, in A.F. v. A.F., n1038 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. n1039

Domestic violence may also be a factor in permitting a battered woman to move out of the jurisdiction with her children. n1040 In Gruber v. Gruber, n1041 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, n1042 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. n1043 This decision, however, is contrary to a line of cases in [*965] other jurisdictions which have terminated parental rights where one parent murdered the child's other parent. n1044

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, n1045 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." n1046 The court concluded that a contrary holding "could only deter battered spouses from reporting their suffering lest they lose their children." n1047 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. n1048 The court emphasized that in a custody dispute:

Evidence 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. n1049

The court in Rapp v. Dimino, n1050 where the battered woman's child was put in the custody of the batterer father amidst a relief [*966] 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. n1051

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 . . . ." n1052 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, n1053 and warns that "court orders which force victims to share custody with their abusers place both victims and children in danger." n1054

Consequently, in order to protect the abused party, a number of courts have refused to award joint custody to batters in both civil protection order and custody cases. In Ellibee v. Ellibee, n1055 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. n1056 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, n1057 the Supreme Court of Montana awarded sole custody to the mother based on evidence that the father had physically [*967] abused her. n1058 The court held that evidence that a child's parent is abused is relevant to the best interests of that child. n1059 Therefore, the court would consider such evidence in awarding sole custody in a divorce proceeding. n1060 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. n1061 In several custody cases, courts have ruled against joint custody in light of significant antagonism between the parties which included allegations of physical abuse. n1062

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, n1063 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. n1064 In Wenzel v. Wenzel, n1065 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. n1066 Additionally, in Giesler v. Giesler, n1067 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. n1068 The court noted that the boyfriend's visitation with his children from prior relationships was subject to supervised visitation. n1069

While an abuse victim may lose custody of her child because of [*969] her involvement with a batterer, courts will often return custody once she terminates the relationship. For example, in Wanamaker v. Scott, n1070 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. n1071

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. n1072 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. n1073 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. n1074

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, n1075 the court held that evidence that the mother was a victim of spousal abuse did not justify awarding custody to paternal grandparents. n1076 Men who abuse their wives were often abused or witnessed domestic violence as children. n1077 In Hughes v. Hughes, n1078 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." n1079 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 [*971] 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, n1080 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. n1081 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. n1082

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. n1083 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. n1084 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. n1085 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. n1086 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. n1087 Thus, given that the P.K.P.A. is a federal [*972] 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. n1088 Fully forty-one percent of all abductions by family members occur between the parents' separation and divorce. n1089 Another forty-one percent occur when the parents have been separated or divorced for longer than two years. n1090 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. n1091 Over seventy percent of all child kidnappers are fathers or their agents. n1092 Research further reveals that over half of abductions occur in the context of domestic violence, n1093 and seventy-seven percent of the abductors snatched the children out of a desire to hurt the other parent. n1094 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 [*973] 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. n1095 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.

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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. n1096 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 "if 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." n1097

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, n1098 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. n1099 In A.F. v. N.F., n1100 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. n1101 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 her father. n1102 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. n1103

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, n1104 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. n1105 In Desmond v. Desmond, n1106 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. n1107 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 $the mother$ 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. n1108

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." n1109 In Bruscato v. Avant, n1110 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. n1111

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. n1112 These states [^977] 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. n1113

In Cole v. Superior Court, n1114 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. n1115 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. n1116 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 behavior in some familial situations. n1117

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." n1118 In Coleman v. Coleman, n1119 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. n1120

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. n1121 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. n1122

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. n1123 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 [*979] portant that courts attempt to discern whether the respondent may be objecting to the move because he wants continued access to his victim. n1124 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. n1125 In In re Marriage of D'Attomo, n1126 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. n1127 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. n1128 The husband was found in indirect criminal contempt of court by the circuit court. n1129 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. n1130 Including custody provisions in all temporary and civil pro [*980] 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. n1131 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. n1132 In
international child abduction cases, courts will employ the same analysis used in interstate custody cases. 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. 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. 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. This approach ensures that the victim not be penalized for 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. 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.

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 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.

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. 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. 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. 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. The District of Columbia statute states that a court may “provide for visitation rights with appropriate restrictions to protect the safety of the complainant.” Six state civil protection order statutes allow visitation in accordance with the best interests of the child. Illinois mandates a rebuttable presumption of supervised visitation when the court finds abuse.

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. The Council found “the propensity for continued violence remains after the divorce or separation and frequently recurs during unsupervised visitation or joint custody.” Similarly, the National Institute of Justice study concluded that “nowhere is the potential for renewed violence greater than during visitation.”

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. 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 abuse program.

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. The Minnesota Legislature has approved state funding for children's
Despite these recommendations, many trial courts are still unwilling to enter orders providing for supervised visitation in civil protection order cases. Some courts have, however, appropriately restricted visitation. In Campbell v. Campbell, 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. The court concluded that "surely, fear that a custodial parent will be assaulted or battered by a noncustodial parent constitutes an act of domestic violence as to their child." In Desmond v. Desmond, in considering emergency jurisdiction under the U.C.C.J.A., the court similarly concluded "it 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 future access to his children." 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. In In re Penny R., the court, while refusing to entirely suspend the defendant's visitation rights, ordered limited and supervised 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. 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.

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. 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. 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. 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. In Cosme v. Figueroa, the court ordered that a father have supervised visitation as part of a temporary protection order pending the outcome of a risk assessment. 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." In Eichenberg v. Eichenberg, 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 a recommendation as to appropriate visitation. In Hopkins v. Hopkins, 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.

Courts will also impose supervised visitation in custody cases where domestic violence exists. In Katz v. Katz, 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. In Commonwealth v. Rozanski, 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, 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. The court further held that the mother had standing to execute the bond when the father failed to return the child in accordance with the order. In Leonetti v. Riehl, 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-visitaton day, engaged in disruptive behavior, and kicked over garbage cans.

Courts have also considered expert opinions on the issue of visitation. In Hall v. Hall, the court relied, in part, on a social worker's recommendation of supervised visitation to support its order. In In re Penny R., 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. In Vogt v. Vogt, 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. n1187 The Vogt court held that only when there is no probable cause of domestic violence may the court order or refer parties to mediation. n1188

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. n1189 For example, the Minnesota statute states that courts will entirely suspend visitation "as needed to guard the safety of the victim and the children." n1190 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. n1191

Appellate courts who have reached this question n1192 have been generally willing to suspend or limit visitation in protection order cases to protect the petitioner or her children from abuse. n1193 In Campbell v. Campbell, n1194 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. n1195 The court found that the children "like their mother, n1189 had reasonable cause to believe that they were about to become the victims of an act of domestic violence. n1196 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." n1197

In Pendleton v. Minichino, n1198 the court issued an ex parte temporary protection order suspending visitation where petitioner alleged present and immediate danger in an affidavit under oath. n1199 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." n1200 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." n1201

In Hughes v. Hughes, n1202 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. n1203 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. n1204

Courts have also suspended visitation in custody and divorce proceedings due to domestic violence. In Goldring v. Goldring, n1205 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 occasions. n1206 The respondent ex-husband "tormented 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." n1207 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.” n1208

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. n1209 Unless courts order financial assistance for the victim n1211 Social science studies reveal the severe financial stress on abused women which so often forces them to return to a batterer. n1212 When a battered woman leaves her abuser, there is a fifty percent chance that her standard of living will drop below the poverty line. n1213 Domestic violence is a leading contributor of homelessness for women and children in this country. n1214 A Senate Judiciary Report reveals that over fifty percent of homeless women are fleeing domestic abuse. n1215 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. n1216 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. n1217

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 . . . financial 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. n1218

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. n1219

Forty-one states, the District of Columbia, and Puerto Rico authorize some form of economic relief in a protection order. n1220 The protection order statutes of thirty-eight jurisdictions contain catch-all provisions under which a court may award financial relief to a victim. n1221 Twenty states specifically authorize the payment of general monetary relief in a protection order. n1222

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. n1223 In Sielski v. Sielski, n1224 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. n1225 Innovative state statutes also authorize payment for economic losses stemming from abuse including medical costs, n1226 lost earnings, n1227 repair and replacement of damaged property, n1228 alternative housing costs, n1229 meals, n1230 out of pocket expenses for injuries, n1231 relocation and travel expenses, n1232 replacement costs for locks, n1233 and counseling costs. n1234 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. n1235

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, n1236 the court held that the catch-all remedy provision of the D.C. Intrafamily Offenses Act n1237 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. n1238 The court concluded that the court has broad judicial discretion to fashion effective remedies to end domestic violence. n1239 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. n1240 In Mugan v. Mugan, n1241 the court also construed that state's domestic violence act broadly to advance the legislative purpose of ending violence. n1242 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. n1243

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
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. \textsuperscript{1244} Case law supports this positive trend of awarding maintenance in protection orders, \textsuperscript{1245} even in jurisdictions where the catch-all provisions are used in the absence of a specific statutory authorization for support. \textsuperscript{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, \textsuperscript{1247} the court awarded temporary maintenance to the woman pending resolution of a palimony claim, even though the parties were unmarried but had cohabitated for twenty-eight years. \textsuperscript{1248} In Brookhart v. Brookhart, \textsuperscript{1249} the court also acted affirmatively to protect a domestic violence victim when it granted temporary support to the petitioner at an evidentiary hearing without requiring the petitioner to specifically request it in her civil protection order petition. \textsuperscript{1250} The court found that the support order was temporary, respondent and counsel were present, and the award was warranted under the circumstances. \textsuperscript{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. \textsuperscript{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. \textsuperscript{1253} Thirty-seven jurisdictions authorize the payment of child support as part of civil protection order remedies. \textsuperscript{1254} The courts also demonstrate considerable willingness to award child support as a civil protection order remedy. \textsuperscript{1255}

The institution of child support guidelines in practically every jurisdiction resulted from the federal requirements under 42 U.S.C. section 666, \textsuperscript{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. \textsuperscript{1257} Child support guidelines protect petitioners from bargaining away child support in exchange for protection from abuse. \textsuperscript{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. \textsuperscript{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 greater than she anticipated and the child's needs were neglected. \textsuperscript{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. \textsuperscript{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. \textsuperscript{1262} Beginning in January 1994, under Federal law, all child support awards are required to be paid through wage withholding. \textsuperscript{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. The court in *Mugan v. Mugan*, recognized the direct relationship between economic dependence and domestic violence. 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 "other 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.”

Five state statutes authorize the payment of mortgage or rent costs as part of a civil protection order. Case law in New Jersey, Ohio, and the District of Columbia authorizes rent and mortgage payments as part of a civil protection order. Other courts have spoken on related issues. In *Nuss v. Nuss*, 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. Similarly, in *Rigwald v. Rigwald*, 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.

e. Utilities

Only the Massachusetts statute explicitly authorizes utility payments as part of civil protection order remedies. However, using 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. 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. . . .” 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. 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 civil protection order. *Mugan v. Mugan*, 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. . . .” Five states and Puerto Rico authorize protection orders which require respondent to pay petitioner's counseling costs. Courts may also order these and other forms of assistance to abuse victims under the "catch all" provisions of the state domestic violence statutes.

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.” 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. When females head households by themselves without assistance of a spouse, the picture changes dramatically: 19.8% are uninsured and 34.5% receive insurance through medicaid. 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. 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.

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. Twenty-six states and the District of Columbia include court costs as a civil protection order remedy. *Case law also supports the award of attorney fees in protection orders. 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. n1290 In Schmidt v. Schmidt, n1291 the court held that because under New Jersey's Prevention of Domestic Violence Act n1292 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. n1293

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, n1294 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. n1295 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. n1296 Courts have, [*1006] however, placed reasonable limits on attorneys fees awards in civil protection order actions. In Kass v. Kass, n1297 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. n1298

Finally, a petitioner may also receive attorney's fees for prosecuting a violation of a protection order. In Linda D. v. Peter D., n1299 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. n1300

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. n1301 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. n1302 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. n1303 Therefore, state [*1007] statutes should clearly articulate that it is properly the police officer's function to provide information and assistance to a victim of domestic abuse. n1304 This practice promotes a consistent and thorough delivery of vital protective services to needy victims. n1305

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. n1306 Eighteen states and Puerto [*1008] [*1009] Rico require written notice of rights and services. n1307 Information [*1010] which the police must provide includes shelter referral, n1308 the right to initiate contempt proceedings after a violation of a protection order, n1309 the right to file a criminal complaint, n1310 the right to file [*1011] an affidavit and obtain a warrant for the batterer's arrest, n1311 the batterer's eligibility for parole and possible release, n1312 and the importance of preserving physical evidence. n1313

Four states require the notice be available in Spanish and English, n1314 and Alaska and Massachusetts require a reasonable effort to give notice in the victim's language. n1315 Rhode Island, moreover, recognizes that domestic violence occurs in all of its communities and, therefore, provides notice in six different languages. n1316 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. n1317

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. n1318 In particular, twelve states require the police to transport the victim to shelter if requested. n1319 In eighteen states and Puerto Rico, the police must assist the [*1012] victim in obtaining medical care. n1320 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. n1321 Eleven states and Puerto Rico require the police to accompany a domestic violence victim to retrieve her personal property. n1322 Case law supports this police involvement. In Fitzgerald v. Fitzgerald, n1323 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 [*1013] could obtain the property, the order may include the assistance of the sheriff. n1324 Some innovative states also require the police to assist a petitioner in obtaining her children from the batterer, n1325 obtaining an arrest warrant, n1326 obtaining an after hours order from a judge, n1327 and in serving process on the respondent. n1328
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. . . ." n1329 Courts have held that the police are obligated to enforce a civil protection order. n1330 Twenty-seven states and the District of Columbia require the police to take a report of a domestic violence incident. n1331 Florida, [*1014] Massachusetts, and Utah provide that the police report shall be available to the domestic violence victim free of charge. n1332

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. n1333 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. n1334 The Pennsylvania statute requires seizure of weapons used in a domestic violence offense. n1335 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. n1336 Courts also authorize the police to seize weapons during a domestic violence call. n1337 In Johnson v. State, n1338 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. n1339 In People v. Johnson, n1340 the police were justified in conducting a limited warrantless search for a gun when responding to a domestic violence complaint because upon arriving at [*1015] the scene they heard a woman scream not to shoot. n1341 More state statutes require the police assistance to domestic violence victims and increase law enforcement's frontline role as an information provider. In State v. Nakachi, n1342 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. n1343

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. n1344

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, n1345 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 [*1016] 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. n1346 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. n1347 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. n1348

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. n1349
under the Fourteenth Amendment Equal Protection Clause, and under negligence theories of liability.

Post-DeShaney cases reveal that a battered woman may continue 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. 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, the court held that under the Pennsylvania Protection From Abuse Act, a protection order creates a special relationship between the police and the victim. The victim's right is not a substantive due process right rejected under DeShaney, but rather a property right to reasonable police response. 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. Police officers may also 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.

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. 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.

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. Adapting 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.

The reticence of many immigrants and refugees to turn to the legal system for help grows out of their experience with legal systems 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. 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.

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. 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.
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. 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. Further, non-English speaking battered women have limited 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 addresses this problem by amending the Family Violence Prevention and Services Act 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 contains the last vestiges of coverture in American Law. Abusive citizens and legal residents use this control to prevent 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, 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. The legislative history of the Violence Against Women Act H.R. 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 or 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 fear of deportation.

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). They will also be eligible as abused spouses, children, and parents of abused children for suspension of deportation. This will offer petitioners protection against their batterers' efforts to have them deported, will make them eligible to receive work authorization, and will enable them to obtain lawful permanent residency without having to leave the United States. 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. 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, conditional residency is awarded to any one who has not been married for two years on the date they receive their residency. To obtain permanent residency status, the conditional resident spouse must prove two years later
that she is still married to the citizen spouse. n1381 At the end of her two year conditional residency, she must file a joint petition with her spouse. n1382

This joint filing requirement served to hold battered women in violent relationships for two years before they could obtain permanent [*1025] 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 n1383 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. n1384

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. n1385

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 [*1026] 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 n1386 or lawful permanent resident; n1387 2) battered women who have resided continuously in the United States for more than seven years may be eligible for suspension of deportation; n1388 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; n1389 or 4) battered women who have lived continuously in the United States since 1972 may quality for registry. n1390

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. n1391 Courts have [*1027] 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. n1392

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. n1393

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. n1394 For most immigrants, n1395 INS [*1028] analyzes the totality of
the immigrant's circumstances to evaluate whether the immigrant will become a public charge in the future. n1396 Factors include the immigrant's age, health, past and current income, education, and job skills. n1397 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. n1398 Battered immigrant women who are single heads of household will have to show an ability to provide for all family members and dependents. n1399 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. n1400

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. n1401 All immigrants and refugees, including undocumented immigrants and persons who received Temporary Protected Status, n1402 may apply for and receive emergency medical services, n1403 services from the Women Infants Children ("WIC") program, n1404 school lunches, and breakfasts, n1405 enrollment in Headstart, n1406 public education from kindergarten through twelfth grade, n1407 federal housing, n1408 and services available through social service block grants. n1409

Lawful permanent residents, refugees, receivers of asylum, and some amnesty applicants may apply for Aid to Families with Dependant Children ("AFDC"), n1410 Food Stamps, n1411 Supplemental Security Income ("SSI"), n1412 Unemployment Compensation Insurance, n1413 Medicaid, n1414 and Job Training Partnership Act programs. n1415 Undocumented parents may also apply for AFDC, Food Stamps, SSI, and Medicaid on behalf of their U.S. citizen children. n1416 However, the amount of funds the family receives will be less than that paid to families where the applicant parent is a citizen. n1417 The grant to families headed by an undocumented parent will only include the children's portion of the funds that other eligible families receive. n1418

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. n1419 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.

[*1031] 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. n1420 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, n1421 to stay away from petitioner's home, n1422 to stay away from petitioner's place of employment, n1423 and may also include an order to pay attorneys fees to a legal services organization representing the petitioner. n1424 Temporary protection orders also frequently require no communication or contact with the petitioner, n1425 no assaulting of the petitioner, n1426 an award of temporary custody of the parties' children to the petitioner, n1427 no visitation with the parties' children, n1428 no weapons possession, n1429 and when needed, temporary child support n1430 and spousal support. n1431

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. n1432 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. Marquetre, n1433 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 taring 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. n1434

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. n1435 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. n1436 A batterer may seek visitation with the children in an effort to maintain contact with and control over the abuse victim. n1437 Visitation remains a catalyst for continued intimidation and abuse. n1438 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.

[*1035] 2. Legal Standard for Issuing Ex parte Orders

State domestic violence statutes generally issue temporary protection orders based on a showing of "good cause." n1439 Statutes define "good cause" to include an emergency, n1440 immediate danger, n1441 immediate and present danger of abuse, n1442 imminent and present danger of bodily injury, n1443 an occurrence of abuse, n1444 a substantial likelihood of imminent danger of abuse. n1445 Clear and convincing evidence of imminent danger of abuse, n1446 and imminent and present danger to a child. n1447 A few states issue temporary protection orders based on probable cause of imminent and present danger, n1448 on or probable cause of irreparable injury. n1449 A temporary protection order may also issue based on the court's reasonable grounds to believe abuse occurred n1450 or that an emergency [n*1036] exists. n1451

Case law confirms that the petitioner must show that she is at risk of imminent harm, n1452 and she must show this by a preponderance of the evidence. n1453 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. n1454 However, visible evidence of physical harm is by no means required for a temporary protection order to be issued. n1455 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; n1456 the respondent's visitation violations; n1457 physical abuse following the parties divorce; n1458 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; n1459 an anonymous tip to the police that the batterer was trying to kill the petitioner; n1460 the respondent's harassment of petitioner, n1461 the respondent's verbal threats against petitioner; n1462 the respondent's [n*1037] throwing the children at the petitioner; n1463 and holding a gun to petitioner's head. n1464

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. n1465 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. n1466 The court concluded that an ex parte order is "central to the substantive relief provided for under the act." n1467 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. n1468 Furthermore, the court even pointed out that such notice could in fact precipitate further domestic violence. n1469 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. n1470

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. n1471 The case law embraces this [n*1038] approach as well. Courts have issued ex parte protection orders based on the sworn affidavit or testimony of the petitioner. n1472 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. n1473 In Oregon, a court will conduct an ex parte hearing by telephone or in person within one judicial day after the petition is filed. n1474 In many jurisdictions the courts will issue emergency protection orders twenty-four hours a day. n1475 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 [n*1039] abuse exists. In Marshall v. Hargreaves, n1476 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. n1477 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. n1478

4. Authority to Issue Temporary Protection Orders Ex Parte
Temporary protection orders may issue in both civil and criminal cases. In *State v. Naegele*, n1479 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. n1480

5. Constitutionality of Temporary Protection Orders

To date, courts have rejected challenges to *ex parte* relief granted in protection orders. n1481 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 afforded [*1040] a hearing. n1482 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. n1483 Courts have held constitutional the denial of visitation rights for ten days, n1484 the suspension of visitation for fourteen days, n1485 and the eviction from home and suspension of visitation for fifteen days. n1486 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. n1487

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, n1488 and [*1041] beyond five days. n1489 Case law has also limited temporary spousal support to two weeks, n1490 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. n1491

However, courts in Ohio and New York have extended temporary protection orders. In *Eichenberger v. Eichenberger*, n1492 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. n1493 The court concluded that the limited delay did not jeopardize the integrity or constitutionality of the process. n1494 *In People v. Forman*, n1495 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. n1496

The New Hampshire domestic abuse statute illustrates an innovative statutory authorization for temporary protection orders. n1497 The New Hampshire code does not limit the duration of the temporary protection order remedies, but rather states that "if 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." n1498 If the respondent does not challenge the order or request [*1042] a hearing, the temporary protection order remedies are left undisturbed. n1499 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. n1500

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, n1501 temporary visitation, n1502 and no contact with the petitioner. n1503 Temporary protection orders entered as a condition of pretrial release have also been found to be appealable. n1504

Courts in North Carolina and Ohio, however, have held that temporary protection orders are not appealable. n1505 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. n1506 In *Smart v. Smart*, the North Carolina Court [*1043] 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. n1507 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. n1508 A petitioner may also not appeal a denial of interlocutory injunctive relief where no underlying claim for permanent injunctive relief is before the court. n1509

1. 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 n1510 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 [n1044] evidence that she is facing a clear and present danger or an imminent danger. n1511 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. n1512 Four state statutes use a "reasonable grounds to believe" or "reasonable cause to believe" standard and require that abuse occurred, n1513 that there is an emergency, n1514 or that the petitioner is in "immediate and present" danger. n1515

The standard of proof can usually be met by showing that the respondent has subjected petitioner to recent abuse. n1516 Many jurisdictions have acknowledged that past abuse is a factor to consider in determining whether the standard of proof has been met. n1517 These [*1045] 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. n1518 One incident of abuse, no matter how remote in time, can be indicative of future and more severe violence. n1519 Past abuse, therefore, can create present fear in the petitioner, and can signify the present intention of the batterer to do her harm. n1520

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. n1521 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. n1522 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 civil protection order. [*1046] 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. n1523 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. n1524 Her ability to meet the standard of proof necessary to obtain a civil protection order must be determined while keeping these issues in mind. n1525

Three jurisdictions explicitly provide by statute that a petitioner can extend her protection order for good cause. n1526 The judge presiding over the civil protection order hearing uses his or her discretion to determine whether good cause for extension exists. n1527 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. n1528 She must usually show by a preponderance of the evidence that she is still in fear of harm by [*1047] the respondent. n1529

Fear of harm may be assessed, as in cases of civil protection order issuance, in light of past abuse and prior protection orders. n1530 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. n1531 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. n1532 The court further held that in deciding whether to extend a protection order issued pursuant to the District's Intrafamily Offenses Act n1533 beyond one year, the "entire mosaic" should be considered, including all episodes of violence during the parties' marriage. n1534 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. n1535 As the court held in Maldonado v. Maldonado, incarceration does not preclude a showing of good cause. n1536 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. n1537 The court stated that:

Although a [civil protection order] does not guarantee that such conduct will not occur, it nonetheless serves as some deterrent. [*1048] 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. n1538

Modification of civil protection orders can occur upon a showing of good cause or a substantial change in circumstances. n1540

**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 n1541

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 "victims 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. n1542

The vast majority of domestic violence victims in every jurisdiction come to court seeking civil protection orders without the assistance of counsel. n1543 Appearing pro se is difficult for the terrified victim of abuse, often encountering the court system for the first 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. n1544

Both state statutes and case law encourage and require court employees to assist petitioners in filing for civil protection orders. n1545 Twenty-one states permit designated court employees to assist with preparation and filing of petitions for protection orders. n1546 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. n1547 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. n1548

Twenty-three states and the District of Columbia do not require filing fees from civil protection order petitioners. n1549 Of those states that do require filing fees, twenty-one states expressly authorize the court to waive the filing fee for indigent petitioners. n1550 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. n1551 Maryland, Nebraska, and West Virginia allow filing fees to be deferred until the completion of a full hearing. n1552 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. n1553

For pro se litigants, courts have been willing to avoid strict 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*, n1554 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. n1555 In *Capps v. Capps*, n1556 petitioner filed a motion to modify an order of protection when she intended to file a motion to renew the order for 180 days. n1557 The court, however, treated her motion as a motion to renew and granted her the appropriate protection. n1558

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. n1559 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. n1560 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. n1561

[*1053] 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. States should follow the lead of Connecticut which recently enacted a law creating family violence and intervention units in the Connecticut judicial system. 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. The intervention units must identify victim service needs, and contract with victim and offender services to provide these programs. The intervention unit will also create a pretrial family violence education programs for persons charged with domestic violence.

The Connecticut statute highlights the crucial need for judicial 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.

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. 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." In domestic violence cases, these standards must be interpreted in order to best protect the victim. 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. 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.

[*1055] 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, the respondent in a family offense proceeding sought an examination of the petitioner before trial. The court denied the request because of the "tensions," the "risk of violence," and the "need for permanent protection" which characterize family offense cases. The court explained that delay caused by an examination would only aggravate these conditions. The court implied that an examination before trial can be inherently intimidating, especially for an unrepresented petitioner. 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.

Batterers have attempted to use discovery rules to gain access to a battered woman's diary. In a New Jersey case, 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. 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, be conditioned upon the issuance of a temporary protection order. The continuance of the hearing date at which the civil protection order can issue pose a danger to petitioners. 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.
petition is filed as violence is escalating, the delays caused by continuances leave the battered woman subject to threats and intimidation. n1584 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. n1585

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. n1586 When a continuance is granted, a temporary protection order should issue to protect the petitioner during the intervening period. n1587

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. n1588 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. n1589 However, in Nohner v. Anderson, n1590 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. n1591 Additionally, in Keneker v. Keneker, n1592 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 days. n1593

Courts may, however, limit the respondent’s ability to frustrate the rapid progress of a protection order case. In Mahorsky v. Mahorsky, n1594 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. n1595

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. n1596 Several state statutes specifically provide for the petitioner’s legal representation in a proceeding to issue n1597 and to enforce a civil protection order. n1598 The protection order statutes of Illinois and Texas provide n1599 that prosecutors may assist petitioners in obtaining protection orders where a criminal prosecution is also filed. n1599 Case law raises other issues connected to the representation of the petitioner in a civil protection order proceeding. Roe v. Roe n1600 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. n1601 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, n1602 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. n1603

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:

victims 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. . . .

Further, difficulties for victims in advocating effectively for [*1060] 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. n1604

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. n1605 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. n1606

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. n1607 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. n1608 However, even in these states, some limits are [*1061] 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. n1609

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. n1610

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. n1611 The country needs more attorneys able and willing to act as battered women's advocates. n1612 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 [*1062] proceedings. n1613 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 n1614 to distribute its funds to various legal services organizations throughout the country in this way. n1615 The LSC must place priority on those populations most in need of legal services. n1616
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. An advocate for Brooklyn Legal Services reports that thirty percent of divorces involve violence as a factor. 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 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 number 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." The Wyoming statute authorizes the court to appoint an attorney to assist the petitioner in seeking a civil protection order. 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, while in Ithaca, New York, private attorneys are paid a reduced fee by the county to represent indigent battered women.

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, he does not have a right to counsel during the initial issuance of the civil protection order. This is so even though the respondent may be imprisoned for contempt if he later violates the protection order.

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, 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. The court firmly concluded that regardless of whether or not the subject order is illegal . . . defendant and his lawyer were in error when they unilaterally elected to violate the order. Defendent, 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.

The court held that "if a court has competent jurisdiction to issue an order, such an order must be obeyed until properly vacated." 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."

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, 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. n1632

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. n1633

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. n1634 In other cases, victims will halt the court process because the violence has temporarily stopped. n1635 In many of these cases, Dr. Ganley reports that the batterer has merely changed tactics. n1636 He begins using good behavior to bring an end to the court proceedings. n1637 Other victims fail to show up for hearings because their batterers have intercepted court notices. n1638

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. n1639 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. n1640

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. n1641 Four states specifically authorize the court to issue a default civil protection order when the respondent fails to appear. n1642

[*1067] 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. n1643 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. n1644 If the respondent desires a new trial after being served with the default order, the respondent must file a timely post-verdict motion. n1645 Where defendant has a history of failing to appear in court, the court may require an appearance bond to ensure his future appearance. n1646

[*1068] L. Dismissals and Withdrawal of Orders n1647

Attorneys and courts should consider requests for dismissals of civil protection orders carefully. n1648 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. n1649 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. n1650 The provisions of the protection order would prohibit further abuse. n1651 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. n1652

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. n1653 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. n1654 Maine, Minnesota, and Nevada require notice to the petitioner and a hearing before the respondent may dismiss a protection order. n1655 Missouri will
permit the parties ["1069] to dismiss a civil protection order by mutual consent. n1656

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., n1657 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. n1658 In Marshall v. Hargreaves, n1659 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. n1660

Courts have also addressed dismissal of domestic violence criminal complaints. In Lakewood v. Pfeifer, n1661 the court refused to dismiss a domestic violence prosecution based on the prosecutor's conclusory statement that insufficient evidence and supporting factual statements existed. n1662 In Commonwealth v. Hatfield, n1663 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 parties' history of abuse. n1664

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, n1665 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. n1666

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. n1667 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. n1668 This policy emerges in part from the fact that contempt is not an offense which demands the right to a jury trial. n1669 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. n1670

[*1071] 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. n1671

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. n1672 A number of states also require a statement of legal findings. n1673 The statutes of Illinois, Kentucky, and Maine require the court to state its reasons for a denial or reservation of a remedy. n1674 Case law requires courts to make findings of fact as to what abuse occurred. n1675 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. n1676 In In re Marriage of Hagaman, n1677 the Illinois Appeals 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. n1678 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. n1679 However, in Delisser v. Hardy, n1680 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. n1681

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*, n1682 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. n1683

3. Consent Orders

Eighteen state statutes authorize the issuance of consent civil protection orders. n1684 Case law also supports the issuance of protection orders *sua sponte* by consent of the parties. n1685 Courts will fully enforce a civil protection order signed and agreed to by the parties. n1686 In *Maldonado v. Maldonado*, n1687 the District of Columbia Court of Appeals concluded that encouraging consent agreements serves the purpose of the Intrafamily Offense Act. n1688 and therefore, "if the consent is voluntary a trial judge ordinarily should issue the civil protection order when requested." n1689 However, "if 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." n1690 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." n1691

In *State v. Stahl*, n1692 the court held that a protection order extended by consent of the respondent without a finding of abuse could form the basis for a criminal contempt charge for a violation of that order. n1693 The court held that the respondent cannot attack or appeal a civil decree entered with his consent, absent such grounds as mistake or fraud. n1694 Courts, relying on a sworn petition, also issue consent civil protection orders between the parties without a finding of abuse. n1695 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. n1696 The civil protection order must be consented to by the parties, not by counsel. n1697

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. n1698 Both researchers and judicial authorities strongly recommend against the issuance of mutual protection orders. n1699 Four out of five victims of intimate offenders resist assaults. n1700 They passively resist by trying to help, threatening, or using evasive action twice as often as victims resort to violence or aggression in self-defense and in response to an abusive relationship. n1701 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. n1702 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. n1703

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. n1704 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 aggressor usually is not concerned about being hurt but uses violence by the other party as a justification or explanation for his own actions. n1705

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. n1706 Furthermore, case law reveals that batterers may seek protection orders to intimidate their partners. In *Chieco v. Chieco*, n1707 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. n1708 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. n1709 North Dakota will issue a mutual restraining order only if the court specifically finds that neither party acted in self defense. n1710 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. n1711 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. n1712 Alaska will only [*1077] issue such an order if there is good cause based on the extraordinary circumstances of the case. n1713

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. n1714 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. n1715

Courts across the country have recognized the danger of mutual orders and have severely restricted their use. n1716 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. n1717 In Deacon v. Landers, n1718 the court reversed a [*1078] 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. n1719 In Fitzgerald v. Fitzgerald, n1720 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. n1721 Therefore, the mutual protection order may not issue without a petition and evidence of abuse by each party. n1722 In Kobey v. Morton, n1723 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. n1724 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." n1725 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 [*1079] 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. n1726

The NIJ challenged the appropriateness of mediation in child custody cases where there is a history of spousal abuse. n1727 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." n1728 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. n1729

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. n1730 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. n1731
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 [*1081] of a protection order. n1737 The Missouri Court 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. n1758 The court held that the Missouri Court 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. n1758

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. n1743 Careful analysis is required when courts consider modifying an existing civil protection [*1082] order. Since most battered women make two to five attempts to flee their batterer's before they succeed, n1744 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. n1745

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 n1746 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. n1747 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. n1748

2. Extensions of Orders/Reissuance in Writing

Twenty-eight jurisdiction’s statutes specifically state that civil protection orders are extendable. n1749 Most courts extend protection [*1083] orders based on continued fear without the requirement of additional acts of violence against the petitioner. In Barry v. Iverson, n1750 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. n1751

In Cruz-Foster v. Foster, n1752 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. n1753 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. n1754 In Maldonado v. Maldonado, n1755 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. n1756 In Capps v. Capps, n1757 the Missouri Court 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. n1758
orders are issued with specific termination dates, it is still advisable to ensure that their custody, visitation, and child protect the victim and her children during what can be an emotionally charged and volatile time. Whenever civil protection orders are working, the parties will not need to meet each other again in court. For married parties who will need to continually meet in court under circumstances fraught with conflict. n1759

Respondents must have actual notice that petitioner has requested a civil protection order extension. In Jenkins v. Jenkins, n1763 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 [*1085] 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. n1764

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. n1765 California and Hawaii's courts issue civil protection orders for a full three years, n1766 and in Illinois and Wisconsin, courts issue civil protection orders for a full two years. n1767 While only a small minority of the states still issue civil protection orders for less than a year, n1768 over half of the states still issue protection orders for one year. n1769

[*1086] Social science research supports the need for increasing the duration of civil protection orders. n1770 Battered women who leave their abusive partners are sometimes followed and harassed for months and even years. n1771 Some batterers continue to harass and beat their partners twenty--five years after the victims have left them. n1772

Physical abuse continues after separation for two--thirds of battered women. n1773 Over one--half of the homicides of female spouses and intimate partners are committed by male batterers after their partners have left them. n1774 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. n1775 [*1087] 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. n1776 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. n1777

In the alternative, three year extendable civil protection orders are recommended. This time--frame provides protection of sufficient [*1088] 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. n1778 The Supreme Court of Oregon, in Marshall v. Hargreaves, n1779 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. n1780 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. n1781 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.

[*1089] R. Immunity

1. Judicial Immunity

Judges issuing protection orders are immune from suits brought against them by batterers. In Agnew v. Campbell, n1782 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. n1783 In Patten v. Beauchamp, n1784 the court held that a judge issuing a protection order performs a judicial act and therefore is immune from civil damages. n1785

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. n1786 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. n1787 In Collins v. King County, n1788 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. n1789 Wisconsin takes an innovative approach and requires that prosecutors issue guidelines for the handling of domestic violence cases. n1790 However, recently in Buckley v. Fitzsimmons, n1791 the United States Supreme Court clarified prosecutorial immunity and held that while state prosecutors enjoy absolute prosecutorial immunity when functioning as an advocate, the prosecutors [*1090] have only qualified immunity when performing investigatory or administrative functions. n1792 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." n1793 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." n1794 Such conduct is given absolute immunity because it is "intimately associated with the judicial phase of the criminal process." n1795

However, a prosecutor's acts of investigation or administration are subject only to qualified immunity. n1796 Such activities, when performed by police, are entitled to only qualified immunity, and this same standard applies to prosecutors who perform those tasks. n1797 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. n1798 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." n1799 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. n1800 Finally, in Parrotino v. City of Jacksonville, n1801 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. n1802
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. These statutes are constitutional. In State v. Errington, the Supreme Court of Minnesota held that subsections of that state's Domestic Abuse Act 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.

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, the court held that a cause of action may lie against court employees who deter domestic violence victims from filing civil protection order petitions. In order to bring suit against court employees, however, petitioners must first exhaust their administrative remedies within the court. 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. However, the importance of Family Court clerk assistance to battered woman seeking protection orders is reflected in the following observation by the Bruno court:

in 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 individualized 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.

S. Appeal of Civil Protection Order

Both state statutes and case law place limits on appeals of protection orders. Nevada affirmatively mandates that protection orders remain in effect and cannot be stayed pending an appeal. Maine and Vermont only permit appeals of civil protection orders based on error of law or an abuse of discretion.

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. Courts have denied civil protection order appeals where a respondent failed to challenge at the hearing whether his conduct constituted abuse, where respondent failed to object to the sufficiency of evidence to warrant a vacate order, and where respondent failed to make due process objections when the court issued the emergency protection order without notice based on affidavits. An appeal, however, may be taken successfully from a civil protection order where the trial court failed to consider all relevant evidence. In Matter of M.D., 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.

A party appealing a trial court's contempt decision must meet a high burden of proof. In State v. Lipcamon, 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. 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.

T. Confidentiality of Abused Party's Address

Seventeen state statutes specifically limit disclosure of the abused party's home address. 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. 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 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 enjoined the Department of Social Security from disclosing the addresses of abused AFDC recipients to their batterers.
II. ENFORCEMENT OF CIVIL PROTECTION ORDERS

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. n1829

Thirty-three states and the District of Columbia enforce protection orders through contempt. n1830 Twenty-four of those states and [*1096] the District of Columbia enforce a civil protection order by civil or — criminal contempt. n1831 Five of these states only enforce civil protection orders through criminal contempt. n1832 In three states, civil contempt is the only contempt enforcement option. n1833 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. n1834 Forty states and Puerto Rico prosecute a violation of a protection order as a misdemeanor. n1835 In seven additional states, violation of a [*1097] civil protection order results in a warrantless arrest, but the statutes are silent on how the action is to be charged. n1836 Twenty-one states will enforce civil protection orders through contempt or as a misdemeanor. n1837 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. n1838 Washington state may also force a defendant who violates a civil protection order to submit to electronic monitoring. n1839 The statutory trend in recent years is to augment contempt enforcement with misdemeanor charges, n1840 and to heighten the criminal classification for a violation of a [*1098] protection order. n1841 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. n1842 Minnesota, Texas, and Washington, have heightened the criminal classification for a civil protection order violation from misdemeanor to felony. n1843 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., n1844 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. n1845

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 n1846 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. n1847 The violation was criminal rather than civil contempt because [*1099] the imprisonment was not remedial or coercive in nature. n1848 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. n1849 In Cipolla v. Cipolla, n1850 the court held that determinate sentences for violating a civil protection order are based on adjudications of criminal, not civil contempt. n1851

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. n1852 Nevada and New Jersey specifically allow their courts to accept the order of a sister state as evidence of facts. n1853 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. n1854 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, n1855 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. n1856 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. n1857 Mutual civil protection orders that have not met these criteria will be
[*1100] 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. 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. The court noted that "the order was, of course, effective against the defendant as to his conduct while not on ceded land." 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., 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.

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. While infrequently used, the advantage of a military protection order over a state civil protection order is that since the military 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.

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. Each tribe determines whether its tribal code allows for protection orders. 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. In practice there is no cross jurisdiction, so the victim should not expect either protection order to be enforced outside of its respective jurisdiction. For example, in St. Germaine v. Chapman, 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.

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 or turn over property. In Sanders v. Shepard, the court held the respondent in civil contempt for failure to produce a minor child according to the terms of the civil protection order. Failure to produce the child was civil contempt because the incarceration was not punitive, but rather effected to incur respondent's remedial compliance. 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.

D. Criminal Contempt

1. Acts Constituting Criminal Contempt

In Dunkelberger v. Pennsylvania Board of Probation and Parole, 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. The court specifically held that "a finding of criminal contempt under the Protection From Abuse Act is a crime." The court further concluded that because "criminal 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.
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 or those close to the petitioner, telephone, have been found to constitute criminal contempt. Courts have also found child abduction and concealment to constitute criminal contempt. Other violent acts that constituted criminal contempt include marital rape and sexual assault, beatings and battery, stalking, assault, damaging petitioner's car, kicking in the door of petitioner's home, and breaking into petitioner's home.

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. The respondent's failure to vacate and failure to return children also constitutes criminal contempt. Other actions considered criminal contempt include telephoning petitioner, filing a frivolous lawsuit against petitioner, following petitioner in a car, 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. In State ex rel. Delisser v. Hardy, 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. 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."

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 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. 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.

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" 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 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. In fourteen states, the maximum penalty for a violation of a civil protection order is six months or less. Petty offenses are considered minor and do not carry a right to jury trial, and are therefore an exception to the Sixth Amendment.

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. n1909 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. n1910 As the court stated in Scott v. District of Columbia, n1911 [*1108] "we 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." n1912 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. n1913

National case law shows that several jurisdictions are in agreement with the Scott court, n1914 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. n1915 Requiring that defendant have a jury trial n1916 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 [*1109] tection order. n1917 New York's statute states that there must be "competent proof that the respondent willfully failed to obey any such order." n1918 Similarly, in State v. Lipcamon, n1919 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. n1920

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 n1921 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. n1922 Her testimony alone, absent other witnesses, met the higher standard of proof to show contempt of a civil protection order. n1923 Further, in People v. Stevens, n1924 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. n1925

Some domestic violence victims may choose to bring contempt motions alleging a course of contemptuous conduct rather than seek a [*1110] separate sentence for each individual violation. In these cases, criminal domestic violence actions are also instructive. In People v. Thompson, n1926 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. n1927 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. n1928

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. n1929 A court will also hold a respondent in contempt for violating an existing protection order even though the appeals court later vacates that order. n1930 [*1111]

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 posttermination to emphasize the importance of respect for court orders. As in Nickler
v. Nickler n1931 and State v. Andrasko, n1932 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. n1933 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, n1934 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. n1935

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, n1936 and that a civil protection order against a minor respondent must be enforced in the juvenile court. n1937 The Washington Court of Appeals in State v. [*1112] Horton n1938 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. n1939

5. Reunification

Battered women typically make between two and five attempts to leave violent relationships before they successfully leave their batterers. n1940 Twenty-six percent of victims and thirty-one percent of batterers interpret battering as a sign of love. n1941 Ninety-three percent of battered women are willing to forgive and forget the first beating that they suffered from their partners. n1942 While batterers are often remorseful following a battering incident, n1943 the percentage of batterers who are remorseful declines over time as violence continues. n1944 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. n1945 Many battered women have finely honed survival skills that have allowed them to survive in the relationship. Battered women need to be able to [*1113] 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. n1946 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. n1947 Eight state statutes affirmatively maintain that reunification of the parties does not preclude enforcement of a protection order. n1948 Courts have also sanctioned this approach and enforced protection orders subsequent to a reunification of the parties. In State v. Kilponen, n1949 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 [*1114] change the court's order." n1950

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. n1951 In Cole v. Cole, n1952 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. n1953 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:

the validity of the court's order was in no way impaired, affected, nor nullified, by the petitioner's consensual
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. n1954

Similarly, in City of Reynoldsburg v. Eichenberger, n1955 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. n1956 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, n1957 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. n1958 The court held that the petitioner's invitation to violate a protection order did not shield the defendant from a contempt conviction. n1959 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. n1960

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, n1961 case law has interpreted the 1990 amendment to the New Jersey domestic violence statute n1962 to preclude vacating a civil protection order upon parties' reunification. Torres v. Lancellotti n1963 limited the reach of pre-1990 case law. In Torres, the court refused to 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. n1964

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. n1965 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. n1966

Courts in all jurisdictions should follow the lead of the courts in Eichenberger, n1967 Kilponen, n1968 Cole, n1969 and Townsend n1970 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. n1971 When parties reconcile, civil protection orders may be modified to remove the stay away provision or no contact provisions. Simple procedures for modification should be available in all jurisdictions. n1972 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, n1973 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. n1974 The court may establish notice from its own records. In People v. Stevens, n1975 the court held that the prosecutor in a criminal contempt [*1118] 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. n1976

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, n1977 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. n1978 Similarly, the voluntariness of guilty pleas in criminal contempt actions should parallel case law in criminal domestic violence prosecutions. In Saliterman v. State, n1979 the court 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. n1980

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. n1981 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, n1982 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. n1983 The Georgia Court of Appeals' decisions in Young v. State n1984 and Watkins v. State, n1985 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. n1986 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. n1987 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. n1988 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 [*1120] 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, n1989 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. n1990 Consequently, the prosecutor need not elect, and the jury need not agree unanimously, on which act the guilty verdict is based. n1991 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. n1992 He must be given notice of the time and place of the hearing. n1993 The protection order itself must give respondent sufficient notice of the specific acts which he is prohibited from committing. n1994

As in any criminal proceeding, the alleged contemnor is entitled to representation by counsel, n1995 is presumed innocent until proven guilty beyond a reasonable doubt, n1996 cannot be compelled to give evidence against himself, n1997 can secure the attendance of witnesses, n1998 may cross-examine the witnesses against him, and is protected against hearsay testimony. n1999 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. n2000 The alleged contemnor does not, however, have a right to jury trial. n2001 Further, due process is not violated when respondent is held pre-trial on a contempt charge for nine days, then sentenced to time [*1121] 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. n2002 In Sanders v. Shephard, n2004 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. n2005

Sentencing contemptors may be different than sentencing persons in other criminal matters. In Wagner v. Wagner, n2006 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. n2007 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. n2008 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. n2009 Courts should not permit the existence of a criminal prosecution to delay the issuance of a civil protection order to a domestic violence victim. n2010

Moreover, double jeopardy does not preclude a subsequent criminal 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, n2011 the court held that a subsequent criminal prosecution for burglary, criminal mischief, criminal trespass, and menacing, after the respondent 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. n2012
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. Missouri law states that enforcement of protection orders through criminal contempt does not preclude criminal prosecution, or visa versa. n2013 Indeed, the courts have clearly identified the need for this approach. In Commonwealth v. Smith, n2015 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.

On July 29, 1993, the U.S. Supreme Court issued its first ruling ever in a domestic violence case. In United States v. Dixon, n2016 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. n2017 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, n2018 the United States Attorney's Office obtained a grand jury indictment for the respondent 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. n2019

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. n2020 The court cited the Supreme Court's decision in Grady v. Corbin n2021 as controlling on the double jeopardy issue. n2022

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. n2023

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. n2024 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. n2025 The Grady "same conduct" test 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. n2026 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. n2027 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, n2028 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 n2027 cutting the batterer.

In a fragmented opinion, a majority of six Justices n2029 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. 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. 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." 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. 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 section 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 section 22–504. 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 section 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. 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 section 22504," 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, a 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. 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. 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.

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. The violence may also stop as a result of negative experiences such as social and legal sanctions,
n2041 loss of children, and social embarrassment. n2042 Dr. Anne Ganley states:

Domestic violence is repeated because it works. It gets overtly, covertly, and inadvertently reinforced by all of society's institu

[*1130]

utions . . . . 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. n2043

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. n2044 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. n2045 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. n2046 These all-inclusive

[*1131] sentences are most effective in protecting the abused party.

State statutes provide insight into how various jurisdictions approach sentencing of domestic offenders. n2047 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. n2048 Thirty-two states [*1132] statutorily authorize the imposition of fines for civil protection order violations and set maximum dollar amounts. n2049 Some states provide [*1133] that a sentence can include a fine and jail time. n2050 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. n2051

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. n2052 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. n2053 Illinois adds that the criminal court may consider other civil protection order violations in sentencing. n2054 Missouri, New Jersey, Oklahoma, North Dakota, Ohio, and Illinois provide that further violations increase the defendant's sentence, n2055 and Oklahoma's statute states that no probation or sus [*1134] pended sentence can reduce the sentencing minimum. n2056 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. n2057

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, n2058 a fine or community service and a term of incarceration, n2059 reimbursement of plaintiff's attorney's fees, n2060 reimbursement of plaintiff's medical care due to violence, n2061 and counseling at defendant's expense. n2062 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 damage. n2063 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. n2064

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. n2065 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. n2066 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. n2067 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 sentences for prior violations of such injunction. n2068 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. n2069

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. n2070 Arizona allows the court to expunge a conviction if the complete sentence is served without a new violation. n2071

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. n2072 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 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. n2073 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 . . . . Every 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. n2074

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. n2075

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. n2076 In Buschauer v. [*1138] 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. n2078

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." n2079 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; n2080 six months imprisonment for willful violation of a protection order; n2081 ninety days imprisonment for stalking, beating, and hospitalizing wife; n2082 nine days and $750 fine for forcibly entering plaintiff's residence and physically abusing her; n2083 eighteen months suspended with four years probation for repeated violations of an order prohibiting contact with former wife; n2084 thirty days in jail [*1139] for willful violation of a protection order; n2085 imprisonment for six hundred days, after finding respondent guilty of four separate criminal contempt of petitioner and her mother's civil protection orders; n2086 revocation of probation and six months in jail for going to wife's home and threatening residents, and for telephoning wife; n2087 six months in jail for breaking into plaintiff's residence and threatening to kill her; n2088 revocation of parole and seven days imprisonment for violating no contact provision of order; n2089 $2,500 in sanctions for violating provision of order; n2090 and probation for twelve months, conditioned on sixteen hours of public service work and imprisonment of two days for harassing former wife. n2091 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. n2092

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 [*1140] accountable for his actions. State v. Sutley n2093 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. n2094
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. n2095 The court in State v. Huletz n2096 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. n2097

In State v. Hobbs, n2098 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. n2099 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. n2100 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. n2101 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. n2102 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 "diversion should only occur in extraordinary cases, and then only after an ad hoc mission of guilt before a judicial officer has been entered." n2103 A judgment of guilt must appear on the respondent's record. Adopting this approach, the court in State v. Aguilar n2104 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. n2105

III. Criminal Domestic Violence Prosecutions n2106

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: n2107 failing to stay away from former wife; n2108 entry into residence followed by physical abuse or harassment; n2109 stabbing; n2110 shooting; n2111 running a car, in which wife was a passenger, off the road and subsequently stabbing her twenty-two times; n2112 placing a box of former wife's clothes covered in tomato juice on her doorstep and leaving threatening messages on her phone machine; n2113 telephoning the recipient of a protection order; n2114 assaulting and threatening recipients of an order including assault with a deadly weapon; n2115 writing and following the recipient of an injunction against harassment and contacting her friends, parents, and employers; n2116 repeatedly contacting former spouse; n2117 striking and kicking wife; n2118 and going to wife's apartment and subsequently bringing wife and children to their family farm. n2119

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, n2120 or kidnapping, n2121 and include: harassing; n2122 threatening generally; n2123 striking and beating generally; n2124 attacking; n2125 stabbing; n2126 shooting; n2127 beating wife about the face and head with fists and a clothes iron; n2128 pushing and hitting girlfriend; n2129 breaking the jaw and cracking the elbow of wife; n2130 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; n2131 hitting wife with car and striking her about the head and neck with an open and closed fist; n2132 beating victim with a chair, threatening her with a gun, and stabbing her with a pair of scissors; n2133 pushing victim into glass, throwing her on ground and then against cement stairs; n2134 splitting lips, breaking ribs, stomping on, striking in the jaw, back, neck, and arms, and flinging into air; n2135 threatening to kill wife, punching her in the mouth, breaking her tooth, and knocking her to the ground while continuing to hit and threaten her; n2136 kicking wife with boots; n2137 grabbing cohabitant and holding her outside of a window, making her urinate on the floor, and hitting her; n2138 kidnapping at gunpoint; n2139 kidnapping former girlfriend,
and then driving car on wrong side of road threatening to kill them both, and eventually running into a telephone pole; n2140 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); n2141 and attempting to force entry into the shelter in which wife was staying. n2142

Rape and sexual assault are common forms of domestic abuse, as evidenced by the volume of case law in this area. n2143 Acts which have constituted domestic sexual assault include: sexual assault of daughter; n2144 forcing oral sex and vaginal intercourse under the threat of a knife; n2145 pulling a gun on estranged wife, ordering her [*1148] to remove clothes, and sexually assaulting her; n2146 sodomizing wife and beating her with a breadboard; n2147 forcing nonconsensual sexual intercourse with girlfriend four times, once under the threat of a knife and other times by physically beating her; n2148 beating and raping wife after making threats to cut out her clitoris with scissors and staple her vagina closed; n2149 and kidnapping and raping cohabitant and mother of child. n2150

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. n2151 Arrest warrants are not constitutionally required, n2152 unless the arrest is to be made in a private home, there are no exigent circumstances, and the occupants have not consented to entry. n2153 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. n2154 [*1149]

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. n2155 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. n2156

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. n2157 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. n2158 The goal is [*1150] 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. n2159

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. n2160 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. n2161 Three jurisdictions mandate arrest where the alleged abusive actions were intended to instill fear of imminent bodily injury or death in the victim. n2162 Louisiana and Wisconsin mandate arrest where there is probable cause of continued violence against the victim. n2163 Hawaii, [*1151] Rhode Island, and Washington mandate arrest where the batterer is found in violation of a criminal no contact order. n2164 Four jurisdictions mandate arrest where the arrest can be accomplished within a certain period after the violent incident. n2165 Six states mandate arrest where a felonious assault or other crime has transpired. n2166 Arizona and Iowa mandate arrest where the batterer used a dangerous or deadly weapon. n2167

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. n2168 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. n2169 Two of these states limit this warrantless arrest to where the protection order violation occurs in the
officer's presence. n2170

[*1152]

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. n2171 Twenty-two states allow a discretionary warrantless arrest when there is probable cause to believe physical abuse has occurred. n2172 Four states authorize discretionary warrantless arrests in some circumstances and mandate arrests in others. n2173 Wisconsin stipulates that a police officer's decision not to arrest cannot be solely based on an absence of visible injury or impairment. n2174 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. n2175 Texas allows a discretionary warrantless arrest if there is probable cause of assault resulting in bodily injury. n2176

Warrantless arrests of domestic violence perpetrators are consistently upheld when challenged in court. n2177 In Watkins v. State, n2178 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. n2179 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, n2180 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 [*1154] on evidence of bodily harm or reasonable belief that the victim is in danger, is constitutional. n2181

To the contrary, warrantless dual arrest of the victim and her abuser have not been upheld. n2182 In Gurno v. Town of Lacomner, n2183 the police arrested both the victim and perpetrator of 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. n2184 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. n2185 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. n2186 Additionally, it is well documented that as domestic violence escalates, batterers often begin using weapons against their victims. n2187 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. n2188

[*1156]

Warrantless searches are also permissible when one who has authority to do so consents to the search. In Commonwealth v. Rexach, n2189 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. n2190 Further, the officer's act of following the defendant into the bedroom was justified by the exigent circumstances exception to the warrant requirement. n2191 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. n2192 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 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." n2193

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, n2194 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. n2195 In State v. Lynd, n2196 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. n2197 In Johnson v. State, n2198 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. n2199 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. n2200 The search and seizure of the gun, therefore, was justifiable as incidental to an arrest. n2201

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. n2202 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, n2203 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. n2204 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 n2205 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 ineffective assistance of counsel entitling defendant to a new trial. n2206 Commonwealth v. Stonehouse n2207 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. n2208

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." n2209 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. n2210 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.

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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. n2211 That the protection order was vacated after a violation of the order is not a defense to the violation. n2212 Additionally, domestic violence statutes that permit prosecutors to charge protection order violations as either misdemeanors or contempt have withstood equal protection challenges. n2213 Maine provides by statute that voluntary intoxication is not a defense to a domestic violence offense. n2214 Provocation is not a defense to the crime of domestic violence. n2215 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. n2216

[*1161]

2. Battered Woman Syndrome n2217

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. n2218

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. n2219 In State v. Frost, n2220 the court held that battered woman syndrome evidence was admissible to bolster the victim's credibility in a prosecution for assault. n2221 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 explain why the victim remained with the defendant and visited him in jail. In State v. Cababag, n2222 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. n2223 As the court stated, "the 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." n2224 In State v. Ciskie, n2225 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. n2226
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, n2227 the court found that the trial court properly considered expert testimony on battered woman syndrome in making its custody determination. In McMaugh v. State, n2228 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. n2229

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. n2230 There is a wealth of scholarly research written on battered women who kill. n2231 Rather than duplicate those efforts here, we have cho

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, n2234 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 . . . 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." n2235 However, in State v. Bolt, n2236 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. n2237 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, n2238 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. n2239 However, in People v. Salvato, n2240 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. n2241

Courts have upheld convictions for both the crime of domestic violence and for lesser included offenses. In State v. Amos n2242 and

[*1166] State v. Shuber, n2243 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. n2244 In defining which acts may be considered as lesser included offenses of domestic violence, the court in State v. Meese n2245 held that assault could not be characterized as a lesser included offense of the
offense of domestic violence. n2246

The speedy trial acts may also affect domestic violence prosecutions. In State v. Mintz, n2247 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. n2248 Entry into the programs tolled the time for a speedy trial. However, in People v. Denman, n2249 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. n2250 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. n2251 Acknowledging the problem, the court in Clark v. State n2252 ruled that the action was not barred under the speedy trial doctrine where the defendant caused delay by coercing the victim not to testify. n2253

Trial courts and defense attorneys have also been found to commit errors in criminal domestic violence prosecutions. In People v. Darnell, n2254 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. n2255 In People v. Torres, n2256 the appellate court held that since the defendant failed to object to 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. n2257

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. n2258 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. n2259 These conditions on the batterer's bail and release include no contact with the petitioner at her home, work, or school, n2260 no harassment of the petitioner or her relatives, n2261 no weapons possession, n2262 counseling, n2263 issuance of a temporary protection order, n2264 and a mental health examination if there have been prior violations of civil protection orders. n2265 The new Delaware statute requires a court to consider prior violations of protection orders before granting bail. n2266 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. n2267 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. n2268 Six states disallow bail or bond prior to the batterer's arraignment. n2269 Minnesota denies bail if the respondent's release poses a threat of bodily injury to any party. n2270 A Minnesota court may also require a maximum bond of $10,000 to deter further civil protection order violations. n2271

Like the numerous state statutes, case law also supports the issuance of temporary protection orders as a condition of pretrial release. n2272 In State v. Naegele, n2273 the court of appeals sustained the issuance of a temporary protection order as a condition of pretrial 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. n2274 In Commonwealth v. Allen, n2275 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. n2276 This approach has the added benefit of offering a victim the immediate protection she needs during the very dangerous pre-trial period. n2277

IV. Neglect and Termination of Parental Rights n2278

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. n2279 Studies reveal that between seventy-five and eighty-seven percent of children from violent homes witness the abuse. n2280 Social science research on children of batterers indicate that these children are at greater risk of substance abuse, juvenile delinquency, n2281 and suicide. In addition to psychological and behavioral problems, children who witness violence in the home are seventy-four percent more likely to commit violent crimes. n2282 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. n2283 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. n2284 Another study found that fifty percent of mothers of abused children are battered women. n2285 The researchers concluded that wife "battering is the most common context for child abuse." n2286 Some researchers conclude that a batterer may abuse a child to maintain coercive control over the abused parent. n2287

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 children may be to fashion remedies that protect both the abused parent and the children from the perpetrator." n2288 Protection of the battered parent is a critical means of protecting an abused child. n2289 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. n2290 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. n2291 This early intervention aimed at protecting both the abused child and parent will halt the escalation of violence [*1171] and facilitate child adjustment. n2292 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. n2293

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. n2294 When the batterer repeatedly abused the mother during a six year marriage and ultimately plead guilty to murdering her, n2295 and when the defendant was acquitted of murdering his wife but his son firmly believed his father was guilty and testified as such. n2296 Specifically, in Kenneth B. v. Elmer S., n2297 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. n2298

For the same reasons, courts have terminated parental rights and denied custody in non-homicide spousal abuse cases. In In re [*1172] Theresa, n2299 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. n2300 In Kimmel v. Kimmel, n2301 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. n2302

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, n2303 which courts have found to be sufficiently credible to meet a "beyond a reasonable doubt" standard of proof in a criminal domestic violence case. n2304 Other forms of evidence frequently offered include witness testimony regarding injuries, medical records, police reports, photographs, n2305 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 [*1173] be allowed to testify fully. n2306 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. n2307 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. n2308 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. n2309

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. n2310 Experts working with abusive men n2311 agree that batterers greatly underreport their violent actions, minimize or deny assaultive behavior against their wives, and claim more involvement by the victim of [*1174] their violence than witness or police reports would support. n2312 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. n2313 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. n2314 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. n2315 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 n2316

Increasingly, courts admit expert testimony on the battered woman syndrome into domestic violence criminal trials. n2317 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 [*1175] 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, n2318 State v. C.V.C., n2319 and State v. Frost, n2320 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. n2321 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. n2322 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. n2323 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. n2324

The battered woman syndrome has also played an important role in criminal prosecutions of battered women who kill their batterers in self-defense. n2325 In State v. Gallegos, n2326 the court not only admit [*1176] 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. n2327 In People v. Torres, n2328 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 [*1177] tion of expert scientific evidence. n2329 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, n2330 "the protection from abuse statute was enacted to alleviate the battered wife syndrome' and has been expanded to protect parties in other close relationships." n2331 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. n2332 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 [*1178] and civil cases, such experts should be schooled in the dynamics of domestic violence. In Bruscato v. Avant, n2333 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. n2334

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. n2335 The courts in civil protection order cases have also routinely admitted evidence of past abuse n2336 and prior protection orders n2337 to support the [*1179] issuance of a civil protection order.

In criminal domestic violence or homicide cases, courts have admitted physical evidence including photographs of the scene, n2338 photographs of the victim's injuries, n2339 physical evidence of the victim's injuries, n2340 a blood stained shirt, n2341 and the defendant's history of victim abuse when he raised a self-defense claim. n2342 In People v. Torres, n2343 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, n2344 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, n2345 prior contempt of civil protection orders, n2346 [*1180] prior domestic violence convictions, n2347 prior bad acts in criminal trials, n2348 and the batterer's history of domestic violence n2349 in criminal domestic violence and murder trials. In People v. Richmond, n2350 the court admitted prior acts of domestic violence in a criminal murder trial because the "evidence that the defendant was [*1181] involved in prior incidents in which the decedent suffered similar injuries was admissible to show the presence of intent and the absence of accident." n2351

In divorce and custody cases, courts will admit photographs of an abused party's injuries, n2352 evidence of past abuse, n2353 and evidence of a party's plea in a murder trial. n2354 Courts have also admitted the testimony of other witnesses. In Taylor v. Taylor, n2355 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, n2356 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, n2357 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, n2358 where a battered woman [*1182] 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. n2359

In addition to expert witnesses, other witnesses may also testify in criminal domestic violence and civil protection order trials. n2360 In People v. Woodson, n2361 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, n2362 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. n2363 In Snyder v. Snyder, n2364 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 [*1183] admit children's testimony in civil domestic relations cases n2365 and in criminal prosecutions. n2366

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. n2367 West Virginia will allow a witness to testify unless there is a finding of disruptiveness or a court rule prohibits it. n2368 Courts will also admit expert testimony. In Cooke v. Naylor, n2369 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. n2370 Similarly, in State v. Harper, n2371 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. n2372 Courts have been reluctant to [*1184] 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, n2373 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. n2374 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. n2375 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. n2376

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. n2377 In Eichenberger v. Eichenberger, n2378 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 petitioner [*1185] failed to waive the confidentiality present in such relationships, the privilege must be affirmed absent demonstrated prejudice. n2379 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. n2380 In State v. Kilponen, n2381 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. n2382

Courts have limited the context in which victim impact statements may be used in domestic violence cases. In Buschauer v. State, n2383 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 [*1186] statement was not under oath, and there was no opportunity for crossexamination.
D. Sufficient Evidence

Case law also addresses the sufficiency of evidence in domestic relations cases and criminal domestic violence prosecutions. In People v. Williams, 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, 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. In State v. Amos, 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.

Criminal domestic violence prosecutions also provide insight. The court of appeals in State v. Gallegos addressed the sufficiency of evidence needed to warrant submitting the abused party's self-defense 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.

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. Therefore, courts should not dismiss cases based solely on a victim's refusal to testify if other evidence is available.

In Commonwealth v. Hatfield, 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 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. 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, 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.

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 developing 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.

FOOTNOTES:


n2 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.


n4 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.

n5 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) $(hereinafter Battered Women$ ); 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 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).

n6 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 than 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).

n7 Physical Violence in American Families: Risk Factors and Adaptations to Violence in 6,415 Families (Murray A. Straus et al. eds., 1987); Browne, supra note 1, at 3185.


n9 Terrifying Love, supra note 4, at 42.


n13 Peter G. Jaffe et al., Children of Battered Women 19 (1990).


n15 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) $(hereinafter Model Code$).

n16 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, section 512.

n17 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, section 510.

n18 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.


n20 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.

n21 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.”).

n22 See NIJ CPO Study, supra note 19.

n23 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.").

n24 NIJ CPO Study, supra note 19, at 19.

n25 Only approximately 11% of litigants in domestic violence cases were likely to receive 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)).

n26 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.

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.

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).

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 & 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).

See Czapanskiy, supra note 23, at 260.

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.

See generally Model Code, supra note 15, section 102(2).


n41 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).

n42 Bureau of Justice Statistics, Report to the Nation 3 (1988); Harlow, supra 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).


n44 Stark & Flitcraft, supra note 11, at 307-08.

n45 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).

n46 David Adams, Identifying the Assaultive Husband in Court: You Be the Judge, 13 Response to theVictimization 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.

n47 Ganley, supra note 21, at 24.

n48 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).


n52 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. 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 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).
n53 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. section 741.30(b) (West Supp. 1993).


n55 Harlow, supra note 3, at 1–3.

n56 This category would include, for example, in-laws, uncles, cousins, and extended family members.

n57 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.

n58 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).


n61 Id.

n62 431 U.S. 494.

n63 Id. at 505–06.

n64 Id.

n65 Id.

n66 Id. at 507–08.

n67 Id.

n68 Id. at 508.

n69 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).


n73 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) (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, 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).

n74 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).


n76 Id. at 931-32.

N77 Id.


n79 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).


n81 Id.


n83 Id. at 378-79.

n84 Id.

n85 Id.
n86 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).


n88 Id.

n89 Lucke v. Lucke, 300 N.W.2d 231, 235-36 (N.D. 1980) (affirming lower court issuance of a 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).

n90 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).


n93 Id. at 116-17.


n97 Id. at 510-14.

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. section 36-3-601(4)(E) (1991) (“persons whose sexual relationship has resulted in a current pregnancy”).


n100 Id. at 179-80.

n101 Id. at 180.

n102 Id. at 179.


n105 Id. at 998.

n106 Id. at 993-98.

n107 Id. at 991.


n110 Woodin, 455 N.W.2d at 536-37; Gina C., 576 N.Y.S.2d at 776-77.

n111 Woodin, 455 N.W.2d at 536-37; Gina C., 576 N.Y.S.2d at 776-77.

n112 Woodin, 455 N.W.2d at 537; Gina C., 576 N.Y.S.2d at 777.

n113 455 N.W.2d at 537.

n114 Id.

n115 576 N.Y.S.2d at 777.

n116 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).


n118 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).

n119 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 Jacqulyn 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).

n120 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 3132 (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).


n122 McFarlane et al., supra note 119, at 3176.

n123 Id.

n124 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, SelfDefense, 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.

n125 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.

n126 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.


n129 State v. Sirny, 772 P.2d 1145, 1146 (Ariz. Ct. App. 1989) (live-in girlfriend); 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. Ibus, 857 P.2d 570 (Haw. Sup. Ct. 1993) (extending coverage to a live-in girlfriend).

n130 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.

n131 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).

n132 Yankoskie, 526 A.2d at 432.

n133 Id. at 430-31.


n135 Id.


n137 Id. at 281-83.


n139 Id.

n140 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).


n142 Id. at 809.

n143 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 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).


n145 Id. at *6.

n146 Id. at *8.


n148 Id.

n149 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).


n151 624 A.2d 584 (N.J. 1993).

n152 Id. (stating that the act applies to "lesbians and gay men caught in violent relationships").


N154 Id. at 1191.

n155 Id. at 1192-93.

n156 Id. at 1193.


n159 Id. at 98.

n160 Id.

n161 Id. at 99.

n162 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-

n164 Bricker, supra note 162, at 1388.

n165 Id. at 1389-91.

n166 Id. at 1392.

n167 Id.

n168 Id. at 1393.

n169 Alaska Stat. section 25.35.200 (Supp. 1993) ("person . . . in a dating, courtship, or engagement relationship with the respondent"); Cal. Fam. Code section 70 (West Supp. 1992) ("person with whom the respondent has had a dating or engagement relationship"); Me. Rev. Stat. Ann. tit. 19, section 762(4) (1992) ("includes individuals presently or formerly living together as sexual partners"); Mass. Gen. L. Ann. ch. 209A, section 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 length of time elapsed since the termination of the relationship"); N.H. Rev. Stat. Ann. section 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. section 40-13-2 (Michie Supp. 1993) (person with whom petitioner has continuing personal relationship); N.D. Cent. Code section 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. section 6102 (1992) ("sexual or intimate partner"); P.R. Laws Ann. tit. 8, section 602 (Supp. 1990) ("Marital relationship shall mean . . . those who have or have had an intimate consensual relationship."); R.I. Gen. Laws section 8-8.1-1 (Supp. 1992) ("persons who shared an intimate sexual relationship within the past six (6) months"); Wash. Rev. Code Ann. section 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 section 48-2A-2 (Supp. 1993) ("current or former sexual or intimate partners").

n170 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).

n171 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.

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%).

n172 O'Keefe, supra note 171, at 467 (12%-26.9%) (noting that high school students who 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.)


n174 Harlow, supra note 3, at 2.

n175 Haw. Rev. Stat. section 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").

n176 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).

n177 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 and others both inside and outside the courtroom.).


n179 Id.

n180 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).

n181 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).


n189 N.M. Stat. Ann. section 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).

n190 N.D. Cent. Code section 14.07.1-01.4 (Supp. 1993) (defining "family or household member" as including any "person with a sufficient relationship to the abusing person as determined by the court").

n191 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.

n192 750 ILCS 60/103 (Smith-Hurd Supp. 1993); see also 725 ILCS 5/112A-3 (SmithHurd 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.


n194 Id. at 1169.

n195 Id.

n196 Id.

n197 Id.
n198 Id. at 1172-73.

n199 Id. at 1172.

n200 Id. at 1173.

n201 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).

n202 Id.


n205 Ky. Rev. Stat. Ann. section 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.").

n206 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 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.

n207 Ala. Code section 30-5-2(2) (1989) ("Any person 18 years of age or older, or who otherwise is emancipated."); Ind. Code Ann. section 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. section 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. section 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. section 6106(A) (1992) ("An adult or emancipated minor may seek relief under this chapter."); R.I. Gen. Laws section 8-8.1-1 (Supp. 1993) (" Cohabitants': emancipated 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. section 35-21-102(a)(1) (Supp. 1993) (filing may be completed by anyone sixteen years of age or older).

n208 See supra note 73.

n209 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).

n210 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 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.


n211 NIJ CPO Study, supra note 19, at 24.

n212 Id. at 19.

n213 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).
n214 See infra notes 1606-11 and accompanying text for a complete discussion of the benefits of lay advocacy.


n217 Ohio Rev. Code Ann. section 3113.31(c) (Baldwin 1992).


n219 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).


n221 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, section 301.

n222 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); Ellibe v. Ellibe, 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).

n223 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).


n227 See generally Model Code, supra note 15, at sections 102, 201.


n229 Id.

n230 Id.

n231 Id.

n232 Id.

n233 Terrifying Love, supra note 4, at 30.

n234 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.

n235 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.

n236 Domestic violence is cyclical. The violence increases in both frequency and severity 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.


n245 Harlow, supra note 3, at 2; see also Klaus & Rand, supra note 3.

n246 Id.

n247 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).


n249 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).

n250 Browne, supra note 1, at 3186. Women are three times more likely than men to require medical care for injuries sustained in family assaults. Glenda Kaufman et al., The Drunken Bum Theory of Wife Beating, 34 Soc. Probs. 218 (1987).

n251 Browne, supra note 1, at 3186.

n252 See generally People v. Ballard, 249 Cal. Rptr. 806 (Cr. 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 (Cr. 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).

n253 *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).

n254 *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 shaved his son's face against a cellar door).

n255 Id.

n256 *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).

n257 *Pierson*, 555 N.Y.S.2d at 227.

n258 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).


n262 *Murray*, 623 N.E.2d 1236.


n265 Id.

n266 Id.

n267 Id.


n271 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).

n272 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. Kilpomen, 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).


n275 Smith, 552 A.2d at 292.

n276 Christenson, 472 N.W.2d at 279.


n278 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 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).

n279 472 N.W.2d 279 (Iowa 1991).

n280 Id. at 280-81.

n281 Id. at 280.

n282 Id.


n284 Johnson, 459 N.W.2d at 887.

n285 Id. at 887 (quoting Wis. Stat. Ann. section 813.12 (West 1990)).

n286 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 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).


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. section 13-1406 (1993) (charging husband with sexual assault of wife if husband used force or threat); Cal. Penal Code section 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. section 53a-67 (West 1993) (requiring that spouse/cohabitant be charged with more than first degree rape); Idaho Code section 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. section 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. section 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. section 200.373 (Michie 1993) (charging husband with rape only if force or threat was used); N.H. Rev. Stat. Ann. sections 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. section 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. section 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, section 3103 (1993) (providing that husband/cohabitant can only be charged with lesser crime of spousal sexual assault); R.I. Gen. Laws section 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. section 16-3-658 (Law. Co-op. 1992) (charging husband with rape only if he used force or threat of force); 18 Pa. Cons. Stat. Ann. section 3103 (1993) (providing that husband/cohabitant can only be charged with lesser crime of spousal sexual assault); Wyo. Stat. sections 35-21-102 to 35-21-104 (1993) (limiting rape charges to husbands to first degree and second degree rape only); W. Va. Code section 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).


n299 Haw. Rev. Stat. sections 707-730 to 707-732 (1992) (charging husbands with first through third degree rape only, not fourth or fifth degree rape); Iowa Code Ann. section 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. sections 21-3501, 21-3502 (Vernon 1993) (charging husband with rape); Mont. Code Ann. sections 45-5-502, 45-5-503 (1993) (providing that husbands/cohabitants can be charged with rape and sexual assault); N.C. Gen. Stat. section 14-27.8 (1993) (providing that husband can be charged with rape regardless of whether the parties are separated); Va. Code Ann. section 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. sections 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).


n301 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).

n302 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).


n304 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.

n305 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.


n307 Campbell, supra note 119; see also Ewing, supra note 180, at 9.


n311 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).
n312 *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).

n313 *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).


n315 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.

n316 Gillespie, supra note 124, at 129.


n318 Angela Browne, Testimony before the U.S. Senate Committee on the Judiciary (Dec. 1990).

n319 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).

n320 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.


n325 Id. at *4-*5.

n326 Id. at *24-*25.


n328 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).

n329 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).


n337 Id. at 126.


n339 Id.
n340 Id. at 931.
n341 Id. at 932.
n343 Id.
n344 Id. at 44.

n345 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).

n346 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).

n347 Ganley, supra note 21, at 19, 23.

n348 392 N.W.2d 604 (Minn. Ct. App. 1986).

n349 Id. at 606.

n350 500 N.Y.S.2d 475 (Fam. Ct. 1986).

n351 Id. at 478.


n353 Id. at 42.

n354 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, Las 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).

n355 Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 499 (2d ed. 1986).

n356 Id. at 495.

n358 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).

n359 Lucke v. Lucke, 300 N.W.2d 231 (N.D. 1980).


n362 Id.

n363 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.

n364 LaFave & Scott, supra note 355, at 495.

n365 See supra note 354.

n366 LaFave & Scott, supra note 355, at 502.

n367 Follingstad et al., supra note 317, at 113 (discussing six different types of emotional abuse and the resulting impact on the victims).

n368 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.

n369 Gillespie, supra note 124, at 129.


n372 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).


n376 Id.


n378 Id.


n381 Johnson v. Cegielski, 393 N.W.2d 547 (Wis. Ct. App. 1986).

n382 Id.


n384 Id.

n385 Id.

n386 Id.


n388 State v. Sarlund, 407 N.W.2d 544, 546 (Wis. 1987).

n389 Id.

n390 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).
n391 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.


n393 Id.


n397 Id.


n399 Id.

n400 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).

n401 Id. at *6.


n403 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 accidentally, 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.).

n404 Didonna, 339 N.Y.S.2d at 592.


n406 Id. at 1014.

n407 Del. Code Ann. tit. 10, section 945 (Supp. 1992) (insulting, taunting other conduct likely to cause humiliation, degradation or fear); Haw. Rev. Stat. section 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


n409 Immigration and Nationality Act, 8 U.S.C. section 1186(a) (Supp IV 1992); 8 C.F.R. section 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").

n410 300 N.W.2d 231 (N.D. 1980).

n411 Id. at 234.

n412 Id. at 233.

n413 443 N.W.2d 196 (Minn. Ct. App. 1989).

n414 Id. at 198.

n415 Id. at 196.

n416 Id. at 198.


n418 Id.


n420 Id. at 580.

n421 Id.

n422 Id.

n423 616 N.E.2d 610 (Ill. 1993).

n424 Id.


n426 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).

n427 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 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).

n428 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.

n429 Follingstad et al., supra note 317, at 114.

n430 Id. at 115.

n431 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).

n432 Follingstad et al., supra note 317, at 113.

n433 Terrifying Love, supra note 4, at 44.


n435 Id. at 465.


n437 Id. at *21.

n438 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).


n441 Kreitz v. Kreitz, 750 S.W.2d 681 (Mo. Ct. App. 1988).

n442 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 "this time I'm not going alone. You better watch your back").

n443 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).

n444 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 the abusive parents. Washington Humane Society, Child Abuse and Cruelty to Animals.


n446 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 nailing nails into her car tires).

n447 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).

n448 Id.

n449 Knuth, 1992 Minn. App. LEXIS at *696.

n450 Id.


n454 Id.

n455 Id.

n456 Id.


n458 Model Anti-Stalking Code, supra note 453, at 13.

n459 Id.

n460 Id.

n461 Id. at 21.

n462 Id.


n464 Model Anti-Stalking Code, supra note 453, at 28.


n466 See generally Model Code, supra note 15, section 303.

n467 See 750 ILCS 60/203 (Smith Hurd Supp. 1993); La. Rev. Stat. Ann. section 46:2133 (West Supp. 1993); Mo. Rev. Stat. section 455.510 (1986); Mont. Code Ann. section 40-4-123 (1993); N.J. Stat. Ann. section 2C:25-28 (West Supp. 1993); Utah Code Ann. section 30-6-3 (1989 & Supp. 1993); W. Va. Code section 48-2A-3 (Supp. 1993); Wis. Stat. Ann. section 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 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).

n468 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).

n469 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).


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 sections 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).


n478 750 ILCS 60/210 (Smith-Hurd Supp. 1993).


n481 See Model Code, supra note 15, section 306.

n482 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).


n484 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).


n487 Id.

n488 Id.

n489 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).


n492 Id.


n494 Id.

n495 Interview with Charon Asetoyer, Director, Native American Women's Health Resource Center in Lake Andes, North Dakota (Oct. 5, 1993).

n496 S. 11, 103d Cong., 1st Sess. section 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

n497 See, e.g., Ark. Code Ann. section 9-15-201(f) (Michie 1993) (a protection order petition may be filed regardless of whether there is any pending litigation between the parties).

n498 See, e.g., In re Marriage of Rodriguez, 545 N.E.2d 731, 732 (Ill. 1989) (affirming 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).

n499 See, e.g., N.J. Stat. Ann. section 2C:25-25 (West 1992); N.D. Cent. Code section 14.07.1-02 (Supp. 1993); Utah Code Ann. section 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. 1988) (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).

n500 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).

n501 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); Kriet v. Kriet, 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) (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).

n503 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 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).

n504 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).

n505 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. Kretiz, 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); Behn 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).

n506 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).

n507 Szensy v. Szensy, 557 N.E.2d 222 (Ill. 1990) (holding it improper to award marital debts to abusive husband).

n508 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 (1988) (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).
n509 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 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).

n510 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).

n511 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).

n512 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).

n513 Minn. Stat. Ann. section 518B:01.6(e) (West 1993).


n515 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).

n516 See Model Code, supra note 15, section 404.

n517 747 S.W.2d 191 (Mo. Ct. App. 1988).

n518 Id. at 193.

n519 Id.

n520 Id.


n522 Id. at 894-95.

n523 725 ILCS 5/112A-14 (Supp. 1993); Md. Code Ann., Fam. Law section 4-510 (Supp. 1993); Miss. Code Ann. section 93-21-9(3) (Supp. 1993); N.M. Stat. Ann. section 40-13-5C (Michie 1993); see also Model Code, supra note 15, section 304 (an order of protection is in addition to and not in lieu of any other available civil or
criminal proceeding).


n536 See Model Code, supra note 15, section 304.

n537 492 N.W.2d 76 (N.D. 1992).

n538 Id. at 81–82.

n539 584 So. 2d 125 (Fla. Dist. Ct. App. 1991)

n540 Id. at 126.
n541 Id.; Fla. R. Civ. Proc. 1.610.

n542 Campbell, 584 So. 2d at 126.

n543 Id.

n544 Id. at 127.


n546 Id. at 530-31.


n548 Id. at 243-44.

n549 291 S.E.2d 923 (N.C. Ct. App. 1982).

n550 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).

n551 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.


n556 See, e.g., Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986).

n557 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.

n558 Leslye E. Orloff, Issuance of Civil Protective Orders, in Domestic Violence in Civil Court Cases, supra note 21, at 75, 78–79.

n559 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.

n560 This approach has been recommended by the District of Columbia Task Force. D.C. Task Force, supra note 213, at 143. “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.” Id. at 155 n.278.


n567 Id. at *1.

n568 Id. at *1.

n569 Id. at *3.


n571 See Del. Code Ann. tit. 10, section 946(c) (1993); Idaho Code section 39–6304(6) (1992); 750 ILCS


n581 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 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
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).

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 section 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 constituted 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).
protection orders issued against him but enforcement must be brought in juvenile court).

n587 Flury v. Howard, 813 P.2d 1052, 1054 (Okla. 1991)

n588 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.

n589 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:

the 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.


n597 113 S. Ct. 2849 (1993).

n598 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.
n599 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).

n600 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.

n601 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.

n602 Gillespie, supra note 124, at 129.

n603 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. Louise 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. 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.

n604 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.").


n607 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).

n608 Boniek, 443 N.W.2d at 196.

n609 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).

n610 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).


n613 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).

n614 443 N.W.2d 196 (Minn. App. 1989).

n615 Id.


n617 597 A.2d 927.

n618 Id. at 930 n.3.

n619 492 N.W.2d 76 (N.D. 1992).
n620 Id. at 81.


n622 Id. at *6-*7.

n623 Id.

n624 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 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).


n627 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).


n630 Boyle, 12 Pa. D. & C.3d at 778.

n631 Id.

n632 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 occurrences happening almost immediately prior to the presenting of the petition.").

n633 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.

n634 393 N.W.2d 547 (Wis. Ct. App. 1986) (per curiam).

n635 Id.

n636 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).


n638 Id. at 1210.

n639 750 S.W.2d 681 (Mo. Ct. App. 1988).

n640 Id. at 685. Some courts have, however, been reticent to hold batterers in contempt 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.


n642 Id. at 282.

n643 Id. at 283.

n644 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).

n645 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).

n646 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).

n647 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 that results in a traumatic condition).

n648 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).

n649 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).
n650 Id.
n651 Id.
n652 Id.
n653 Id.

n654 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).

n655 Id.

n656 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).

n657 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 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).

n658 Id. at 1208.
n659 Id. at 1210.

n661 Id. at 746.
n662 573 A.2d 376 (Me. 1990).
n664 Cooke, 573 A.2d at 377-78.

n667 Eichenlaub, 490 A.2d at 920.
n668 310 N.W.2d 681 (Minn. 1981).

n670 Errington, 310 N.W.2d at 682-83.


Id. at 1032-33.

Id.

Id. However, an Illinois court struck down a marriage license fee which funded domestic violence programs. In Boynton v. Kasper, 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.


Id. at 453.

Id. at 452.

Id.

Id. at 453.


n686 NIJ CPO Study, supra note 19, at 33.


n689 See also Siggelkow v. State, 731 P.2d 57, 62 (Alaska 1987) (holding that a court hearing a divorce action has the authority to hear a variety of causes and impose remedies it sees fit, including a no contact order).

n690 See generally Model Code, supra note 15, sections 305, 306.


n692 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).

n693 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).

n694 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).

n695 See, e.g., Sielski v. Sielski, 604 A.2d 206 (N.J. Super. Ct. Ch. Div. 1992) (holding 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).
n696 Powell, 547 A.2d at 975.

n697 Id. at 975.

n698 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”).

n699 Id.

n700 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:

husband 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.

n701 209 Cal. Rptr. 83 (Ct. App. 1984).

n702 Id. at 85.

n703 Id.

n704 Id. at 86.

n705 Id.

n706 Id. at 88.

n707 See id. at 87.


n709 Id. at 694.

n710 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).

n711 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).


n713 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).


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, sections 305, 306.


n728 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, sections 305, 306.

n729 Cobb, 545 N.E.2d at 1161.


n738 Id. at *1.

n739 Id. at *4.

n740 Id.


n742 Id. at 1210.

n743 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. 901192-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).


n745 Family Violence Project, supra note 687, at 10.


n747 See, e.g., N.J. Stat. Ann. section 2C:25-29 (West 1992) (providing that a court can order respondent to stay away from petitioner's family); N.Y. Fam. Ct. Act section 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, sections 305, 306.

n748 See, e.g., N.J. Stat. Ann. section 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 section 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); 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, sections 305, 306.

n749 Ark. Code Ann. section 9–15–205 (Michie 1993); Lewis, 508 N.W.2d at 75 (requiring respondent to stay away from any premises temporarily occupied by petitioner).


n753 Id.

n754 Id.


n760 See, e.g., id.


n762 459 N.W.2d 886 (Wis. App. 1990).

n763 Id. at 886.

n764 Orloff & Klein, supra note 26, at 15.

n765 More than 1 in 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.

n766 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)).

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 section 5517 (West 1993).

n768 Leslye Orloff, Issuance of Civil Protection Orders, in Domestic Violence in Civil Court Cases, supra note 21, at 75, 101.


n770 Id. at *11-*12.


n772 Id. at 751.


n774 Id. at *3-*4.


n777 Id. at *2-*3.

n778 Id. at *9-*10.

n779 The National Institute of Justice found that "offenders 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.


n781 Domestic Violence in Criminal Court Cases, supra note 23, at 73.

n782 Id. at 74.


n790 Id.


n792 Women and Violence, supra note 789, at 68-69 (statement of the NOW Legal Defense Fund).


n794 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.


n797 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).

n798 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.

n799 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).

n800 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 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).


See, e.g.,


n808 See Model Code, supra note 15, sections 305, 306.


n811 Id. at *1.


n818 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 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.


n820 Id. at 995-96.


n822 Marquette, 686 P.2d at 995-96.

n823 NIJ CPO Study, supra note 19, at 41-42.

n824 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.


n826 See, e.g., Mich. Comp. Laws Ann. section 600.2950 (West 1986); N.Y. Fam. Ct. Act section 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).


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).


n834 Id. at 842-43.

n835 Id.


n838 Id.

n839 Id. at 682-83.

n840 Id. at 683.

n841 673 S.W.2d 478 (Mo. Ct. App. 1984).

n842 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).

n843 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.

n844 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 (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.

n845 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).

n846 The average stay at a battered women's shelter is less than two weeks. Jean GilesSims, A Longitudinal Study of Battered Children of Battered Wives, Fam. Rel., Apr. 1985, at 205-06.

n847 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. This is particularly true for battered immigrant and refugee women, who often turn instead to friends and relatives for shelter.

n848 297 S.E.2d 135 (N.C. Ct. App. 1982).

n849 Id. at 136.


n852 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.

n853 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).


n855 424 U.S. at 319.

n856 The Mathews court developed a test that ex parte relief is constitutional when the 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.

n857 Orloff & Klein, supra note 26, at 87; Browne, supra note 10, at 1080-81.


n866 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).
n867 406 N.W.2d at 52.

n868 Id. at 54.


n870 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).

n871 Fifty-nine percent of batterers destroyed or damaged sentimental and personal effects of their victims. Follingstad et al., supra note 317, at 113.


n878 Cal. Fam. Code section 2045 (West 1993); Del. Code Ann. tit. 10, section 949 (1993); 750 ILCS 60/214
(Smith–Hurd 1993).


n882 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).

n883 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, sections 305, 306.


n886 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).
n887 Goolkasian, supra note 780, at 2.

n888 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.

n889 Klaus & Rand, supra note 3, at 4.

n890 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.

n891 Id.


n893 Model Code, supra note 15, sections 207, 306.

n894 See infra notes 1333–43 & 2186–202 and accompanying text.


n901 N.H. Rev. Stat. Ann. section 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. section 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.”).


n904 Id. at 1204.

n905 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.

n906 Sanders & Browne, supra note 905, at 381.


n909 Family Violence Project, supra note 687, at 21.

n910 See generally Model Code, supra note 15, section 102.

n911 NIJ CPO Study, supra note 19, at 44.


n914 Cal. Fam. Code section 5754 (West 1992); 750 ILCS 60/214 (Smith-Hurd 1993); Mass. Gen. Laws Ann. ch. 209A, section 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.


n916 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).

assessment should be ordered unless defendant can show that the request is arbitrary and capricious).

n918 See, e.g., id. at 523 (ordering defendant to undergo domestic violence counseling).


n920 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.


n923 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.

n924 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.

n925 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).


n927 Ganley, supra note 21, at 32.

n928 Id.
n929 Id.
n930 Id.
n931 Id.
n932 Id.
n933 Domestic Violence in Criminal Court Cases, supra note 23, at 151-52.
n934 Id.
n936 Domestic Violence in Criminal Court Cases, supra note 23, at 151.
n937 Id.
n938 Id. at 152.
n939 Id. at 151; Ganley, supra note 935, at 173-93.
n941 Family Violence Project, supra note 687, at 50.
n942 Id.
n943 See generally Model Code, supra note 15, section 102.
n944 NIJ CPO Study, supra note 19, at 44.
n945 Orloff & Klein, supra note 26, at 105.
n948 See, e.g., Stroschein v. Stroschein, 390 N.W.2d 547 (N.D. 1986) (refusing to order mental examination of civil protection order petitioner).

n950 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, section 216.

n951 D.C. Task Force, supra note 213, at 143.


n953 Id.

n954 Id.


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, 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, section 401.

n957 Family Violence Project, supra note 687, at 9.

n958 Id. (citations omitted).
n959 Id. at 24.

n960 Id.

n961 Id. at 26.

n962 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).

n963 Id. at 49 (citations omitted).

n964 Id.

n965 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.

n966 Id. at 26.

n967 Id.


n969 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.

n970 Women and Violence, supra note 789, at 142.


n973 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.

n974 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.

n975 National Women Abuse Prevention Project, supra note 969, at 1 (1987); Ford, supra note 800, at 3.

n976 Roy, supra note 800, at 89-90.


n978 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, section 402.

n979 Id. at 102.


n981 Behind Closed Doors, supra note 978, at 112-14.

n982 Rosenbaum & O'Leary, supra note 980, at 693.

n983 Behind Closed Doors, supra note 978, at 101.

n984 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).

n986 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).


n989 Id.


n994 Id.


n996 Hart, supra note 991, at 31; see also Model Code, supra note 15, sections 401, 403.


n998 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.

n999 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%.


n1000 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.

n1001 486 N.W.2d 509 (N.D. 1992).

n1002 Id.

n1003 Id. at 512.

n1004 Id. at 512.

n1005 D.C. Task Force, supra note 213.

n1006 Id. at 147.

n1007 Id. at 148.

n1008 Id. at 11 app. H.

n1009 Id. at 10–11 app. H.

n1010 Id. at 11 app. H.

n1011 Id.

n1012 Id.

n1013 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 ).

n1014 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).

n1015 584 So. 2d 125 (Fla. App. 1991).

n1016 Id. at 126.

n1017 Id. at 126-27 (citation omitted).

n1018 747 S.W.2d 191 (Mo. Ct. App. 1984).

n1019 Id. at 193.

n1020 Id.


n1022 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).

n1023 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., 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).


n1026 Id. at 774.


n1028 Id. at 203-04.

n1029 Id.

n1030 Id. at 203.

n1031 Id. at 203-04.

n1032 Id. at 204.


n1035 Id. at 813-14.


n1037 Id. at 377.


n1039 Id. at 514.
n1040 See Model Code, supra note 15, section 402.


n1043 Id. at 986. But see Dschaak v. Dschaak, 479 N.W.2d 484 (N.D. 1992) (awarding custody to the father after minimizing the abuse against the mother, which the court described as only controlling and verbally abusive).


n1045 796 S.W.2d 164 (Tex. 1990).

n1046 Id. at 167.

n1047 Id.

n1048 Id. at 168.

n1049 Id.


n1051 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.


n1053 Family Violence Project, supra note 687, at 25; see also Model Code, supra note 15, section 401.

n1054 Id.


n1056 Id. at 467–68.

n1057 760 P.2d 71 (Mont. 1988).

n1058 Id. at 72–73.

n1059 Id.

n1060 Id.

n1061 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).

n1062 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 toward 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).

n1063 392 N.W.2d 904 (Minn. Ct. App. 1986).

n1064 Id. at 906-07.

n1065 469 N.W.2d 156 (N.D. 1991).

n1066 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 exbrother-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. Atkins, 406 S.E.2d 434 (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).

n1067 800 S.W.2d 59 (Mo. Ct. App. 1990).

n1068 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.

n1069 Id.


n1071 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).
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).

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.


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 batters', and only 24% of non-batters' 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).


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).
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 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.


Id.


Finkelhor et al., supra note 1089, at 103.


Child Abduction Studied; Domestic Violence Implicated in Child Abductions, supra note 1091, at 3.

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.

n1096 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. section 1738A (West Supp. 1993). Many states specify situations in which action that would otherwise be prohibited will not be subject to parental kidnapping charges. See, e.g., D.C. Code Ann. section 16-1023(a) (Supp. 1988).

n1097 Model Code, supra note 15, section 402(3).

n1098 509 N.Y.S.2d 979 (Fam. Ct. 1986).

n1099 Id. at 982-83.

n1100 549 N.Y.S.2d 511 (Sup. Ct. 1989).

n1101 Id. at 512.

n1102 Id. at 514-15.

n1103 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).


n1105 Id. at 869.

n1106 509 N.Y.S.2d 979 (Fam. Ct. 1986).

n1107 Id. at 982-83.
n1108 Id. at 982.

n1109 Id. at 982–83.


n1111 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).

n1112 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. 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).

n1113 See, e.g., Kimmel, 392 N.W.2d at 908; Benda, 565 A.2d at 1124.

n1114 218 Cal. Rptr. 905 (Ct. App. 1985).

n1115 Id.

n1116 Id. at 908.
n1117 Id.

n1118 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).


n1120 Id.


n1122 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. Callura, 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).

n1123 See, e.g., Benda, 565 A.2d at 1124.

n1124 Orloff & Klein, supra note 26, at 43.

n1125 Domestic Violence in Criminal Court Cases, supra note 23, at 43, 50.


n1127 Id. at 798.

n1128 Id. at 797.

n1129 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.


n1133 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).

n1134 See, e.g., *Garza*, 726 S.W.2d at 200-01.

n1135 See, e.g., *id.* at 200-02.

n1136 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 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).

n1137 *Child Abduction Studied; Domestic Violence Implicated in Child Abductions*, supra note 1091, at 3.

n1138 For discussion, a sample letter, and court order, see *Orloff & Klein*, supra note 26, at 8.

n1139 42 U.S.C. section 11601.


n1142 See generally Model Code, supra note 15, sections 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).


n1147 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.").

n1148 Iowa Code Ann. section 236.5.2.d (West Supp. 1993).

n1149 Family Violence Project, supra note 687, at 25.

n1150 Id.

n1151 NIJ CPO Study, supra note 19, at 43.

n1152 Family Violence Project, supra note 687, at 19–20; see also Model Code, supra note 15, section 306.

n1153 Id.; Orloff & Klein, supra note 26, at 51; see also NIJ CPO Study, supra note 19, at 43–44.


n1156 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.

n1157 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).


n1159 Id.

n1160 Id. at 127.

n1161 509 N.Y.S.2d 979, 983 (Fam. Ct. 1986).

n1162 Id.; see also In re Marriage of Klister, 777 P.2d 272 (Kan. 1989) (allowing the 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).

n1163 See, e.g., Hall v. Hall, 408 N.W.2d 626 (Minn. Ct. App. 1987).

n1164 Id. at 629.
n1165 Id.

n1166 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.


n1168 Id. at 528.

n1169 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).


n1171 Id. at *9–*10.


n1173 Id. at 138.

n1174 467 N.Y.S.2d 223 (Sup. Ct. 1983).

n1175 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).


n1177 545 N.E.2d 731 (Ill. 1989).

n1178 Id. at 734–35.

n1179 Id. at 734.


n1181 Id.

n1182 408 N.W.2d 626 (Minn. Ct. App. 1987).

n1183 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).


n1185 Id. at 340.

n1186 455 N.W.2d 471 (Minn. 1990).

n1187 Id. at 474-75.

n1188 Id.


n1192 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.

n1193 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).


n1195 Id. at 126.

n1196 Id.


n1199 Id. at *20.

n1200 Id.

n1201 Id.

n1203 Id. at 478-79.

n1204 Id. at 479.


n1206 Id.

n1207 Id. at 273.

n1208 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).

n1209 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.


Like other victims of interpersonal violence, women assaulted by male intimates learn to weigh all alternatives against their perception of the assaillant's ability to control or to harm . . . . For women whose assaillant is their husband or other intimate partner predictable effects of attack are further compounded by the fact that the assaillant 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 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.

n1210 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)).

n1211 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.

n1212 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).

n1213 Women and Violence, supra note 789, at 95.

n1214 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 families have children—disproportionately singlemother 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 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).


n1216 Dwyer & Tully, supra note 844, at 9.

n1217 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).

n1218 Family Violence Project, supra note 687, at 22.


section 518B.01.6 (West Supp. 1993); Miss. Code Ann. section 93-21-13(1) (Supp. 1993); Mo. Ann. Stat. section
N.C. Gen. Stat. section 50B-3(a) (Michie 1993); N.D. Cent. Code section 14-07.102.4(e) (Supp. 1993); Ohio Rev.
tit. 8, section 664 (Supp. 1993); R.I. Gen. Laws section 15-15-3 (Supp. 1993); S.C. Code Ann. section 20-4-
60(c)(7) (Law. Co-op. 1985); S.D. Codified Laws Ann. section 25-10-5 (1984); Tenn. Code Ann. section 36-3-
606(a) (1991); Tex. Fam. Code Ann. section 71.11(a)(2)(c) (West Supp. 1993); Utah Code Ann. section 30-6-6
Wyo. Stat. section 35-21-105(b) (1988); see also Model Code, supra note 15, section 306.

741.304(a)(b)(g) (West 1986); Haw. Rev. Stat. section 5865(b) (1987 & Supp. 1993); Idaho Code section 39-
6306(I)(e) (1993); 750 ILCS 60/214(b)(17) (Smith-Hurd 1992 & Supp. 1993); Iowa Code Ann. section 236.5(2)
section 621 (Supp. 1990).

tit. 10, section 949(6), (7) (Supp. 1993); Idaho Code section 39-6306 (Supp. 1993); 725 ILCS 5/112A-14(b) (Smith-
20-4-60(c) (Law. Co-op. 1985); Utah Code Ann. section 30-6-6 (Supp. 1993); Wash. Rev. Code Ann. section
621 (Supp. 1990).

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).

n1225 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 punitive damages in domestic violence cases).


n1235 For a full discussion, see Domestic Violence in Civil Court Cases, supra note 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).

n1236 547 A.2d 973 (D.C. 1988).


n1238 Powell, 547 A.2d at 974–75.

n1239 Id. at 975.

n1240 Id.


n1242 Id.

n1243 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).


n1248 Id.

n1250 Id. at 796.

n1251 Id.

n1252 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).

n1253 Family Violence Project, supra note 687, at 21–22.


n1255 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).


n1257 Id.

n1258 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.

n1259 712 S.W.2d 461 (Mo. App. 1986).

n1260 Id. at 463.

n1261 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.

FAMILY VIOLENCE PROJECT, supra note 687, at 22.

Id.

Id. at 2–3.

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); NJ. STAT. ANN. § 2C:25-29(b)(4) (West 1993); see also MODEL CODE, supra note 15, § 306.

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 properly 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).


Id.

423 N.W.2d 701 (Minn. App. 1988).

Id.

Id. at 3.

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:4.1(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 denial 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.


n1284 Id.

n1285 Id.

n1286 See MODEL CODE. supra note 15. §§ 504-507 (discussing recommended provisions for public health settings, health care facilities, and health care workers).


n1289 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 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).

n1290 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).


n1293 Schmidt, 620 A.2d at 1389–90.


n1295 Id. at *1–*2.

n1296 Spoto v. McCarroll, 593 A.2d 375, 379 (N.J. Super. Ct. App. Div. 1991) (holding 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).

n1297 355 N.W.2d 335 (Minn. Ct. App. 1984)
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.*

577 N.Y.S.2d 354 (Fam. Ct. 1991)

For this reason, it is essential that police officers participate in continuing education programs on domestic violence. See MODEL CODE, *supra* note 15, § 509.

NU CPO STUDY, *supra* note 15, at 60.

*Hart, supra* note 991, at 70-71.


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) ("It 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(1) (1990) ("All 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) ("Advising 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(1) (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 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) ("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. . . ."); 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).

n1307 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 adequate and pertinent notice of his 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 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).


n1309 COLO. REV. STAT. ANN. § 14-4-104(2)(a) (West Supp. 1993).


n1311 CONN. GEN. STAT. ANN. § 46b-38b(d)(2) (West Supp. 1993).


n1315 ALASKA STAT. § 18.65.520(b) (1991); MASS. GEN. LAWS ANN. ch. 209A, § 6(4) (West Supp. 1993).


n1320 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. §


n1323 406 N.W.2d 52 (Minn. Ct. App. 1987).

n1324 Id. at 54.

n1325 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.").


n1330 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) (rinding 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).


n1339 Id. at 33.


n1341 Id. at 852.


n1343 Id. at 388.

n1344 City of Grafton v. Swanson, 497 N.W.2d 421, 423 (N.D. 1993) (citations omitted).
See, e.g., Raucci v. Town of Rotterdam, 902 F.2d 1030 (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 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).

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).

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 the 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 revoler was involved in the shooting).

n1352 *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 F.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).


n1354 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).

n1355 739 F. Supp. at 265.

n1356 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 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).


n1358 Several programs which have year 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).

The legislative history of the Violence Against Women Act H.R. 1133 reiterates the following: "many 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).

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).

n1360 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).

n1361 UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY. INEQUALITY AND DISCRIMINATION 75 (1993).

n1362 Id.

n1363 Id.

n1364 Id.

n1365 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).

n1366 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); 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.

The Violence Against Women Act will go to conference committees 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 BUI.

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.


Id.

Id.


Id.

Id.

Id.

3537 (codified as amended at 8 U.S.C. § 1186(c)(4) 1251 (1988)).

n1384 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).

n1385 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.

n1386 Immigration and Nationality Act, § 201 (b).

n1387 Id. at § 203(a).

n1388 Id. at § 244(a).

n1389 Id. at § 208(a).

n1390 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.


n1392 ORLOFF & KLEIN, supra note 26. at 8.

n1393 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 (Deana Jang et al. eds., 1991) [hereinafter IMMIGRANT WOMEN]; NATIONAL IMMIGRATION LAW CENTER, GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS (1992).


n1395 Except those whose status as alien is adjusted to that as an alien lawfully admitted for temporary


n1399 Id.

n1400 Wheeler, supra note 1393: NATIONAL IMMIGRATION LAW CENTER, supra note 1393.

n1401 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 woman in leaving a batterer, absent longer term dependance on the program will not generally preclude her from attaining immigration status at some future time.


n1403 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).

n1404 The statutory mandate of the Special Supplemental Food Program for WIC is to 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).


n1406 NATIONAL IMMIGRATION LAW CENTER, supra note 1393. at xi.


n1408 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.

n1409 NATIONAL IMMIGRATION LAW CENTER, supra note 1393, at xi.

n1410 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.

n1411 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).

n1412 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.

n1413 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. at app. XIII-1.

n1414 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.


n1416 See Wheeler, supra note 1393.

n1417 Id.

n1418 Id. at IX-10–11.

n1419 See Debbie Lee et al., Community Organizing, in IMMIGRANT WOMEN, supra note 1393, at X-9 to X-10.


n1422 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); 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. COMP. 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) (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 parte 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 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.

n1423 MINN. STAT. ANN. § 518B.01.7(a)(3) (West Supp. 1993); see also MODEL CODE, supra note 15. §§ 305, 306.

n1424 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).


n1428 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 menial health center stating that visitation with the father is contrary to the child's best interests).


n1430 ALA. CODE § 30–5–7 (a)(5) (1989); ALASKA STAT. § 25.35.020(c) (1991); LA. REV. STAT. ANN.


n1432 See also MODEL CODE, supra note 15, § 306.


n1434 Id. at 995-96; at also In re Marriage of Bolt, 854 P.2d 322 (Mont. 1993) (upholding ex parte protection order granting temporary custody to petitioner).

n1435 NIJ CPO STUDY, supra note 19, at 43.

n1436 FAMILY VIOLENCE PROJECT, supra note 687, at 26.


n1438 See D.C. TASK FORCE, supra note 213, at 141, 151.


n1444 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).


n1447 DEL. CODE ANN. tit. 10, § 947 (Supp. 1993); Mo. ANN. STAT. § 455.035 (Vernon 1986).


n1452 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 TOO where the police received a tip through a community "crimestoppers" information service that the respondent was trying to kill the petitioner).


n1455 See, e.g., Steckler, 492 N.W.2d at 81.


n1457 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).

n1458 Id.


n1461 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 assaulted her, continued to her harass her, made verbal threats against her, and threw the children and the children's toys at her).

n1462 Id.; see also Steckler, 492 N.W.2d at 76.

n1463 Marquette, 686 P.2d at 991.

n1464 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).
n1465 494 N.W.2d 282 (Minn. 1992).

n1466 Id. at 286-87.

n1467 Id. at 286.

n1468 Id. at 286-87.

n1469 Id. at 286.

n1470 Id. at 290.


n1473 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).

n1474 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.

1985); VA. CODE ANN. i 16.1-253.4 (Michie Supp. 1993); see also MODEL CODE, supra note 15. § 305.

n1476 725 P.2d 923 (Or. 1986).

n1477 Id. at 925.

n1478 Id.


n1480 Id.; see also State v. Dawson. No. 79AP-565 (Ohio Ct. App. Oct. 18, 1979) (proventing 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 Ct. CL 1981) (stating that orders of protection may be made a condition of release on bail).

n1481 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).

n1482 Id.

n1483 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).

n1484 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.

n1485 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).

n1486 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).

n1487 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).

n1488 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, holding 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).
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).


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 through he had earlier consented to its continuance).


Id. at 682–83.

Id.


Id. at 759–60.


Id.; see also OR. REV. STAT. § 107.718(6)(b) (1991); MODEL CODE, *supra* note 15. § 308 (authorizing either party to request a hearing to contest or expand relief).


Id.

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).


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).

See People v. Demi, 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).

n1506 Dawson, No. 79AP-565.

n1507 Smart, 297 S.E.2d at 137.

n1508 Smart, 297 S.E.2d 137-38; Dawson, No. 79AP-565.

n1509 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).


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).

n1511 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).


n1515 CAL. FAM. CODE § 5650 (West 1993).

n1516 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").

n1517 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 bearing 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 showing 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).

n1518 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.*

n1519 *Sec 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.").

n1520 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.

n1521 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).

n1522 *See id.* 1046

n1523 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).

n1524 Blackwood, 476 N.E.2d at 745.

n1525 Battered women, especially (hose 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 records, 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.

n1526 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.

n1527 Maldonado, 631 A.2d at 42.

n1528 See Cruz–Foster, 597 A.2d at 930 & n.3.

n1529 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).

n1530 See, e.g., Boniek, 443 N.W.2d at 198.


n1532 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).


n1534 Cruz–Foster, 597 A.2d at 930–31.

n1535 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").

n1536 Id.

n1537 Id. at 43–44.

n1538 Id. at 43.


n1540 Mo. ANN. STAT. § 455.528(1) (Vernon Supp. 1993); VT. STAT. ANN. tit. 5 15, § 1103(b) (1989). For a full discussion of civil protection order modifications, see infra notes 1743–48 and accompanying text.

n1541 See MODEL CODE, supra note 15, § 313.

n1542 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).

n1543 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.

n1544 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.

n1545 See MODEL CODE, supra note 15, §§ 302, 510 (including training for court personnel).

n1546 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. § 94(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) (1983) (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 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. § 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).

n1547 State v. Errington, 310 N.W.2d 681, 682-83 (Minn. 1981).

n1548 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).


n1551 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).

n1552 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).

n1553 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.


n1555 Id. at 126.

n1556 715 S.W.2d 547 (Mo. Ct. App. 1986).

n1557 Id. at 549.

n1558 Id. at 552-53.


n1560 Id. at 213.

n1561 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).


n1563 CONN. GEN. STAT. ANN. § 46b–38(c) (West Supp. 1993); see also MODEL CODE. supra note 15, §§ 501, 502 (creation of state and local advisory councils on domestic violence).
n1564 CONN. GEN. STAT. ANN. § 46b–38c(c).

n1565 Id.

n1566 Id. § 46b–38c(g).

n1567 Id. § 46b–38c(i) (West Supp. 1993).

n1568 See, e.g., D.C. CT. R. ANN., SUPER. CT. — INTRAFAMILY PROC., R. 8(d) (Michie 1993).

n1569 Orloff, supra note 768, at 141.

n1570 See id. at 143.

n1571 Id. at 143.

n1572 D.C. CT. R. ANN., SUPER. CT. — INTRAFAMILY PROC., R. 8(b) (Michie 1993).


n1574 Id. at 559.

n1575 Id. at 560.

n1576 See id.

n1577 See id.

n1578 Id.


n1580 Id. at 1209.

n1581 Ganley, supra note 21. at 43–44.

n1582 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.

n1583 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.").

n1584 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).

n1585 Ganley, supra note 21, at 45.

n1586 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 minimum reasonable duration and may be limited to certain requested remedies); IOWA CODE ANN. §§ 236.4.3, 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).

n1587 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. ANNat, SUPER. CT. — INTRAFAMILY PROC., R. 4(d) (Michie 1993).


n1589 Id. at 682.


n1591 Id. at 203.


n1593 Id. at 1085.


n1595 Id. at 212–13.

n1596 NIJ CPO STUDY, supra note 19, at 19.

n1597 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).
n1598 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. 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).

n1599 750 ILCS 60/202 (Smith-Hurd 1993); TEX. FAM. CODE ANN. § 71.04 (West Supp. 1993).


n1601 Id. at 1209.


n1603 Id. at 532.

n1604 NIJ CPO STUDY, supra note 19, at 19.

n1605 Czapanskiy, supra note 23, at 247.

n1606 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.

n1607 Leslye Orloff, Address at the American Bar Assoc. Commission on Nonlawyer Practice (June 25, 1993).

n1608 CAL. FAM. CODE § 5519(d) (West 1993) (lay person may not give legal advice); 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. § 899.73 (West Supp. 1993) (petitioner may be accompanied in court by a service representative).

n1609 CAL. FAM. CODE § 5519(d) (West 1993).

n1610 Orloff, supra note 1607.

n1611 NU CPO STUDY, supra note 19, at 19.

n1612 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).

n1613 NU CPO STUDY, supra note 19, at 22.


n1615 See 42 U.S.C. § 2996(f)(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.


n1617 NATIONAL DOMESTIC VIOLENCE MEDIA CAMPAIGN, EXECUTIVE SUMMARY (1993).

n1618 DEL MARTIN. BATTERED WIVES 164 (1976).


n1620 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).

n1621 See NU CPO STUDY, supra note 19. at 22.1064

n1622 Id.

n1623 Thompson v. Thompson, 359 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).

n1624 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).

n1625 Cloutterbuck, 556 A.2d at 1087.


n1627 Id. at 55.

n1628 Id.

n1629 Id.

n1630 Id.
n1632 Id. at 572.
n1633 NIJ CPO STUDY, supra note 19. at 29.
n1634 Ganley, supra note 21. at 46.
n1635 Id.
n1636 Id.
n1637 Id.
n1638 Id.

n1639 See, e.g., D.C. CT. R. ANN., SUPER. CT. — INTRARAMILY PROC., R. 5.

n1640 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.

n1641 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.

n1642 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 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).

n1643 See, e.g., WASH. REV. CODE § 26.18.050(3) (West 1993).

n1644 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 be go into the house).

n1645 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).

n1646 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).

n1647 For the position of judicial authorities on dismissals of criminal domestic violence actions, see MODEL
CODE, supra note 15. §§ 212, 213.

n1648 Ganley, supra note 21, at 47 ("We often ignore the multiple barriers to domestic violence victims and blame them for their ambivalence' rather than eliminating the barriers."). Id.

n1649 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.").

n1650 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.

n1651 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.

n1652 Orloff. supra note 768, at 176-77; NU CPO STUDY, supra note 19. at 28.


n1655 ME. REV. STAT. ANN. tit. 19. § 765.5 (1981) (respondent may move to dismiss a 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).


n1657 449 N.Y.S.2d 584 (Fam. Ct. 1982).

n1658 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).

n1659 725 P.2d 923 (Or. 1986).

n1660 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.


n1662 Id. at 1136.


n1664 Id. at 1277.

n1666 Id.

n1667 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).

n1668 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).

n1669 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).

n1670 See infra notes 1902-16 and accompanying text for a more complete discussion of this issue.

n1671 See FAMILY VIOLENCE PROJECT, supra note 687, at 4-5.

n1672 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).


n1674 750 ILCS 60/221(a)(2) (Smith-Hurd 1991); KY. REV. STAT. ANN. 9 403.735(4) (Michie/Bobs-Merrill 1993); ME. REV. STAT. ANN. tit. 19. § 765.3A (West Supp. 1992).

n1675 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, 219 (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).

n1676 See, e.g., People v. Stevens, 506 N.Y.S.2d 995 (City Ct. 1986) (noting that findings 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).


n1678 Id. at 1280.
n1679 See, e.g., Mailer 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).


n1681 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).


n1683 Id.

n1684 ALA. CODE § 30–5–7(a) (1989) (court may approve consent agreement); DEL. CODE 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).


n1689 631 A.2d at 44.

n1690 Id.

n1691 Id.

n1692 416 N.W.2d 269 (S.D. 1987).

n1693 Id. at 270.

n1694 Id.
n1695 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).

n1696 See Deacon v. Landers, 587 N.E.2d 395, 398 (Ohio Ct. App. 1990) (reversing mutual civil protection order since there 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.

n1697 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).


n1699 See FAMILY VIOLENCE PROJECT, supra note 687, at 19.

n1700 HARLOW, supra note 3, at 6.

n1701 Id.

n1702 "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 to access the impact that forcible sexual assault, perpetrated solely by men, has on intimate relationships. Browne, supra note 10, at 1078.

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).

n1704 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.").


n1706 FAMILY VIOLENCE PROJECT, supra note 687, at 24.

n1708 Id.

n1709 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. § 555.050.2 (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. 5 310.


n1711 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, 5 3 (West 1993); N.D. CENT. CODE § 14-07.1-02.5 (Supp. 1993).

n1712 CAL. FAM. CODE 5 5514 (West 1993); W. VA. CODE § 48-2A-6 (1993); see also 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).

n1713 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).


n1715 Id. at § 2265(C).

n1716 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).

n1717 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 magistrate 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).
n1719 Id. at 398.

n1720 406 N.W.2d 52 (Minn. Ct. App. 1987).

n1721 Id. at 54.

n1722 Id.


n1724 Id. at 530.

n1725 Id. at 532.

n1726 FAMILY VIOLENCE PROJECT, supra note 687. at 28.

n1727 GOOLKASIAN, supra note 780. at 62.

n1728 Id.

n1729 FAMILY VIOLENCE PROJECT, supra note 687, at 28; see also Czapanskiy, supra note 23, at 273. ("We 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 biased as judges. Because they do not operate in the open, however, holding them accountable is much more difficult."). Id.


n1731 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 Germene et al., Mandatory Custody 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 property, 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).


n1733 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.

n1734 455 N.W.2d 471 (Minn. 1990).

n1735 Id. at 475.

n1736 Id. at 474.


n1738 563 A.2d 1318 (Vt. 1989).

n1739 Id. at 1321-22.

n1740 545 N.E.2d 731 (Ill. 1989).

n1741 Id. at 732.

n1742 Id. at 734.


n1744 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).

n1745 NIJ CPO STUDY, supra note 19, at 53.

n1746 772 S.W.2d 14 (Mo. Ct. App. 1989).

n1747 Id. at 15.

n1748 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).


n1751 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.


n1753 Id. at 930.

n1754 Id. at 931.


n1756 Id. at *5–*13.

n1757 715 S.W.2d 547 (Mo. Ct. App. 1986).

n1758 Id. at 552.

n1759 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.

n1761 Id. at *1.

n1762 Id. at *3.

n1763 784 S.W.2d 640 (Mo. Ct. App. 1990).

n1764 Id. at *3; 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).

n1765 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.).

n1766 CAL. FAM. CODE § 5756 (West 1993); HAW. REV. STAT. § 586-5.5 (Supp. 1992).


n1768 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. § 30-5-6 (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 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.

n1769 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

n1770 See supra notes 599-604 and accompanying text.

n1771 ANGELA BROWNE, WHEN BATTERED WOMEN KILL 114 (1987).

n1772 See ANN JONES. WOMEN WHO KILL 298-99 (1980).


n1774 PATRICK A. LANGAN & CHRISTOPHER A. INNES, BUREAU OF JUSTICE STATISTICS. PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 2 (1986).


n1776 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 injunction would have served to adequately protect her from the continued abuse of the defendant.

n1777 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.").


n1779 725 P.2d 923 (Or. 1986).

n1780 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); NU CPO STUDY, supra note 19, at 28 (providing explanation for why petitioners may fail to appear or request withdrawal of orders).


n1783 Id. at *2.

n1785 Id. at 294-95.


n1789 Id. at 187-89.

n1790 WIS. STAT. ANN. § 968.075 (West Supp. 1993).

n1791 113 S. Ct. 2606 (1993).

n1792 Id. at 2617.

n1793 Id. at 2613 (citation omitted).

n1794 Id. at 2613.

n1795 Id. (citation omitted).

n1796 Id. at 2616.

n1797 Id. at 2615.

n1798 Id. at 2616.

n1799 Id. at 2616.

n1800 Id. at 2615.


n1802 Id. at 590.

n1803 ARK. CODE ANN. § 9-15-203 (Michie 1987) ("the 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 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) (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(c) (Supp. 1993) (provide standard forms with instructions for completion).

n1804 310 N.W.2d 681 (Minn. 1981).

n1805 MINN. STAT. ANN. § 518B (1980).

n1806 310 N.W.2d at 682-83.

n1807 393 N.E.2d 976 (N.Y. 1979).

n1808 Id. at 981.

n1809 See id.

n1810 Id. at 980-81.

n1811 Id. at 977.


n1813 NEV. REV. STAT. ANN. § 33.030(3) (Michie 1985).


n1815 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.


n1817 *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).

n1818 *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).


n1820 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).

n1821 483 N.W.2d 605 (Iowa 1992).

n1822 Id. at 607.

n1823 Id.


n1825 CAL. FAM. CODE § 5517 (West 1993); DEL. CODE ANN. tit. 10, § 946(b) (Supp. 1993).


n1827 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.

n1828 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.

n1829 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).

n1830 ALA. CODE § 30-5-10(b) (1989); ARIZ. REV. STAT. ANN. § 13-36021 (Supp. 1993); ARK. CODE.


21 Hofstra L. Rev. 801, *1189

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.


n1841 See supra notes 1835–38.


n1845 Id. at 355-56.

n1847 *Id.* at 11-12.

n1848 *Id.*

n1849 *Id.*


*Id.* at 1055.


n1857 *Id.*

n1858 *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).

n1859 *545 N.E.2d 1161, 1164 (Mass. 1989)*.

n1860 *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.

n1861 *408 N.Y.S.2d 716 (1978)*.

n1862 *Id.* at 716.

n1863 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).

n1864 *Id.*


n1866 *Id.*
n1867 Interview with Charon Asetoyer, Director of the Native American Women’s Health Resource Center, in Lake Andes, S.D. (Oct. 5, 1993).

n1868 Id.

n1869 505 N.W.2d 450 (Wis. Ct. App. 1993).

n1870 Id. at 451.

n1871 This may also be prosecuted as criminal contempt. See City of Columbus v. Patterson, No. 82 AP–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).


n1873 Id. at 1154.

n1874 Id. at 1158.

n1875 Id. at 1159.


n1877 Id. at 10.

n1878 Id. at 9.

n1879 Id. at 9–10 (quoting Cipolla v. Cipolla, 398 A.2d 1053 (Pa. Super. Ct. 1979)).


n1883 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).


n1886 Eichenlaub, 490 A.2d at 918.


n1888 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).

n1889 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); Gilbert, 765 P.2d at 1209.

n1890 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).


repeatedly called petitioner, because harassment was not statutorily provided for in the protection order statute).

n1893 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. 82 AP-47, 1982 WL 4556 (Ohio Ct. App. Dec. 9, 1982) (defendant held in contempt when he failed to vacate in compliance with a temporary protection order).

n1894 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).


n1898 Saliterman, 443 N.W.2d at 842-43.


n1900 Id. at 1208.

n1901 Id.


n1903 Id. at 399.

n1904 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).


n1911 Id. at 581.

n1912 Id. at 581.

n1913 Id.

n1914 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).

n1915 The question of a batterer's right to a jury trial will only arise when a victim files several contempt motions 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 jury trial, if the jurisdiction will award a jury trial when the counts are consolidated. If the contempt charges 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.

n1916 See supra notes 1667-70 and accompanying text for more information on jury trials.


n1919 483 N.W.2d 605 (Iowa 1992).

n1920 Id. at 607.


n1922 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.

n1923 Blackwood, 476 N.E.2d at 743.

n1924 506 N.Y.S.2d 995 (Oswego City Ct. 1986).

n1925 Id. at 999.


n1927 Id. at 519.

n1928 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 contempt proven at trial. Contempt was found in 55.1% of cases tried and only 14.2% of contempt 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).

n1929 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).

n1930 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).


n1933 Andrasko, 454 N.W.2d at 649.


n1935 Id. at *1.

n1936 Rayan v. Dykeman, 274 Cal. Rptr. 672 (Cl. 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).


n1939 Id. at 704-05.

n1940 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.").

n1941 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").

n1942 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.

n1943 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.

n1944 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).


n1946 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.

n1947 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).

n1948 Cal. Penal Code section 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, section 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, section 766.8 (West Supp. 1993) (petitioner cannot take action/inaction which alters the civil protection order's effectiveness); Minn. Stat. Ann. section 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. section 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. section 173B:4V (1992) (temporary reconciliation of parties shall not revoke order); 23 Pa. Const. Stat. Ann. section 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. section 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, section 308.


n1950 Id. at 1029.

n1951 Cf. Model Code, supra note 15, section 308.


n1953 Id. at 219.

n1954 Id.


n1956 Id. at *4.


n1958 Id. at 1298-99.

n1959 Id. at 1299.

n1960 Me. Rev. Stat. Ann. tit. 19, section 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. section 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).

n1961 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.


n1964 Id. at 1377-78.

n1965 Id. at 1377.

n1966 Id. at 1378.


n1971 See NIJ CPO Study, supra note 19, at 53 (discussing preferred practices regarding modifications).

n1972 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.

n1973 See supra note 1940.

n1974 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).


n1976 Id. at 998.


n1978 Id. at *2.


n1980 Id. at 844.


n1983 Id. at 981.


n1986 Young. 348 S.E.2d at 135-36.

n1987 Watkins, 360 S.E.2d at 48-49.

n1988 Id. at 48.


n1990 Id. at 518.

n1991 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.
n1992 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).


n1994 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 (Okl. 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.

n1995 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).


n1998 See, e.g., Hart, 690 P.2d at 516 (defendant has right to secure the attendance of witnesses).

n1999 See, e.g., Vito, 551 A.2d at 577 (new trial granted in part because trial court allowed hearsay testimony during contempt proceedings).

n2000 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).

n2001 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).


n2003 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).


n2005 Id. at 1159.

n2007 Id. at 163–64.

n2008 Id.


n2010 Orloff & Klein, supra note 26, at 22–28; see also supra notes 1581–85 and accompanying text.


n2012 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).


n2016 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.

n2017 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 of 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).


n2019 Id. at 728–29.

n2020 Id. at 731.


n2022 Dixon, 598 A.2d at 730.

n2023 Grady, 495 U.S. at 524.


n2025 Grady, 495 U.S. at 510, 515–16.

n2026 Id. at 510.

n2027 Dixon, 598 A.2d at 731.

n2028 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 terrorist 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).

n2029 Justices Scalia, Kennedy, Rehnquist, O’Connor, Thomas, and Blackmun.
n2030 Dixon, 113 S. Ct. at 2865.
n2031 Id. at 2868.
n2032 Id. at 2881.

n2033 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).

n2034 Dixon, 113 S. Ct. at 2858 n.3.

n2035 Id. at 2864.


n2038 Id. at *30.

n2039 Id.

n2040 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).

n2041 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.

n2042 Fagan, supra note 2040, at 389 (social stigmatization).

n2043 Ganley, supra note 1519, at 30–31 (citations omitted).

n2044 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.


n2047 For a detailed guide to sentencing acts of domestic violence within one jurisdiction, see P.R. Laws Ann. tit. 8, sections 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. section 631. Exteuatin 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 spuses or cohabitators, 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. section 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 extenuating circumstances and to be decreased to 2 years if there are extenuating circumstances. Id. section 634. Sexual assault is placed into several categories which cover a sentencing range of from 10 to 25 year fixed terms. Id. section 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. section 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. section 635.
fine and imprisonment); Vt. Stat. Ann. tit. 13, section 1030 (West Supp. 1993) (imprisoned not more than 1 year or fined not more than $5,000, or both); Wis. Stat. Ann. section 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 section 48-2A-7 (Supp. 1993) (imprisonment of up to 30 days and a fine not to exceed $1,000, or both).


n2051 N.Y. Jud. Law section 846-a (McKinney Supp. 1994). These options are regularly combined at the trial level in many states.

n2052 Domestic Violence in Criminal Court Cases, supra note 23, at 138-40.


n2058 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, "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 can nonetheless have significant adverse effects upon the victim." Id. at *9.


n2064 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, sections 219, 220.

n2065 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, section 218.

n2066 See Model Code, supra note 15, section 203.

n2067 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).


n2069 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).


n2072 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 377425; Walker & Browne, supra note 2040, at 17 (at least half of the batterers who complete treatment programs continue their violent behavior with new partners).

n2074 1982 Report for the President's Task Force on Victims of Crime, quoted in Orloff & Klein, supra note 26, at 46.

n2075 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.


n2078 Id. at 1048.

n2079 Attorney General’s Task Force on Family Violence, supra note 2064, at 34; see also NIJ CPO Study, supra note 19, at 58.


n2083 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).

n2084 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).


n2086 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).

n2087 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).


n2090 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).

n2091 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.
(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).

n2092 In re Marriage of Rodriguez, 545 N.E.2d 731, 732 (Ill. 1989).


n2094 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).

n2095 Cf. Model Code, supra note 15, section 217 (residential confinement in home of victim prohibited).


n2097 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).


n2099 Id. at 1030.

n2100 Id. at 1031.

n2101 Id. at 1031-32.

n2102 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).

n2103 Family Violence Project, supra note 687, at 37; see also Domestic Violence in Criminal Court Cases, supra note 23, at 144–45.


n2105 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).

n2106 See Model Code, supra note 15, sections 210, 214.

n2107 For more criminal cases, see National Council of Juvenile and Family Court Judges, 25 Juv. & Fam. L. Dig. (1993).


n2109 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 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).

n2110 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).
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).

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).

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).

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 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”).

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).

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).

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).

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).

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).

Additional cases involving lethal acts of domestic violence include: Buschauer v. State, 804 P.2d 1046


n2126 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).

n2127 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").


n2129 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).


n2131 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).

n2132 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).


n2135 People v. Healy, 18 Cal. Rptr. 2d 274 (Ct. App. 1993) (defendant convicted of offenses under cohabitant abuse and torture statutes).


n2137 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).

n2138 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).

n2140 *State v. Hobbs, 801 P.2d 1028 (Wash. Ct. App. 1990)* (defendant was convicted of kidnapping in the first degree).


n2142 *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).

n2143 See supra part I.C.2 for a discussion on marital rape and sexual assault.


n2145 *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).

n2146 *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).

n2147 *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).

n2148 *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).


n2150 *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).

n2151 *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, sections 205(A), 205(B).

n2152 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).

n2153 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).

n2154 See, e.g., *People v. Wilkins, 17 Cal. Rptr. 2d 743 (Ct. App. 1993)* (concluding that 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).

n2155 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.

n2156 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).


n2158 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 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%.


n2159 Mandatory training on domestic violence for law enforcement officers is also necessary to accomplish this goal. Model Code, supra note 15, section 509.


However, since 1985 the clear trend is to move from discretionary arrest for violation of civil protection orders

(West Supp. 1993).


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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 section 594(B)(d)-(e) (Supp. 1993). Since the mid-1980s, states have been moving from discretionary 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. sections 13-3602 (Supp. 1987-88); La. Rev. Stat. Ann. sections 46:2131-2142 (West 1982 & Supp. 1986); Mass. Gen. Laws Ann. ch. 209A, sections 6-9 (Supp. 1986); Utah Code Ann. section 30-6-8 (1953), as amended by section 30-6-8 (Supp. 1993).


n2179 Id. at 49-50 (quoting Ga. Code Ann. section 17-4-20(a) (Supp. 1993)).

n2180 382 So. 2d 299 (Fla. 1980).

n2181 Id. at 300 (discussing Fla. Stat. Ann. section 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 willful 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. Naegle, 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).

n2182 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. section 17-4-20.1(B) (Supp. 1993); Mo. Ann. Stat. section 455.085(3) (Vernon Supp. 1993); Nev. Rev. Stat. Ann. section 171.137(2) (Michie 1992); N.H. Rev. Stat. Ann. section 173-B:9 (Supp. 1992); Wash. Rev. Code Ann. section 10.31.100(2)(b) (West 1990); Wis. Stat. Ann. section 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. section 629.342 (West Supp. 1993); N.J. Stat. Ann. section 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, section 1901(b) (1993).


n2184 Id. at 54.

n2185 See Model Code, supra note 19, section 207; see also supra notes 1333-43 and accompanying text.

n2186 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.

n2187 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).


n2190 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).

n2191 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).

n2192 Id.

n2193 Id. But see State v. Gissendaner, No. 1 CA-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).


n2195 Id. at 853.


n2197 Id. at 773.


n2199 Id. at 33.

n2200 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 basis of information that the occupants were involved in a domestic dispute and that one of them possessed a gun).

n2201 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).


n2204 Id. at 1067.

n2205 329 N.W.2d 161 (Wis. 1982).

n2206 Id. at 165-67, 169.

n2207 555 A.2d 772 (Pa. 1989).

n2208 Id. at 784.

n2209 See infra section III.D.2.

n2210 Orloff & Klein, supra note 26, at 26. "Furthermore, victims may be traumatized, withdrawn and non-responsive. Many suffer from low self-esteems and have developed shortterm 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.

n2211 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).

n2212 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).

n2213 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).


n2216 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).

n2217 See also infra part V.A.

n2218 Domestic Violence in Criminal Court Cases, supra note 23, at 117.

n2219 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.


n2221 Id. at 1288.


n2223 Id. at 722.

n2224 Id. at 719.

n2225 751 P.2d 1165 (Wash. 1988).

n2226 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).

n2227 621 A.2d 267 (Conn. 1993).


n2229 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 murder conspiracy prosecution where defendant testified she was not in danger when accompanying husband to meet undercover agent before arrest).

n2230 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. Fedon, 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).


n2232 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).

n2233 Id.


n2235 Id. at *6-7.


n2237 Id. at 1325.

n2238 206 Cal. Rptr. 516 (Cl. App. 1984).

n2239 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 (Cl. 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).


n2241 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).


n2246 Id. at *2.


n2248 Id. at *4.


n2250 Id. at 866; see also Model Code, supra note 15, section 218.

n2251 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 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, section 213.

n2253 Id. at 1327.


n2255 Id. at 791.


n2257 Id. at 868-69.

n2258 See Model Code, supra note 15, sections 211, 222.


n2265 Ohio Rev. Code Ann. section 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).


arraignement.


n2274 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).


n2276 Id. at 365.

n2277 Ganley, supra note 21, at 43-44; see also supra note 1582.

n2278 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.


n2280 Battered Woman, supra note 4, at 59.


n2282 Women and Violence, supra note 789, at 131.

n2283 Id. at 93.

n2284 Broken Bodies and Broken Spirits: Family Violence in Maryland and Recommendations for Change (Family Violence Coalition, Maryland, June 1991).


n2286 Id. at 97.

n2287 See id. at 111-12.

n2288 Agtuca et al., supra note 2278, at 245.


n2291 Agtuca et al., supra note 2278, at 247; see also Model Code, supra note 15, section 409.

n2292 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, sections 409, 511, 514. School personnel and state, county, and city educators must also receive domestic violence training. Id. sections 513, 514.


n2294 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).

n2295 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).

n2296 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).


n2298 Id. at 195.


n2300 Id. at 938-39.

n2301 392 N.W.2d 904 (Minn. Ct. App. 1986).


n2303 Judicial authorities emphasize that spousal privilege is inapplicable in family violence cases. See Model Code, supra note 15, section 215.


n2306 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).

n2307 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).

n2308 Ganley, supra note 21, at 41-47 (discussing how power and control affects domestic violence victims in the court system).

n2309 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).


n2311 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).

n2312 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).


n2314 Battered Woman, supra note 4, at 25.


n2316 See infra notes 2218-30 and accompanying text.

n2317 See sources cited supra note 2231.


n2319 450 N.W.2d 463 (Wis. Ct. App. 1989).


n2321 Ciskie, 751 P.2d at 1165.
n2322 C.V.C., 450 N.W.2d at 463.

n2323 Frost, 577 A.2d at 1282.

n2324 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).

n2325 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 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. Dilion, 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. Parson, 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).


n2329 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).

n2331 Id. at 204.


n2334 Id.; see also In re The Appeal in Pima County Juvenile Severance Action No. S113432, 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).


n2336 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. 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).

n2337 See, e.g., Boniek, 443 N.W.2d at 196.


n2341 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).


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 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).


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).

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).

n2353 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).

n2354 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).


n2359 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).

n2360 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,

as 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).


n2363 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.


n2365 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).

n2366 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).


n2369 573 A.2d 376 (Me. 1990).

n2370 Id. at 378.


n2372 See, e.g., Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992) (holding 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).

n2373 604 A.2d 33 (Me. 1992).

n2374 Id. at 34.

n2375 Id. at 37.

n2376 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).


n2379 Id. at 681.

n2380 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).


n2382 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 nontestimonial 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) (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).


n2384 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. 93 AP-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).


n2389 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).


n2391 Id. at 251.

n2392 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:
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, section 212.


n2395 Id. at 1276.


n2397 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-CA001840-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).