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# WHAT'S THE HOLD-UP? MAKING THE CASE FOR LIFETIME ORDERS OF PROTECTION IN NEW YORK STATE

JENNIFER RIOS\*

## I. INTRODUCTION

Domestic violence takes the lives of many mothers, wives, sisters, aunts, and friends every year. According to the U.S. Department of Justice's Bureau of Justice Statistics, approximately 1,300 women each year are killed in the United States by husbands, ex-husbands, boyfriends or ex-boyfriends.<sup>1</sup> Domestic violence in New York is an extremely serious problem. On any given day in New York City, police officers respond to approximately 600 incidents of domestic violence, and the Domestic Violence Hotline receives 400 calls.<sup>2</sup> "For far too long, domestic violence remained behind closed doors, destroying families and costing thousands of lives," states Governor Pataki.<sup>3</sup> "Over the past six years, New York has made great strides in fighting domestic violence in our homes and in our communities, but there is still more we can do and these important measures are the next critical step we must take."<sup>4</sup>

According to Senator Stephen Saland, "[e]xtending the duration of these orders of protection will give victims the peace of mind they deserve. Victims no longer have to be concerned that their orders of protection will run out while they are still living in fear of being harmed."<sup>5</sup> Assemblywoman Amy Paulin said, "I

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<sup>1</sup> Marie Tessier, *Study Indicates Jobless Abusers Most Apt to Kill*, WOMEN'S E NEWS (Sept. 23, 2003), at <http://www.womensenews.org/article.cfm/dyn/aid/1461> (last visited Oct. 20, 2005).

<sup>2</sup> Mayor's Office to Combat Domestic Violence, *Keeping Our Homes Safe: Addressing Domestic Violence in New York City* 2 (Jan. 2, 2004), available at [http://www.nyc.gov/html/ocdv/downloads/pdf/safe\\_home.pdf](http://www.nyc.gov/html/ocdv/downloads/pdf/safe_home.pdf) (last visited Oct. 20, 2005) [hereinafter *Addressing Domestic Violence*].

<sup>3</sup> Press Release, Office of the Governor, Press Releases, Governor Unveils Sweeping Reforms to Combat Domestic Violence: Legislation Allows Lifetime Orders of Protection, Strengthens Protections for Children (Mar. 21, 2001), available at [http://www.state.ny.us/governor/press/year01/march21\\_4\\_01.htm](http://www.state.ny.us/governor/press/year01/march21_4_01.htm) (last visited Oct. 20, 2005) [hereinafter Press Release 1].

<sup>4</sup> *Id.*

<sup>5</sup> Press Release, Office of the Governor, Press Releases, *Governor Pataki Signs Bill to Protect Victims of Family Violence: Legislation Extends Duration of Orders of Protection in Family Violence Cases* (Sept. 24, 2003), available at [http://www.state.ny.us/governor/press/year03/sept24\\_03.htm](http://www.state.ny.us/governor/press/year03/sept24_03.htm) (last visited Oct. 20, 2005) [hereinafter Press Release 2].

have seen first-hand the trauma and frustration associated with this type of abuse. This law is dedicated to ensuring that victims of abuse do not have to endure further pain by being forced to return to court to extend an order that is about to expire.”<sup>6</sup>

Charlotte Watson, Executive Director of the Office for the Prevention of Domestic Violence, said, “[b]y helping victims avoid regular returns to court for the renewal of orders of protection, this measure will prevent hardships both at work and at home, while promoting greater stability in the lives of victims and their families.”<sup>7</sup> Not all victims are alike and different victims require variations in the durations of their orders of protection. Executive Director Watson also claims that, “[f]or victims in the gravest danger, even appearing at court can increase the risk she faces by providing the perpetrator access to her. We look forward to the day when the law recognizes that for some victims, two or even five years is not enough and that a lifetime Order of Protection is necessary for victim safety.”<sup>8</sup>

This article advocates for lifetime orders of protection in New York State, or in the alternative, an interim compromise solution of considerably extended orders of protection. Currently, victims of domestic violence in New York can obtain orders of protection from both criminal and civil court.<sup>9</sup> The Family Court Act places certain restrictions on the definition of “family” and who is eligible for a family court order of protection. The discussion that follows, when referring to Family Court orders of protections for victims of domestic violence, will refer to women in intimate partner relationships, who are either married to, divorced from, or have a child in common with the perpetrator. Criminal court orders of protection may also be issued to a victim after the arrest of a batterer. The criminal procedure law does not require that a woman fall within the definition of “family,” as does the Family Court Act.

The Domestic Violence Omnibus Act of 2001 was introduced on March 21, 2001 by Governor George E. Pataki.<sup>10</sup> Among other provisions, the Act and related bills called for an amendment to the Family Court Act in order to increase the duration of family court orders of protection from one to three years and to give judges discretion, in some cases, to issue lifetime orders of protection.<sup>11</sup> In addition, the Act called for amending criminal procedure law to provide criminal court judges the ability to issue lifetime orders of protection against batterers.<sup>12</sup>

On September 24, 2003, Governor Pataki announced his signing into law legislation that extends the duration of family court orders of protection from one to two years without aggravating circumstances and from three to five years with

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Finding Safety and Support: What is an Order of Protection, *available at* [http://www.opdv.state.ny.us/about\\_dv/fss/orderprt.html](http://www.opdv.state.ny.us/about_dv/fss/orderprt.html) (last visited Oct. 20, 2005) [hereinafter Finding Safety].

<sup>10</sup> See Press Release 1, *supra* note 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

aggravating circumstances.<sup>13</sup> The law also changed the notion of “aggravating circumstances” to include a single violation of an order of protection, in turn allowing victims to obtain five year orders of protection without having to demonstrate multiple violations.<sup>14</sup>

Just across the Hudson River, New Jersey law provides for final orders of protection—orders of protection that last indefinitely. Final orders of protection, known as final restraining orders (FRO) in New Jersey, require that one party show good cause as to why the order should be vacated. The court must also make a specific finding that an application by a former victim was not at all coerced. New Jersey is not alone. Connecticut judges can issue a standing criminal restraining order in domestic violence cases when they believe that such an order will best serve the interests of the victim and the public.<sup>15</sup> These standing orders remain in effect until they are modified or revoked by the court.<sup>16</sup> Nine other states, including Alaska, Colorado, Florida, Hawaii, Michigan, North Dakota, Oklahoma, Vermont, and Washington have also resisted placing limitations on the duration of orders of protection. In California, there exists the possibility for domestic violence protection orders to be renewed for an additional three years or even indefinitely.

This is all in direct contrast to New York and most other states, where orders of protection expire on a set date unless the victim attempts to renew the order by showing additional incidents of abuse or other reasons why the order remains necessary. Even though victims may obtain extensions to their protective orders in New York, the extension process tends to require victims to come face to face with their batterers in court, and potentially come out of hiding to make court appearances, all to retain their court-order protection.<sup>17</sup> These factors seem to undermine a central purpose of these protective orders—ensuring the safety of these women against their attackers.<sup>18</sup>

Despite the Governor’s repeated proposals allowing criminal and family court judges the ability and discretion to issue lifetime orders of protection, why has no such legislation has been instituted? Are lifetime orders of protection too harsh? Is there a compromise solution that would protect both victims of domestic violence as well as protect defendants’ rights?

Parts II and III of this article provide an overview of domestic violence, including general statistics regarding domestic violence and statistics specific to New York, and an explanation of the different types of orders of protection

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<sup>13</sup> See Press Release 2, *supra* note 5.

<sup>14</sup> *Id.*

<sup>15</sup> U.S. DEP’T. OF JUST., LEGAL SERIES BULLETIN NO. 4, ENFORCEMENT OF PROTECTIVE ORDERS (Jan. 2002), *available at* <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin4/ncj189190.pdf> (last visited Oct. 20, 2005) [hereinafter BULLETIN NO. 4].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

available to victims. Part IV surveys the law in the varying states regarding protective orders. The various organizations and influential bodies in support of lifetime orders of protection are explained in Part V. Parts VI and VII discuss possible counterarguments to lifetime orders of protection and the effectiveness of protective orders. Part VIII discusses a possible interim solution, while battered women in New York State wait for the legislature to pass the provisions regarding lifetime orders of protection. Finally, the article ends with a brief conclusion in Part IX.

## II. DOMESTIC VIOLENCE

### *A. Definition Of Domestic Violence*

The type of domestic violence this article discusses, is the physical, psychological, emotional, or sexual abuse by a spouse or intimate partner. In the context of couples, domestic violence can occur between the people who are: living together, dating, separate, heterosexual or homosexual.<sup>19</sup> Physical abuse may take the form of punching, slapping, hitting, kicking, choking, biting, shoving, pushing, or holding someone down.<sup>20</sup> Using or threatening to use weapons, including atypical weapons such as household items, also constitutes domestic violence.<sup>21</sup> Psychological or emotional abuse may take the form of isolating the victim, threats to the victim, intimidation, using the victim's children against her, general cruelty such as denying the victim access to medical care, abusing pets, or destroying items of value, and withholding financial support.<sup>22</sup> Sexual abuse may consist of withholding sex and/or affection, preventing the victim from using birth control, not allowing her to protect herself against sexually transmitted diseases, or forcing sexual acts against the victim's will.<sup>23</sup> In a nutshell, abuse is about power and control.<sup>24</sup>

### *B. Who Is Affected By Domestic Violence?*

"Domestic violence happens regardless of socio-economic status, race, ethnicity, age, education, employment status, physical ableness, marital status, or childhood history."<sup>25</sup> Women are not the only victims of domestic violence, though most acts of domestic violence are committed by men against women.<sup>26</sup> For this reason, the focus of this article will be on violence perpetrated by men

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<sup>19</sup> N.Y. CITY DEP'T OF HEALTH & MENTAL HYG., HEALTH AND MENTAL HYGIENE NEWS, HEALTH BULLETIN: DOMESTIC VIOLENCE AND ABUSE, Vol. 2, No. 10. (Oct 22, 2002), available at [www.nyc.gov/health](http://www.nyc.gov/health) (last visited Oct. 20, 2005) [hereinafter HEALTH BULLETIN].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See HEALTH BULLETIN, *supra* note 19.

<sup>25</sup> See Finding Safety, *supra* note 9.

<sup>26</sup> See HEALTH BULLETIN, *supra* note 19.

against women. However, men may also be victims, abused by women or their male partners.<sup>27</sup> Domestic violence can also exist between female same-sex couples.<sup>28</sup> In addition, children can be victims of domestic violence.<sup>29</sup> Men who abuse their partners are also likely to abuse their children.<sup>30</sup> Between fifty and seventy percent of men who abuse their female partners also physically abuse their children.<sup>31</sup> The abuse of children is generally less severe than the abuse of the female partner, but as the violence against the partner gets worse, so does the abuse against the child.<sup>32</sup> There is also a high correlation between men who abuse their female partners and those who sexually abuse female children.<sup>33</sup>

### *C. Domestic Violence Related Statistics*

Domestic violence is the leading cause of serious injury to women.<sup>34</sup> Domestic violence will occur in one out of every five families.<sup>35</sup> It occurs across all racial and ethnic groups, regardless of age, income, education, religion, immigration status, or sexual orientation.<sup>36</sup> Between 1976 and 1996, approximately one third of all women who were homicide victims in the United States were killed by current or former intimate partners.<sup>37</sup> In contrast, six percent of male homicide victims were killed by their intimate partners.<sup>38</sup> Furthermore, women make up the vast majority of all intimate partner homicides victims,<sup>39</sup> in 1998, women constituted seventy-two percent of all intimate partner homicide victims.<sup>40</sup>

According to a recent study sponsored by the National Institute of Justice, intimate partner violence occurs more in disadvantaged neighborhoods.<sup>41</sup> Couples who faced economic distress were more susceptible to violence; the combination of money problems and living in a tough neighborhood provided a catalyst for higher levels of violence.<sup>42</sup> Women living in socio-economically disadvantaged neighborhoods were more than twice as likely to be victims of intimate violence, as

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Finding Safety, *supra* note 9.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See HEALTH BULLETIN, *supra* note 19.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> BUREAU OF INJURY EPIDEMIOLOGY, N.Y. CITY DEP'T OF HEALTH, FEMICIDE IN NEW YORK CITY 1995-2002: SORTABLE STATISTICS (2004) [hereinafter FEMICIDE].

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> NAT'L INST. OF JUSTICE, WHEN VIOLENCE HITS HOME: HOW ECONOMICS AND NEIGHBORHOOD PLAY A ROLE I (Sept. 2004).

<sup>42</sup> *Id.* at 3.

compared to women in more socio-economically advantaged neighborhoods.<sup>43</sup> When comparing African-American couples and white couples with similar income levels, the levels of intimate violence were similar, and perhaps less so with the African-American couples with higher income rates.<sup>44</sup> Overall, young, foreign-born, and minority women were overrepresented among women killed by domestic violence.<sup>45</sup>

Domestic violence in New York City is an extremely serious problem that warrants immediate attention. The figures obtained from the recent New York City Health Department Study are startling. According to this study, "the rate of intimate partner femicide has remained fairly stable from 1995-2002 with a slight increase in 2002 indicating that intimate partner femicide remains a major public health issue in New York City."<sup>46</sup> The Study further shows that while interventions have helped to decrease overall femicide, it does not appear that they have contributed to decreasing femicides committed by intimate partners.<sup>47</sup>

Women in New York City are more likely to be killed at the hands of their husbands and lovers than by strangers.<sup>48</sup> Of the 1,030 female deaths classified as homicides by the Chief Medical Examiner of New York City (OCME) between 1995 and 2002, 339 were intimate partner homicides, 369 were non-intimate partner homicides and 322 were classified as having an unknown motive.<sup>49</sup> This means that about one in three women killed each year in New York City is killed by an intimate partner.<sup>50</sup> Men comprised over ninety-four percent of the perpetrators, and only 3 of the intimate partner homicides were committed by women.<sup>51</sup> Victims of intimate partner femicide were nearly three times more likely than victims of non-intimate partner femicide to be found dead in their own homes.<sup>52</sup> Most women killed at the hands of partners or former partners were either shot (nearly forty percent) or stabbed (thirty-one percent).<sup>53</sup> Women who were stabbed to death were two times more likely to have been killed by an intimate partner than by a non-intimate partner.<sup>54</sup>

This serious problem of intimate partner violence brings about various other costs.. The Center for Disease Control and Prevention published a report providing conservative estimates of the costs associated with domestic violence.<sup>55</sup> Domestic

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<sup>43</sup> *Id.* at 1.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> See FEMICIDE, *supra* note 37.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Lisa L. Colangelo, *More Slain by Beaus*, DAILY NEWS, Oct. 22, 2004.

<sup>49</sup> See FEMICIDE, *supra* note 37.

<sup>50</sup> See HEALTH BULLETIN, *supra* note 19.

<sup>51</sup> See FEMICIDE, *supra* note 37.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See *Addressing Domestic Violence*, *supra* note 2, at 2-3.

violence has short and long-term consequences for both society and its victims.<sup>56</sup> In American society, the cost of intimate partner rape, physical assault and stalking, exceeds \$5.8 billion each year, \$4.1 billion of which is spent directly on medical and mental health care services.<sup>57</sup> In terms of lost productivity from paid work and household chores, intimate partner violence costs \$.09 billion in lost productivity per year, and \$.09 billion in lost earnings for victims of domestic violence over a lifetime.<sup>58</sup>

With respect to the victim, short term effects of domestic violence include physical, emotional and psychological harm.<sup>59</sup> In the long run, domestic violence has a significant effect on a victim's physical and mental health and increases a victim's risk of future illnesses.<sup>60</sup> As a result of abuse, victims may experience decreased work ability, decreased effective parenting skills, and reduced ability to lead a healthy and independent life.<sup>61</sup>

### III. ORDERS OF PROTECTION

Changes in domestic violence policies began in the late 1960's and 1970's.<sup>62</sup> Prior to that time, orders of protection for battered women were almost never an option.<sup>63</sup> Before the 1970's, women had to initiate divorce proceedings to even be eligible for protective orders.<sup>64</sup> During the 1960's and 1970's, states began to enact legislation that authorized protective orders not in conjunction with a divorce action.<sup>65</sup> These orders required abusers to refrain from any further abuse against their former partners.<sup>66</sup> Before 1976, only two jurisdictions had this type of legislation.<sup>67</sup> Pennsylvania led the way.<sup>68</sup> By 1982, thirty-three states and the District of Columbia had statutes dealing with civil protection orders.<sup>69</sup> Currently, every state has a protective order statute, and has had one since the early 1990's.<sup>70</sup>

An order of protection is a court issued document that helps protect a victim of domestic abuse from future abuse or harassment.<sup>71</sup> In an order of protection,

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *Addressing Domestic Violence*, *supra* note 2, at 2-3.

<sup>61</sup> *Id.*

<sup>62</sup> Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 833 (2004).

<sup>63</sup> *Id.*

<sup>64</sup> EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE, THE CRIMINAL JUSTICE RESPONSE* 233 (3d. ed. 2003).

<sup>65</sup> See Sack, *supra* note 62, at 833.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> BUZAWA, *supra* note 64, at 234.

<sup>69</sup> See Sack, *supra* note 62, at 833.

<sup>70</sup> BUZAWA, *supra* note 64, at 234.

<sup>71</sup> See *Finding Safety*, *supra* note 9.



judges are able to set limits on the offender's behavior.<sup>72</sup> New York judges in family, criminal, and Supreme Courts have an array of provisions to include in an order.<sup>73</sup> Among these provisions are the following: a judge may order the offender to stop abusing the victim and her children; tell the offender to remove himself from the home and stay away from the home, workplace, and family of the victim; direct the offender to have no contact with the victim (including phone calls, letter, messages from third parties); and order the offender to stay away from the children, their babysitters, day care, and schools.<sup>74</sup> After an order is issued, it may only be changed by a judge and only after a request is made in court.<sup>75</sup> If the order contains a stay away provision, and the offender goes to victim's house by her invitation, he is violating the order and must still be arrested.<sup>76</sup>

### A. Civil Court Orders Of Protection

"Civil restraining orders were . . . developed expressly as a technique for advocates of battered women to circumvent the reluctance of police, prosecutors, and criminal courts to properly handle domestic violence cases."<sup>77</sup> Protective orders may be obtained in family court or another civil court upon the filing of a petition by a private party.<sup>78</sup> In order to obtain an order of protection, the petitioner has to show that either a threat was made, or some form of abuse occurred.<sup>79</sup> States have their own rules and eligibility requirements for obtaining domestic violence related protective orders.<sup>80</sup> For example, eligibility may be determined by the relationship between the victim and the batterer.<sup>81</sup> In some states, only people who are legally married to, or have children in common with the respondent, may petition for such an order.<sup>82</sup> These orders are frequently issued ex parte.<sup>83</sup> The party being restrained does not need to be represented in order for the petitioner to obtain temporary relief prior to a hearing for a permanent order.<sup>84</sup>

Civil rules of procedure apply to the issuance of a protective order, because it is not a criminal proceeding.<sup>85</sup> The proceedings are designed, explicitly, to prevent future unlawful conduct, rather than to punish past criminal behavior.<sup>86</sup> The evidentiary standard is therefore by a preponderance of the evidence, and not

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Finding Safety, *supra* note 9.

<sup>77</sup> BUZAWA, *supra* note 64, at 234.

<sup>78</sup> See Sack, *supra* note 62, at 833-834.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 834-835.

<sup>81</sup> *Id.* at 835.

<sup>82</sup> *Id.*

<sup>83</sup> BUZAWA, *supra* note 64, at 234.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 235.

<sup>86</sup> *Id.*

“beyond a reasonable doubt.”<sup>87</sup> In domestic violence cases, courts may issue protective orders that (among other things) prohibit further contact with the victim (either in person, by phone, mail, etc.), or order the respondent to vacate the home.<sup>88</sup>

In New York, a victim can go to family court and seek an order of protection if she is legally married to, divorced from, has a child in common with, or is otherwise related to the offender.<sup>89</sup> If eligible for family court, the victim may seek relief in the family court, the criminal court, or both at the same time.<sup>90</sup> In addition to the order of protection, family court judges can order the abuser to pay expenses related to the abuse, such as hospital and doctor bills, as well as property damage.<sup>91</sup>

The New York Supreme Court is also a civil court.<sup>92</sup> If a victim gets a divorce, separation, or annulment, they can request an order of protection at any time before the trial or before a final settlement; when an order of protection is part of a divorce order from court, it is permanent and will never expire.<sup>93</sup> After it is issued, getting the Supreme Court to change an order can be difficult and expensive.<sup>94</sup> Therefore, it is often advantageous to include a provision in the order that any future modifications can be made in family court.<sup>95</sup>

### *B. Criminal Court Orders Of Protection*

It is not always the case that victims have to initiate a civil suit in order to be granted a protective order. In some states, criminal courts have the jurisdiction to issue protective orders in criminal proceedings pertaining to an incident of domestic violence.<sup>96</sup> As early as 1977, New York State gave criminal and county courts concurrent jurisdiction over domestic violence.<sup>97</sup> When both courts have equal powers to issue temporary restraining orders and permanent injunctions, there exists “the potential to dramatically enhance criminal courts’ ability to divert appropriate cases from the criminal justice system without relying on another court to assume jurisdiction.”<sup>98</sup>

Criminal court punishes crimes by imposing fines, jail time, and/or probation.<sup>99</sup> Criminal court is a mechanism available to all victims of domestic

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<sup>87</sup> *Id.*

<sup>88</sup> BUZAWA, *supra* note 64, at 236.

<sup>89</sup> See Finding Safety, *supra* note 9.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Finding Safety, *supra* note 9.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (focusing on criminal and family court orders, and not those obtained through a divorce proceeding).

<sup>96</sup> See Sack, *supra* note 62, at 833-834.

<sup>97</sup> BUZAWA, *supra* note 64, at 235.

<sup>98</sup> *Id.*

<sup>99</sup> See Finding Safety, *supra* note 9.

violence, regardless of whether they are related to the offender.<sup>100</sup> However, a criminal court order of protection can only be issued after criminal charges are filed against the abuser.<sup>101</sup>

### C. Which Court To Choose

When deciding between forums from which to obtain orders of protection, victims have several issues to consider.<sup>102</sup> For instance, in order to obtain a criminal court protective order, there must have been an arrest or a criminal charge filed against the abuser.<sup>103</sup> In addition, criminal cases require a higher level of proof of the alleged incident(s) than civil court cases and can often take much longer to be decided.<sup>104</sup> Furthermore, in family court, the victim must follow through with the case, whereas in criminal court, the district attorney can decide to go forward with a case with or without the victim's involvement.<sup>105</sup> It may also be easier to get a temporary/emergency order of protection from family court than criminal court, and using the family court system does not prevent a victim from also filing criminal charges.<sup>106</sup>

## IV. STATUS OF THE LAW

### A. Across America

Forty-two states, and the District of Columbia, have protective orders that last at least one year.<sup>107</sup> Conversely, the Domestic Violence Model Code proposes that courts determine the duration of protective orders.<sup>108</sup> Under the Model Code, an order would remain in effect indefinitely, until a court orders a modification or dissolution.<sup>109</sup> Ten states, including New Jersey, have followed the Model Code in placing no limits on the duration of protective orders.<sup>110</sup> Courts in Ohio can provide petitioners with as much as five year orders of protection.<sup>111</sup> In

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See Finding Safety, *supra* note 9.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *infra* Part IV.A and accompanying notes.

<sup>108</sup> See Nat'l Council of Juvenile & Family Court Judges, Family Violence: A Model State Code § 306 (1994).

<sup>109</sup> *Id.*

<sup>110</sup> N.J. STAT. ANN. § 2C:25-29 (2004) (Alaska, Colorado, Florida, Hawaii, Michigan, New Jersey, North Dakota, Oklahoma, Vermont and Washington, comprise the ten states that have followed the Model State Code in placing no limits on the duration of orders of protection). See also ALASKA STAT. § 18.66.100 (2002); COLO. REV. STAT. ANN. § 13-14-102 (2002); FLA. STAT. ANN. § 741.30 (2002); HAW. REV. STAT. § 586-5.5 (2002); MICH. COMP. LAWS ANN. § 600.2950 (2002); N.D. CENT. CODE § 14-07.1-02 (2002); OKLA. STAT. ANN. tit. 22, § 60.4 (2002); VT. STAT. ANN. tit. 15, § 1103 (2002); WASH. REV. CODE ANN. § 26.50.060 (2002).

<sup>111</sup> OHIO REV. CODE ANN. § 3113.31 (2002).

Wisconsin, protective orders can be entered for the duration asked for by the petitioner, up to four years.<sup>112</sup> California, Kentucky, Mississippi, Rhode Island, and South Dakota issue three year orders of protection.<sup>113</sup> However in California, the protective order may be renewed for three additional years, or renewed indefinitely.<sup>114</sup>

States such as Texas, Virginia, and four others provide up to two year orders of protection.<sup>115</sup> Several states issue at least one year orders. Alabama, Arizona, Delaware, the District of Columbia, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Tennessee, and Washington State all issue at least one year orders of protection.<sup>116</sup> The rest of the states: Connecticut, Georgia, Idaho, New Mexico, South Carolina, Utah, West Virginia, and Wyoming all issue orders that last six months or less.<sup>117</sup> It is important to note that most of these states allow an order to be extended beyond its original term.<sup>118</sup>

Orders of protection in New Jersey are often valid for the life of the petitioner.<sup>119</sup> This is in sharp contrast with New York, where orders of protection are valid only for a maximum of five years.<sup>120</sup> In order for a New Jersey protective order to be vacated, one of the parties must show the court "good cause" as to why the order is no longer necessary.<sup>121</sup> Even if the parties reconcile, the order still remains in effect and fully enforceable, unless a proper showing is made upon the court.<sup>122</sup> In addition to the "good cause" requirement, the court must specifically find that the victim's application to terminate the order was not made under duress

<sup>112</sup> WIS. STAT. ANN. § 813.12 (2002).

<sup>113</sup> CAL. FAM. CODE § 6345 (2002); KY. REV. STAT. ANN. § 403.750 (2002); MISS. CODE ANN. § 93-21-17 (2002); R.I. GEN. LAWS § 15-15-3 (Supp. 1993); S.D. CODIFIED LAWS § 25-10-5 (2002).

<sup>114</sup> CAL. FAM. CODE § 6345 (2002).

<sup>115</sup> TEX. FAM. CODE § 85.025 (2002); VA. CODE ANN. § 16.1279.1 (2002) (Arkansas, Illinois, Indiana, and Maine are the four other states that provide up to two year orders of protection). See ARK. CODE ANN. § 9-15-205 (2002); 725 ILL. COMP. STAT. § 5/112A-20 (2002); IND. CODE ANN. § 34-26-5-9 (2002); 19-A M.R.S. § 4007 (2002).

<sup>116</sup> ALA. CODE § 30-5-7 (2002); ARIZ. REV. STAT. ANN. § 13-3602 (2002); DEL. CODE ANN. tit. 10, § 1045 (2002); D.C. CODE ANN. § 16-1005 (2002); IOWA CODE ANN. § 236.5 (2002); KAN. STAT. ANN. § 60-3107 (2002); LA. REV. STAT. ANN. § 46:2136 (2002); MD. CODE ANN. FAM. LAW § 4-506 (2002); MASS. GEN. LAWS ANN. ch. 209A, § 3 (2002); MINN. STAT. ANN. § 518B.01 (2002); MO. REV. STAT. 455.040 (2003); MONT. CODE ANN. § 40-4-121 (2002); NEB. REV. STAT. § 42-924 (2002); NEV. REV. STAT. ANN. § 33.080 (2002); N.H. REV. STAT. ANN. § 173-B:5 (2002); N.Y. FAM. CT. ACT § 842 (2002); N.C. GEN. STAT. § 50B-3 (2002); OR. REV. STAT. § 107.718 (2002); PA. STAT. ANN. tit. 23, § 6108 (2002); TENN. CODE ANN. § 36-3-605 (2002); WASH. REV. CODE ANN. § 26.50.60 (2002).

<sup>117</sup> CONN. GEN. STAT. ANN. § 46b-15 (2002); GA. CODE ANN. § 19-13-4 (2002); N.M. STAT. ANN. § 40-13-6 (2002); S.C. CODE ANN. § 20-4-70 (2002); W. VA. CODE § 48-27505 (2002).

<sup>118</sup> See *supra* notes 111-118.

<sup>119</sup> Victoria L. Lutz & Cara M. Bonomolo, *How New York Should Implement Federal Full Faith and Credit Guarantees for Out-of-state Orders of Protection*, 16 PACE L. REV. 9, 16 (1995).

<sup>120</sup> *Id.*

<sup>121</sup> See generally Carolyne R. Dilgard, *Crossing the Line: The Interstate Implications of Issuing and Enforcing Domestic Violence Protection Orders: An Examination of New Jersey*, 35 RUTGERS L.J. 253, 286 (2003).

<sup>122</sup> *Id.*

or coercion.<sup>123</sup> “This is a key distinction between New Jersey and most other states where orders are allowed to expire after a certain period of time, unless parties come forward with evidence that the order is still needed.”<sup>124</sup>

### B. *New York State*

#### 1. The Domestic Violence Omnibus Act Of 2001

On March 21, 2001, Governor George E. Pataki announced the introduction of the Domestic Violence Omnibus Act of 2001.<sup>125</sup> This legislation called for a change in New York State law with respect to the duration of orders of protection.<sup>126</sup> The new legislation sought to give criminal and family court judges the ability to issue lifetime orders of protection.<sup>127</sup>

Many of the reforms proposed by the Domestic Violence Omnibus Act (first proposed in 1999), were in response to recommendations made by the Governor’s Commission on Domestic Violence Fatalities.<sup>128</sup> This Commission was chaired by Jeanine Pirro, Westchester County District Attorney.<sup>129</sup> Ms. Pirro said,

Governor Pataki has long been a champion of victim’s rights. These proposals recognize the devastating impact that domestic violence has on its victims and children who witness the abuse. I have no doubt that the proposals, once enacted, will save lives. I urge the legislature to pledge their support for these proposals.<sup>130</sup>

Together, the Governor’s Domestic Violence Omnibus Act of 2001, and related bills were supposed to: (1) amend the Criminal Procedure law to allow the criminal court to issue lifetime orders of protection against domestic violence offenders, in appropriate cases, and to amend the way current law calculates the duration of an order; and (2) amend the Family Court Act to allow family courts to issue orders of protection for a three year duration, increased from one year, and to allow family courts to issue lifetime orders of protection.<sup>131</sup> Currently, the maximum duration of an order is five years for a felony, three for a misdemeanor, and one year for other offenses. Though orders of protection were extended to three years in 2003, lifetime orders of protection still have not come to fruition in New York.

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 286-287.

<sup>125</sup> See Press Release 1, *supra* note 3.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See Press Release 1, *supra* note 3.

<sup>131</sup> *Id.*

## 2. Orders Of Protection Extended In 2003

For years, Governor Pataki has repeatedly proposed the Omnibus Domestic Violence Act.<sup>132</sup> Yet, a main feature of this Act—strengthening protection for victims of domestic violence by increasing the duration of orders of protection in family and criminal court domestic violence cases—remains unrealized.<sup>133</sup> The legislation calls for lifetime orders of protection in New York Family and Criminal Court.<sup>134</sup>

In 2003, the maximum duration of orders of protection were extended, but not by much.<sup>135</sup> For family court issued orders, protection was extended from one to two years.<sup>136</sup> With aggravating circumstances, family courts may issue five year orders, rather than three.<sup>137</sup> In addition, the law passed in 2003 expanded the concept of aggravating circumstances to include just one violation of a valid order of protection.<sup>138</sup> In that type of case, the court could issue up to a five year order.<sup>139</sup> Under former law, a history of repeated violations of a valid order had to be demonstrated and only a three year order would be issued.<sup>140</sup> “Although this bill is an important stride toward increasing protection to victims of domestic violence, it falls short of Governor Pataki’s proposed Omnibus Domestic Violence Act which would allow for the issuance of lifetime orders of protection, which states such as New Jersey currently provide for.”<sup>141</sup>

## 3. Current Status Of The Proposed Law

In a February 3, 2004 press release, the Governor reiterated his call for a series of bills to protect domestic violence victims.<sup>142</sup> Once again, he called for an amendment to the Criminal Procedure Law “to allow criminal courts, in appropriate cases, to issue lifetime orders of protection against perpetrators of domestic violence” and for an amendment to the Family Court Act for an “increase [in] the duration of orders of protection issued by family courts from one year to three years and to allow the issuance of lifetime orders of protection.”<sup>143</sup>

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<sup>132</sup> See Press Release 2, *supra* note 5.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See Press Release 2, *supra* note 5.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Lisa A. Frisch, *Pro Bono Corner-The Legal Project*, WBA NEWSLETTER, Oct. 3, 2003, available at [www.legalproject.org/newsletters/WBA-Oct03.doc](http://www.legalproject.org/newsletters/WBA-Oct03.doc) (last visited Nov. 11, 2005).

<sup>142</sup> Press Release, Office of the Governor, Press Releases, Governor Recognized for Efforts to Prevent Domestic Violence: Renews Call for Critical Legislation to Combat Domestic Violence in the Home, Feb. 3, 2004, available at [http://www.state.ny.us/governor/press/year04/feb3\\_1\\_04.htm](http://www.state.ny.us/governor/press/year04/feb3_1_04.htm) (last visited Nov. 11, 2005).

<sup>143</sup> *Id.*

Relevant portions of “AN ACT to amend the criminal procedure law, the Family Court Act and the penal law, in relation to creating the crime of domestic assault,” read as follows:<sup>144</sup>

The duration of such an order shall be fixed by the court FOR SUCH PERIOD AS THE COURT, IN ITS DISCRETION, DEEMS APPROPRIATE TO SECURE THE PROTECTION OF PERSONS AFFECTED BY ITS TERMS, UP TO THE LIFETIME OF ANY SUCH PERSON, and ~~in~~ SUCH DURATION SHALL BE STATED IN THE ORDER.<sup>145</sup> . . .

An order of protection under section eight hundred forty-one of this part shall set forth reasonable conditions of behavior to be observed for a period not ~~in excess of two~~ LESS THAN THREE years by the petitioner or respondent or for a SUCH period ~~not in excess of five years~~ STATED IN THE ORDER AS THE COURT, IN ITS DISCRETION, DEEMS APPROPRIATE TO SECURE THE PROTECTION OF PERSONS AFFECTED BY ITS TERMS, UP TO THE LIFETIME OF ANY SUCH PERSON upon (i) a finding by the court on the record of the existence of aggravating circumstances as defined in paragraph (vii) of subdivision (a) of section eight hundred twenty-seven of this article; or (ii) a finding by the court on the record that the conduct alleged in the petition is in violation of a valid order of protection. Any finding of aggravating circumstances pursuant to this section shall be stated on the record and upon the order of protection. Any order of protection issued pursuant to this section shall specify if an order of probation is in effect. AN ORDER OF PROTECTION ISSUED PURSUANT TO THIS SECTION SHALL NOT BE MODIFIED UNLESS THERE IS A FINDING BY THE ISSUING COURT THAT THERE HAS BEEN A CHANGE IN CIRCUMSTANCE THAT NECESSITATES THE MODIFICATION AND THAT THE REQUESTED MODIFICATION WILL NOT ADVERSELY AFFECT THE SAFETY OF THE PERSON PROTECTED BY THE ORDER.<sup>146</sup>

Should the preceding text be passed by the New York State Legislature and enacted into law, both criminal and family courts would have the ability and the discretion to provide victims with lifetime orders of protection. As mentioned earlier with regard to New Jersey, a New York family court judge would also be required to make a finding of a change in circumstance to modify an order made pursuant to the above mentioned section.

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<sup>144</sup> The words in upper case letters constitute additions to the law and strikethroughs are to be omitted.

<sup>145</sup> Assem. B. A-10086, 227th Sess. (N.Y. 2004) (pertaining to the opening paragraph of subdivision 5 of § 530.12 of the Criminal Procedure Law, as amended by chapter 384 of the laws of 2001. As of the date of this note, this proposed legislation has not been enacted into law. This section also appears in subdivision 4 of § 530.13 of the Criminal Procedure Law, as amended by chapter 384 of the laws of 2001.).

<sup>146</sup> *Id.* (pertaining to the opening paragraph of § 842 of the Family Court Act, as amended by chapter 579 of the laws of 2003).

## V. SUPPORT FOR LIFETIME ORDERS OF PROTECTION

During a February 5, 2002 press conference sponsored by the New York State Coalition Against Domestic Violence, Chief Administrative Judge Jonathan Lippman said that the Judiciary is strongly in support of lifetime orders of protection.<sup>147</sup> The Judge did not endorse any specific proposed bill on the subject, but endorsed the general concept.<sup>148</sup> “Judges are often limited to very short orders of protection,” stated Judge Lippman.<sup>149</sup> “What happens is sooner or later someone falls between the cracks and something terrible happens. We want to make sure that judges have the discretion to provide the most protection possible, including lifetime orders of protection.”<sup>150</sup>

Safe Horizon is the largest provider of domestic violence services in the country.<sup>151</sup> With respect to New York, Safe Horizon maintains offices in all five boroughs, as well as the Safe Horizon Counseling Center, a New York State licensed mental health clinic that works exclusively with those who have suffered from violence, abuse and other traumas.<sup>152</sup> Among several other proposals in their 2003 Legislative Agenda, Safe Horizon advocated for a New York law to “authorize courts to issue lifetime orders of protection.”<sup>153</sup>

On January 31, 2004, the Board of Directors of the Women’s Bar Association of New York met at New York Life Insurance Company in New York City.<sup>154</sup> Among the highlights of that meeting was a Board vote to support, on recommendation of the Legislative Committee, “a bill that would provide for lifetime Orders of Protection in certain, specified circumstances, with the recommendation that language be included to clarify that modification of the Order should only be granted if it will not adversely affect the security of the victim.”<sup>155</sup>

Former Mayor Rudolph Guiliani spoke of domestic violence in his January 14, 1998 State of the City Address.<sup>156</sup> In particular, the Mayor said that “[d]omestic violence is still a problem that affects far too many New Yorkers and gets far too little attention.”<sup>157</sup> He told New Yorkers that the City would push for anti-stalking legislation, lifetime orders of protection, and full faith and credit for

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<sup>147</sup> John Caher, *Shifting Focus of Court Restructuring To Domestic Violence Draws Supporters*, 227 N.Y.L.J. Feb. 6, 2002, at 1, col. 3.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Safe Horizon, <http://www.safehorizon.org/page.php?page=addressingviolence> (last visited Nov. 11, 2005).

<sup>152</sup> *Id.*

<sup>153</sup> Safe Horizon, Legislative Agenda, at <http://www.safehorizon.org/page.php?page=legislativeagenda> (last visited Oct. 20, 2005).

<sup>154</sup> Women’s Bar Ass’n of the State of N.Y., Board Highlights, Jan. 2004, at [http://www.wbasny.bluestep.net/shared/custompage/custompage.jsp?\\_event=view&\\_id=445505\\_c\\_sU127802\\_s\\_i148858](http://www.wbasny.bluestep.net/shared/custompage/custompage.jsp?_event=view&_id=445505_c_sU127802_s_i148858) (last visited Oct. 20, 2005).

<sup>155</sup> *Id.*

<sup>156</sup> Archives of Rudolph W. Giuliani, The State of the City Address, Jan. 14, 1998, available at <http://www.nyc.gov/html/rwg/html/98a/stcitext.html> (last visited Oct. 20, 2005).

<sup>157</sup> *Id.*



out-of-state orders, so that New York City would have “additional legal power to protect women and children from being injured by their batterers.”<sup>158</sup> This message was reiterated in the Former Mayor’s Management Report of February of 1999, which stated,<sup>159</sup> “(t)he city has proposed . . . legislation allowing the courts to issue lifetime orders of protection, so that victims of domestic violence are not forced to wait until the next attack or threat to their safety before seeking legal protection.”<sup>160</sup> Victim advocate, Tara T. Brayton described the benefits of having an order of protection, stating that police seem more likely to take telephone calls for help more seriously if an order of protection is involved.<sup>161</sup> In addition, once an order of protection has been served on the abuser, he can be arrested if the order is violated, even if the family court was the issuing court.<sup>162</sup> Another advantage is the court’s ability to make the abuser leave the home.<sup>163</sup> Without this, the victim may feel that she has to leave her home in order to feel safe.<sup>164</sup> An order of protection makes it possible for the victim to stay in the home, while forcing the abuser to leave.<sup>165</sup> Victims may not have the resources to leave the home, and for this reason, forcing the abuser to leave shifts some of the financial burden. However, an abuser may discontinue financial contributions to the home, creating an unfortunate issue that victims must consider when deciding to seek an order of protection.

Both the New York State Assembly and the New York State Senate have submitted memorandums in support of the aforementioned changes to the Family Court Act and Criminal Procedure Law. The New York State Assembly puts forth this compelling argument for change:

Orders of protection are an important line of defense for domestic violence victims. They serve as a strong message that abusive behavior will not be tolerated and provide some assurance to the victim that the order will serve as a deterrent to future abuse. The effectiveness of such orders is often diminished, however, by statutory provisions that limit their duration. Under current law, upon a conviction for any offense, courts may only issue orders of protection for up to five years in the case of a felony conviction, up to three years for a misdemeanor conviction and up to one year for a violation. Furthermore, family courts may only issue orders of protection for up to one year or, in the event the court finds aggravating factors, for up to three years. Curiously, courts may thereafter modify existing orders of protection at any time—even without considering whether there has been a change in circumstances necessitating such

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<sup>158</sup> *Id.*

<sup>159</sup> Mayor’s Management Report, Feb. 1999, available at [www.nyc.gov/html/ops/downloads/pdf/1999\\_mmr/0299\\_summary.pdf](http://www.nyc.gov/html/ops/downloads/pdf/1999_mmr/0299_summary.pdf).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See Mayor’s Management Report, *supra* note 159.

<sup>165</sup> *Id.*

modification or whether the modification will adversely affect the safety of the person protected by the order.

Whereas temporary orders of protection may be extended during the pendency of a case, final orders of protection issued after a case has been concluded may not be extended. Thus, a victim may not secure a subsequent order of protection once a final order has 'run out' unless he or she is re-victimized by the abuser. The failure to recognize that certain victims of domestic violence are at risk for periods of time longer than the statutory limits is a serious shortcoming in existing law. This bill rectifies this flaw by redefining the duration of orders of protection and allowing for lifetime orders of protection in appropriate cases . . . .

The bill addresses another significant flaw in existing law. Currently, judges may, for any reason or no reason at all, amend existing orders of protection even in the absence of evidence of a change in circumstances necessitating a modification. The bill rights this deficiency by specifying that orders of protection may not be modified unless there is a finding that there has been a change in circumstances necessitating the modification and that the requested modification will not adversely affect the safety of the person protected by the order.<sup>166</sup>

With such seemingly strong support for lifetime orders of protection, why have they yet to become the law in New York State? The proposed legislation calls for lifetime orders of protection to be issued only in "appropriate cases."<sup>167</sup> Though the Bill does not define the term "appropriate," it is reasonable to believe that discretion will be given to judges to further develop the term "appropriate." In any case, orders of protection of a substantial duration, should only be used in the most serious of domestic violence cases.

A study of eleven cities, including New York City, revealed that the following eight factors significantly increase a woman's risk of dying at the hands of her intimate partner: (1) offender's access to a gun; (2) offender's previous threat with a weapon; (3) recent physical separation from the offender; (4) having a child in the home who is not biologically related to the offender; (5) stalking by the offender; (6) forced sex by the offender; (7) abuse by the offender during pregnancy; and (8) unemployed offender.<sup>168</sup> Courts should consider the existence of these factors or a combination thereof, when deciding whether or not to issue lifetime orders. When some or all of these factors are present, lifetime orders of protection ought to be granted.

In addition, it is imperative to recognize that certain victims have needs that go beyond the statutory scope of current protective orders. "The failure to

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<sup>166</sup> N.Y. State Assembly Memorandum in Support of Legislation, Bill No. A-10086, available at <http://www.senate.state.ny.us/>; see also N.Y. State Senate Memorandum in Support of Legislation, Bill No. S-5438 (a similar proposition made by the N.Y. State Senate), available at <http://www.senate.state.ny.us/>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

recognize that certain victims of domestic violence are at risk for periods of time longer than the statutory limits is a serious shortcoming in existing law.”<sup>169</sup>

In many communities, there are barriers and complications associated with criminal arrest and prosecution.<sup>170</sup> Therefore, protective orders have become a primary source of legal sanctions against batterers as well as a primary source of protection for victims.<sup>171</sup> “In contrast to the reactive arrest and criminal prosecution processes, protection orders are victim-initiated and timely. They also allow a relaxed standard of proof, focus on the victim’s protection, and prescribe a wide range of specific interventions or reliefs that address extralegal concerns of safety and economic well-being.”<sup>172</sup>

Protective orders are a means of providing prospective intervention to prevent likely abuse.<sup>173</sup> Protective orders may at times, be the only remedy to prevent abuse from escalating before an actual physical assault.<sup>174</sup> This is the case because civil protective orders avoid the requirement of past criminal conduct beyond a reasonable doubt.<sup>175</sup> In cases of threats and intimidation, where the potential for serious abuse is very high, this characteristic of civil protective orders is quite useful.<sup>176</sup>

Violations of civil protective orders are criminal offenses in all states, and therefore the existence of the order gives police a strong mechanism to stop abuse.<sup>177</sup> Police have the right to arrest the respondent and prosecutors may subsequently make a conviction for the violation. “The use of protective orders makes it more likely that police will act decisively by giving officers an independent method for verifying recidivism and providing evidence that a victim is willing to pursue legal redress.”<sup>178</sup> Police are likely to make a domestic violence call a higher priority if caller has an order of protection.<sup>179</sup> When police respond to a call where a protective order is already in place, they may be more inclined to take action in order to prevent potential legal liability.<sup>180</sup> “In the eyes of the officer, breach of this duty might make the officer and the police department potentially liable if an injury occurs and the order is not enforced.”<sup>181</sup>

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<sup>169</sup> N.Y. State Senate Memorandum in Support of Legislation, Bill No. S-5438, *available at* <http://www.senate.state.ny.us/>.

<sup>170</sup> Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, NAT’L INST. OF JUSTICE RES. REP. (Jan. 1996), *available at* <http://www.ncjrs.org/txtfiles/crimdom.txt>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> BUZAWA, *supra* note 64, at 236.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> BUZAWA, *supra* note 64, at 236.

<sup>179</sup> *See Finding Safety, supra* note 9.

<sup>180</sup> BUZAWA, *supra* note 64, at 236.

<sup>181</sup> *Id.*

Orders of protection “serve as a strong message that abusive behavior will not be tolerated and provide some assurance to the victim that the order will serve as a deterrent to future abuse.”<sup>182</sup> When victims obtain a protective order from a court, they gain a feeling of empowerment.<sup>183</sup> Knowing that the police may enforce an order can make the victim feel more secure and make the offender less likely to abuse again.<sup>184</sup>

Protective orders of longer durations would reduce the number of times a victim would have to go to court to renew her order; allowing her to avoid having to take time away from work, family obligations, etc. In this respect, victims are suffering because the law in New York State does not provide some victims with ample protection. Finally, lifetime protective orders and orders of extended duration are used widely in other states. As mentioned earlier, domestic violence is a very serious problem in New York. The cost in terms of lives, injuries, and quality of life, are reason enough to justify increasing the duration of protective orders for victims.

#### VI. ARGUMENTS AGAINST LIFETIME ORDERS OF PROTECTION

For all the reasons mentioned above, one may wonder why New York State does not provide domestic violence victims in the most serious of cases with lifetime orders of protection. First, orders of protection may become the harassment tool of choice for victims. In New York, whenever a call is placed to police concerning a violation of a valid order of protection, the provision of mandatory arrest requires that law enforcement arrest the offender for any such violation. It is possible that victims may place a call to police for slight, inadvertent or even non-existent, violations of an order. This leaves the respondent in the position of being subject to arrest, possibly at the whim of the victim/former victim. There may be some instances in which it would be unfair to subject someone to punishment for the “lifetime of the victim.” However, abuse of protective orders by a few should not ruin the option or those victims of domestic violence who live in fear and are faced with very real threats to their safety. The prospect of saving one or a few of the lives lost each year to domestic violence ought to outweigh this concern. As mentioned earlier, approximately 1300 women across the United States lose their lives at the hands of an intimate partner each year.

Second, even when orders are granted, there are limits to their efficacy.<sup>185</sup> Protective orders may stop many potential offenders, but when it comes to “hard-core” offenders, protective orders may “prove to be an illusory remedy, allowing many people to think they have solved the problem without, in fact, having handled

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> BUZAWA, *supra* note 64, at 240.

the worst offenders.”<sup>186</sup> Research has shown that “hard-core recidivists are not deterred by the prospects of the social stigma associated with an arrest or even incarceration. Such offenders are unlikely to stop merely because of another piece of paper.”<sup>187</sup> In addition, women who have been frequently and severely battered, may be so terrified, that, paradoxically, they may be the least likely to obtain permanent orders.<sup>188</sup> However, for those women who do benefit from protective orders and for those batterers who are deterred by the prospect of arrest and/or criminal prosecution, lifetime orders do become an important part of preventing future abuse.

Lastly, a lifetime order of protection may attach a stigma to the defendant or be called an excessively long sentence, which may violate both the Federal and New York State Constitutions which bar “unduly harsh punishment” or deprive an offender of personal liberty without due process of law. However, this consequence may be mitigated when lifetime orders are granted only in cases serious enough to warrant such a measure.

#### VII. EFFECTIVENESS OF LIFETIME ORDERS AND THE NEED FOR PROPER ENFORCEMENT

Courts are increasingly being given discretion to restrict conduct and impose specific conditions, and they can tailor a protective order to fit the particular circumstances of a case.<sup>189</sup> However, such orders are only effective if they can convince the restrained party that the order will be enforced.<sup>190</sup> “Unequivocal, standardized enforcement of court orders is imperative if protective orders are to be taken seriously by the offenders they attempt to restrain.”<sup>191</sup> Results of studies concerning the effectiveness of protective orders are mixed. The effectiveness of restraining orders in reducing the incidence of domestic violence has only been examined in a few studies, which “have been non-experimental or quasi-experimental with designs that weaken any conclusions about their effectiveness.”<sup>192</sup> There is also little data on the extent of the use of protective orders in conjunction with criminal prosecution.<sup>193</sup>

As an initial matter, “[c]omprehensive provisions of restraining orders are only as good as their enforcement.”<sup>194</sup>

Enforcement is the Achilles’ heel of the civil protection order process, because an order without enforcement at best offers scant protection and at

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 241.

<sup>188</sup> *Id.*

<sup>189</sup> See BULLETIN NO. 4, *supra* note 15.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See Fagan, *supra* note 170.

<sup>193</sup> *Id.*

<sup>194</sup> NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE 21-22 (1990).

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.

It appears that when protection orders only offer weak protection, the explanation may lie in the functioning of the justice system rather than the nature of protective orders as a remedy . . . . Changes in the justice system's handling of protection orders can significantly increase their utility . . . . Where judges have established a formal policy that offenders who violate an order will be apprehended and punished, often with a jail term, both judges and victim advocates report the highest level of satisfaction with the system.<sup>195</sup>

A 2001 study by Mears et al. reported that positive effects of protective orders were not apparent despite the fact that seeking and obtaining a protective order represented active victim efforts to seek outside support in preventing revictimization.<sup>196</sup> The research showed that there was almost no additional protection from revictimization in the face of protective orders if protection was measured as the number of days from the original to the second incident of abuse.<sup>197</sup> Instead, the researchers found that there was no statistically significant difference between offenders bound by a protective order, arrested offenders, and offenders who were both under a protective order and arrested for a violation of it.<sup>198</sup> In addition, the study found that women in low-income communities who had obtained protective orders were at an increased risk for being abused again.<sup>199</sup>

However, in contrast, a study sponsored by the National Center for State Courts found that victims of domestic violence interviewed 1 to 6 months after they had obtained protective orders, perceived that their well-being was positively impacted by the issuance of the order, and this positive impact increased with time.<sup>200</sup> The study also found incidents of re-abuse to be low, and 95% of the victims interviewed said that they would obtain a protective order again.<sup>201</sup> The difference between these studies appears to be in the way that "effectiveness" outcomes were measured.<sup>202</sup> If "effectiveness" is measured on the basis of preventing future abuse from happening, these studies show little positive impact.<sup>203</sup> However, this does not mean that when re-abuse occurs, it will be ignored by police.<sup>204</sup> Other studies clearly show that women feel "protected" and

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<sup>195</sup> NAT'L INST. OF JUSTICE, CIVIL PROTECTIVE ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT 2 (Mar. 1990).

<sup>196</sup> BUZAWA, *supra* note 64, at 243.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> BUZAWA, *supra* note 64, at 243.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

“empowered” by the orders, and “the lifting of fear is itself valuable.”<sup>205</sup> Harrell and Smith conducted a study of the efficacy of orders of protection in deterring domestic violence, in which data was gathered based on a sample of orders of protection issued from January to September of 1991.<sup>206</sup> The sample consisted of 355 women who filed for an order of protection and alleged abuse by their male partners.<sup>207</sup> Both the women and men were interviewed three months after the order of protection was issued.<sup>208</sup>

The women were interviewed a second time one year after the order, and additional information was collected in the form of police and court records.<sup>209</sup> Harrell and Smith found that women generally felt that the orders of protection were worthwhile.<sup>210</sup> For example, 79% thought it was helpful to send the abusers a message that their actions were wrong, and 62% of the victims felt it was very or somewhat helpful in punishing their partners for the abuse.<sup>211</sup> Again, although victims report high recidivism rates, the protective orders proved important in other ways—namely, the order became a source of empowerment for the victims, and obtaining the order of protection was the first time they had support from society to hold the abuser accountable for his actions.<sup>212</sup>

Keilitz, Davis, Efke, Flango, and Hannaford reported positive results with respect to the effectiveness of orders of protection, after gathering information from three jurisdictions: a family court in Wilmington, Delaware; a county court in Denver, Colorado; and a superior court in the District of Columbia.<sup>213</sup> Effectiveness was based on victims’ self-reports and improvement in the quality of their lives following the issuance of the order, as well as court or police records documenting another incident of abuse.<sup>214</sup> The research consisted of telephone interviews of 285 women one month after receiving their orders of protection.<sup>215</sup> Follow-up interviews were conducted with 177 of the women, six months after the order was issued.<sup>216</sup> Based on results from the first interview, 72% of victims revealed that their quality of life had improved since the order was issued.<sup>217</sup> After the follow-up interview, 85% of victims reported that their quality of life had been improved by the order.<sup>218</sup> The researchers noted that when issuing an order of

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<sup>205</sup> *Id.*

<sup>206</sup> Tara T. Brayton et al., *The Need for Intervention: The Effectiveness of Current Programs Designed to Deter Family Violence* 69 (Apr. 1, 2003), available at <http://faculty.clinton.edu/faculty/Tara.Brayton/FinalDocument.pdf>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 70.

<sup>211</sup> See Brayton et al., *supra* note 206, at 70.

<sup>212</sup> *Id.* at 70-71.

<sup>213</sup> *Id.* at 71.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See Brayton et al., note 206, at 71.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 72.

protection, the criminal record of the abuser should be taken into account.<sup>219</sup> Abusers who have long criminal histories tend to violate the orders more readily than those abusers without past criminal histories.<sup>220</sup> The results of these studies do indicate that an order of protection can, in fact, lower the rate of re-abuse.<sup>221</sup> They also show that orders of protection do work for many people.<sup>222</sup> In addition, although orders of protection may not always deter future abuse, many victims gain a sense of empowerment through the orders.<sup>223</sup> Keilitz concluded, after reviewing studies of the effectiveness of protective orders, that they were most likely to protect victims from future abuse if they were written very specifically, contained comprehensive terms and conditions, were easy to obtain, and were integrated into victims' access to social and victim services.<sup>224</sup>

### VIII. A COMPROMISE SOLUTION

Should the Legislature fail to enact the aforementioned provisions into law, and lifetime orders of protection in New York are no longer a viable option, is there perhaps a compromise? Should victims in New York, where women in New York City are facing such a "major public health issue,"<sup>225</sup> be able to obtain protective orders of a longer duration? Longer than the absolute state statutory maximum of five years for a felony offense, and three years in family court with aggravating circumstances?

Perhaps in the interim, while the New York State Legislature stalls efforts to enact lifetime orders of protection into law, provisions for extended orders of protection should be considered. Perhaps ten, fifteen or twenty year orders may provide a temporary solution and mitigate some of the concerns mentioned earlier about lifetime orders of protection. For instance, California issues ten year orders of protection for stalking related offenses. This could be applied to extremely serious<sup>226</sup> domestic violence cases in New York, such as cases involving the eight factors, or a combination thereof, mentioned in Part IV. In addition, this extension may be appropriate in cases involving a felony, which is a characteristic in New York of five year orders, the longest orders currently issued. Providing ten, fifteen and twenty year orders would reduce the number of times a woman would have to go to court, to come out of hiding, and face her attacker.

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> See Brayton et al., *supra* note 206, at 72.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Allisa Politz Worden, *The Changing Boundaries of the Criminal Justice System: Redefining the Problem and the Response in Domestic Violence*, 2 CRIM. JUST. 215, 242 (2000), available at [http://www.ncjrs.org/criminal\\_justice/2000/vol\\_2/02g2.pdf](http://www.ncjrs.org/criminal_justice/2000/vol_2/02g2.pdf).

<sup>225</sup> *Id.*

<sup>226</sup> The term "serious" is used to make a distinction between case specific incidents involving domestic violence. This is not to undermine the "seriousness" of any incident of purported domestic violence.



## IX. CONCLUSION

A state like New Jersey, with its progressive response to the serious public health and safety issue posed by domestic violence, has led the way in taking a stand against battering and family violence. Yet, the New York State Legislature continues to stall in its enactment of the Domestic Violence Omnibus Act or a similar piece of legislation providing for indefinite or lifetime orders of protection. This legislation was first introduced in 1999. Six years later, New York Courts still only issue, at the very maximum, five year orders of protection. These orders are issued only in the case of a felony. New York needs to follow the lead of progressive states and provide the utmost protection to its citizens. Family violence should not be tolerated, and a firm stance must be taken. Should life time orders of protection finally come to fruition in New York, New York's powerful sphere of influence may perhaps cause other states to follow the Big Apple's lead. It is about time that victims in New York are protected and empowered by this declaration against family violence.