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**Domestic Violence: A Review of State Legislation Defining
Police and Prosecution Duties and Powers**

June 2004

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The opinions expressed herein are those of the author and do not necessarily represent the opinions of the Institute for Law and Justice.

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Legislative attention to the problem of domestic violence has led in the past decade to the enactment of an avalanche of new laws in the 50 states. Between 1997 and 2003 there were over 700 new domestic violence-related enactments, including both amendments of old laws and enactment of new laws, such as the creation of a new crime of domestic violence in 38 states.¹ By and large, state legislators have had few models to guide their actions;² few state legislators are fully aware of what legislators in other states have done. Nor has there been much effort, with a few exceptions, to incorporate research findings on “what works” into legislation.

This review can serve as a reference for state legislators concerned with domestic violence (including stalking), especially in defining the responsibilities of law enforcement and prosecutor agencies. It can also serve as a source of ideas for advocates interested in promoting legislative reforms directed at reducing domestic violence. Finally, this review can help researchers and evaluators better understand the legal context (and constraints) in which local justice agencies operate in responding to domestic violence.

Background

The Problem of Domestic Violence

Domestic violence is a serious social problem. Its victims number in the tens of millions. Each year the Federal Bureau of Investigation receives over one million copies of orders of protection against domestic violence issued by the state courts.³ Since not all states participate in the FBI program, nor do all the participating states fully report, this one million figure is an underestimate of the numbers of domestic violence cases coming to the attention of the justice system. It is, however, impossible to generate a more exact estimate since there is no reliable

¹ These statistics are based upon annual reviews of state violence-against-women legislation initially conducted by the author for an evaluation of the federal block grant STOP (Services and Training for Officers and Prosecutors) program that provides funds under the Violence Against Women Act of 1994 for state and local agencies to use in combating violence against women. See note 3 *infra*. These reports are available at www.ilj.org/dv/index.htm. A summary of the first three of these reports was published in 2001 as part of the Final Report of the National Evaluation of the STOP Program, funded by the National Institute of Justice.

² But see, ADVISORY COMMITTEE FAMILY VIOLENCE PROJECT, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994); NATIONAL CRIMINAL JUSTICE ASSOCIATION, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR THE STATES (1993).

³ Unpublished information provided by the FBI's National Crime Information Center, charged with operating a central repository of protection orders for law enforcement to use in verifying the existence and validity of such orders when presented with a potential violation of that order. A list of states participating in the central

data about the number of domestic violence victims who do not seek court orders, including both those who seek help only from the police and those who do not turn to the public authorities at all.

Our FBI-based estimate is consistent with estimates provided by victim surveys conducted by the Bureau of Justice Statistics⁴ and other researchers. The National Violence Against Women Survey (NVAW) estimated that approximately 1.8 million women and one million men were physically or sexually assaulted by an intimate partner in 1995.⁵ Using a somewhat different definition of domestic violence, the Bureau of Justice Statistics (BJS) National Crime Victimization survey estimated there were approximately one million domestic violence victimizations in 1998.⁶ Until the FBI protection order data became available, there was no other method to validate or supplement the survey findings.

Depending upon whether one uses estimates derived from the FBI statistics or the survey date, it is clear that over a 10-year period, there have been millions of victims of domestic violence. Even assuming a recidivism rate of 50 percent, the number of domestic violence

repository program as of 2000 is reported in ATTORNEY GENERAL AND LIEUTENANT GOVERNOR'S FAMILY VIOLENCE COUNCIL, STOPPING FAMILY VIOLENCE: THE COMMUNITY RESPONDS. (n.d. at 17).

⁴ Callie Marie Rennison, *Intimate Partner Violence, 1993-2001*. BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF (Feb. 2003); *Intimate Partner Violence and Age of Victim, 1993-99*. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (Oct. 2001); Callie Marie Rennison & Sarah Welchans, *Intimate Partner Violence*. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (May 2000). See also Callie Rennison, *Criminal Victimization 2001: Changes 2000-2001 with Trends 1993-2001*. BUREAU OF JUSTICE STATISTICS NATIONAL CRIME VICTIMIZATION SURVEY (Sept. 2002 at 8).

⁵ PATRICIA TJADEN & N. THEONNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY. (2000); *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*. NATIONAL INSTITUTE OF JUSTICE & CENTERS FOR DISEASE CONTROL AND PREVENTION RESEARCH BRIEF (Nov. 1998).

⁶ There is considerable fluctuation in the BJS estimates of domestic violence from year to year, reflecting perhaps the reliability problems associated with looking at a subset of a larger sample survey. Nonetheless the overall stability of the yearly estimates indicates that a rough estimate of annual domestic violence is approximately one million victimizations. See Callie Marie Rennison, *Intimate Partner Violence*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 3 (May 2000) (Table 2). The more recent BJS report on the 2000 Victimization survey suggests that there was a major drop in domestic violence to 655,350 victimizations. Given the existing pattern of yearly fluctuations, this one-third reduction seems to be an unlikely estimate. See Callie Marie Rennison, *Criminal Victimization 2000: Changes 199-2000 with Trends 1993-200*. BUREAU OF JUSTICE STATISTICS NATIONAL CRIME VICTIMIZATION SURVEY (June 2001 at 8). Furthermore, without going into great detail, suffice it to say that the methodologies used by these researchers, typically involving telephone surveys, are not designed to get at embarrassing personal information such as being a domestic violence victim. An alternative estimate of between 3 and 4 million victims annually is provided by L. Walker, *Domestic Violence*, in CLINICAL HANDBOOK OF ADULT EXPLOITATION AND ABUSE. (T. Miller & L. Veltkamp eds) 77 (1998).

victims in the past decade is between 5 and 15 million. Anyway one looks at the statistics, this is a substantial number of persons.

Looking at domestic violence less abstractly, the FBI estimated that nearly 25 percent of all violent crime incidents in 1998 involved domestic violence.⁷ Similarly, the National Crime Victimization Survey (NCVS) estimates that approximately 22 percent of all female victims of violence in the United States were attacked by an intimate partner.⁸ Furthermore, according to the FBI, in 1997 almost one-third (29 percent) of all female homicide victims were killed by their husbands or boyfriends, a rate that has remained relatively constant since 1976.⁹ Finally, domestic violence is the largest cause of intentional injury to women.¹⁰

The Justice System Response: Overview

Until recently, legal fictions, social prejudices, and criminal justice apathy and ignorance combined to define domestic violence as a nonevent. Society's often-tacit acceptance of domestic violence has significantly waned in the past decade, however.¹¹ New laws in many states now criminalize abusive behavior that was implicitly accepted (although not necessarily

⁷ FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1998. 276-289 (1999) at 3279. The F.B.I. used data submitted to the National Incident Based Reporting System from 14 states.

⁸ Rennison, *supra* note 3 at 1. Only three percent of violent crime against males, however, was committed by intimate partners.

⁹ (Owens-Manley 1999), See also, Leonard Paulozzi, Linda Saltzman, Martie Thompson & Patricia Holmgreen, *Surveillance for Homicide Among Intimate Partners — United States, 1981-1998*. 50 MORBIDITY AND MORTALITY Weekly Report No SS-3 ((October 12, 2001)

¹⁰ See Michael Rand, *Violence-Related Injuries Treated in Hospital Emergency Rooms*. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 11 Table 7 (August 1997), who reports that approximately 38 percent of all visits to the emergency room by women for intentionally caused injuries were caused by a spouse/ex-spouse or boyfriend.

¹¹ At the national level, enactment of the Violence Against Women Act (VAWA) as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, is the most obvious symbol of the new recognition of the seriousness of domestic violence. See also VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994: CONFERENCE REPORT TO ACCOMPANY H.R. 3355 (1994) (Report 103-694). The VAWA was reauthorized in October 2000, Pub. L. 106-386, and the new VAWA, Pub. L. 106-386, is in some ways broader than the 1994 act. See HOUSE CONFERENCE COMMITTEE REPORT NO. 106-891, VIOLENCE AGAINST WOMEN ACT OF 2000 (July 20, 2000).

Key provisions of VAWA include criminalizing interstate travel to commit domestic violence; establishment of a new grants program of up to \$800 million over 5 years for police, prosecution, and service projects to aid victims of domestic violence; new requirements for state observation of the Full Faith and Credit clause in responding to out-of-state protective orders; a ban on firearm licensing of persons convicted of domestic violence.

Consider also FLA. STAT. ANN. § 741.2901 (2) (“It is the intent of the Legislature that domestic violence be treated as a criminal act rather than a private matter.”); TEX. CODE CRIM. PROC. ANN. art. 5.03 (family or household relationship does not create an exception to official duties).

approved) 15 years ago.¹² Among the more significant advances in criminal law relating to domestic violence are (1) the adoption of antistalking laws in 50 states where there were none in 1989;¹³ (2) repeal or limitation of states' spousal exemption laws in rape cases;¹⁴ and (3) passage of new domestic violence battery laws that provide unique penalties in family-related assault and battery cases.¹⁵

Other laws reform the criminal process to make arrest and prosecution of abusers easier. For example, every state now permits warrantless arrests in misdemeanor domestic violence cases—subject to a police officer's determination that probable cause exists to believe domestic violence occurred.¹⁶

Civil protective laws to protect abused spouses and other family members have become integrated with the criminal law to augment the protections offered by the former. In almost all states, violation of a court order of protection is a crime; in some it is a felony, in others a misdemeanor.¹⁷ Police officers are authorized to arrest order violators without a warrant, based on a determination of probable cause that a court order was violated. Similarly, advances in information technology used by criminal justice agencies, such as statewide law enforcement computerized criminal record communication systems, now improve police enforcement of civil law injunctions.¹⁸

Many states have also updated their civil protective laws that provide for court injunctions against domestic violence. These changes include broadening the category of

¹² Compare the findings presented here with Lisa G. Lerman, Leslie Landis & Sharon Goldzweig, *State Legislation on Domestic Violence*, In ABUSE OF WOMEN: LEGISLATION, REPORTING, AND PREVENTION, 39-70 (Joseph J. Costa ed. 1983).

¹³ See *infra*, notes 50-57, and accompanying text.

¹⁴ See *infra* notes 31-39 and accompanying text.

¹⁵ See *infra* notes 40-49 and accompanying text.

¹⁶ See *infra* notes 85-99 and accompanying text. See also *infra* note 224 and accompanying text for an illustration of how one state statutorily operationalizes the probable cause requirement.

¹⁷ See *infra* notes 64-71 and accompanying text.

¹⁸ See *infra* note 125 and accompanying text.

persons who may seek court protection to include non-married couples¹⁹ and eliminating the need for victims to pay court fees to invoke the protection of the court.²⁰

Finally, new training mandates ensure that police, prosecutors, and judges will be better informed about the societal and personal costs of domestic violence and how these criminal justice actors can best act to reduce such incidents.²¹

The remainder of this review is divided first into an examination of state legislation affecting how law enforcement and prosecutors respond to domestic violence. This includes substantive criminal law, criminal procedure, and system support provisions. Second is an analysis of how well the various states' laws provide adequate protection for victims of domestic violence. This includes discussion of the scope of legislative provisions that the states deem needed and legislative implications from research on how criminal justice agencies deal with domestic violence. It also includes comparisons between the review findings and several states' laws, including a detailed comparison to Pennsylvania law.

I. State Legislative Variations

Not every state has adopted every type of law cited above; nor has every state adopted the most protective law possible.²² Indeed, the states have adopted widely variant statutory models that in some instances reflect strong legislative intent to protect domestic violence victims; in other instances the laws perhaps reflect more compromise than fervor. Among the key indicators of the depth of statutory protection offered are

- Severity of punishment for domestic violence, violation of court orders, and stalking

¹⁹ See, e.g., WIS. STAT. ANN. § 813.12 (1)(a). Similar changes have also been adopted by the Violence Against Women Act reauthorization (*supra* note 3), § 1109, amending 42 U.S.C. 3796gg-2. This, in turn, has led to additional state enactments to match the federal changes.

²⁰ See e.g., ALASKA STAT. § 18.66.150 (d); KAN. STAT. ANN. § 60-3104 (a). Again federal law has led the way; see 2000 VAWA reauthorization § 1101, codified at 42 U.S.C. §§ 3796gg-5 (a)(1), 3796hh (c)(4).

²¹ See *infra* notes 140-152, 157-159 and accompanying text.

²² An earlier and more expansive, albeit now dated, analysis of state domestic violence laws is Catherine Klein & Leslye Orloff, *Providing Legal Protection for Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993). See also Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 J. JUV. & FAM. CRT. J. 1 (Special Issue No 4 1992); Costa, *supra* note 4. Another, more recent, albeit less extensive, review is Jennifer Stojak, *Domestic Violence* 1 GEO. J. GENDER & L. 579 (2000).

- Extent to which the state criminal code provides for domestic violence-related crimes such as marital rape or terrorizing
- Breadth and scope (e.g., mandatory versus discretionary, time limitations) of police authority to arrest without a warrant (based on probable cause) offenders charged with domestic violence, stalking, or order-violation
- Degree of non-arrest duties assigned to officers for purposes of providing victim assistance, such as informing of rights, transporting to medical facility or shelter, or helping with removal of personal property
- Degree of emphasis upon training police and prosecutors on issues relating to domestic violence, including stalking and sexual assault
- Extent to which state law allows for an evaluation of police and prosecutor efforts through such methods as mandatory police reporting and tabulation of domestic violence incidents.
- Restrictions on release of arrestees before first court appearance.
- Authority of criminal court to issue orders of protection similar to those issued by a family court.

One additional issue that must be included in any assessment of the variation among state domestic violence laws is the integration of domestic violence with states' victim rights acts. For example, many states' laws provide that police officers responding to a domestic violence call must inform the "victim" of his or her rights, such as the right to a court protective order, and of services such as shelter availability.²³ In other states without such statutory requirements, there are broad victim rights acts that provide generally for police and prosecutor informing victim of rights.²⁴ Finally, there are states where both types of laws coexist.²⁵

Legislative Review

This review grew out of a larger study to examine police and prosecutor responses to domestic violence²⁶ for which we reviewed state laws affecting how police and prosecutors perform their duties in domestic violence cases.²⁷ Special attention was paid to states' penal and

²³ E.g., ALASKA STAT. § 18.65.520.

²⁴ E.g., ARIZ. REV. STAT. ANN. §§ 13-4405, 4419; COLO. REV. STAT. ANN. § 24-4.1-302.5. See *infra* note 131 for a complete listing.

²⁵ E.g., FLA. STAT. ANN. §§ 741.29, 960.001. See generally, David Ford, Ruth Reichard, Stephen Goldsmith & Mary Jane Regoli, *Future Directions for Criminal Justice Policy on Domestic Violence*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?*, 243, 248-250 (Eva Buzawa & Carl Buzawa eds.1996).

²⁶ See *supra*, note 1.

²⁷ The review includes all legislation enacted up to December, 2003. Laws enacted after that date are not included herein. This review did not examine civil laws such as those providing for protective orders (except for those

criminal procedure laws that set out agency staff duties and provide for staff training. No systematic attempt was made, however, to examine state court decisions ruling on the constitutionality of state laws that may be subject to such challenges (e.g., stalking laws, marital exception to sex assault laws). Thus, this paper may count laws that are, in fact, inoperative in whole or part under court interpretation.²⁸ The present review has followed the initial model, although support for this effort has come from a variety of federal grants and ILJ funds.

Criminal Code Provisions

The starting point for understanding police and prosecutor responses to domestic violence is determining what laws they enforce. These laws include both traditional (common law) offenses and more recent provisions that explicitly criminalize domestic violence and related offenses. Other provisions criminalize violation of a civil order of protection issued by the court, complementing the common law offense of criminal contempt of court.²⁹

Traditional Offenses

Common law crimes that are often invoked in domestic violence incidents include homicide offenses, assault and battery, sexual assault, and criminal trespass. Needless to say, every state provides criminal penalties for homicide and assault and battery. All but a few states punish criminal trespass.³⁰

laws directly relating to the operation of the criminal justice system). See *infra*, note 55, for books discussing this topic. For yet another type of civil law enactment, see Jeffrey Even, *Washington's Address Confidentiality Program: Relocation Assistance for Victims of Domestic Violence*, 31 GONZAGA L. REV. 523 (1995). Even within the justice system context, many laws have been left out as secondary to our focus on arrest and prosecution. See, e.g., OKLA. STAT. tit. 10 § 1211 (requiring judicial training on domestic violence); IDAHO CRIM. RULES, Rule 33.4 (setting standards for evaluation of batterers who were found guilty); ALA. CODE § 30-6-3 (prosecutor duties include certifying domestic violence facilities for state funding); CONN. GEN. STAT. ANN. § 46b-38b (a) (firearm seizure); MINN. STAT. ANN. § 634.20 (evidence law provision allowing testimony about defendant's prior domestic violence in domestic violence prosecution).

²⁸ See, e.g., *Long v. State*, 931 S.W.2d 285 (Tex. 1996) (striking down state stalking law, TEX. PENAL CODE ANN. § 42.071); *State v. Machholz*, 574 N.W.2d 415 (Minn. 1998) (harassment law, MINN. STAT. ANN. § 609.749 (2), (7) is constitutionally overbroad).

²⁹ This discussion of criminal laws relating to domestic violence is far from complete. See, e.g., Victor Veith, *Broken Promises: A Call for Witness Tampering Sanctions in Cases of Child and Domestic Abuse*, 18 HAMLIN L. REV. 533 (1996). Other relevant crime types include reckless endangerment (e.g., VT. STAT. ANN. tit. 13 § 1025; WASH. REV. CODE ANN. § 9A.36.050) or other special population offenses such as R.I. GEN. LAWS § 11-5-14.2 (battery against child 10 years old or less) and R.I. GEN. LAWS § 11-5-10.1 (assault on person 60 years or older).

³⁰ NATIONAL CRIMINAL JUSTICE ASSOCIATION, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR STATES 38 (1993) reports that 46 states had criminal trespass laws as of 1993. A number of states have recently

Sexual Assault Laws: The Marital Exemption. State laws against rape, another common law offense, present a different picture, however. Until recently, many states' laws provided for a marital exemption defense to charges of rape of an offender's spouse.³¹ In recognition of its seriousness,³² most states have now abolished the marital defense. However, only 12 states and the District of Columbia have explicitly totally abolished the marital defense to charges of sexual assault.³³ Another 20 states seem to have implicitly repealed the exemption by simply removing all statutory references to the exemption.³⁴ In all but one of the remaining

strengthened their criminal trespass laws. *See, e.g.,* CAL. PENAL CODE § 601 (felony trespass to enter onto property with intent to carry out a threat).

³¹ See generally Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, LAW & SOC. INQUIRY 941 (1996); Comment, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEVELAND STATE L. REV. 351 (1995). See also Cassandra DeLaMothe, *Liberty Revisited: A Call To Repeal The Marital Exemption for All Sex Offenses in New York's Penal Law*, 23 FORD. URBAN L.J. 857 (1996); Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1463 (2003).

³² See Lana Stermac, Grinetta Del Bove & Mary Addison, *Violence, Injury and Presentation Patterns in Spousal Sexual Assaults*. 7 VIOL. & WOMEN 1218 (2001); Jacquelyn Campbell & Karen Soeken, *Forced Sex and Intimate Partner Violence: Effects on Women's Risk and Women's Health*. 5 VIOL. AGAINST WOMEN 1017 (1999). See also D.S. Riggs, D.G. Kirkpatrick & H.S. Resnick, *Long Term Psychological Distress Associated with Marital Rape and Aggravated Assault: a comparison with other crime victims*. 7 J. FAM. VIOL. 283 (1992); K.A. Culbertson & C. Dehle, *Impact of Sexual assault as a Function of Perpetrator Type*. 16 J. INTERPERSONAL VIOL. 992 (1998) (victims of spousal sexual assault showed higher levels of anger and depression).

Studies on the prevalence of spousal sexual assaults are, however, fragmentary. This may, in part, reflect past attitudes about its lack of significance and difficulties in devising a methodology that can provide reliable estimates. See, e.g., A. Myhill & J. Allen, *RAPE AND SEXUAL ASSAULT OF WOMEN: FINDINGS FROM THE BRITISH CRIME SURVEY (2002)* (Home Office report describing the effect of anonymous reporting through use of laptop computers to reduce reporting embarrassment inhibiting victim reporting).

³³ Ten states have abolished the marital exemption by statutory refutation. These are COLO. REV. STAT. § 18-3-409, GA. CODE ANN. § 16-6-1 (a); MICH. COMP. L §§ 750.50.520b, .5201; N.H. REV. STAT. ANN. § 632-A-5; N.J. STAT. ANN. § 2C:14-2, -5(b); N.C. § 14-27.8; TEX PENAL CODE § 22.01; UTAH CODE ANN. § 76-5-402 (2); WIS. STAT. ANN. § 940.225 (6); and WYO. STAT. § 6-2-307. The District of Columbia has also abolished the exemption, D.C. CODE § 22-3019. In Alabama and New York, the state courts have ruled the exemption to be unconstitutional, *Merton v. State*, 500 So.2d 1301 (Ala. Ct. App. 1986); *People v. Liberta*, 64 N.Y.2d 152 (1984).

³⁴ See e.g., former DEL. CODE ANN. tit 11 § 775 (1986); Ark. Code § 5-14-103 (rape). Compare N. MEX. STAT. ANN. §§ 30-9-10E, 30-9-11 (1984) with N. MEX. STAT ANN. §§ 30-9-10, 11 (2002). See, e.g., LA. ACTS 203. Act 232 (amending R.S. 14:43 (A) and 43.1).

A complete listing of these states is provided in Exhibit 1 *supra*. Note, however, it is possible that in the absence of explicit refutation, a state court may hold that the marital exemption exists, especially if there was never any explicit inclusion of the exemption in the state's penal code. See also IOWA CODE ANN. 709.4(1), denying application of the exemption in third degree sexual assault cases; first and second-degree sexual assault definitions make no reference to the marital exemption, IOWA CODE ANN. §§ 709.1-709.3.

18 states, a marital exemption exists as a limited bar to prosecution.³⁵ In that state, the marital exemption is total, but the state penal code has a specific crime of spousal sexual assault.³⁶

State Variations. Five states provide for a marital exemption in lesser offenses, but seemingly repeal it for forcible rape cases.³⁷ Four other states have enacted special spousal sexual assault laws that have the effect of abolishing the marital exemption laws to the extent that they parallel the general sexual assault laws.³⁸ These latter laws may be

³⁵ These states provide a varying assortment of statutory provisions. See, e.g., 720 ILCS 5/12-18 (c) (limited exemption where spousal complaint of rape is delayed past 30 days of the incident). Three states repeal the spousal exemption where the couple is living apart under a separation agreement; these are LA. REV. STAT. ANN § 14:43 (B); MD. CRIM. LAW § 3-318; OHIO REV. CODE ANN. § 2907.02(G). See also N.Y. PENAL LAW § 130.00 (3), (4). MISS. CODE § 97-3-99 does not specifically specify that there must be a legal separation, merely that the couples are “living apart” and also eliminates the spousal exemption in forcible rape cases, while MISS. CODE § 97-3-65 (2) eliminates the spousal exemption in rape cases involving the use of drugs or liquids.

Four other states deny the exemption where force, threat of force, or drugs were used; these include Idaho (ID STAT. §§18-6107, 6101 (3)(4)); Maryland (MD. CRIM. LAW § 3-318); Nevada (NEV. REV. STAT. § 200.373); and Oklahoma (OKLA. STAT. § 21-1111 (b)). Tennessee bars the exemption where a weapon was used or serious injury resulted. Rhode Island (R.I. GEN. LAWS § 12-29-5) repeals the exemption except where the issue of ability to consent to sexual relations exists (e.g., mental illness or competence). Note that Maryland and Tennessee also repeal the exemption in separation cases.

Iowa repeals the marital exemption for sexual assault in the third degree (IOWA CODE ANN. § 709.4 (1)), but does not refer to marital status in defining first or second-degree sexual assault, IOWA CODE ANN. §§ 709.3, 709.2, and 709.1 (defining sexual abuse). KAN. STAT. § 21-3517 maintains the marital exemption for misdemeanor sexual battery, perhaps implying a repeal for felony-level sexual assaults. MINN. STAT. § 609.349 (marital exemption law), 609.342 (defining first degree sexual assault — not covered by prior statute) and R.I. GEN. LAWS § 11-37-2 (1) limit the marital exemption to cases where there is mental impairment or physical barriers to giving consent, unless the parties are living separately without court filing for divorce or separation. MISS. CODE ANN. § 97-3-99 and NEV. REV. STAT. § 200.373, like Idaho, lift the marital exemption where there is force or the threat of force; unlike Idaho there is no reference to use of drugs or alcohol to gain consent. Okla. Stat. § 21-1111 (b) also lifts the marital exemption to cases involving force or threat of force against the victim or a third party, or where rape by instrumentation occurred. WASH. REV. CODE § 9A.44.060 maintains the marital exemption for third degree rape, again suggesting its nonapplicability in more serious cases.

³⁶ ARIZ. REV. STAT. ANN. §§ 13-1406.01. The standard of proof required under this law is significantly higher than that set by the state’s other sexual assault laws in non-spousal rape cases. The spousal sexual assault law requires a showing of force or threatened force, omitting other types of nonconsensual sex acts. The court may also, at its discretion, downgrade the spousal sexual assault to a Class 1 misdemeanor with mandatory counseling.

³⁷ These are; KAN. STAT. § 21-3517; KY. REV. STAT. § ; MINN. REV. STAT. § ; MO. REV. STAT. § 566.023; WASH. REV. CODE ANN. § 9A.44.010 *et seq.* (limited exemption in rape 3 cases).

³⁸ The states with spousal sexual assault laws are ARIZ. REV. STAT. ANN. § 13-1406.1, CAL. PENAL CODE § 262; CONN. GEN. STAT. ANN. § 53a-70b, TENN. CODE ANN. § 39-13-507 (applies only to acts where weapon was used or serious injury resulted, or where spouses are living apart and filed for divorce or separate maintenance.), and VA. CODE ANN. §§ 18.2-61, 18.2-67.2:1. But see VA. CODE ANN. 19.2-218.2, establishing a treatment alternative to prosecution when defendant and prosecution agree to it. In addition, S.C. CODE ANN. § 16-3-615 conditionally establishes a spousal sexual battery crime, while also limiting the spousal exemption to rape charges to exclude cases where the parties are living apart under a formal separation agreement, S.C. CODE ANN. § 16-3-658. South Carolina law also provides that persons convicted of sexual assault of a spouse must register under the state's sexual offender registration law, S.C. CODE ANN. § 23-3-430 (c) (17), (18).

more effective than applying general rape laws to marital rape cases in persuading some jurors that marital rape is a serious offense.³⁹

In sum, weighing the degree to which the marital exemption is a practical barrier to most rape prosecutions then, only 4 states' laws are a significant burden; an additional five states' laws prohibit charge bargaining in intimate partner sexual assault cases, since the marital exemption remains in place for lesser charges, even if not for rape (thus inhibiting potential plea negotiations).

³⁹ See Mary Kirkwood & Daron K. Cecil, *Marital Rape: A Student Assessment of Rape Laws and the Marital Exemption*. 7 VIOL. & WOMEN 1234 (2001) (nearly 20 percent fewer college students surveyed (90 versus 74%) did not view unconsented sex as rape when it involved married versus unmarried partners).

State	Explicit denial of bar	Conditional denial of bar	Parallel law for spousal rape	Implicit denial-of bar — No reference	Exemption is total bar to all prosecution	Partial bar to rape prosecutions	Bars lesser charges; no cite felonies
ME				Yes			
MD		If separation agreement				Except if force used	
MA				Yes			
MI	Yes						
MN		If living apart					Yes
MS		If living apart				Except where force, threat used	
MO				Yes			Yes
MT				Yes			
NB				Yes			
NV						Except where force, threat used	
NH	Yes						
NJ	Yes						
NM				Yes			
NY	Yes*	If separation agreement					
NC	Yes						
ND				Yes			
OH		If separation agreement					
OK						Except where force, threat used	
OR				Yes			
PA				Yes?			
RI						Bar where consent capability at issue	
SC		If living apart	Yes, if report within 30 days				

State	Explicit denial of bar	Conditional denial of bar	Parallel law for spousal rape	Implicit denial-of bar — No reference	Exemption is total bar to all prosecution	Partial bar to rape prosecutions	Bars lesser charges; no cite felonies
SD						Bar where consent capability at issue	
TN		If living apart & filed	Yes			Except if weapon used or serious injury	
TX	Yes						
UT	Yes						
VT				Yes			
VA			Yes			Except if by force or threat	
WA							Yes
WV				Yes			
WI	Yes						
WY	Yes						
Total	13	8	6	19	1	11	4

* Court decisions in Alabama and New York have seemingly abolished the marital defense, although statutory provisions retaining the defense still remain.

New Offenses: Domestic Violence

Just as some states have adopted spousal sexual assault laws as supplements to traditional rape laws, 39 states have adopted laws specifically directed at domestic violence. Two approaches are seen: (1) enactment of new criminal code provisions that are directed at domestic violence assault and battery and (2) sentencing enhancement provisions that increase the penalties for domestic violence involving the commission of any crime.⁴⁰ The primary purpose of both these types of laws is to provide enhanced penalties, especially for repeat offenses, and to ensure equality of treatment for victims of domestic violence.⁴¹

⁴⁰ State domestic assault/ battery and sentencing laws include ALA. CODE §§ 13A-6-130-132; ALASKA STAT. § 12-55.135 (g) (i) (minimum sentence provision for repeat offense); ARIZ. REV. STAT. § 13-711, 13-3601 (N), 13-3601.01, 13-3601.02; ARK. CODE ANN. §§ 5-26-301 to 309; CAL. PENAL CODE §§ 243 (e) (misdemeanor battery), 273.5 (felony assault), PENAL CODE §§ 1203.097 (sentencing), 13700 (definition); COLO. REV. STAT. §§ 18-6-801, 16-21-103 (2)(b) (identifying domestic violence cases for case management and data collection purposes); DEL. CODE ANN. tit. 11 § 3906 (sentencing provision for second offense), 10 DEL. CODE § 1024 (first offender diversion program); FLA. STAT. ANN. §§, 741.28 to .283 (special prosecutorial and sentencing provisions); GA. CODE ANN. § 16-5-23.1 (f); HAW. REV. STAT. § 709-906; IDAHO CODE § 18-918; 720 ILCS 5/12-3.2; IND. CODE ANN. §§ 35-42-2-1.3; IOWA CODE ANN. § 708.2A; KAN. STAT. ANN. § 21-3412a; KY. REV. STAT. ANN. § 508.032; LA. REV. STAT. § 14:35.3; MICH. STAT. ANN. §§ 28.276, 276(1), (2); MINN. STAT. ANN. §§ 609.2242, 2243; MO. REV. STAT. § 565.070 (4) (penalty provision); MISS. CODE § 97-3-7 (3) (simple domestic assault), (4) (aggravated domestic assault-felony); MO. REV. STAT. §§ 565.063, .072, .073; MONT. CODE ANN. § 45-5-206; NEV. REV. STAT. § 200.485; N.M. STAT. ANN. §§ 30-3-12 to 16; N. D. CENT. CODE § 12.1-17-01; OHIO REV. CODE ANN. § 2919.25; OKLA. STAT. tit. 21 § 644 (C); OR. REV. STAT. § 163.160 (3); R.I. GEN. LAWS §§ 11-5-3 (b), 12-29-5; S.C. CODE ANN. §§ 16-25-20 TO 65; TENN. CODE ANN. §§ 39-13-101 (b)(2), 102 (d)(2), 111, 36-3-601; TEX. PENAL CODE ANN. § 22.01 (b)(2); UTAH CODE ANN. § 77-36-1.1; VT. STAT. ANN. tit. 13 § 1042-1044; VA. CODE ANN. §§ 18.2-57.2, 57.3; W. VA. CODE § 61-2-28; WIS. STAT. ANN. § 939.621; WYO. STAT. §§ 6-2-501 (e), 7-13-1105 (c) (intensive probation of abusers authorized). ARIZ. REV. STAT. § 13-3601 (H) also requires that all offenses involving domestic violence be so identified in all court documents, including indictments.

For alternative recognition by state legislators of domestic violence as distinct crimes, see also ARIZ. REV. STAT. § 13-3601.01 (treatment required except where court finds prior treatment attendance failed); COLO. REV. STAT. § 18-6-801 (1)(a) (providing required treatment attendance for offenders convicted of assault and other crimes that involved domestic violence). Other states requiring treatment program attendance include CAL. PENAL CODE § 1203.097 (a)(6); COLO. REV. STAT. § 18-6-801 (a); DEL. CODE ANN. tit. 11 § 3906 (second conviction); FLA. STAT. ANN. § 741.281; GA. CODE ANN. § 19-13--10; HAW. REV. STAT. § 709-906 (6); IOWA CODE ANN. § 708.2A (a), 2 (B); MINN. STAT. ANN. § 518B.2 (1); MISS. CODE ANN. § 97-3-7 (5) (authorizes court to order); MONT. CODE ANN. § 45-5-206 (4); NEV. REV. STAT. § 200.485 (2); N.C. GEN. STAT. § 15A-1343 (B1)(9A), 143B-394.16 (a)(8), 50B-3 (a)(12); N.D. CENT. CODE § 12.1-17-13; OKLA. STAT. tit. 21 § 644; R.I. GEN. LAWS § 12-29-5 (a); S.D. CODE ANN. § 25-10-5.1 (family counseling); UTAH CODE § 77-36-5 (5); VA. CODE ANN. § 18.2-57.3 (discretionary with court). See also VA. CODE ANN. § 19.2-218.2 (authorizing hearing on treatment alternative to prosecution). See also N. M. STAT. ANN. § 31-26-3 (B) (18-21) (includes domestic violence as separate crime for purposes of Victims of Crime Act); N.D. CENT. CODE §§ 29-01-16, 19 (compromise forbidden where domestic violence is involved in crime).

⁴¹ See N.J. STAT. ANN. § 2C:25-18 (*Legislative Findings for Prevention of Domestic Violence Act of 1991*), which states that “even though many of the existing criminal statutes are applicable to acts of domestic violence,

State Variations. In 9 of these states, a single violation of the domestic violence criminal law may be a felony.⁴² In 7 states, a second domestic violence offense is treated as a felony.⁴³ And in 18 states, a third domestic violence misdemeanor conviction calls for felony sentencing.⁴⁴ Even where domestic assault is treated as a misdemeanor, the criminal codes of 13 states provide for a mandatory minimum jail sentence.⁴⁵ Of special interest is a Wisconsin law providing for a 2-year enhancement for a repeat domestic assault occurring within 72 hours of release after arrest from a first domestic abuse incident.⁴⁶ Finally, 13 states now provide enhanced penalties when domestic violence is

previous social attitudes...[have resulted] in these acts receiving different treatment from similar crimes when they occur in a domestic context.”

⁴² Domestic violence may be a separate felony under state penal codes in ALA. CODE §§ 13A-6-130, 131; ARK. CODE ANN. § 5-26-306; CAL. PENAL CODE § 273.5 (a); IDAHO CODE § 18-918 (6); MISS. CODE ANN. § 97-3-7 (2), (4) (discretionary sentence); MO. REV. STAT. § 565.070; N.M. STAT. ANN. §§ 30-3-13, 14, 16; S.C. CODE ANN. § 16-25-65 (10-year maximum misdemeanor for aggravated domestic violence); VT. STAT. ANN. tit. 13 § 1043.

⁴³ Laws providing felony penalties for second misdemeanor domestic violence offenses include; GA. CODE ANN. § 16-5-23.1 (f)(2); 720 ILCS 5/12-3.2; MICH. STAT. ANN., §§ 28.276 (4) (2 priors), 28.276.4(1) (if aggravated assault and 1 prior); OHIO REV. CODE ANN. § 2819.25 (D); OKLA. STAT. tit. 21 § 644 (C); TEX. PENAL CODE § 22.01 (b)(2); VT. STAT. ANN. tit. 13 §§ 1043 (a)(3), 1044 (a)(2). UTAH CODE § 77-36-1.1 provides for a one-level increase in crime seriousness for a second domestic violence related crime.

⁴⁴ Felony penalties are provided for a third domestic violence conviction by ARIZ. REV. STAT. § 13-3601.02 (A), (F); ARK. CODE ANN. § 5-26-303 (2); HAW. REV. STAT. § 709-906 (7); IDAHO CODE § 18-918 (7)(a); IOWA CODE ANN. § 708.2A(4); KAN. STAT. ANN. § 21-3412 (3); KY. REV. STAT. § 508.032; MINN. STAT. ANN. § 609.2242 subd. 4; MISS. CODE § 97-3-7 (3) (simple domestic assault); MO. REV. STAT. § 565.070 (4); MONT. CODE ANN. § 45-5-206 (3)(a); NEV. REV. STAT. § 200.485 (1)(c); R.I. GEN. LAWS § 12-29-5 (c)(2); S.C. CODE ANN. § 16-25-40 (simple domestic violence as a 3 year maximum misdemeanor); TEX. PENAL CODE § 22.01; VA. CODE ANN. § 18.2-57.2 (B); W.VA. CODE § 61-2-28 (c); WYO. STAT. § 6-2-501 (f)(ii). COLO. REV. STAT. § 18-6-801 (7); ORE. REV. STAT. § 163.160 provide felony penalties for a fourth domestic violence misdemeanor conviction.

⁴⁵ Mandatory minimum jail sentences are provided for by ALASKA STAT. § 12.55.135 (g), (h); ARIZ. REV. STAT. § 13-3601.02 (B) (4 months with 2 priors), (C) (8 months with 3 priors); CAL. PENAL CODE §§ 243 (e)(3), 273.5 (g)(1)(2); FLA. REV. STAT. § 741.283 (five days for intentional harm); HAW. REV. STAT. § 709-906 (5) (increase from 2 to 30 days for second offense); 720 ILCS 5/12-3.2(b); IOWA CODE ANN. § 708.2A (6)-(9); KAN. STAT. ANN. § 21-3412 (2)(c) (2nd offense); LA. REV. STAT. § 14:35.3 (2 days incarceration or 4 days community service); MINN. STAT. ANN. §§ 609.2242, 2243 (gross misdemeanor and felony cases); MO. REV. STAT. § 565.063 (6 months); MONT. CODE ANN. § 45-5-206 (3)(a); R.I. GEN. LAWS. § 12-29-5 (2nd offense). The only evaluation of mandatory minimum laws finds, as expected that resulted in both increased use of jail penalties and a decline in conviction rates, as well as a short term increase in case processing time until the court responded by adopting a uniform domestic violence case protocol. The principal reasons for decreased convictions were increased defendant reluctance to plead guilty and a reduction in victim cooperation. Christopher Carlson & Frank J. Nidey, *Mandatory Penalties, Victim Cooperation and the Judicial Processing of Domestic Abuse Assault Cases*. 41 CRIME & DELINQ. 132 (1995).

⁴⁶ WIS. STAT. ANN. § 939.621.

committed in the presence of a minor,⁴⁷ and 3 states provide enhanced penalties for domestic violence assaults on a pregnant woman.⁴⁸

State Variations. An unusual blend of criminal procedure and civil law is the West Virginia statute requiring police investigation when a person who is the beneficiary of an order of protection is reported missing.⁴⁹

Exhibit 2. Domestic Violence Crime Laws

State	No Crim Code §	Ass't Crime (1 st offense)	Sentence Enhancement to Crime Level	Enhancement for Pregnant Victim	Enhancement for Child Presence During DV	Batterer Intervene Program Required	Jail Mand Minimum Sentence Required
AL		Misd & Felony					2 nd offense
AK		Misd			Yes		2 nd offense
AZ		Misd	3 rd offense is felony	Yes	Yes	Yes	3 rd offense
AR		Misd & Felony	3 rd misd is felony	Yes			
CA		Misd & Felony				Yes	2 nd offense
CO	None		4 th offense is felony			Yes	
CT	None			Yes			
DE	None					1 st offender	
State	No Crim Code §	Crime (1 st offense)	Sentence Enhancement to Crime Level	Enhancement for Pregnant Victim	Enhancement for Child Presence During DV	Batterer Intervene Program Required	Jail Mand Minimum Sentence Required
FL	None				Yes	Yes	Yes where harm resulted

⁴⁷ Enhanced penalties for domestic violence in the presence of a minor are provided by ALASKA STAT. § 12.55.155 (c)(18); ARIZ. REV. STAT. § 13-702A (18); FLA. STAT. ANN. § 921.0024 (1)(b); HAW. REV. STAT. § 706-606.4; IDAHO CODE § 18-918 (7)(b); 720 ILCS 5/12-3.2 (C); LA. REV. STAT. § 14:35.3; MISS. CODE § 97-3-7; N. C. GEN. STAT. § 14-33; OHIO REV. STAT. §§ 2929.12 (B)(9) (felony cases); OKLA. STAT. ANN. tit. 21 § 644; OR. REV. STAT. § 163.160; UTAH CODE § 76-5-109. In addition, IND. CODE ANN. § 35-38-1-7.1 and MONT. CODE ANN. § 45-5-206 authorize judges to consider at sentencing whether domestic violence was committed in the presence of a minor.

⁴⁸ ARIZ. REV. STAT. §§ 13-711, ARK. CODE ANN. § 5-26-303; 3601. CONN. GEN. STAT. ANN. §§ 53a-59a, 60b, 61a; GA. CODE § 16-5-23.1 (h); UTAH CODE § 76-5-102 (3)(b); WYO. STAT. § 6-2-502 (a)(iv), also penalize attacks on pregnant women, but are not limited to domestic violence cases..

⁴⁹ W.VA. CODE § 48-27-601.

GA		Misd	2d offense is felony			Yes	
HI		Misd	3 rd offense is felony		Yes	Yes	Yes
ID		Misd & Felony	2 nd misd is felony		Yes	Psychological evaluation	
IL		Misd	1 prior is felony		Yes		2 nd offense
IN		Misd	1 prior is felony				
IA		Misd	3 rd offense is felony			Yes	Yes
KS		Misd	3 rd offense is felony			Discretionary	2 nd offense
KY	None		3 rd assault is felony				
LA			3 rd offense is felony	Yes	Yes	Yes	
MA	None			Yes			
MI		Misd	2d offense is 1-year misdemeanor; 3 rd offense is felony				
MN		Misd	3 rd offense is felony				Gross misd and felony
MS		Misd & Felony	3 rd misd is felony		Yes	Discretionary	
MO		Misd & Felony	3rd misd assault is felony				2 nd offense
MT		Misd	3 rd assault is felony equal		Discretionary	Yes	Yes
NV		Misd	3 rd offense is felony			Yes	Yes
NM		Misd & Felony					

State	No Crim Code §	Crime (1 st offense)	Sentence Enhancement to Crime Level	Enhancement for Pregnant Victim	Enhancement for Child Presence During DV	Batterer Intervene Program Required	Jail Mand Minimum Sentence Required
NY	None						
NC	None				Yes	Yes	
ND		Misd				Yes	
OH		Misd	2 nd offense is felony		Yes		
OK		Misd	2 nd offense is felony		Minimum set	Yes	
OR		Misd	4 th offense is felony		Yes		
RI		Misd	3 rd offense is felony			Yes	2 nd offense
SC		Misd & Felony					
SD	None					Family counseling	
TN							
TX		Misd	2 nd offense is felony				
UT	None		2 nd offense is one-level increase	Yes	Yes	Yes	
VT		Misd & Felony	2 nd misd offense with injury is felony				
VA		Misd	3 rd offense is felony			Discretionary	
WV		Misd	3 rd offense is felony				
WI	None		Felony if within 72 hours of arrest				
WY		Misd	3 rd offense is felony	Yes			

Stalking and Related Offenses

A common corollary of domestic violence after a court order of protection has been issued is the offense of stalking. The new stalking laws supplement the older harassment and threatening laws that were found ineffective when dealing with less aggressive following, lurking and the like. First enacted in 1990 by California, every state has now adopted a stalking law to deal with more sophisticated harassments and implicitly threatening behavior.⁵⁰

State Variations. In 38 states, a first stalking offense may be treated as a felony;⁵¹ in 24 of these states, stalking can also be a misdemeanor, depending on the specific conduct involved.⁵² In the other 12 states, 9 provide for felony treatment only for a second⁵³ and 3

⁵⁰ The California stalking statute is codified at CAL. PENAL CODE § 646.9. This law is unique in providing prosecutors discretion to charge identical stalking behavior as either a felony or misdemeanor (“wobbler”). See generally, Tatia Jordan, *The Efficacy of the California Stalking Law: surveying its evolution, extracting insights from domestic violence cases*, 6 HASTINGS WOMEN’S L.J. 363 (1995). Note, *California’s Anti-Stalking Statute: Deterrent or False Sense of Security?* 24 SOUTHWESTERN L. REV. 389 (1995); Note *Stalking Stuffers: A Revolutionary Law To Keep Predators Behind Bars*, 35 SANTA CLARA L. REV. 1027 (1995). A somewhat different history is found in Doris Marie Hall, *Outside Looking In: Stalkers and Their Victims*. 22-24 (1997) (Unpublished Ph.D. Dissertation, Claremont Graduate School, Claremont California).

Most recently, there has been concern about the applicability of stalking statutes to Internet use. While a number of states have explicitly defined stalking to include electronic stalking (e.g., California), only North Carolina and Washington have enacted a separate cyberstalking crime law, N.C. GEN. STAT. 14-196.3; WASH. REV. CODE § 9.61.new, Laws 2004, Ch. 94, § 1. States that explicitly include electronic communication as a means of stalking include ALASKA STAT. § 11.61.120; FLA. STAT ANN. § 784.048; GA. CODE ANN. § 16-5-90; HAW. REV. STAT. § 711.1106.5; 720 ILCS 5/12-7.5; KAN. STAT. ANN. § 21-3438; LA . REV. STAT. 14: 40.2; 17-A ME.. REV. STAT. ANN. § 210-A; MISS. CODE ANN.§ 97-29-45; MONT. CODE ANN. § 45-5-220; N.J. STAT. ANN. §§ 2C:33-4, 2C:1-14, 2C:12-10; N.Y. PENAL LAW § 240.30; OR. REV. STAT. §§ 163.730, 166,065; 18 PA. CONSOL. STAT. §§ 312, 323, 325; S.D. CODE ANN. § 22-19A-1; TN. CODE ANN. § 39-17-308 (a)(1) (threat law); TX. PENAL CODE § 42.07; UTAH CODE ANN. § 77-3a-1.

⁵¹ The 14 states that have first offense stalking felony laws with no lesser penalties include ALA. CODE §§ 13A-6-90, 91; ARIZ. REV. STAT. ANN. § 13-2923; ARK. CODE ANN. § 5-71-229; COLO. REV. STAT. § 18-9-111 (4), (5); DEL. CODE ANN. tit. 11 § 1312A; 720 ILCS 5/12-7.3, 7.4; IND. CODE ANN. § 35-45-10-5; KAN. STAT. ANN. § 21-3438; MD. CRIM. LAW § 3-801 *et seq.* (5 year misdemeanor); MASS. GEN. LAWS ANN. ch. 265 § 43; R.I. GEN. LAWS § 11-59-2; TEX. PENAL CODE ANN. § 42.07; UTAH CODE ANN. § 77-3a-1; VT. STAT. ANN. tit. 13 § 1061-63. One difficulty in comparing crime gradings is the lack of uniformity among the state stalking laws in defining stalking. While most states require a threat to be made as an element of the crime, not all do so. In a few states, the term stalking encompasses both types of stalking, with non-threatening stalking a misdemeanor and the same behavior with a threat to be aggravated stalking, a felony. See, FLA. STAT. ANN. § 784.048; MO. REV. STAT. § 565.225; NEV. REV. STAT. § 200.575; OHIO REV. CODE ANN. § 2903.211. Also compare MICH. COMP. L. § 750.411h (stalking) with § 750.411I (aggravated stalking).

⁵² The 24 states where first-offense stalking is punished as either a felony or a misdemeanor include ALASKA STAT. §§ 11.41.260, 11.41.270; CAL. PENAL CODE § 646.9; CONN. GEN. STAT. ANN. §§ 53a-181c, 181d, 181e; FLA. STAT. ANN. § 784.048; GA. CODE ANN. §§ 16-5-90, 91; IOWA CODE ANN. § 708.11 (3)(c); KY. REV. STAT. ANN. § 508.130, .140, .150; LA. REV. STAT. ANN. § 14:40.2 (B)(1), (2), (3); MICH. STAT. ANN. § 28.643(8), (9); MINN. STAT. ANN. § 609.749 (2)(a)(2); MO. REV. STAT. § 565.225 (3)- (5); NEV. REV. STAT. § 200.575; N.J. STAT. ANN. § 2C:12-10 (c), (e); N.M. STAT. ANN. § 30-3A-2; N.Y. PENAL L. § 120.40-§ 120.60; N.D. CENT. CODE § 12.1-17-07.1 (6); OHIO REV. CODE ANN. § 2903.211; OKLA. STAT. tit. 21 § 1173; 18 PA. CONS. STAT.

states provide for felony conviction only after a third stalking offense.⁵⁴ In the District of Columbia, a second stalking conviction calls for a maximum of 18 months jail time; a third offense, for 3 years.⁵⁵ In no jurisdiction is stalking always a misdemeanor, even for repeat offenses.⁵⁶ See Exhibit 3 for a more detailed state-by state listing.

State Variations. In New York, stalking is defined to include single incidents of following (and other covered acts) against multiple victims.⁵⁷

Exhibit 3. Criminal Stalking Laws: Felony* or Misdemeanor Penalties

State	Felony-1 st Offense	Felony or Misdemeanor-1 st Offense	Misdemeanor-1 st Offense	Felony-2 nd Offense	Felony-3 rd Offense
AL	X				
AK		X			
AR	X				
AZ	X				
CA		X			
CO	X				
CT		X			

ANN. § 2709 (c)(2)(ii); S.C. CODE ANN. § 16-3-1720, 1730; S.D. CODIFIED LAWS ANN. § 22-19A-1, 2; WASH. REV. CODE ANN. § 9A.46.110 (5); WIS. STAT. ANN. § 940.32 (2); WYO. STAT. § 6-2-506 (d), (e).

⁵³ Laws authorizing felony penalties for a second misdemeanor stalking offense include HAW. REV. STAT. § 711-1106.4 (where stalking accompanied by order violation); IDAHO CODE § 18-7905 (c); MISS. CODE ANN. § 97-3-107 (3); MONT. CODE ANN. § 45-5-220 (3); NEB. REV. STAT. § 28-311.03, .04; N.H. REV. STAT. ANN. § 633:3-a (VD)(a); N.C. GEN. STAT. § 14-277.3 (b); OR. REV. STAT. § 163.732; TENN. CODE ANN. § 39-17-315 (b)(2). States that provide felony penalties for a second misdemeanor stalking conviction where felony penalties are available for the most serious stalking cases include Alaska, Connecticut, Georgia, Hawaii (if second violation violates court order or release conditions), Iowa, Louisiana (within 7 years), Michigan, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Washington, Wisconsin, and Wyoming (citations *supra* notes 43, 44).

⁵⁴ ME. REV. STAT. ANN. tit 17-A § 210-A (1)(C), 1252 (2)(C) (setting sentence for Class C crimes); VA. CODE ANN. § 18.2-60.3 (B); W.VA. CODE § 61-2-9a (d). See also IOWA CODE ANN. § 708.11 (3)(a), providing for felony penalties for a third simple stalking conviction.

⁵⁵ D.C. CODE ANN. § 22-504.

⁵⁶ See notes 51-56 *supra*.

⁵⁷ N.Y. PENAL CODE § 120.55.

State	Felony-1 st Offense	Felony or Misdemeanor-1 st Offense	Misdemeanor-1 st Offense	Felony-2 nd Offense	Felony-3 rd Offense
DE	X				
DC			X	X	
FL		X			
GA		X		X	
HI			X	X	
ID		X		X	
IL	X				
IN	X				
IA		X			
KS	X				
KY		X			
LA		X		X	
ME			X		X
MD	X				
MA	X				
MN		X			
MS			X	X	
MO		X		X	
MT			X	X	
NE			X	X	
NV		X		X	
NH			X	X	
NJ		X		X	
NM		X		X	
NY		X			
NC			X	X	
ND		X		X	
OH		X		X	
OK		X		X	
OR			X	X	
PA		X		X	

State	Felony-1 st Offense	Felony or Misdemeanor-1 st Offense	Misdemeanor-1 st Offense	Felony-2 nd Offense	Felony-3 rd Offense
RI	X				
SC		X		X	
SD		X		X	
TN			X	X	
TX	X				
UT	X				
VT	X				
VA			X		X
WA		X		X	
WV			X		X
WI		X		X	
WY		X		X	

* As used in the Model Penal Code and federal law, “felony” here means any offense for which the authorized sentence includes a term of incarceration of at least one year and a day.

Related Crimes: As noted *supra*, stalking is but the newest criminal law aimed at harassing and threatening behavior. Other stalking-related laws in the states include provisions barring harassment (26 states),⁵⁸ threats and intimidation (36 states and the District of Columbia),⁵⁹ telephone threats or harassment (44 states),⁶⁰ and letter threats (19 states).⁶¹ In most

⁵⁸ Harassment laws include ALA. CODE § 13A-11-8; ALASKA STAT. § 11.61.120 (a)(1); ARIZ. REV. STAT. ANN. § 13-2921; ARK. CODE ANN. § 5-71-208; COLO. REV. STAT. § 18-9-111 (1); CONN. GEN. STAT. ANN. § 53a-182b; DEL. CODE ANN. tit. 11 §§ 1311, 12; HAW. REV. STAT. § 711-1106; IOWA CODE ANN. § 708.7; ME. REV. STAT. ANN. tit. 17-A § 506-A; MD. CRIM. LAW § 3-803; MASS. GEN. LAWS ANN. ch. 265 art. 43A; MINN. STAT. ANN. §§ 609.27, 749; MO. REV. STAT. § 565.090; NEV. REV. STAT. § 200.571; N.H. REV. STAT. ANN. § 644:4; N.J. STAT. ANN. § 2C:33-4; N.M. STAT. ANN. § 30-3A-2; N.Y. PENAL LAW § 240.25, .30; N.D. CENT. CODE § 12.1-31-01 (1)(e), (g), (h); OR. REV. STAT. § 166.065; 18 PA. CONS. STAT. ANN. § 2709 (A); S.C. CODE ANN. §§ 16-3-1700, 1710; TEX. PENAL CODE ANN. § 42.07; WASH. REV. STAT. ANN. § 9A.46.020; WIS. STAT. ANN. § 947.013. The Missouri law cited here also includes specific reference to harassment by means of electronic communication.

⁵⁹ State laws criminalizing threats include ALA. CODE § 13A-6-23; ALASKA STAT. §§ 11.56.807, 810, 11-41.530 (a)(1) (coercion); ARIZ. REV. STAT. ANN. § 13-1202; ARK. CODE ANN. § 5-13-301; CAL. PENAL CODE § 422; COLO. REV. STAT. §§ 18-3-206 (menacing), 18-9-106 (1)(b) (disorderly conduct); CONN. GEN. STAT. ANN. §§ 53a-62, 181 (d); DEL. CODE ANN. tit. 11 § 621; D.C. CODE ANN. § 22-504 (a); FLA. STAT. ANN. §§ 836.05 (verbal threats), 836.10 (written threats); GA. CODE ANN. § 16-11-37; HAW. REV. STAT. § 707-716; 720 ILCS 5/12-6; IND. CODE ANN. § 35-45-2-1; KAN. STAT. ANN. § 21-3419; KY. REV. STAT. ANN. § 508.050; LA. REV. STAT. ANN. § 14:40.1; ME. REV. STAT. ANN. tit. 17-A §§ 209, 210; MASS. GEN. LAWS ANN. ch. 275 § 1 *et seq.* (maintaining peace); MINN. STAT. ANN. § 609.27; MO. REV. STAT. § 574.010.1 (c); MONT. CODE ANN. § 45-

instances, these laws only provide for misdemeanor penalties, reflecting the fact that they precede the stalking laws that impose more severe penalties. Ten states provide enhanced felony penalties for harassment or stalking of a minor.⁶²

Court Order Violation Crimes

Criminal justice proceedings are but one way in which legislators have provided remedies for victims of domestic violence. A civil law alternative to criminal court is the court order of protection (i.e., injunction). Every state provides for a civil court order of protection

5-203; NEB. REV. STAT. § 28.311.01; N.H. REV. STAT. ANN. § 631:4; N.J. STAT. ANN. § 2C:12-3; N.Y. PENAL LAW § 120.14 (1); N.C. GEN. STAT. § 14-277.1; N.D. CENT. CODE § 12.1-17-04; OHIO REV. CODE ANN. §§ 2903.21, .22; OKLA. STAT. tit. 21 § 1362; OR. REV. STAT. § 166.155; 18 PA. CONS. STAT. § 2706; TEX. PENAL CODE ANN. § 22.07; UTAH CODE ANN. § 76-5-107; VT. STAT. ANN. tit. 13 §§ 1026, 1701; WASH. REV. CODE ANN. § 9A.46.020; WIS. STAT. ANN. § 943.30.

In many states, threats may be alternatively punished as common law assault. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 2701 (a)(3); TENN. CODE ANN. § 39-13-101 (a)(2).

⁶⁰ Telephone threat or harassment laws include ALA. CODE § 13A-11-8; ALASKA STAT. § 11.61.120 (a)(2)-(4); ARIZ. REV. STAT. ANN. § 13-2916; ARK. CODE ANN. § 5-71-209; CAL. PENAL CODE § 653m; COLO. REV. STAT. § 18-9-111(1) (e)-(g); CONN. GEN. STAT. ANN. §§ 53a-182b, 183; FLA. STAT. ANN. § 365.16; GA. CODE ANN. § 46-5-21; IDAHO CODE § 18-6710; 720 ILCS 5/12-6; IND. CODE ANN. § 35-45-2-2; IOWA CODE ANN. § 708.7; KAN. STAT. ANN. § 21-4113; KY. REV. STAT. ANN. § 525.080; LA. REV. STAT. ANN. § 14:285; ME. REV. STAT. ANN. tit. 17-A § 506; MD. CRIM. LAW § 3-805; MASS. GEN. LAWS ANN. ch. 269 § 14A; MICH. STAT. ANN. § 28.808; MINN. STAT. ANN. §§ 609.79, .749 (2)(a)(4), (2)(a)(5); MISS. CODE § 97-29-45 (b); MO. REV. STAT. § 565.090; MONT. CODE ANN. § 45-8-213; NEV. REV. STAT. § 201.255; N.M. STAT. ANN. § 30-20-12; N.Y. PENAL LAW § 240.30; N.C. GEN. STAT. §§ 14-196, 14-277.1; N.D. CENT. CODE § 12.1-17-07; OHIO REV. CODE ANN. §§ 2917.21, 4931.31, 4931.99 (penalty provision); OKLA. STAT. tit. 21 § 1172; OR. REV. STAT. §§ 166.065 (1)(c), 166.090; 18 PA. CONS. STAT. ANN. § 5504; S.C. CODE ANN. § 16-17-430; S.D. CODIFIED LAWS ANN. § 49-31-31; TENN. CODE ANN. § 39-17-308; TEX. PENAL CODE ANN. § 42.07; UTAH CODE ANN. § 76-9-201; VT. STAT. ANN. tit. 13 § 1027; VA. CODE ANN. § 18.2-427; WASH. REV. CODE ANN. § 9.61.230; W. VA. CODE § 61-8-16; WIS. STAT. ANN. § 947.012; WYO. STAT. § 6-6-103.

⁶¹ Letter threat laws include ARK. CODE ANN. § 5-71-209 (a)(1); CONN. GEN. STAT. ANN. §§ 53a-182b, 183 (a)(2); FLA. STAT. ANN. § 836.10; 720 ILCS 5/12-6; IND. CODE ANN. § 35-45-2-2 (a)(2); IOWA CODE ANN. § 708.7 (1)(a)(1); KY. REV. STAT. ANN. § 525.080; MICH. STAT. ANN. § 28.622; MISS. CODE ANN. § 97-3-85; MO. REV. STAT. § 565.090; NEV. REV. STAT. § 207.180; N.Y. PENAL CODE § 240.30 (1); N.C. GEN. STAT. §§ 14-277.1 (a)(2), 394; OKLA. STAT. tit. 21 § 1304; ORE. REV. STAT. § 166.065 (1)(c); TENN. CODE ANN. § 39-17-308 (a)(1); TEX. PENAL CODE ANN. § 42.07; VA. CODE ANN. § 18.2-60; WIS. STAT. ANN. § 943.30. *See also* KAN. STAT. ANN. § 21-3889 (threat by telefacsimile); MASS. GEN. LAWS ANN. ch. 265 § 43 (a) (e-mail or facsimile threats as element of stalking); MICH. STAT. ANN. § 28.643(8) (411h) (1)(e)(vi) (electronic communication as element of stalking); N.Y. PENAL CODE § 240.30 (1) (aggravated harassment by electronic or mechanical means); WIS. STAT. ANN. § 947.0125 (2)(b)(threat by e-mail or other electronic communication); WYO. STAT. § 6-2-506 (b)(i) (electronic harassment as part of stalking).

⁶² Laws providing felony penalties for stalking a minor include ALASKA STAT. § 11.41.260 (a)(3) (age 16); CONN. GEN. STAT. ANN. § 53a-181c (a)(3) (age 16); FLA. STAT. ANN. § 784.048 (5) (age 16); IOWA CODE ANN. § 708.11 (3)(b)(3) (age 18); LA. REV. STAT. § 14:40.2 (2)(b) (under age 18), (6)(a) (12 years or younger), ; MICH. STAT. ANN. § 28.643(8) (411h)(2)(b) (age 18); MINN. STAT. ANN. § 609.749 (3)(5) (age 18); N.M. STAT. ANN. § 30-3A-3.1 (A)(4) (age 16); OHIO REV. CODE ANN. § 2903.211 (B)(2)(d); VT. STAT. ANN. tit. 13 § 1063 (a)(4) (age 16) (make harassing or stalking a minor a felony offense). S.D. CODIFIED LAWS § 22-19A-7 makes stalking a minor age 12 or younger a Class 1 misdemeanor. *See also* MICH. COMP. LAWS § 750.145d, making it a crime to use a computer to stalk a minor.

against domestic violence.⁶³ Typically, these orders enjoin any further violence and, where the parties are not residing together, further mandate that the abuser stay away from the victim.

State Variations. Forty-four states and the District of Columbia make violation of the court order of protection against domestic violence a separate criminal offense.⁶⁴ In Kansas, violation of an order may be subject to a special criminal trespass law.⁶⁵ Even in those states where there is no criminal penalty, violation of a court order of protection may be punished by a court finding of criminal contempt, which typically calls for misdemeanor-level penalties.⁶⁶ In only 7 states can a single violation of a court protection order be treated as a felony;⁶⁷ in the remainder it is a misdemeanor. However, in 8 states, repeat violations of a court order may constitute a felony.⁶⁸ In addition, one

⁶³ Stojak, *supra* note 22 at 695, note 100, lists the statutory citations for these laws. For information on civil protection orders, see PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT (1990); SUSAN KEILITZ, PAULA HANNAFORD, & HILLERY EFKEMAN, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE (1991).

⁶⁴ Laws making violation of a court order a separate criminal offense include ALA. CODE §§ 30-5-9, 5A-3; ALASKA STAT. § 11.56.740; ARIZ. REV. STAT. ANN. §§ 13-2810 (A)(2), 12-861 TO 865; ARK. CODE ANN. § 9-15-207 (b); CAL. PENAL CODE §§ 273.6, 273.65; COLO. REV. STAT. § 18-6-803.5; CONN. GEN. STAT. ANN. §§ 46B-38C (CRIMINAL COURT ORDER), 53a-223, 223b, 40d (persistent offender); DEL. CODE ANN. tit. 10 § 1046; D.C. CODE ANN. § 16-1005; FLA. STAT. ANN. §§ 741.31 (4), 784.047; GA. CODE ANN. §§ 16-5-95, 19-13-6 (b); HAW. REV. STAT. § 586-11; IDAHO CODE § 39-6312; 725 ILCS 5/112A-23; IND. CODE ANN. § 35-46-1-15.1; IOWA CODE ANN. § 236.8; KY. REV. STAT. ANN. § 403.763; ME. REV. STAT. ANN. tit. 5 § 4659 (harassment order); MD. FAM. LAW CODE § 4-509 (a) (subject to voter approval of related constitutional amendment); MASS. GEN. LAWS ANN. ch. 209A § 7; MINN. STAT. ANN. § 518B.01 Subd. 14 (b)-(d); MO. REV. STAT. § 455.085 (7), (8); MONT. CODE ANN. § 45-5-626; NEB. REV. STAT. § 42-924 (felony if 2nd offense involving same victim); NEV. REV. STAT. § 33.090; N.H. REV. STAT. ANN. § 173-B:8 (III); N.J. STAT. ANN. § 2C:25-30; N.M. STAT. ANN. § 40-13-6 (E); N.Y. PENAL LAW § 215.51 (b), (c); N.C. GEN. STAT. §§ 14-226.1, 50B-4(a); N.D. CENT. CODE § 14-07.1-06; OHIO REV. CODE ANN. § 2919.27; OKLA. STAT. tit. 22 § 60.6; R.I. GEN. LAWS §§ 8-8.1-3, 15-15-3 (d); S.C. CODE ANN. § 16-25-50; S.D. CODIFIED LAWS ANN. § 25-10-13; TENN. CODE ANN. § 39-13-102 (c) (if assault, enhanced penalty); TEX. PENAL CODE ANN. § 25.07; UTAH CODE ANN. § 76-5-108 (b); VT. STAT. ANN. tit. 13 § 1030; VA. CODE ANN. §§ 16.1-253.2; WASH. REV. CODE ANN. § 26.50.110; W. VA. CODE § 48-2A-10d; WIS. STAT. ANN. § 813.12 (8); WYO. STAT. § 6-4-404. Hawaii law, in addition to providing criminal penalties for violation of a protective order, also requires order violators to attend batterer intervention programs, HAW. REV. STAT. §§ 586-11.

⁶⁵ KA. STAT. ANN. § 21-3721 (a)(1)(c). See also CONN. GEN. LAWS § 53a-107 (a)(2); OHIO REV. CODE ANN. § 2911.211; VA. CODE ANN. § 18.2-119.

⁶⁶ See LA. REV. STAT. § 46:2137; MISS. CODE ANN. § 93-21-21; 23 PA. CONS. STAT. ANN. § 6113.1. Only Oregon seems to provide no criminal law means of punishing protection order violations.

⁶⁷ MASS. GEN. LAWS ANN. ch. 209A § 7 (two and one-half maximum sentence is denoted a misdemeanor under state law), ch. 265 § 43 (felony to stalk in violation of domestic violence protective order); MINN. STAT. ANN. § 518B.01 (14)(d)(1); N.Y. PENAL LAW § 215.52; OHIO REV. CODE ANN. § 2919.17 (B)(1)(b) (where there are two prior domestic violence convictions); S.D. CODIFIED LAWS § 25-10-13 (with assault); VT. STAT. ANN. tit. 13 § 1044 (with injury). CONN. GEN. STAT. § 53a-223 provides felony penalties for violation of a restraining order issued by a sentencing court under § 53a-40e.

⁶⁸ A second order violation is a felony under CONN. GEN. LAWS § 53a-40d; MO. REV. STAT. § 455.085 (7), (8); VT. STAT. ANN. tit. 13 § 1030. Three violations are required under MONT. CODE ANN. § 45-5-626; R.I. GEN.

state makes it a felony to violate a criminal protection order issued as part of a sentence after conviction for a domestic violence-related crime.⁶⁹ Four other states make an assault in violation of a protective order to be a felony; violations not involving assaults are misdemeanors.⁷⁰ A mandatory minimum sentence for repeat order violations is established in 4 states.⁷¹

Twenty-nine states authorize issuance of a civil protection order against stalking, regardless of whether there is any related domestic violence.⁷² Violation of an antistalking order can be a criminal offense in 25 of these states, often at a higher level than that authorized for violation of a domestic violence protective order.⁷³

LAWS § 12-29-5 (c)(2); S.D. CODIFIED LAWS § 25-10-13; TEX. PENAL CODE ANN. § 25.07 (g); WASH. REV. CODE ANN. § 26.50.110 (5).

⁶⁹ CONN. GEN. STAT. ANN. § 53A-40e, -110c.

⁷⁰ MASS. GEN. LAWS ANN. ch 265 §§ 13A, 15A; S.D. CODIFIED LAWS ANN. § 25-10-13; TENN. CODE ANN. § 39-13-102 (d); TEX. PENAL CODE ANN. § 25.07 (g).

⁷¹ Mandatory minimum sentences are provided for by ALA. CODE § 30-5-9 (30 days for 2nd offense, 120 days for 3rd); CAL. PENAL CODE § 273.6(e) (30 days minimum for second violation of protective order); HAW. REV. STAT. § 586-11 (30 days); N.J. STAT. ANN. § 2C:25-30 (30 days). See also ALASKA STAT. § 12-55-135 (c) (20 day minimum sentence for non-assault domestic violence in violation of a protective order); DEL. CODE ANN. tit. 11 § 1271A (c) (15 days for third violation of order). The Alabama law *supra* is supplemented by a provision doubling the minimum penalties for domestic violence when it is a violation of a court order, ALA. CODE §§ 13A-6-130 (b), 131 (b), 132 (b)..

⁷² State laws authorizing stalking protection orders include ALASKA STAT. § 18.65.850 *et seq.*; ARIZ. REV. STAT. § 12-1809 (harassment); CAL. FAM. CODE § 6320, CIV. PROC. CODE §§ 527, 527.6; COLO. REV. STAT. §§ 13-14-101 18-1-1001; FLA. STAT. ANN. § 784.046; GA. CODE ANN. § 16-5-94; IDAHO CODE § 18-7905; IOWA CODE ANN. § 708.12 (1) (criminal no-contact); KAN. STAT. ANN. § 60-31a06; KY. REV. STAT. § 508.155 (criminal order); LA. REV. STAT. § 431.005, C.C.P. § 3603.1; ME. REV. STAT. ANN. tit. 5 § 4655; MICH. STAT. ANN. § 27A.2950(1); MINN. STAT. ANN. § 609.748; MO. REV. STAT. § 455.020, .040, .050; MONT. CODE ANN. § 40-5-220 (4); NEB. REV. STAT. 28-311.09; NEV. REV. STAT. § 200.591; N.H. REV. STAT. ANN. § 633:3-a (III-a); N.D. CENT. CODE § 12.1-31.2-01 (disorderly conduct order); OHIO REV. CODE § 2903.214; OKLA. STAT. tit. 22 § 60.2 (A); OR. REV. STAT. §§ 30.866, 163.735, .738; S.C. CODE ANN. § 16-3-1750; S.D. CODIFIED LAWS ANN. § 22-19A-8; VA. CODE ANN. § 19.2-152.8 *et seq.*; WASH. REV. CODE ANN. § 10.14.040 *et seq.* (anti-harassment); WIS. STAT. ANN. §§ 813.12, .125; WYO. STAT. § 7-3-507. Other laws authorizing employers to obtain protection orders on behalf of their employees include ARK. CODE ANN. § 11-5-15; COLO. REV. STAT. § 13-14-102 (b); IND. CODE ANN. § 34-26-6; NEV. REV. STAT § 33.200 TO 33.360, R.I. GEN. LAWS § 28-52-2; TENN. CODE ANN. § 20-14-1-1 *et seq.*

It may also be possible that where state law does not explicitly authorize anti-stalking orders of protection that the courts may entertain such a motion based upon common law principles. This is especially true in states authorizing civil suits for damages from stalking, see, e.g., R.I. GEN LAWS § 9-1-2.1.

⁷³ Among those states not explicitly authorizing criminal penalties for violation of a anti-stalking protective order are Arizona (ARIZ. REV. STAT. § 12-1809 (I) specifically references the crime of “interfering with judicial proceedings”) and Michigan (MICH. COMP. LAWS § 600.2950a (8)(a)(i) specifically cites criminal contempt). Related laws include CONN. GEN. STAT. ANN. § 54-1k; OHIO REV. CODE. ANN. § 2919.27 (A)(2) (providing criminal penalties for violation of a stalking protective order issued as a condition of pretrial release); W.VA. CODE § 61-2-9a (providing enhanced misdemeanor penalties for stalking in violation of a domestic violence protection order). IND. CODE ANN. § 35-45-10-5 provides that violation of a criminal order of protection against

State Variations. Ten of the 26 states with explicit criminal penalties for violating a stalking protective order make a first such violation a felony offense.⁷⁴ Of the remaining 16 states, 5 provide for enhanced felony penalties for a repeat violation of a stalking protective order.⁷⁵ Eleven states provide only misdemeanor penalties for order violations, although one of the 11 states does provide for felony penalties where there is an aggravated assault involved in the order violation.⁷⁶

Other Related Crimes

Domestic violence affects not only its victims, but other persons and institutions as well, including the administration of justice. Other related crimes in the state penal codes include tampering or intimidation of a witness (27 states)⁷⁷ and interfering with reporting of a crime (14

stalking constitutes the crime of stalking for which felony penalties attach. KY. REV. STAT. ANN. § 508.140 (1)(b)(1); MASS. GEN. LAWS ANN. ch. 265 § 43 make it a felony to stalk in violation of a domestic violence protection order. R.I. GEN. LAWS § 11-52-4-3 provides criminal penalties for cyberstalking in violation of a protective order.

⁷⁴ Felony penalties for violating a stalking court order are provided by CAL. FAM. CODE § 6320, CIV. PROC. CODE §§ 527, 527.6; GA. CODE ANN. § 16-5-91; KAN. STAT. ANN. § 21-3438 (B) (enhanced felony penalties for stalking in violation of order of protection); NEV. REV. STAT. § 200.591 (5)(b)(permanent order); N.D. CENT. CODE § 12.1-17-07.1 (6)(a)(2); OHIO REV. CODE ANN. § 2919.17 (B)(2)(b) (with two prior order violations or stalking convictions); OR. REV. STAT. § 163.732 (2)(b); R.I. GEN. LAWS § 11-59-3; WASH. REV. CODE ANN. § 9A.46.110 (5)(b); WYO. STAT. ANN. § 6-2-506 (e)(iv).

⁷⁵ Felony penalties for repeat violations of a stalking order are provided by IDAHO CODE § 18-7905 (c); MO. REV. STAT. § 455.085.1 (7), (8); MONT. CODE ANN. § 45-5-626 (third violation is felony); N.H. REV. STAT. ANN. § 633:3-a (VI)(a) (second offense); VA. CODE ANN. § 18.2-60.3 (B) (third offense).

⁷⁶ Misdemeanor penalties for violating a stalking court order are provided by COLO. REV. STAT. § 18-6-803.5 (2)(a); FLA. STAT. ANN. § 784.047; IOWA CODE ANN. § 708.12 (4) (criminal no-contact); ME. REV. STAT. ANN. tit. 5 § 4659; MINN. STAT. ANN. § 609.748 (6); NEB. REV. STAT. 28-311.09 (4); OHIO REV. CODE § 2903.214 (K); OKLA. STAT. tit. 22 § 60.6; S.C. CODE ANN. § 16-3-1720 (B); S.D. CODIFIED LAWS ANN. § 22-19A-16; WIS. STAT. ANN. §§ 813.125 (7), 947.013 (1r). However, South Dakota law upgrades a stalking protective order violation to a felony if the violation involved an aggravated assault, S.D. CODIFIED LAWS ANN. § 22-19A-16, or if the violation of the order itself constitutes stalking, S.D. CODIFIED LAWS ANN. § 22-19A-2. See also GA. CODE ANN. § 16-5-91 (stalking in violation of order is felony); WIS. STAT. ANN. § 940.20 (1m)(b) (battery against person protected by protective order is felony).

⁷⁷ Witness intimidation or threat laws include CAL. PENAL CODE § 136.1; COLO. REV. STAT. § 18-8-704, 706; CONN. GEN. STAT. ANN. § 53A-151; DEL. CODE ANN. tit 11 § 1263, 1244 (a)(4), 3532; FLA. STAT. ANN. §§ 914.22, .23; HAW. REV. STAT. § 710.1072, 1072.2 (retaliation); KAN. STAT. ANN. § 21-3832, 3833; KY. REV. STAT. ANN. §§ 520.040, .045, .050; LA. REV. STAT. ANN. § 14:129.1; MD. CRIM. LAW § 9-302; MASS. GEN. LAWS ANN. ch. 268 § 13B; MINN. STAT. ANN. § 609.498; MO. REV. STAT. § 575.270; NEV. REV. STAT. §§ 199.230, .240; N.H. REV. STAT. ANN. § 641.5; NM STAT. ANN. § 30-24-3; N.Y. PENAL LAW §§ 215.11 TO .17; N.C. GEN. STAT § 14-226; OKLA. STAT. tit 21 § 455; 18 PA. CONS. STAT. ANN. § 4952; R.I. GEN. LAWS § 11-32-5; S.C. CODE ANN. § 16-9-340; TENN. CODE ANN. § 39-16-507; UTAH CODE ANN. §§ 76-8-306, 508, 510.5; WASH. REV. CODE ANN. § 9A.72.110; WIS. STAT. ANN. §§ 940.42-.45, 940.201; WYO. STAT. § 6-5-305. Texas law makes an actual assault upon a witness a felony-one offense, TEX. PENAL CODE ANN. § 22.02(b)(3). See generally, Kerry Murphy Neeley, *Victim and Witness Intimidation: New Developments and Emerging Responses*. NATIONAL INSTITUTE OF JUSTICE RESEARCH IN ACTION (Oct. 1995).

states).⁷⁸ One state's laws even include interfering with access to a medical facility or shelter and trespass at a domestic violence shelter to be crimes.⁷⁹ Another state makes trespass on a shelter premise a misdemeanor.⁸⁰ Two other states make it a misdemeanor to maliciously disclose the location of a domestic violence shelter.⁸¹ Yet another new stalking-related crime in 2 states is privacy violation.⁸²

Criminal Procedure

The criminal justice process begins with the arrest of the suspected perpetrator. Each of the three substantive crimes described *supra* has its separate requirements for an arrest to occur.

Warrantless Arrest: Domestic Violence

One of the most important innovations in domestic violence cases has been a change in the common law rule authorizing police to make warrantless arrests in misdemeanor cases only where they actually see the crime committed. In response to considerable anecdotal evidence⁸³ of police "leniency" in arrests for domestic violence, as of 2000,⁸⁴ all states authorize warrantless arrests of domestic violence offenders based solely on a probable cause determination that an offense occurred and that the person arrested committed the offense (the

⁷⁸ See ALASKA STAT. § 11.56.745; ARIZ. REV. STAT. §§ 13-702, 1202; CAL. PENAL CODE § 591.5; CONN. GEN. LAWS § (new), ACTS 2003, ACT 43; 720 ILCS 5/12-6.3; IND. CODE ANN. § 35-45-2-5; NEV. REV. STAT. § 199.305; N.H. REV. STAT. ANN. § 642.10; OR. REV. STAT. § 165.572; WASH. REV. CODE ANN. § 9A.36.150; WIS. STAT. ANN. § 940.44; WYO. STAT. § 6-5-212 prohibit interfering with the report of a crime. GA. CODE ANN. § 16-10-24.3; MINN. STAT. ANN. § 609.78 (2) make interfering with a 911 call a crime. S.D. CODIFIED LAWS ANN. § 49-31-29.2 provides misdemeanor penalties for interfering with reporting of an emergency. In other states, obstruction of justice laws may apply to offenses involving interference with filing police complaints. See, e.g., UTAH CODE ANN. § 76-8-306 (1)(f). See also OHIO REV. STAT. § 2921.31.

⁷⁹ MINN. STAT. ANN. § 609.7495.

⁸⁰ HAW. REV. STAT. § 708-816.5.

⁸¹ CAL. PENAL CODE § 273.7; GA. CODE ANN. § 19-13-23.

⁸² HAW. REV. STAT. § 711-1111 (unconsented observing, filming, or recording of another person in state of undress); IDAHO CODE § 18-7006 (trespass of privacy). See also MD. CRIM. LAW § 3-902 (criminalizes unconsented prurient interest visual surveillance of a person in a private place).

⁸³ There is, however, a small body of research supporting the anecdotal evidence. See, e.g., Edem F. Arakame & James Fyfe, *Differential Police treatment of Male-on-Female Spousal Violence: Additional Evidence on the Leniency Thesis*. 7 VIOL. AGAINST WOMEN 22 (2001).

⁸⁴ The last state to enact a warrantless arrest law for domestic violence misdemeanor cases was Indiana, *infra* note 85.

common law standard used for felony cases).⁸⁵ In 21 states and the District of Columbia, police arrest is required when the officer determines that probable cause exists.⁸⁶

State Variations. Nine states place time or “noticeable injury” limits on the exercise of an officer’s discretionary power to arrest.⁸⁷ Mandatory arrest authority is subject to some time or noticeable injury limitations in 10 states⁸⁸ and limited to felony assaults in 3 states.⁸⁹ In 8 states, an arrest for domestic violence is the preferred action,⁹⁰ officers who

⁸⁵ For an illustrative discussion of warrantless arrest law in one state, see Comment, *Batterers Beware: West Virginia Responds to Domestic Violence With the Probable Cause Warrantless Arrest Statute*, 97 W. VA. L. REV. 181 (1994).

The 21 state laws providing only discretionary arrest authority include ALA. CODE § 15-10-3 (a)(8); DEL. CODE ANN. tit. 11 § 1904; GA. CODE ANN. § 17-4-20.1; HAW. REV. STAT. § 709-906; IDAHO CODE § 19-603; 725 ILSC 5/107-2; IND. CODE ANN. § 35-33-1-1; KY. REV. STAT. ANN. § 431.005 (2); MD. CRIM. PROC. § 2-204; MINN. STAT. ANN. § 629.341; MO. REV. STAT. § 455.085.1; NEB. REV. STAT. § 29-404.02 (3); N.H. REV. STAT. ANN. §§ 173-B:9, 594:10; N.M. STAT. ANN. § 31-1-7; N.C. GEN. STAT. § 15A-401 (b), (b)(2)(d); OKLA. STAT. tit. 22 § 40.3 (B); 18 PA. CONS. STAT. ANN. § 2711; TEX. CRIM. PROC. CODE ANN. § 14.03 (a)(4); VT. RULES CRIM. PROC. Rule 3; W. VA. CODE § 48-2A-14; WYO. STAT. §§ 7-20-102 (a), 35-21-107 (b)(iv).

⁸⁶ State laws establishing a mandatory arrest policy include: ALASKA STAT. § 18.65.530; ARIZ. REV. STAT. ANN. § 13-3601 (B); COLO. REV. STAT. § 18-6-803.6; CONN. GEN. STAT. ANN. § 46b-38b (a); D.C. CODE ANN. § 16-1031; IOWA CODE ANN. §§ 236.12 (2), KAN. STAT. ANN. § 22-2307 (b)(1); LA. REV. STAT. ANN. § 46-2140 (1) (aggravated or second degree battery), (2) (danger to victim exists where assault or simple battery occurred); ME. REV. STAT. ANN. tit 19-A § 4012 (5); MISS. CODE ANN. § 99-3-7 (3); NEV. REV. STAT. § 171.137; N.J. STAT. ANN. § 2C:25-21; N.Y. CRIM. PROC. LAW § 140.10 (4)(c); OHIO REV. CODE ANN. § 2935.032 (A)(1)(a); OR. REV. STAT. § 133.055 (2)(a); R.I. GEN. LAWS § 12-29-3; S.C. CODE ANN. § 16-25-70; S.D. CODIFIED LAWS ANN. §§ 23A-3-2.1; UTAH CODE ANN. § 77-36-2.2; VA. CODE ANN. § 19.2-81.3; WASH. REV. CODE ANN. § 10.31.100 (2); WIS. STAT. ANN. § 968.075(3). MO. REV. STAT. § 455.085.1 requires arrest for a second domestic violence incident within 12 hours. COLO. REV. STAT. § 18-6-803.6 is somewhat unique in explicitly stating that an officer is not required by this statute to make an arrest where there is no probable cause.

A considerable literature on mandatory arrests exists. See, e.g., Joan Zorza, *Mandatory Arrest for Domestic Violence*, 10 CRIM. JUST. (Fall 1995 at 2); Pamela Blass Bracher, *Mandatory Arrest for Domestic Violence: The City of Cincinnati’s Simple Solution to a Complex Problem*, 65 U. CINN. L. REV. 155 (1996); Marion Wales, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?* 1996 U. ILL. L. REV. 533 (1996); Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 PACE L. REV. 97 (1995).

⁸⁷ Discretionary arrest limits are established by ARK. CODE ANN. § 16-81-113; DEL. CODE ANN. tit 11 § 1904; MD. CRIM. PROC. § 12-204 (a)(1)(i), (ii); MINN. STAT. ANN. § 609.341; N.H. REV. STAT. ANN. § 594:10 (I)(b); N.D. CENT. CODE § 14-07.1-11 (2) (but see 14-07.1-10(1) (setting forth presumptive arrest policy); OKLA. STAT. tit. 22 § 40.3; 18 PA. CONS. STAT. ANN. § 2711; WYO. STAT. § 7-20-102.

⁸⁸ Mandatory arrest limits are established by ARIZ. REV. STAT. ANN. § 13-3601; IOWA CODE ANN. §§ 236.12, 804.7 (5); LA. REV. STAT. ANN. § 46-2140 (2); MISS. CODE ANN. § 99-3-7 (3); NEV. REV. STAT. § 171.137; N.J. STAT. ANN. § 2C:25-21; R.I. GEN. LAWS § 12-29-3; S.C. CODE ANN. § 16-25-70; WASH. REV. CODE ANN. § 10.31.100 (2)(b); WIS. STAT. ANN. § 968.075 (3). See also VA. CODE ANN. § 19.2-81.3, which authorizes officer discretion to determine whether “special circumstances” exist that dictate alternatives to arrest be used.

⁸⁹ Mandatory arrest in felony assault cases is required by ME. REV. STAT. ANN. tit. 19-A § 4012 (5); OHIO REV. CODE ANN. § 2935.032 (A)(1)(a); WASH. REV. CODE ANN. § 10.31.100 (2)(b). Statutes such as N.J. STAT. ANN. § 2C:25-21 that mandate warrantless arrest only where injury resulted or weapon was used may, in practice, be applied only in felony-level assaults.

⁹⁰ Preferred arrest policy laws include ARK. CODE ANN. § 16-81-113; CAL. PENAL CODE § 836; FLA. STAT. ANN. § 741.29 (4)(b); MASS. GEN. LAWS ANN. ch. 209A § 6; MICH. STAT. ANN. §§ 28.874 (1), 28.1274(3); MONT. CODE ANN. § 46-6-311 (2)(a); N.D. CENT. CODE § 14-07.1-10; TENN. CODE ANN. § 36-3-619. OHIO REV. CODE

fail to arrest in these states must usually explain why they did not do so in a written incident report.⁹¹ Two of the states whose laws provide a preference for arrest, however, place time limits on such action.⁹²

State Variations. One problem in implementing mandatory arrest policies in domestic violence cases occurs when both parties allege that the other was the aggressor, leading the police to arrest both parties, including an innocent victim who may have been acting in self-defense. Without a law or policy limiting the officer's duties under the mandatory arrest law in the dual arrest context, victim complaints to the police may be deterred by fear of personal arrest, contrary to the purpose of the mandatory arrest law. Hence, many states have adopted an amendment to the mandatory arrest law authorizing the officer to arrest only the primary aggressor.⁹³ A corollary amendment often provides an incentive to exercise judgment in dual arrest situations by requiring the officer to fully explain why a dual arrest was made.⁹⁴ Because the problem of dual arrests can be exacerbated by the court's issuance of mutual orders of protection to both parties, many state laws contain provisions limiting the authority of the court to issue mutual orders of protection.⁹⁵ A number of other states (and some of those with dual arrest laws) also have statutory

ANN. § 2935.03 (B)(3)(b) provides for a preferred arrest policy when there is "reasonable grounds" to arrest; however, when there is probable cause to arrest, arrest is mandatory. N.H. REV. STAT. ANN. § 173-B:9 is ambiguous in directing that an officer "should" arrest the primary aggressor in the context of a discretionary arrest directive for domestic violence generally.

⁹¹ See Lonn Lanza Kaduce, Richard G. Greenleaf & Michael Donahue, *Trickle-up Report Writing: The Impact of a Proarrest Policy for Domestic Disturbances*, 12 JUST. Q. 525 (1995), for a discussion of changes in incident report writing accompanying adoption of a proarrest policy.

⁹² ARK. CODE ANN. § 16-81-113 (4 hours); N.D. CENT. CODE §§ 14-07.1-10, 14-07.1-11 (12 hours).

⁹³ State laws setting forth "dual arrest" or "primary aggressor" guidelines for police to follow in making arrests include ALA. CODE 13A-6-134; ALASKA STAT. § 18.65.530 (b); ARIZ. REV. STAT. ANN. § 13-3601 (B) (self defense is not an act of domestic violence); COLO. REV. STAT. § 18-6-803.6 (2); CONN. GEN. STAT. ANN. § 46b-38b (b); FLA. STAT. ANN. §§ 741.29 (4), 901.15 (7) (public policy to discourage dual arrest), 943.171 (1) (training in dual arrests); GA. CODE ANN. § 17-4-20.1 (b); IOWA CODE ANN. § 236.12 (3); MD. CRIM. PROC. § 2-204 (B) (self defense consideration); MASS. GEN. LAWS ANN. ch. 209A § 6 (7) (special report required); MICH. STAT. ANN. § 28.1274(3) (3)(b)(ii); MO. REV. STAT. § 455.085 (3); MONT. CODE ANN. § 46-6-311 (2)(b); NEV. REV. STAT. § 171.137 (2); N.H. REV. STAT. ANN. § 173-B:9; N.J. STAT. ANN. § 2C:25-21 (comparison required); N. MEX. STAT. ANN. § 40-13-1.1; N.Y. CRIM. PROC. LAW § 140.10 (4)(c); N.D. CENT. CODE § 14-07.1-10 (2); OHIO REV. CODE ANN. §§ 2935.03 (B)(3)(d), 2935.032 (A)(1)(a)(ii), (b)(ii); R.I. GEN. LAWS § 12-29-3 (c)(2); S.C. CODE ANN. § 16-25-70 (D); S.D. CODIFIED LAWS ANN. § 23A-3-2.2; TENN. CODE ANN. § 36-3-619 (b), (c); UTAH CODE ANN. § 77-36-2.2 (3); VA. CODE ANN. §§ 19.2-81.3 (B), 19.2-81.4 (2); WASH. REV. CODE ANN. § 10.31.100 (2)(c); WIS. STAT. ANN. § 968.075 (3)(a)1.b.

⁹⁴ See *infra* notes 126-128 and accompanying text.

⁹⁵ See Mary O'Brien, *Mutual Restraining Orders in Domestic Violence Civil Cases*, 30 CLEARINGHOUSE REV. 231 (1996).

provisions that tell police not to discourage reporting of domestic violence by threatening arrest of the person making a complaint.⁹⁶

State Variations. Surprisingly, only one state mandates that a police officer seek an arrest warrant where arrest is not authorized due to expiration of a time limit after the domestic violence occurred;⁹⁷ one other state mandates seeking a warrant where an arrest could not be made for any reason.⁹⁸

State Variations. Two states authorize probable cause-based arrests without a warrant where law enforcement believes defendant interfered with reporting of a domestic violence crime.⁹⁹

Warrantless Arrests: Stalking

Because most states either make stalking a felony offense under all circumstances or provide for aggravated stalking as felony offenses, the need for legislation authorizing warrantless arrests based upon probable cause for stalking is not as great as it is for domestic violence. Nonetheless a few states have enacted warrantless arrest laws for stalking crimes.¹⁰⁰ A few other states have laws authorizing probable cause-based warrantless arrests for violation of an anti-stalking protective order.¹⁰¹ One other state authorizes warrantless arrest where there is interference in any emergency call.¹⁰²

Warrantless Arrests: Court Order Violations

⁹⁶ See, e.g., CONN. GEN. STAT. ANN. § 46b-38b (b).

⁹⁷ R.I. GEN. LAWS § 12-29-3 (b)(4). The problem of fleeing offenders is common in many jurisdictions, reaching, in our studies, as high as 40-50 percent of all domestic violence calls to the police. Some jurisdictions we have studied make a significant effort to follow up on these cases, such as return visits to the incident address (or other locations where the suspect may be found) by patrol or special domestic violence officers. Many others do not, however. F.W. Dunford, *System-Initiated Warrants for Suspects of Misdemeanor Domestic Assault: A Pilot Study*, 7 JUSTICE Q 631 (1990), found that automatic issuance of arrest warrants reduced subsequent violence.

⁹⁸ OHIO REV. CODE ANN. § 2935.03 (B)(3)(g).

⁹⁹ IND. CODE ANN. § 35-33-1-1 (a)(9)(B); 17 ME REV. STAT. ANN. § 15 (5-A).

¹⁰⁰ See, e.g., 17 ME. REV. STAT. ANN. § 15 (5-A); MD. CRIM. PROC. § 2-205; VA. CODE § 19.2-81.3.

¹⁰¹ See, e.g., LA. REV. STAT. § 14.133.1 (general provision applicable to any order violation); N.H. REV. STAT. §§ 594.10 (I)(b), 633:3-a (III-a); VT. CRIM. RULES, Rule 3..

¹⁰² TEX. PENAL CODE § 42.062, CODE CRIM. PROC. § 14.03.

Violation of a court order of protection is a crime in most states, and state laws in all but one state and the District of Columbia authorize warrantless arrests based on a probable cause determination that the order has been violated.¹⁰³

State Variations. In 31 states, arrest for violating the court order is mandated,¹⁰⁴ and in one state it is preferred (mandated arrest authority may be set by local policy).¹⁰⁵ In 16 states, only discretionary arrest is authorized for violating an order of protection;¹⁰⁶ in contrast, 6 of these 16 states establish a preferred or mandated arrest policy in domestic violence incidents.¹⁰⁷

Citation/Bail Release

Mandatory arrest laws implicitly assume that arrest means taking into physical custody and retaining custody until a court hearing occurs. In some states, however, other laws can

¹⁰³ The District of Columbia and the state of Indiana are the only jurisdictions without explicit statutory authority permitting police to make an arrest on the basis of a protective order violation.

¹⁰⁴ Arrests without a warrant for violating a court protective order are mandated by ALASKA STAT. § 18.65.530; CAL. PENAL CODE § 836; COLO. REV. STAT. § 18-6-803.5; IOWA CODE ANN. § 236.11; KAN. STAT. ANN. § 22-2307 (b)(1); KY. REV. STAT. ANN. § 403.760; ME. REV. STAT. ANN. tit. 19-A § 4012 (5); MD. FAM. LAW CODE ANN. § 4-509 (b) (subject to voter approval of related constitutional amendment); MASS. GEN. LAWS ANN. ch. 209A § 6 (7); MINN. STAT. ANN. § 518B.01 Subd. 14 (e); MISS. CODE ANN. § 99-3-7 (3); MO. REV. STAT. § 455.085.1 (2); NEB. REV. STAT. § 42-928, 28-311.09 (9) (stalking order); NEV. REV. STAT. § 33.070 (1); N.H. REV. STAT. ANN. § 173-B:8 (I) (if within 12 hours); N.J. STAT. ANN. § 2C:25-31; N.M. STAT. ANN. § 40-13-6 (c); N.Y. CRIM. PROC. LAW § 140.10 (4) (b); N.C. GEN. STAT. § 50B-4.1 (b); OR. REV. STAT. § 133.310 (3)(a); 23 PA. CONS. STAT. ANN. § 6113; R.I. GEN. LAWS § 12-29-3 (b)(iv) (if within 24 hours); S.C. CODE ANN. § 16-25-70 (B) (if physical injury); S.D. CODIFIED LAWS ANN. § 23A-3-2.1 (1); TENN. CODE ANN. § 36-3-611; TEX. CRIM. PROC. CODE ANN. § 14.03 (b) (if in presence of officer, otherwise discretionary); UTAH CODE ANN. § 77-36-2.4; VA. CODE ANN. § 19.2-81.3; WASH. REV. CODE ANN. § 26.50.110 (2); W. VA. CODE § 48-2A-10c (if injury); WIS. STAT. ANN. §§ 813.12 (7), 813.125 (6). California law provides for preferred arrest, but requires local agencies to establish mandatory arrest policies, CAL. PENAL CODE §§ 836, 13701.

¹⁰⁵ OHIO REV. CODE ANN. § 2935.032 (B)(1)(a) (authorizing local agencies to adopt mandatory arrest policies in lieu of the statutory preferred arrest policy).

¹⁰⁶ Discretionary arrest for violating a court order of protection is authorized by ALA. CODE §§ 30-5A-4, 15-10-3 (A)(7); ARIZ. REV. STAT. ANN. § 13-3602 (L); ARK. CODE § 5-53-134 (C); DEL. CODE ANN. tit. 10 § 1046; FLA. STAT. ANN. § 901.15 (6), (8); GA. CODE ANN. §§ 16-7-2, 19-13-1 (2), 17-4-20 (a) (together authorize arrest for violating court order that involves criminal trespass); HAW. REV. STAT. § 803-5 (any offense); IDAHO CODE § 39-6312 (2); 725 ILCS 5/112A-26; LA. CODE CRIM. PROC. art. 213 (any offense); MICH. STAT. ANN. § 28.874; MONT. CODE ANN. § 46-6-311 (2)(a); N.D. CENT. CODE § 14-07.1-11 (1); OKLA. STAT. tit. 22 § 60.9; VT. RULES CRIM. PROC. Rule 3; WYO. STAT. § 7-20-102 (b). Connecticut law is somewhat ambiguous. But see CONN. GEN. STAT. ANN. § 54-1g (arraignment procedures following arrest for order violation). The Arkansas law, *supra* at subsection (d), is unique in stating that reconciliation of the parties may be an affirmative defense to a charge of violation of a protective order.

¹⁰⁷ Arizona and Louisiana law mandate arrest for domestic violence where injury is seen or fear of injury occurring exists. Ohio mandates arrest where the officer has probable cause and prefers arrest where there is only a “reasonable” basis for arrest. Michigan, Montana, and North Dakota law provide for a preferred arrest policy, *supra* note 90.

operate to undercut this assumption. Thus, state law may permit law enforcement officers to issue a citation in lieu of arrest. Other laws or practices may permit the release of an arrestee pursuant to a bail schedule established by the law or the court. Both types of laws save officer time and reserve jail resources for those cases most requiring incarceration. However, inappropriate use of citation and stationhouse bail is often problematic in cases where there is a potential for violence, often the situation with domestic violence police calls.

State Variations. In 14 states, the criminal procedure laws explicitly bar police officer use of a citation or appearance ticket in lieu of a formal arrest.¹⁰⁸ In one other state, the officer may not issue a citation where there is a possible danger to the victim.¹⁰⁹ In 4 of the states barring the use of a citation in lieu of an arrest, the arrest itself is discretionary, neither preferred nor mandated.¹¹⁰ But in one state that places no restrictions on police citation, domestic violence arrestees must be fingerprinted.¹¹¹ In one other state, the bail schedule used by the court is increased in domestic violence cases.¹¹² Maryland prohibits bail commissioners from releasing defendants charged with violation of a protective order,¹¹³ resulting in a *de facto* jail-holding period. Finally, 3 states authorize police or the magistrate to hold persons arrested for family violence for a short period before posting of bail;¹¹⁴ one other state authorizes either preventive detention or electronic monitoring where danger to the victim is found;¹¹⁵ and a fifth state prohibits the use of

¹⁰⁸ Citation use is barred by ALASKA STAT. § 12.25.180 (a)(5); CAL. PENAL CODE § 853.6 (a) (order violation cases); COLO. REV. STAT. § 16-3-105 (1.5); CONN. GEN. STAT. ANN. § 54-63d (b) (where defendant is charged with domestic violence involving use or threatened use of weapon); FLA. STAT. ANN. § 741.2901 (3); IOWA CODE ANN. §§ 236.14 (2), 708.11 (5), 805.1 (1) (stalking); MICH. COMP. L. § 764.9C (3); MINN. STAT. ANN. § 629.72; MONT. CODE ANN. § 46-9-302 (1) (bail schedule use prohibited); N.H. REV. STAT. ANN. § 173-B:9 (where defendant charged with violating protective order); N. D. CENT. CODE § 14-07.1-10 (3); OKLA. STAT. tit. 22 § 1105(B); 18 PA. CONS. STAT. ANN. § 2711; R.I. GEN. LAWS § 12-29-4 (a). NEV. REV. STAT. § 178.484 (4) prohibits bail release within 12 hours of arrest without, however, explicitly barring citation use. ALA. CODE § 15-13-190 (involving physical attack or order violation); MISS. CODE § 99-5-37; MONT. CODE ANN. § 46-9-302, bar bail release of persons arrested for domestic violence before a judicial hearing. The Alabama law, *supra*, does, however authorize bail after 12 hours without a judicial hearing. The Montana law also applies to stalking charges.

¹⁰⁹ TENN. CODE ANN. § 40-7-118 (b)(3)(D), (c)(2).

¹¹⁰ These states are Minnesota, New Hampshire, Oklahoma, and Pennsylvania (citations *supra* at note 85)..

¹¹¹ NEV. REV. STAT. § 171.1229 (2).

¹¹² GA. CODE ANN. § 17-6-1 (f)(2). NEV. REV. STAT. § 178.484 (5), provides for an escalating bail schedule in domestic violence that looks at prior domestic violence convictions and past injuries.

¹¹³ MD. CRIM. PROC. § 5-202 (e).

¹¹⁴ NEV. REV. STAT. § 178.484 (5) (6) (no less than 12 hours); TENN. CODE ANN. § 40-11-150 (h) (hold up to 12 hours); TEX. CRIM. PROC. CODE ANN. art. 17.291 (up to 48 hours).

¹¹⁵ N.H. REV. STAT. ANN. §§ 597:2 (III-a).

non-monetary bail at first appearance in dangerous crimes, including domestic violence and stalking.¹¹⁶

State Variations. Two states require a judicial hearing appearance after arrest for violation of a protective order.¹¹⁷ Ohio authorizes courts to establish bail schedules for domestic violence cases, provided that the schedules include specific factors set forth in the statute that must be considered in setting bail.¹¹⁸

Criminal Protective Order

Although court orders of protection are commonly thought to refer to orders issued by the civil court, criminal courts have always had inherent authority to issue protection-like orders as part of their orders relating to pretrial release and probation. This authority has been expanded to include parallel authority to issue formal orders of protection similar to those issued by the civil court as part of the court's criminal law duties. Thus, a number of states now authorize, or even mandate, the arraiging court to issue a criminal protective order as a condition of bail or other form of pretrial release.¹¹⁹ Violation of a criminal protective order may result in either the release order being reversed or even additional criminal charges (or both).¹²⁰ Criminal court orders of protection may also be issued as part of the court's sentence after conviction.¹²¹

¹¹⁶ FLA. STAT. ANN. § 907.041 (3)(4). See also ME. REV. STAT. ANN. tit 15 § 1023 (4), requiring bail commissioners to obtain background information in domestic violence cases. Compare MICH. COMP. LAWS § 770.9a, denying post conviction bail in specified assault cases (domestic violence on pregnant woman, stalking) unless court finds “no danger.”

¹¹⁷ N.D. CENT. CODE § 1270.1 (a)(4); UTAH CODE ANN. § 77-20-1. It should be noted that since the arrest is for violation of a court order is also contempt of court, local practice or court rules may require delivery of the violator to the court once arrest is accomplished.

¹¹⁸ OHIO REV. STAT. § 2919.251 (B).

¹¹⁹ See, e.g., IOWA CODE ANN. § 901.5 (7A); LA. C.C.R.P. § 327.1 (bail condition); OHIO REV. STAT. § 2919.26.

¹²⁰ Laws providing penalties for violation of a criminal court protective order include COLO. REV. STAT. § 18-1-1001 (contempt of court); CONN. GEN. STAT. ANN. §§ 46b-38c, 53a-40e (domestic violence order), 54-1K (stalking protection order); IDAHO CODE § 18-920 (1); IOWA CODE ANN. § 236.14 (2) (mandates 7 day minimum jail sentence served); LA. REV. STAT. § 14:79 (A)(1), (B)(1); ME. REV. STAT. ANN. tit. 15 § 321 (3), (6); MINN. STAT. ANN. § 518B.01 Subd. 22; NEV. REV. STAT. § 178.484 (6), (7); 18 PA. CONS. STAT. ANN. § 4955; R.I. GEN. LAWS § 12-29-4 (a)(3); TEX. CRIM. PROC. CODE art. 17.292; WASH. REV. CODE ANN. § 10.99.045. See also MASS. GEN. LAWS ANN. ch. 276 § 42A (authorizing imposition of such conditions as will result in no-contact, including travel restrictions), ch. 296 § 6 (authorizing issuance of no-contact order upon release from custody). Note also that some state laws authorize issuance of a criminal order of protection at sentencing, typically as an accompaniment to probation, see, e.g., CAL. PENAL CODE § 1203.097 (a)(2).

¹²¹ See, e.g., CAL. PENAL CODE § 1203.3 (condition of probation); KY. REV. STAT. § 508.155 (stalking protection order after conviction for stalking); LA. C.C.R.P. § 871.1); W. VA. CODE § 61-2-9a (j) (upon conviction for stalking).

State Variations. In 5 states, arrest is mandated for violation of a criminal no-contact order issued as part of pretrial release order.¹²² In 3 of these states, a violator of any prerelease condition is subject to mandatory arrest.¹²³ In a 6th state, arrest for violation of bail conditions is discretionary.¹²⁴

Criminal Justice System Support/Improvements

Criminal justice system improvements that support law enforcement and prosecutor responses to domestic violence include the creation of a centralized state-wide registry for court orders of protection, requirements relating to officers preparing incident reports when called to a domestic violence scene, specification of prosecutor duties towards victims of domestic violence, police guidelines, training requirements for law enforcement and prosecutors, and multi-agency operations.

Centralized Order Registration Systems

A prerequisite for the police to arrest for violating a protective order is the validity of the victim's assertion of a valid protective order. To facilitate police determination whether a court order of protection against domestic violence is in effect, 36 states have established centralized registries for protection orders.¹²⁵ Typically these laws require police to enter court orders into the registry within a short period after receipt of the order from the court (e.g., 24 hours).

¹²² These are KY. REV. STAT. § 431.005 (4); NEV. REV. STAT. §§ 178.484 (8), 178.4851 (6); N. D. CENT. CODE § 14-07.1-13 (5); TENN. CODE ANN. § 40-11-150 (i) (violation of release conditions); WASH. REV. CODE ANN. § 10.99.055. See also TEX. CRIM. PROC. CODE ANN. § 17.46 (no-contact order in criminal stalking cases). MINN. STAT. ANN. § 518B.01 (22) authorizing issuance of a no-contact order also provides for discretionary arrest for violation of this type of protective order.

¹²³ KY. REV. STAT. ANN. § 431.005 (4); NEV. REV. STAT. § 178.4851 (6); TENN. CODE ANN. §§ 40-7-103 (b), 40-11-150 (i).

¹²⁴ FLA. STAT. ANN. § 901.15 (14).

¹²⁵ State laws establishing protective order central registries (including use of the law enforcement information network for this purpose) include ALASKA STAT. § 18.65.540; ARIZ. REV. STAT. ANN. § 13-3602 (L) (local registry); ARK. CODE ANN. § 12-12-215 (a); CAL. FAMILY CODE § 6380; COLO. REV. STAT. § 18-6-803.7; CONN. GEN. STAT. ANN. § 46b-38c (c); DEL. CODE ANN. tit. 10 § 1046 (b); FLA. STAT. ANN. §§ 741.30 (7)(b), 943.05 (2)(e); IDAHO CODE § 39-6311 (2)(b); IND. CODE ANN. § 5-2-9-5; 725 ILCS 5/112A-28, 750 ILCS 60/302; KY. REV. STAT. ANN. §§ 403.737, 403.770; 19 ME. REV. STAT. ANN. §§ 16, 632 (4-B), 25 ME. REV. STAT. ANN. § 2803-B, ; MD. CODE ANN. art. 88B § 7A; MASS. GEN. LAWS ANN. ch. 209A § 5 (referring to Acts 1992, Ch. 188, establishing registry); MICH. STAT. ANN. § 27A.2950(10); MO. REV. STAT. § 455.040 (3); MONT. CODE ANN. §§ 40-4-125, 40-15-303; NEV. REV. STAT. § 179A.350; N.H. REV. STAT. ANN. § 173-B:4 (1-a)(VI); N.J. STAT. ANN. §§ 2C:25-28 (n), 29 (c) (state police notification); N.Y. EXEC. LAW § 221-a; N.C. GEN. STAT. § 50B-3 (d); N.D. CENT. CODE § 12-60-23; OHIO REV. CODE ANN. § 3113.31 (F)(2) (local registry); OR. REV. STAT. § 107.720; 23 PA. CONS. STAT. ANN. §§ 6105 (E), 6109 B); R.I. GEN. LAWS § 12-29-8.1; TENN. CODE

Incident Reports

A mechanism for supervising police officer adherence to laws and policies favoring arrests in domestic violence cases is requiring written reports detailing whether an arrest was made and if not, why it was not made. In 35 states and the District of Columbia, police officers are required to file incident reports in domestic violence cases.¹²⁶ These reports typically will describe what occurred and the reasons why no arrest was made or why dual arrests were made.¹²⁷

State Variations. In 14 states, reports of all domestic violence incidents must be forwarded to state authorities and will usually be tabulated for inclusion in the state Uniform Crime Reports.¹²⁸ In 2 states, copies of incident reports must be forwarded to the district attorney in cases where no arrest was made.¹²⁹

ANN. § 36-3-609; TEX. FAM. CODE ANN. § 85.042 (a), GOV'T. CODE ANN. § 411.042 (b)(5); UTAH CODE ANN. §§ 30-6-8, 53-5-209; VT. CODE ANN. tit. 15 § 1107 (b); VA. CODE ANN. §§ 16.1-279.1 (B), 19.2-152.8 (E) (stalking orders), 19.2-387.1 (registry created); WASH. REV. CODE ANN. §§ 26.50.100, .160; W. VA. CODE § 48-2A-12; WIS. STAT. ANN. § 813.12 (6)(c). A central registry may also be established through administrative discretion in applying a more general law. *See, e.g.*, ARIZONA SUPREME COURT, ANNUAL REPORT (2002), reporting on a federal grant to establish such a registry (available at www.supreme.court.state.az.us/report2002/page5.htm, last visited January 29, 2004). A description of how the centralized registry operates is found in CONNECTICUT JUDICIAL BRANCH, THE PROTECTION ORDER REGISTRY (n.d.), available at the state court web site, www.jud.state.ct.us (last visited January 29, 2004).

¹²⁶ Police officer filing of incident reports is required by ALA. CODE § 15-10-3 (c); ALASKA STAT. § 18.65.530 (e) (if no arrest or dual arrest); CAL. PENAL CODE § 13730; CONN. GEN. STAT. ANN. § 46b-38d; D.C. CODE ANN. § 16-1032; FLA. STAT. ANN. § 741.29 (2); GA. CODE ANN. § 17-4-20.1 (a); HAW. REV. STAT. § 709-906 (3) (if officer believes abuse occurring); IDAHO CODE § 39-6316 (4) (where probable cause of crime exists, report to prosecutor); 750 ILCS 60/303; IOWA CODE ANN. § 236.9 (requirement for criminal justice agency collection of statistics implies need for report); KAN. STAT. ANN. § 22-2307 (b)(8)B, (b)(9); KY. REV. STAT. ANN. § 403.785 (to state Cabinet for Human Resources); LA. REV. STAT. ANN. § 46:2141; ME. REV. STAT. ANN. tit. 19-A § 4012 (1) (requirement for departmental reports to state implies officer reports); MASS. GEN. LAWS ANN. ch. 209A § 6 (7); MICH. STAT. ANN. § 28.874(3) (2), 28.1274(3) (3)(h); MINN. STAT. ANN. § 629.341 (Subd. 4); MONT. CODE ANN. § 46-6-601 (non-arrest reasons); NEV. REV. STAT. § 171.1227; N.J. STAT. ANN. § 2C:25-24; N.Y. CRIM. PROC. LAW § 140.10 (5); N.D. CENT. CODE § 14-07.1-12; OHIO REV. CODE ANN. § 2935.032, 2935.03 (B)(3)(c) (report of why no arrest); OKLA. STAT. tit. 22 § 40.6 (requirement for department reports to state implies officer reports); 23 PA. CONS. STAT. ANN. § 6105 (c) (conditioned on adoption of NIBRS); R.I. GEN. LAWS § 12-29-3 (f); S.C. CODE ANN. § 16-25-70 (F) (for dual arrest reports); S.D. CODIFIED LAWS ANN. § 23A-3-21 (only if arrest made); TENN. CODE ANN. § 36-3-619 (e); TEX. CRIM. PROC. CODE ANN. § 5.05; UTAH CODE ANN. § 77-36-2.2 (5) (if no arrest or dual arrest); VA. CODE ANN. § 19.2-81.3 (c); WASH. REV. CODE ANN. § 10.99.030 (6)(b); W. VA. CODE § 48-2A-9 (d); WIS. STAT. ANN. § 968.075 (4) (if no arrest made); WYO. STAT. § 7-20-107 (a). *See also* COLO. REV. STAT. § 18-6-803.6 (4.5), requiring officers to include in their written or oral report of a domestic violence incident whether a child was present.

¹²⁷ *See e.g.*, VA. CODE ANN. § 19.2-81.3 (report required for nonarrests with domestic violence and stalking calls).

¹²⁸ State reporting of domestic violence incidents is established by IOWA CODE ANN. § 236.9; KAN. STAT. ANN. § 22-2307 (b)(9); KY. REV. STAT. ANN. § 403.785 (1); ME. REV. STAT. ANN. tit. 25 § 1544; NEV. REV. STAT. § 179A.075 (6)(h); N.J. REV. STAT. § 2C:25-24; OHIO REV. CODE ANN. § 3113.32; OKLA. STAT. tit. 22 § 40.6 (C); 23 PA. CONS. STAT. ANN. § 6105 (C); TENN. CODE ANN. § 36-3-619 (f) (state office of courts); TEX. CRIM.

Prosecutor Duties

Prosecutors have not been a central focus of legislators concerned about domestic violence, due in large part to the traditional discretion afforded them to determine whether to file charges, what charges to file, and to reduce or dismiss charges as they see fit.¹³⁰ The major exception to this rule is the states' victim rights acts provisions. In many states, these laws place responsibility on prosecutors to inform crime victims of their procedural and substantive rights (e.g., to compensation);¹³¹ and in half these states, the laws require the prosecutor to meet with

PROC. CODE ANN. § 5.05; WASH. REV. CODE ANN. § 10.99.030 (12); W. VA. CODE § 48-2A-9 (d); WYO. STAT. § 7-20-107 (b). See also IOWA CODE ANN. § 692.22 (stalking) ME. REV. STAT. ANN. tit 19 § 770 (1) (stalking and harassment cases); WIS. STAT. ANN. § 165.829 (stalking) (requirement expired). FLA. STAT. ANN. § 741.316 (3), requires the state Department of Law Enforcement to annually publish a report based on statistics on domestic violence gathered by the new domestic violence fatality review teams established by the law. See also KY. REV. STAT. ANN. § 403.7505 (requiring state collection of information on domestic violence incidents and offenders).

¹²⁹ IOWA CODE ANN. § 236.11 (order violation cases); WIS. STAT. ANN. § 968.075 (4). See also MICH. STAT. ANN. 28.874(3) (3), requiring report to district attorney within 48 hours.

¹³⁰ Many prosecutor offices have, however, developed their own internal policies for how domestic violence cases should be handled. See, Michael Dean Parker & Tracy Johnson Buzzeo, *Evidence Based Domestic Violence Prosecution* 1 J. COMMUNITY POLICING 55 (2001). See generally, Cathleen A. Booth, *No-Drop Policies: Effective Legislation or Protectionist Attitude?* 30 U. TOLEDO L. REV. 621 (1999); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*. 7 UCLA WOMEN'S L.J. 173 (1997).

¹³¹ State Victim Rights Act laws or their equivalent have been adopted by all 50 states and the District of Columbia. See ALA. CODE §§ 15-23-62, 63; ALASKA STAT. § 12.61.010; ARIZ. REV. STAT. ANN. §§ 13-4405-4419; ARK. CODE ANN. § 16-21-106 (d); CAL. PENAL CODE § 679.02; COLO. REV. STAT. § 24-4.1-302.5; CONN. GEN. STAT. ANN. §§ 54-203 (requiring Office of Victim Services to notify victims of their rights), 54-222a (requiring police officers to notify victims of their rights); DEL. CODE ANN. tit. 11 §§ 9405, 9410; D.C. CODE § 23-1901 to 1906; FLA. STAT. ANN. § 960.001; GA. CODE ANN. § 17-7-2 *et seq.*; HAW. REV. STAT. § 801D-1 *et seq.*; IDAHO STAT. § 19-5306; 725 ILCS 120/4; IND. CODE ANN. § 33-14-10-1 *et seq.*; IOWA CODE ANN. §§ 915.10 *et seq.*; KAN. STAT. ANN. § 74-7333; KY. REV. STAT. §§ 421.500 to .540; LA. REV. STAT. ANN. § 46:1844; ME. REV. STAT. ANN. tit. 17-A §§ 1172, 3; MD. CONST. Declaration of Rights, art. 47; MASS. GEN. LAWS ANN. ch. 258B; MICH. STAT. ANN. § 28.1287(753) *et seq.*; MINN. STAT. ANN. § 611A.02 *et seq.*, 629.341; MISS. CODE ANN. § 99-36-5; MO. REV. STAT. § 595.209.1; MONT. CODE ANN. §§ 46-24-101 to 213; NEB. REV. STAT. § 81-1848; NEV. CONST. Art. 1, § 8(2); N.H. REV. STAT. ANN. § 21-M:8-k; N.J. STAT. ANN. § 52:4B-44; N.M. STAT. ANN. § 31-26-4; N.Y. EXEC. LAW § 640; N.C. GEN. STAT. § 15A-825; N.D. CENT. CODE § 12.1-34-02; OHIO REV. CODE ANN. § 2930.01 *et seq.*; OKLA. STAT. ANN. tit. 19 § 215.33; OR. CONST. art. 1 § 42, OR. REV. STAT. § 147.405 *et seq.*; 18 PA. STAT. § 11.212, .213.; R.I. GEN. LAWS § 12-28-3; S.C. CODE ANN. § 16-3-1530; S.D. CODIFIED LAWS ANN. § 23A-28C-1 *et seq.*; TENN. CODE ANN. § 40-38-103; TEX. CODE CRIM. PROC. § 56.02 *et seq.*; UTAH CODE ANN. § 77-38-1 *et seq.*; VT. STAT. ANN. tit. 13 § 5301 *et seq.*; VA. CODE ANN. § 19.2-11.01; WASH. REV. CODE ANN. § 7.69.030; W. VA. CODE §§ 61-11A-1 to 6; WIS. STAT. ANN. § 950.04; WYO. STAT. § 1-40-203.

Typical provisions include those found in ALASKA STAT. § 12.61.010, which grants victims the right to be present at hearings, right to be notified of court proceeding dates and changes in schedule, right of protection against harm from cooperating with law enforcement, right to be told of compensation availability, right to medical treatment without delay, right to make a statement to court, right to information about parole or other release hearings, and right to notice of escape.

the victim about their decisions to charge the defendant, accept a plea to reduced charge, or to make a sentencing recommendation to the judge after conviction.¹³²

State Variations. One state requires a written prosecution plan with vertical prosecution requirement in domestic violence cases.¹³³ Another state requires special domestic violence prosecution staff or units¹³⁴ Two other states require written policies that favor prosecution¹³⁵ A fifth state sets a bar on accepting pleas in domestic violence cases to lesser charges.¹³⁶

State Variations. Only one state explicitly places responsibility for dealing with victims on prosecutors in domestic violence cases *as such*.¹³⁷ In 2 states, state law places limitations on the prosecutors' ability to plea bargain.¹³⁸ One other state requires local prosecutors to have written policies on domestic violence prosecution.¹³⁹

Police and Prosecutor Training and Guidelines

Police Training . The many changes in law that have occurred in the creation of new crimes and in the enforcement of these laws underscore the need for training in domestic violence among police and prosecutors.

State Variations (entry-level training). State legislators have enacted laws that require police entry-level training to include domestic violence in 31 states and the District of Columbia.¹⁴⁰ Related training requirements have been enacted for sex crimes in 6

¹³² One difficulty with victim rights laws is that these laws assume that the victim desires that the offender will be prosecuted. This is a problematic assumption in domestic violence cases. See Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARVARD L. REV. 1850 (1996); George E. Wattendorf, *Prosecution Issues in Domestic Assault Cases: Trying A Case Without Victim Cooperation*, 35 N. HAMP. B.J. (June 1994 at 42). Many states that require prosecutor-victim meetings explicitly reject any victim veto in prosecution decisions, *see. e.g.*, UTAH CODE ANN. § 77-36-2.7 (1)(e).

¹³³ MINN. STAT. ANN. § 611A.0311. See also ME. REV. STAT. ANN. tit. 19-A § 4012 (8) (state and local prosecutor plans required).

¹³⁴ FLA. STAT. ANN. § 741.2901 (1).

¹³⁵ FLA. STAT. ANN. § 741.2901 (2); WIS. STAT. ANN. § 968.075 (7).

¹³⁶ NEV. REV. STAT. § 200.485 (5) (unless domestic violence charge not sustainable).

¹³⁷ ALASKA STAT. § 12.61.015 (a).

¹³⁸ CAL. PENAL CODE § 1192.7; COLO. REV. STAT. § 18-6-801 (3).

¹³⁹ ME. REV. STAT. ANN. tit. 19-A § 4012 (8).

¹⁴⁰ Police entry-level training on domestic violence is required by ALASKA STAT. §§ 18.65.240, 18.65.510; CAL. PENAL CODE § 13519; CONN. GEN. STAT. ANN. §§ 7-294g (a), 46b-38b (f); D.C. CODE ANN. § 16-1034; FLA. STAT. ANN. § 943.171; GA. CODE ANN. § 35-1-10; IDAHO CODE § 39-6316; 50 ILCS 705/7 (a); IOWA CODE ANN. § 80B.11 (2); KAN. STAT ANN. § 74-5605; KY. REV. STAT. ANN. § 403.784; MASS. GEN. LAWS ANN. ch. 6 §

states.¹⁴¹ Other related required training includes violent crime prevention and investigation,¹⁴² violent crimes, including stalking,¹⁴³ victim rights,¹⁴⁴ victim needs,¹⁴⁵ and crisis intervention.¹⁴⁶ The minimum content of the required domestic violence entry training is specified by statute in 21 states.¹⁴⁷ Alaska law, for example, requires that domestic violence training include materials on state laws, crime incidence and significance, and service providers.¹⁴⁸ Other topics include techniques to minimize threats to officer and victim safety, the investigation and management of domestic violence cases, report writing, shelters, and written notice of victim rights.¹⁴⁹

State Variations (in-service training). Only 7 states require in-service domestic violence police training to complement entry training requirements.¹⁵⁰ Two states and the

116A; MICH. STAT. ANN. § 4.450(9 (c), 28.1274(3); MINN. STAT. ANN. § 629.341 (subd. 5); MO. REV. STAT. § 590.105.1 (7)(8)(9); NEB. REV. STAT. § 42-927; NEV. REV. STAT. § 481.054 (1)(m), (2)(e), (stalking training), 5(b); N.J. STAT. ANN. § 2C:25-20; N.Y. EXEC. LAW §§ 642 (5), 214b; OHIO REV. CODE ANN. §§ 109.744, .77 (B)(3); OKLA. STAT. tit. 70 § 3311 (D)(2) (family intervention training); OR. REV. STAT. § 181.642 (2); 23 PA. CONS. STAT. ANN. § 6105 (a); R.I. GEN. LAWS § 12-29-6 (a); S.D. CODIFIED LAWS ANN. §§ 23-3-39.5, 42.1; TEX. OCC. CODE ANN. § 1701.253 (b)(1)(B)(iv); UTAH CODE ANN. § 77-36-2.3; VA. CODE ANN. § 9-170(38); WASH. REV. CODE ANN. § 10.99.030 (2)-(4); W. VA. CODE §§ 48-2A-9 (i), 48-2C-17; WIS. STAT. ANN. § 165.85 (4)(b)(1); WYO. STAT. § 7-20-105.

¹⁴¹ CAL. PENAL CODE § 13516 (a), (b); IOWA CODE ANN. § 80B.3; N.M. STAT. ANN. § 29-11-5 (D); OHIO REV. CODE ANN. §§ 109.71, 109.77 (B)(3), 109.73 (A)(4), (5), 109.79 (A); TEX. OCC. CODE ANN. § 1701.253 (b)(1)(C); WASH. REV. CODE ANN. § 43.101.270.

¹⁴² FLA. STAT. ANN. §§ 943.171, 17 (5).

¹⁴³ MINN. STAT. ANN. § 626.8451 (1a), NEV. REV. STAT. § 289.600. See also FLA. STAT. ANN. § 943.17 (5).

¹⁴⁴ NEV. REV. STAT. §§ 481.054(5)(b), 481.056 (5)(b).

¹⁴⁵ N.J. STAT. ANN. §§ 52:4B-47. See also FLA. STAT. ANN. § 943.172 (victim assistance and rights).

¹⁴⁶ OKLA. STAT. tit. 70 § 3311 (D)(2).

¹⁴⁷ The amount and content of the required training varies. Missouri, for examples, requires a minimum of 30 hours training on domestic violence topics, while Connecticut, only 2 hours. Compare MO. REV. STAT. § 590.105(7) with CONN. GEN. STAT. ANN. § 7-294g.

¹⁴⁸ ALASKA STAT. § 18.65.250.

¹⁴⁹ See also, CAL. PENAL CODE § 13519(a), (b), which requires training on enforcement of criminal laws, availability of civil remedies, availability of community help, protection of victim, and techniques for minimum violence. It also includes citizen arrest, report writing, diversion, tenancy issues, law enforcement impact on children, verification and enforcement of court orders, and citation and release policies.

¹⁵⁰ In-service training of police is required by CONN. GEN. STAT. ANN. § 7-294g (a); GA. CODE ANN. § 35-1-10 (state funded training only); IND. CODE ANN. § 5-2-8-2; KY. REV. STAT. ANN. § 403.784 (every 2 years); R.I. GEN. LAWS § 12-29-6 (b); S.D. CODIFIED LAWS ANN. § 23-3-39.4, 42.1 (every 4 years); TEX. OCC. CODE ANN. § 1701.253 (b)(1)(B)(iv). MASS. GEN. LAWS ANN. ch. 6 § 116A (f); NEV. REV. STAT. § 481.054 () (stalking training); OHIO REV. CODE ANN. § 109.73 (A)(6); S. C. CODE ANN. § 23-6-435; WASH. REV. CODE ANN. § 10.99.030 (3) provide for the availability of in-service training for police, but it is not statutorily required. CAL. PENAL CODE § 13519 (c) encourages local agencies to provide in-service domestic violence training and makes state assistance available for such training. Maine requires local law enforcement agencies to develop training on domestic violence for their officers, but leaves the content of such training to local discretion, ME. REV. STAT. ANN. tit. 19-A § 4012 (3). TEX. OCC. CODE § 1701.253 requires training on dual arrests “wherever possible.”

District of Columbia require in-service training where the officers had no entry training in domestic violence.¹⁵¹ One reason for this smaller number of states compared to that for entry training is the absence in many states' laws of any reference generally to state standards for in-service training.¹⁵²

Police Guidelines. A training-related requirement in 19 states is for local development of written policies and procedures for the handling of domestic violence cases.¹⁵³

State Variations. State legislation relating to policies and procedures includes that of 8 states where a central agency (e.g., Attorney General) is responsible for drafting minimum uniform or model standards for local agencies to use in drafting their local policies and procedures.¹⁵⁴ More limited legislation is found in 3 states that require local

Related in-service training laws include MD. ANN. CODE art. 41 § 4-201 (d)(3) (sex crimes); N.J. STAT. ANN. 52:4B-47 (b), which provides for training on "crime victim need." N.M. STAT. ANN. § 29-11-5; TEX. GOV'T. CODE ANN. § 415.034(b)(3)(B)(iv); WASH. REV. CODE ANN. § 43.101.270 offer police in-service training for handling sexual assault cases. ALASKA STAT. § 18.68.030 provides for the establishment of sex crime training without mandating attendance.

KY. REV. STAT. § 403.784 requires training on domestic violence for police dispatch personnel.

¹⁵¹ D.C. CODE ANN. § 16-1034 (d); W. VA. CODE § 48-2A-9 (I); WYO. STAT. § 7-20-105 (a)(i) require in-service training for officers who did not receive entry training in domestic violence.

¹⁵² Notwithstanding the absence of state legislation requiring domestic violence in-service training, Police Officer Standards and Training agencies may provide such training on their own initiative. Police department internal training units may similarly offer such training. In a number of jurisdictions, including Queens County, New York and Sacramento, California, we were told of on domestic violence prosecutors providing training to police officers, usually through roll call training. Federal funds are also available for training programs. *See, e.g.,* LISA NEWMARK, ADELE HARRELL & BILL ADAMS, EVALUATION OF POLICE TRAINING CONDUCTED UNDER THE FAMILY VIOLENCE PREVENTION AND SERVICE ACT (1995).

¹⁵³ Laws requiring local police agencies to develop written policies and procedures include those of CAL. PENAL CODE §§ 13519 (c)(1), 13700 *et seq.*; CONN. GEN. STAT. ANN. § 46b-38b (e); KAN. STAT. ANN. § 22-2307; KY. REV. STAT. ANN. § 403.783; ME. REV. STAT. ANN. tit. 19-A § 4012 (2), (7); MICH. STAT. ANN. § 28.1274(3); MINN. STAT. ANN. § 629.342 Subd. 2; N. Y. EXEC. LAW §§ 575 (7), 840 (3)(f); N.D. CENT. CODE § 14-07.1-14; OHIO REV. CODE ANN. § 2935.032 (A); 23 PA. CONS. STAT. ANN. § 6105 (a); R.I. GEN. LAWS § 12-29-3 (g); S.D. CODIFIED LAWS ANN. § 23-3-39.8; TENN. CODE ANN. § 38-12-106; VT. STAT. ANN. tit. 15 § 1107 (a); VA. CODE ANN. § 19.2-81.4; WASH. 2004 LAWS, Ch. 18, § 3; W. VA. CODE § 48-2A-9 (g); WIS. STAT. ANN. § 968.075 (3). MO. REV. STAT. § 455.080 authorizes, but does not require, local agencies to establish procedures for dispatchers and officers to learn about prior calls. CAL. PENAL CODE § 13702 requires local agencies to establish policies and standards for dispatchers in responding to calls about domestic violence and violations of orders of protection.

¹⁵⁴ State model standards are provided for by FLA. STAT. ANN. § 943.1701; KY. REV. STAT. ANN. § 403.783; MINN. STAT. ANN. § 629.342; N.Y. EXEC. LAW § 575 (7); R.I. GEN. LAWS § 12-29-3 (g); TEX. CRIM. PROC. CODE ANN. § 56.05 (c); VA. CODE ANN. § 9-170(38); W. VA. CODE § 48-2A-9 (g).

written guidelines for verification of protective orders.¹⁵⁵ One other state, conversely, requires the Attorney General to set standards for police crime victim duties.¹⁵⁶

Prosecutor Training and Operations. Much less attention has been paid to the training and performance of prosecutors compared to that for law enforcement. This is, of course, a reflection of a more general disparity, not one limited to domestic violence.

State Variations. Only 4 states require that prosecutors be trained in the handling of domestic violence cases.¹⁵⁷ Three other states' laws authorize the availability of such training to prosecutor offices.¹⁵⁸ Another 3 states' laws provide for victim assistance training to be made available.¹⁵⁹

Miscellaneous laws relating to prosecutors include:

- State grants for special domestic violence prosecutor units¹⁶⁰
- Required consultation with victim prior to final plea negotiations or at opening of trial¹⁶¹
- Bar to referral to mediation as alternative to prosecution¹⁶²
- Authority for prosecutors to file for civil protection order on behalf of victim.¹⁶³

Multi-Agency Operations . Although encouragement of multi-agency operations is one of the implied goals of the Violence Against Women Act,¹⁶⁴ very little state legislation has

¹⁵⁵ IDAHO CODE § 39-6311 (3); N.H. REV. STAT. ANN. § 173-B:8(II) (order verification procedures); TEX. CODE CRIM. PROC. art. 5.05 (c), TEX. FAM. CODE ANN. art. 86.001 (a) (protective order procedures).

¹⁵⁶ N.J. STAT. ANN. § 52:4B-44.

¹⁵⁷ ALASKA STAT. § 18.66.310 (c); FLA. STAT. ANN. § 741.2901 (1) (special unit staff); KY. REV. STAT. § 15.718; N.D. CENT. CODE § 12-62-05; S.D. CODIFIED LAWS ANN. § 23-3-39.6.

¹⁵⁸ ARK. CODE ANN. § 16-21-206 (2), (8); CONN. GEN. STAT. ANN. § 46b-38b (f); WASH. REV. CODE ANN. § 10.99.030 (3).

¹⁵⁹ FLA. STAT. ANN. § 960.001 (1)(m); N.J. STAT. ANN. § 52:4B-47 (b); N.Y. EXEC. LAW § 642 (5). CAL. PENAL CODE § 13516 requires development of prosecutor training in sex assault crimes to include handling of victim emotional trauma. WASH. REV. CODE ANN. § 43.101.270 authorizes interdisciplinary training for prosecutors and police in sexual assault case handling.

¹⁶⁰ CAL. PENAL CODE § 273.81 *et seq.*

¹⁶¹ MICH. STAT. ANN. § 28.1287(756) (3). See also ARIZ. REV. STAT. § 13-4419 (conference with victim at start of trial).

¹⁶² IOWA CODE ANN. § 236.13. In contrast, MISS. CODE ANN. § 93-21-113 authorizes prosecutorial diversion once after domestic violence charges have been filed. ARIZ. REV. STAT. § 13-3981 (B) requires prosecutor approval for any civil compromise to settle a misdemeanor criminal case involving domestic violence. UTAH CODE ANN. § 77-36-2.7 (1)(f), (2) authorizes diversion after a plea only on condition of treatment attendance.

¹⁶³ See TEX. CRIM. PROC. CODE ANN. § 5.06.

addressed this issue. One of the few such laws, in California, requires the development of protocols for prosecution, law enforcement, child protection, and community-based agencies for how these agencies will work together to respond to domestic violence where a child is present at the residence.¹⁶⁵ A less comprehensive law is Virginia's provision creating the position of state facilitator to help local jurisdictions implement domestic violence programs.¹⁶⁶

II. Analysis

The major policy question for analysis is, how “effective” are the states’ laws against domestic violence?¹⁶⁷ Answering this question first requires the identification of a standard (model legislative components or guidelines) against which the state laws can be compared.¹⁶⁸ Application of these guidelines then allows us to identify those states that best encompass the provisions found in the guidelines. Finally, a more detailed look at how these guidelines can be used is then demonstrated by using the state of Pennsylvania’s laws as a case example for needed change in legislation.

A. Legislative Guidelines

Two sources for legislative guidelines are existing legislation and findings from research and evaluation studies that imply legislative solutions.

Existing Legislation as Guidelines Source

Drawing upon existing legislation as a guide, we can identify three levels of criminal law legislation aimed at reducing domestic violence. These include

¹⁶⁴ See 2000 VAWA Reauthorization § 1103, codified at 42 U.S.C. § 3796gg (b)(8) (“supporting formal and informal statewide, multidisciplinary efforts ... to coordinate the response ... to violent crime against women.”) (STOP grant program).

¹⁶⁵ CAL. PENAL CODE § 13732.

¹⁶⁶ VA. CODE ANN. § 2.2-515.1.

¹⁶⁷ For a discussion of the effect of domestic violence laws providing for civil court orders of protection, see Laura Dugan, *Domestic Violence Legislation: Exploring Its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOL. & PUBLIC POLICY (2003).

¹⁶⁸ In the absence of any empirical data showing the relative effectiveness of differing statutory enactments or approaches, we must rely upon an informed judgment for these guidelines. While they reflect much anecdotal reporting from police and prosecutors, they do not necessarily comport with the views of some victim advocates. As such, others may well disagree with our assessment.

- Basic criminal law and procedure provisions, such as legislation criminalizing domestic violence as a separate penal code provision or authorizing warrantless arrest based upon probable cause
- Additional implementing provisions such as enhanced penalties for specific types of domestic violence, e.g., committed within 24 hours of jail release; establishing criminal penalties for related crimes such as interference with a 911 call; and requiring arresting officers to examine issue of primary aggressor
- Further enactments to provide system improvements to support police and prosecutors such as training or information systems.

Research and Evaluation Findings as Sources of Legislative Innovation

Existing legislation is not the sole source of a guidelines construct. A second source of ideas for legislation is the findings of program evaluations of the effectiveness of criminal justice initiatives to reduce domestic violence. Three such findings immediately come to mind; these are

- Promotion of offender targeting to focus on most serious cases
- Coordination among law enforcement, prosecution, and victim services providers
- Improved evidence collection by law enforcement.

1. Guidelines Based on Existing Legislative Models

Pursuant to the discussion *supra*, the analysis first looks at the basic statutory requirements, then turns to implementing provisions of law, and then to laws directed at system improvements. The first two types of laws are further divided into substantive criminal law and criminal procedure; system improvements fit neither category.

a. Minimum Criminal Law and Procedure Requirements. The minimum legislative requirements include the following penal and procedure code provisions.

Substantive Criminal Law Provisions

- Establishment of domestic violence assault and battery as a distinct crime.
- Establishment of the crime of stalking Where the definition of stalking that is used includes general intent and psychological injury to the victim, stalking should be a felony-level offense. Where lesser levels of intent or victim harm are used, simple stalking may be classified as a misdemeanor offense; however, second and subsequent offenses should be classified as potential felony offenses.¹⁶⁹

¹⁶⁹ I.e., penalties akin to the California “wobbler” laws.

- Felony penalty availability for violation of court orders of protection, including criminal court orders.¹⁷⁰
- Elimination of any vestiges of the spousal exemption from general rape laws and enactment of special spousal rape laws that underscore for police, prosecutors, judges, and jurors the criminal nature of such acts.

Criminal Procedure Legislation

- Provision for mandatory warrantless arrest for domestic violence of any sort, for violation of a court protective order, or for stalking, and a bar against officer issuance of a citation in lieu of arrest.
- Prohibition against release of a defendant arrested for domestic violence without a court appearance at which danger to the victim can be assessed and appropriate conditions of release established.

b. Implementing Provisions. Implementing provisions again include both substantive and procedural law components.

Criminal Law Provisions

- Enhanced penalties for domestic violence committed within 72 hours of release after arrest for either domestic violence or violation of an order of protection.
- Felony penalties for aggravated domestic violence or stalking (e.g., weapon presence).
- Enactment of other laws providing for criminal law punishment of persons interfering with a victim's filing of a police report or access to a health facility or shelter for domestic violence victims; providing for felony penalties against any person assaulting a victim for reporting domestic violence or otherwise seeking to intimidate victims against exercising their legal rights.

Criminal Procedure

- Discouragement of dual arrests through appropriate statutory guidelines for police investigation of domestic violence complaints.
- Unreasonably short time limitations upon the duration of the power to execute a warrantless arrest should be repealed.¹⁷¹

¹⁷⁰ The availability of such penalties would still permit prosecutors to use their discretion to determine whether to proceed with misdemeanor or felony-level charges as different cases warrant. One consequence of adopting this recommendation is that it would complement the use of criminal contempt as a means of penalizing order violations and would require enactment of a specific domestic violence order violation penal code provision in states without such laws. This would also clarify what is a murky area of the criminal procedure laws (what criminal charge should be filed) and thus potentially increase police officer arrests in order violation cases.

¹⁷¹ See discussion *supra* notes 87-89 and accompanying text.

- Written policies and procedures should encourage police to obtain arrest warrants where an arrest is not immediately possible because suspect has left scene.¹⁷²
- Mandatory issuance of a criminal order of protection as a condition of bail release, with mandatory arrest and separate criminal penalties for violation of the order.¹⁷³
- Mandatory reporting of all domestic violence incidents by officers responding to calls for assistance; reports should include an explanation of why no arrest was made or why dual arrests were made
- Expansion of police officer duties in responding to calls for assistance at domestic violence scenes to provide victims with written notices of their rights and available services, and the provision of other assistance such as arranging for transportation to a medical facility or shelter; related authorities include the power to seize weapons used by the abuser or which could be used unless seized
- Specification of prosecutor duties in domestic violence cases to include typical Victim Rights Act provisions such as notification of legal rights, personal meeting with victims to explain criminal court processes, and consultation with victims at key case decision points; and authority to file for civil protection order on behalf of victim where criminal prosecution not filed

c. System Improvement Laws. System improvement laws do not easily fit into the substantive-procedural law dichotomy.

Training/Guidelines

- Mandatory entry and in-service training for police and prosecutors on domestic violence and other topics related to dealing with victims, including intensive training for special unit officers and prosecutors.
- Requirement for both a state model and local written policies and procedures for police and prosecution to guide agency staff in the exercise of discretionary decisions to arrest or prosecute.
- Judicial training on sentencing in domestic violence cases.

Information Systems Support

- Establishment of a state repository for entry of court orders of protection issued by both civil and criminal courts, including orders issued by a family court as part of divorce, support, or other proceedings.

¹⁷² An equivalent practice in some jurisdictions in New York state is to have the suspect's name put on the police department's warrant information system with the information that the suspect is to be arrested based upon probable cause. No formal warrant for arrest is sought because of state court rulings relating to right to an attorney attaching when the suspect is arrested pursuant to a warrant.

¹⁷³ Judicial discretion to override such a police should, however, be maintained for use in appropriate cases.

- Requirement for a uniform statewide format for victim applications for court orders of protection and the court orders themselves.

2. Guidelines Based on Evaluation Findings of Effectiveness

The two clear findings from program evaluations that lend themselves to legislation are offender targeting and agency coordination.

a. System Improvements: Offender Targeting¹⁷⁴

Most legislative actions in the past decade since VAWA was first debated have had the effect of widening the criminal justice net. New crimes have been created and law enforcement is encouraged to arrest violators of these new and older criminal laws. By and large these laws have been successful in reducing domestic violence and bringing justice to its victims. As the justice system matures, however, new needs are identified; increasingly, local agencies are turning to a more targeted focus on the most serious or “dangerous” cases.

The rationale for this trend is simple. As with most crime, a small number of offenders are responsible for a disproportionate share of domestic violence, especially the most dangerous cases where homicide is a potential outcome.¹⁷⁵ Conversely, most offenders arrested for domestic violence do not return to the criminal courts.¹⁷⁶ Research suggests that official

¹⁷⁴ A complementary approach is to target high-risk victims for intensive services. See Ken Pease & Gloria Laycock, *Revictimization: Reducing the Heat on Hot Victims*. NATIONAL INSTITUTE OF JUSTICE RESEARCH IN ACTION (Nov. 1996).

¹⁷⁵ See Christopher Maxwell, Joel H. Garner & Jeffrey A. Fagan, *The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program* (NIJ Research Brief 2001) at p. 9 (8 percent of offenders account for 82 percent of all repeat domestic violence).

¹⁷⁶ See, e.g., J.A. Gordon & L.J. Moriarty, *The Effects of Domestic Violence Batterer Treatment on Domestic Violence Recidivism*, 30 CRIMINAL JUSTICE & BEHAVIOR 118 ((2003), finding that in their population of 248 offenders, only 10 percent had prior convictions. ILJ’ evaluation of jurisdictions implementing the grants to Encourage Pro-Arrest Policies saw similar distributions of prior records. In Queens County, for example, a sampling of offenders being prosecuted found that about 20 percent had prior arrests for domestic violence (unpublished data). See also, David Olson & Loretta Stalano, *Violent Offenders on Probation: Profile, Sentence and Outcome Differences Among Domestic Violence and Other Violent Probationers*, 7 VIOL. AGAINST WOMEN 1164, 1177 (2001) (18.2 percent of domestic violence probationers committed new crimes against their victim during probation); Edward Gondolf, *A Comparison Between Four Intervention Systems: Do Court Referral Program Length and Service Matter?* 14 J. INTERPERSONAL VIOL. 41 (1999) (less than 1/3 of victims reported reassaults and less than 1/4 were rearrested over 15 month period); Richard Peterson, *Combating Domestic Violence in New York City, 2001*. CJA RESEARCH BRIEF No 4 (December 2003) (18 percent of those arrested for domestic violence rearrested for a domestic violence offense within 18 months); Amy Thistlewaite & David Gibbs, *Severity of Disposition on Domestic Violence Recidivism*. 44.CRIME & DELINQ. 388 (1998) (18 percent recidivism among 683 misdemeanants for a one-year follow-up); Lynette Feder & Laura Dugan, *A Test of the Efficacy of Court Mandated Counseling for Domestic Violence Offenders: The Broward Experiment*. 19 JUSTICE Q. 343 (2002) (24 percent recidivism for one year follow-up). Most published research, however, reports on all records of arrest without separately breaking out domestic violence

recidivism after a first domestic violence offense is relatively low, approximately 20 percent (depending upon police arrest practices that tend to expand or minimize the arrest “net.”).¹⁷⁷ Hence, criminal justice agencies need to be legislatively encouraged to focus significant resources on high-risk offenders. For example, the need for mandatory minimums at the time of the first arrest is much lower than it is for subsequent arrest; the costs of jail space, overcrowding, and the likelihood of reduced pleas and convictions add further weight to this conclusion. For the “serial abuser,” however, more serious penalties are needed, including the threat of felony sanctions.

Other Legislative Recommendations

- Law enforcement and prosecution agencies must be required to establish written policies and procedures for dealing with domestic violence that include threat assessment and mechanisms for dealing with high threat cases.
- Existing statutory requirements relating to determination of primary aggressor or incident reporting should be modified to include consideration of threat levels, requiring field officers to obtain threat assessment-type information for later analysis by specialized staff.
- New laws are needed to target serious offenses that are often overlooked by both law enforcement and prosecution, especially that of the offense of strangulation. Although this crime can often be charged as attempted murder, it rarely is, even when its occurrence is recognized.¹⁷⁸

offenses. This is highly misleading, since research conducted for the Department of Labor shows that about one-third of the labor force have a record of arrest for some offense. See NEAL MILLER, A STUDY OF THE NUMBER OF PERSONS WITH RECORDS OF ARREST OR CONVICTION IN THE LABOR FORCE, (Technical Assistance Paper No. 63, Office of the Assistant Secretary for Policy, Evaluation and Research, U.S. Department of Labor) (1979).

¹⁷⁷ See, e.g., Maxwell, Garner & Fagan, *The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program*. NIJ RESEARCH BRIEF (2001 at p. 9) (82 percent of all repeat domestic violence committed by 8 percent of offenders. See also Gordon & Moriarty, *The Effects of Domestic Violence Batterer Treatment on Domestic Violence Recidivism*. 30 CRIM. JUST. & BEHAVIOR 118 (2003) (10 percent recidivism; Olson, & Stalano, *Violent Offenders on Probation: Profile, Sentence and Outcome Differences Among Domestic Violence and Other Violent Probationers*. 7 VIOLENCE AGAINST WOMEN 1164 (2003) (18.2 percent recidivism among probationers); R. Peterson *Combating Domestic Violence in New York City, 2001*. CJA RESEARCH BRIEF. (December 2003) (18 percent recidivism); A. Thistlewaite & D. Gibbs. *Severity of Disposition on Domestic Violence Recidivism*. 44 CRIME AND DELINQUENCY 388 (1998) (18 percent recidivism); L. Feder & L. Dugan, *A Test of the Efficacy of Court Mandated Counseling for Domestic Violence Offenders: The Broward Experiment*. 19 JUST. Q. 343 (2002) (24 percent recidivism).

¹⁷⁸ Nebraska is the only state to provide a separate criminal code offense for strangulation, NEB. REV. STAT. § 28-new; Laws 2004, LB 943. Although there has been virtually no academic research on strangulation in domestic violence cases, estimates from the few jurisdictions that train law enforcement to identify these cases suggest this is a not uncommon offense, probably in the neighborhood of 25 percent of all domestic violence assault

Other provisions relating to specific deterrence of domestic violence offenders generally, such as mandatory minimum sentences after a second offense, may need to be clarified so that they are not used as a “one-sentence fits all” requirement. Instead, threat assessment should be used to determine if more significant incarceration terms are appropriate.¹⁷⁹

Finally, a targeting strategy will require close cooperation between service providers working with victims and law enforcement/prosecution agencies. Such cooperation exists in a number of jurisdictions on an informal basis, but it is often affected by victim-counselor confidentiality laws.¹⁸⁰

b. System Improvements: Coordination

It goes almost without saying that agency coordination is necessary, if not sufficient, for any criminal justice innovation to be successful. Domestic violence is no different from any other area of the criminal justice system. Indeed, virtually every successful police or prosecution domestic violence program ILJ has evaluated in the past 8 years was found, in part, to have improved through better coordination of effort. In Queens County, New York, for example, the police department issued a directive at the urging of the prosecutor’s office on evidence collection, which was instrumental in allowing the new domestic violence prosecution unit to nearly triple its conviction rate.¹⁸¹ In another site, in contrast, the new prosecution unit for

cases. Personal communication from Gael Strack, Chief Domestic Violence unit, San Diego Corporation Counsel’s office. This estimate has been repeated to this author by jurisdictions as diverse as New York state and Texas. Other crimes that often go unprosecuted include spousal rape, discussed *supra*, notes 31-39 and accompanying text, and violation of court orders of protection, which in our experience often are dealt with as probation violations (assuming there is an underlying conviction).

¹⁷⁹ See COURT IMPROVEMENT COMMITTEE OF THE COLORADO SUPREME COURT COMMISSION ON FAMILIES IN THE COLORADO COURTS, RECOMMENDATIONS FOR FAMILY CASES. (2001), reporting on a risk assessment initiative in 4 pilot jurisdictions intended to create better sentencing and supervision guidelines for offenders.

¹⁸⁰ E.g., N.C. GEN. STAT. § 8-53.12 (Creates privileged communication between victims and agents of rape crisis centers and domestic violence programs). But see ALASKA STAT. § 12.55.023(b) (authorizes a victim advocate for a domestic violence victim to submit a statement to the sentencing court when the victim makes no statement).

¹⁸¹ Among other indicia of coordination, the NYPD distributed digital cameras using departmental using, resulting in arresting officers being able to e-mail photographs of victim injuries to the prosecutor to be used at arraignment; the prosecutor was provided the arresting officer incident report through terminal access to the NYPD on-line booking system, at the point when the report was completed and sent to the jail for holding until arraignment; NYPD domestic violence unit officers respond to requests from the prosecutor to monitor compliance with a criminal court Stay-away order.

domestic violence cases showed virtually no such improvement, due in part to the absence of such inter-agency cooperation.¹⁸² Among the key coordination issues are the following.

Improved Evidence Collection. Effective evidence collection is essential for successful criminal prosecution;¹⁸³ domestic violence cases are especially susceptible to evidence collection failures because of the problematic nature of victim testimony.¹⁸⁴ Improved evidence collection is, however, difficult to mandate directly through legislation, since it involves at least three layers of law enforcement personnel involvement: arresting officers who collect the evidence, supervisory officers who review the evidence collection, and agency policymaker commitment to enforce policies about evidence collection. It is obviously possible for legislation to mandate that evidence collection be made part of the law enforcement agency's written policies and procedures, including detailing what types of evidence should be collected (e.g., digital photographs of victim injuries and crime scene, weapons used, etc.). It is a more difficult task to write in incentives for agency supervisors and policymakers to enforce an evidence collection mandate.¹⁸⁵ Nonetheless, while not a panacea, providing specific guidance on evidence collection can be useful, depending upon local politics, law enforcement relationships with the prosecutor, and other individual/local factors.

Court Structure Changes—The Domestic Violence Court. Prosecutor focus on domestic violence offenses often results in the assignment of specialized prosecutors to handle these cases, often using a “vertical” case prosecution model (the same prosecutor handles most or all steps in the case). This may involve a specialized unit in larger offices or the assignment of a single prosecutor to handle these cases in smaller offices. In either instance, the court must

¹⁸² Report on file; for reasons of confidentiality, the specific site studied is not named here.

¹⁸³ Obviously, the quality of police evidence collection is critical to prosecution implementation of “evidence-based” prosecution policies in domestic violence cases. See Tracey J. Buzzeo, *Evidence Based Domestic Violence Prosecution*. 3 J. COMMUNITY POLICING 55 (2001). Evidence-based prosecution has generally replaced the more controversial “no-drop” policies adopted by prosecutors in their initial efforts to show they took domestic violence cases seriously. See e.g., Note, *No-Drop Policies: Effective Legislation or Protectionist Attitude?* 30 UNIV. TOLEDO L. REV. 621 (1999). As David Ford & Susan Breall, *VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR PROSECUTORS*. (2003), note, there is little reported research on the effect of either policy.

¹⁸⁴ G.E. Wattendorf, *Prosecution Issues in Domestic Assault Cases: Trying Cases Without Victim Cooperation*. 35 N.H. BAR J. (June 1994 at 42).

¹⁸⁵ In one jurisdiction we visited, a written reprimand is placed in the personnel file of both the arresting officer and the supervising sergeant in any case forwarded to the prosecutor without the required evidence or an

readjust its procedures and organizational structure to better process domestic violence cases through a specialized docket funneling all such cases to one courtroom. This is required to eliminate scheduling conflicts that would otherwise occur were domestic violence cases assigned to one prosecutor be heard by multiple judges and courtrooms.¹⁸⁶

A second way in which courts may organize differently to handle domestic violence cases is the creation of a specialized docket to review defendant adherence to a sentencing requirement that the defendant attend a counseling or other type of intervention program. In some courts, the caseloads are so high that the treatment monitoring court is staffed by a magistrate, rather than the sentencing judge.¹⁸⁷

Legislation to establish special domestic violence courts (or domestic violence dockets in smaller courts) may be required in states that have decentralized court systems combined with extensive legislative control over court jurisdiction (e.g., Georgia, Texas). In other states with highly centralized court systems, the central court administrator or chief justice can mandate the establishment of the domestic violence courts (e.g., New Jersey). Which ever path is taken, adequate legislative appropriations will be required to properly handle what is likely to result in a new stream of cases that were previously not brought by either victims, police, or the prosecution.

Other Coordination Improvements. Other types of coordination, while not as critical as the two types described *supra*, may also contribute to efforts to prosecute abusers and reduce domestic violence. These include coordination between (1) prosecutors and probation officers who supervise domestic violence abusers, and (2) between law enforcement and prosecutors on the one hand, and victim advocates for domestic violence victims on the other. One example of prosecution-probation coordination includes direct notification by prosecutors to probation when a probationer is charged with a new domestic violence offense so that revocation of probation

explanation for its absence. In this jurisdiction, agency managers ratings include their precinct's domestic violence arrests.

¹⁸⁶ Domestic violence courts are becoming increasingly common. See SUSAN KEILITZ, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY (2000); JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, DOMESTIC VIOLENCE COURTS: A DESCRIPTIVE STUDY (May 2000). See also Judge Amy Karan, Susan Keilitz & Sharon Denaro, *Domestic Violence Courts: What They Are and Should We Manage Them?* JUV. & FAM. CT. J. 75 (Spring 1999); CENTER FOR COURT INNOVATION, WHAT MAKES A DOMESTIC VIOLENCE COURT WORK? KEY PRINCIPLES (2002).

¹⁸⁷ This is the case in the New York City courts.

may be promptly initiated. Probation officers and law enforcement officers may also work together to undertake preemptive “sweeps” or visits to the residences of domestic violence victims to ensure there is neither continuing violence where the parties reside together nor visits in violation of a court stay-away order.

Coordination between law enforcement or prosecutors with victim advocates is especially useful in promoting reporting of domestic violence and reassuring victims to improve victim cooperation with the prosecutor.¹⁸⁸

Legislative Recommendations

Legislation can stimulate coordination action where local officials are receptive to the idea of improved coordination.¹⁸⁹ The most obvious vehicle for legislation promoting agency coordination is to require local planning and development of written policies and procedures that include a provision for how the types of coordination will occur among victim advocates, probation, law enforcement, and prosecution. Special funding by the legislators through the state criminal justice planning agencies could further stimulate coordination efforts.

The several criminal code and criminal procedure laws detailed above parallel in many ways the “Criminal Penalties and Procedures” provisions of the *Model Code on Domestic and Family Violence* developed by the National Council of Juvenile and Family Court Judges.¹⁹⁰ The *Model Code*, however, is a much broader document and includes provisions not discussed here, including civil orders of protection, custody of children, and prevention efforts. Among the more significant differences between the listing above and the provisions of the *Model Code* are the specification in the former of separate domestic violence crimes (the *Model Code* simply provides for enhanced penalties for a second domestic violence-related offense such as assault

¹⁸⁸ See, e.g., T.S. Whetstone, *Measuring the Impact of a Domestic Violence Coordinated Response Team*, 24 INTER. J. POLICE STRATEGIES & MANAGEMENT 371 (2001); M. Shepard, D.R. Falk & B.A. Elliott, *Enhancing Coordinated Community Responses to Reduce Recidivism in Cases of Domestic Violence*, 17 J. INTERPERSONAL VIOL. 551 (2002). R. Tolman & A. Weisz, *Coordinated Community Intervention for Domestic Violence: The Effects of Arrest and Prosecution on Recidivism of Woman Abuse Perpetrators*, 41 CRIME & DELINQ. 481 (1995); J.A. Zweig & M. R. Burt, *Effects of Interactions Among Community Agencies on Legal System Responses to Domestic Violence and Sexual Assault in STOP-Funded Communities*, 14 CRIM. JUST. POLICY REV. 249 (2003).

¹⁸⁹ Legislation is never self-implementing. Where the local officials responsible for its implementation are opposed to improved coordination efforts, it will not occur until changes in local leadership first occur.

and battery¹⁹¹), explicit repeal of any spousal or marital exemption to the sexual assault laws, and system functionality concerns such as requiring police to seek a warrant where immediate arrest is not possible. Most significantly, the Model Code does not address offender targeting laws.

Nonetheless, the *Model Code* is a good, quick resource for those seeking additional discussion of many of the issues raised here and many others not discussed here. Most importantly, the *Model Code* provides specific legislative language for implementing the recommendations made here (e.g., § 223 of the *Model Code* includes a provision requiring that written policies and procedures include provision for law enforcement coordination with medical services).

B. Assessing State Legislation: The National Perspective

From a criminal justice perspective,¹⁹² the states with the most comprehensive overall legislation for combating domestic violence include California, Minnesota, and Wisconsin. All of these states make domestic violence a crime (California law includes a felony domestic violence provision).¹⁹³ California also has a separate provision for sexual assault of spouse.¹⁹⁴ None of these states recognizes a spousal exemption for rape. All three states make violation of a protective order a crime and also authorize criminal contempt proceedings for violations.¹⁹⁵

California makes stalking a felony,¹⁹⁶ while the other two states provide felony treatment for repeat stalking.¹⁹⁷ All three states provide for civil orders of protection in stalking cases, with criminal penalties for their violation.¹⁹⁸ California and Wisconsin also provide separate penalties for telephone threats.¹⁹⁹ Wisconsin makes harassment a Class A misdemeanor.²⁰⁰ Most

¹⁹⁰ ADVISORY COMMITTEE FAMILY VIOLENCE PROJECT, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994). See also NATIONAL CRIMINAL JUSTICE ASSOCIATION, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR THE STATES (1993).

¹⁹¹ MODEL CODE § 203 (one degree above normal penalty). For a comparative law application of the *Model Code* to one state's laws, see Arizona Coalition Against Domestic Violence, COMPARISON OF ARIZONA'S STATUTES, POLICY, TRAINING, AND EDUCATION TO THE MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 1994 (2002).

¹⁹² This analysis does not consider differences in state civil law provisions for authorizing protective orders or for funding domestic violence victim assistance programs.

¹⁹³ *Supra* note 40.

¹⁹⁴ *Supra* note 38.

¹⁹⁵ *Supra* note 64.

¹⁹⁶ *Supra* note 50.

¹⁹⁷ *Supra* note 53.

¹⁹⁸ *Supra* notes 72-76.

¹⁹⁹ *Supra* note 60.

significantly, two of these states provide for limited targeted treatment of serial abusers. Thus, California and Minnesota provide for mandatory jail sentences for repeat domestic violence.²⁰¹ In addition, the California “wobbler” law for domestic violence assault can also be used for this purpose.

California provides for preferred arrests in domestic violence cases and in order violations; local policy sets standards for mandatory arrest in order violation cases.²⁰² Minnesota law mandates arrest in order violation cases and authorizes discretionary arrest in domestic violence cases within 12 hours of their occurrence.²⁰³ Wisconsin also mandates arrest in both types of cases; however, arrest in domestic violence cases must be made within 28 days of the incident and there must be physical injury or a threat of injury.²⁰⁴ Only Wisconsin does not require written incident reports by the police;²⁰⁵ Wisconsin requires a report only if no arrest was made.²⁰⁶ California and Minnesota bar the use of citations in lieu of arrest.²⁰⁷ All 3 states require written policies and procedures for the handling of domestic violence cases;²⁰⁸ Minnesota law calls for state-level model policies.²⁰⁹

All 3 states’ laws include mandates for local prosecutors. California funds special domestic violence units and places limits on plea-bargaining in serious cases.²¹⁰ Minnesota requires local prosecutors to have a written plan for handling domestic violence cases; the plan must include vertical prosecution.²¹¹ Wisconsin requires prosecutors to have written policies to guide assistant prosecutors; the policies must favor prosecution.²¹² All three states’ laws require that entry-level police training include domestic violence.²¹³

²⁰⁰ *Supra* note 58.

²⁰¹ *Supra* note 45.

²⁰² *Supra* note 90.

²⁰³ *Supra* notes 85, 87, 104.

²⁰⁴ *Supra* notes 86, 104.

²⁰⁵ *Supra* note 126.

²⁰⁶ *Id.*

²⁰⁷ *Supra* note 108.

²⁰⁸ *Supra* note 153.

²⁰⁹ *Supra* note 154.

²¹⁰ *Supra* note 138.

²¹¹ *Supra* note 133.

²¹² *Supra* note 135.

²¹³ *Supra* note 140.

The three states that seem to have the best criminal law provisions for combating domestic violence are not perfect. Each state has significant weaknesses. California, for example, lacks a police incident reporting requirement and does not mandate arrest for domestic violence. On the other hand, its criminal code provisions establishing domestic violence as a separate crime and setting penalties for stalking are among the strongest in the nation. Minnesota also fails to mandate arrests in domestic violence cases; but requires police incident reports, bars the use of citations instead of arrest, and requires vertical prosecution. Wisconsin law provides for enhanced penalties for any domestic violence within 72 hours of release after arrest,²¹⁴ but state law seemingly makes no mention of any bar to the use of citations.

In sum, even the best states' laws have gaps. But as a group, these states illustrate the best that state legislation currently provides.

C. Assessing State Legislation : The Pennsylvania Example

The legislative guidelines, presented *supra*, can also be used by local policymakers as a standard for assessing the needs of their state for new legislation. A review of the state domestic violence laws in Pennsylvania illustrates this.

Pennsylvania Law

The Legislative Guidelines are composed of two major types of laws: substantive criminal law and criminal procedure. The analysis of Pennsylvania law follows this structure.

Substantive Criminal Law Omissions

The review of state domestic violence laws identified six substantive criminal law issues of concern for Pennsylvania.

1. Pennsylvania law does not include a separate domestic violence criminal statute (found in 38 states' laws). The most significant omission is that of enhanced penalties for recurring domestic violence.

²¹⁴ *Supra* note 46.

2. There is no spousal sexual assault law in Pennsylvania (found in 6 states). However, in 1995, Pennsylvania did repeal state laws providing for a spousal exception to rape where the parties were still living together.²¹⁵

3. There are only limited penalties for violation of a court protective order. Pennsylvania law provides for only criminal contempt²¹⁶ versus 7 states making order violation a separate felony offense and 8 states with felony enhancement for repeat protective order violations.

4. There are only limited penalties for first-time stalking in Pennsylvania²¹⁷ (38 states make first-time stalking a felony or potential felony). Nor are the penalties for threats²¹⁸ or harassment²¹⁹ very strong.

5. There are no Pennsylvania statutory provisions to enforce victim's right to file complaint with police (e.g., crime of interfering with 911 call) (14 states), or to seek shelter, or to protect their safety at a shelter. State law does provide for felony punishment of efforts to intimidate or retaliate against witnesses,²²⁰ which can be used in domestic violence cases.

6. There is no bar in Pennsylvania to firearm possession for conviction of simple domestic violence. State law provides for such a bar where a person is convicted of stalking or aggravated assault and where the person is subject to a protective order providing for confiscation of firearms.²²¹

Criminal Procedure Code

Criminal procedure code provisions are also lacking when compared with other states, albeit not as badly. The review of Pennsylvania state law showed the following five areas of concern.

1. There is no Pennsylvania statutory requirement for mandatory arrest for domestic violence (found in 21 states) or even a preferred arrest policy (8 states), or for direction in dual

²¹⁵ Former 18 PA. CONS. STAT. ANN. § 3103, *repealed* P.L. 985 Special Session No. 1, § 2 ((1995)

²¹⁶ See 23 PA. CONS. STAT. ANN. § 6114 (b). See also, 18 PA. CONS. STAT. ANN. §§ 4954, 5 (order of protection against witness intimidation; violation is criminal contempt)

²¹⁷ See 18 PA. CONS. STAT. ANN. § 2709.1 (misdemeanor of first degree; 2nd offense is felony of third degree)..

²¹⁸ 18 PA. CONS. STAT. ANN. § 2706 (misdemeanor).

²¹⁹ 18 PA. CONS. STAT. ANN. § 2709 (misdemeanor of third degree).

²²⁰ See 18 PA CONS. STAT. ANN. §§ 4952, 4953.

arrest situations such as how to identify the primary aggressor where cross complaints exist.²²² (Related laws also missing in Pennsylvania include a requirement to seek a warrant when an arrest could not be made at the scene and forwarding of an incident report to the district attorney where no arrest is made.) Pennsylvania law mandates arrest when there has been a violation of a court protective order.²²³ State law authorizes arrest at the officer's discretion in domestic violence cases only where physical injury or other corroborative evidence is seen.²²⁴ The same law also bars the use of citation in lieu of arrest (found in 14 states).²²⁵ State law also requires local incident reports to be filed with the state, but conditions this on implementation of the new FBI incident-based reporting system (NIBRS).²²⁶ When the incident reports are filed, the State Police are to publish department-level statistical summaries of police incident reports.²²⁷

2. Pennsylvania law fails to specify the officer's non-arrest duties when responding to a domestic violence call to include assisting victim to obtain medical help, transport to shelter, remove belongings from property, etc. Police are required, however, to provide²²⁸ a notice of rights under the state Victims Rights Act,²²⁹ and of rights as a domestic violence victim to a protective order and shelter availability.²³⁰ Police may seize weapons used in domestic violence,²³¹ or threatened to be used, where a protective order has been violated;²³² however, no provision is made for seizure of any other weapons seen (but not used to commit domestic violence) at the incident scene.

3. There is no provision in Pennsylvania for domestic violence training of prosecutors (found in 7 states). Police statutory training requirements²³³ for domestic violence do not seemingly include in-service training (9 states) and may even be limited to protection order enforcement. The Pennsylvania Municipal Police Officers Education and Training Commission

²²¹ See 18 PA. CONS. STAT. ANN. § 6105 (a), (b).

²²² 18 PA. CONS. STAT. ANN. § 2711 authorizes only probable cause-based arrests. This is defined in the statute to require either physical injury to the victim or other corroborative evidence.

²²³ See 23 PA. CONS. STAT. ANN. § 6113 (a).

²²⁴ See 18 PA. CONS. STAT. ANN. § 2711.

²²⁵ See 18 PA. CONS. STAT. ANN. § 2711 (c)(1).

²²⁶ See 23 PA. CONS. STAT. ANN. § 6105 (c).

²²⁷ 23 PA. CONS. STAT. ANN. § 6105 (g).

²²⁸ 18 PA. CONS. STAT. ANN. § 2711 (d).

²²⁹ 71 PA. STAT. ANN. § 180-9.6 (Victim Rights Act).

²³⁰ 23 PA. CONS. STAT. ANN. § 6105 (b).

²³¹ 18 PA. CONS. STAT. ANN. § 2711 (b).

²³² 23 PA. CONS. STAT. ANN. § 6113 (b).

has authority, however, to issue regulations regarding in-service training that can provide an alternative source for requiring mandatory in-service training in domestic violence.²³⁴ State law does require local police agencies to establish written policies and procedures²³⁵ (19 states), without, however, providing for any state oversight of these policies' content. There are no requirements for prosecutors to develop pro-prosecution policies that would apply to cases where the victim is a non-cooperating witness.

4. Citation release in domestic violence cases is not permitted.²³⁶ Pennsylvania law authorizes issuance of a criminal protective order at bail or other form of pretrial release on a finding of threat or danger,²³⁷ without making such an order mandatory upon a probable cause finding of domestic violence.

5. In at least one area, Pennsylvania law is among the nation's leaders. Thus, state law establishes a state registry for domestic violence orders and was one of the first states to provide for registry of out-of-state orders for application of the Full Faith and Credit requirement.²³⁸ The prothonotary is responsible for notifying the state police of entry of a court order of protection within 24 hours of its entry.²³⁹ Registration is not required for enforcement of foreign orders.²⁴⁰

Pennsylvania Summary

In comparison with other states' laws, Pennsylvania law lacks many statutory provisions intended to protect victims of domestic abuse. The most obvious candidate for legislative action is mandatory arrest policies for domestic violence. At the same time, direction should be provided for dual arrest situations to discourage officers from arresting both parties except in the rare instance when there is no primary aggressor. In general, enforcement of court protective orders needs to be strengthened, including increased penalties. Consideration should be given to making mandatory the issuance of criminal protective orders at release hearings, with violation of this order a separate criminal offense. There is no necessary imperative for a new domestic

²³³ 23 PA. CONS. STAT. ANN. § 6105 (a).

²³⁴ 53 PA. CONS. STAT. ANN. §§ 2164(1), 2170 (e).

²³⁵ 23 PA. CONS. STAT. ANN. § 6105 (a).

²³⁶ 18 PA. CONS. STAT. ANN. § 2711 (c)(1).

²³⁷ 18 PA. CONS. STAT. ANN. § 2711 (c)(2)

²³⁸ 23 PA. CONS. STAT. ANN. §§ 6105(e), 6113 (a), 6118.

²³⁹ *Id.*

²⁴⁰ 18 PA. CONS. STAT. ANN. § 6104 (d)(3). See 2000 VAWA Reauthorization § 1101, codified at 18 U.S.C. § 2265 (d)(2).

violence crime, but consideration should be given to a law that provides enhanced mandatory penalties for repeat domestic violence offenses. Stalking laws should also be upgraded to provide felony penalties for aggravated stalking and threats. Finally, it should be noted that references in existing state law to the implementation of NIBRS in Pennsylvania are dated. According to the Department of Justice, Pennsylvania has stopped testing of NIBRS for a variety of factors, including inadequate funding.²⁴¹ The failure of NIBRS should not, however, result in a similar failure of required reporting by police of how they handle domestic violence incidents and calls for service. Public accountability can only be served by such a requirement and it should be enforced.

Summary

This review shows how far states have come in the past few years in both understanding the seriousness of domestic violence and acting on that seriousness. At the same time, it must be recognized that for decades states have had laws on the books that said that domestic violence is criminal behavior. But they did little to enforce these laws.²⁴² The enactment of the Violence Against Women Act of 1994 (VAWA) was a signal that Congress wanted states to enforce laws against domestic violence. VAWA also served to encourage advocates to press for improved state laws to combat domestic violence. The separate enactment of stalking laws, beginning in 1990, provided a parallel track for legislative initiatives against domestic violence that has also proved valuable. Not surprisingly, a review of federal funding under the STOP block grant program found that these two legislative efforts have indeed merged at the operational level in many jurisdictions, with nearly 50 agencies developing stalking projects directed at violence against women.²⁴³

Many problems remain, however. State legislation making domestic violence a crime and providing new remedies for victims of domestic violence is largely a hodge podge of

²⁴¹ See SEARCH INC., IMPLEMENTING THE NATIONAL INCIDENT-BASED REPORTING SYSTEM: A PROJECT STATUS REPORT (1997) (only 6 percent of US population covered by NIBRS); NIBRS STAFF REPORT 1: REPORT ON STATE INCIDENT-BASED REPORTING PROFILES AND CERTIFIED SOFTWARE APPLICATIONS 85-86 (1997) (Pennsylvania halted NIBRS testing before implementation). The most recent Bureau of Justice Statistics report on NIBRS' status states that Pennsylvania remains in a "testing" status as of December 2002. See report at www.ojp.usdoj.gov/bjs/nibrsstatus.htm, last visited January 29, 2004

²⁴² This failure was, of course, the rationale for enactment of VAWA. See discussion, *supra*, at note 3.

differing provisions. Different states do different things in different ways. While diversity in legislation is a natural consequence of a federal system, it remains troubling that problems in responding to domestic violence that are common in most, if not all, states are not universally addressed by the states.

This paper provides an outline of what a comprehensive statutory approach should be, listing examples of model code provisions *supra*. A few states come close to this standard, but most do not. It may be hoped that this simple checklist approach can provide “needs” guidance to state legislators in revamping their domestic violence laws. The analysis of Pennsylvania law *supra* also provides an example of how such a review might be conducted.

Responses from state legislators, criminal justice practitioners, advocates, and researchers to earlier versions of this paper strongly indicate that legislative efforts to improve laws against domestic violence and stalking will continue. One important consequence of VAWA has been to help create coalitions of advocates for such actions that include not only traditional advocates, but also judges, prosecutors, law enforcement officers, and other officials who are responsible for enforcing these laws. To the extent that there are shortcomings to these laws, this new coalition of advocates is joining together to eliminate such shortcomings. This paper’s review of relevant legislation can be used to guide their efforts.

²⁴³ Neal Miller, *Stalking As a Focus of the STOP Program*, in THE URBAN INSTITUTE, 2000 REPORT: EVALUATION OF THE STOP FORMULA GRANTS TO COMBAT VIOLENCE AGAINST WOMEN (2000).