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Expanding Protective Order Coverage.

Kellie K. Player

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RECENT DEVELOPMENT

EXPANDING PROTECTIVE ORDER COVERAGE

KELLIE K. PLAYER

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I. INTRODUCTION

Over the last forty years, significant progress has been made in protecting individuals from domestic violence.¹ Making civil protective orders available to victims of abuse was an important first step in reducing domestic violence.² While it is true that a “protective order that is not enforced is merely an expensive piece of paper,”³ the use of warrantless arrests,⁴ the expansion of the

1. See *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249, 1256 (Md. 2001) (emphasizing that the problem of domestic violence “was largely ignored until the mid-1970s”); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 11–13 (1999) (reporting that great strides have been made since domestic violence came to the public’s attention and prompted legislative reform beginning in the late 1960s to early 1970s); see also Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979–1991*, 33 S. TEX. L. REV. 353, 355 (1992) (acknowledging that the Texas Legislature has been revising the laws concerning family violence since the 1970s).

2. See Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 165 (1993) (stating that domestic violence statutes permitted civil orders of protection to prohibit further violent acts); Matthew Litsky, Note, *Explaining the Legal System’s Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 152 (1990) (pointing out that protective order legislation was initiated in the 1970s as a remedy to domestic violence).

3. James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1202 (1995) (citing U.S. DEP’T OF JUST., ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 11 (1984)); see Matthew Litsky, Note, *Explaining the Legal System’s Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 160 (1990) (stressing that protective orders are only worth the value of the “paper they are written on” unless they are enforced (quoting E. Yaroshefsky, Private Practitioner, Remarks at a Panel Discussion on Battered Women, presented by the Legal Association for Women at New York Law School (Nov. 13, 1989)) (internal quotation marks omitted)); see also Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN’S L.J. 339, 361–62 (1995) (illustrating that enforcement is necessary to the integrity of protective orders).

4. Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 497 (2008); see also Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979–1991*, 33 S. TEX. L. REV. 353, 369–70 (1992) (detailing revisions to Texas law that expanded the applicability of warrantless arrests to include probable cause that an assault would happen in the future); James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1180 (1995) (noting the revision to the Texas statute that authorized warrantless arrests (citing TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(3) (West Supp. 1995))). A warrantless arrest is necessary and proper in situations in which the victim is at risk of immediate harm. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1148 (1993) (explaining that a delay in the arrest or the

class of people who qualify for protection,⁵ and the education of those involved in the justice system have all led to greater safety for victims of family violence.⁶ The attention to and the evolution of protective order laws have led to greater protection for victims of abuse.⁷ Accordingly, protective order law is likely to continue evolving and enlarging access to protection.⁸

The Texas Legislature recently expanded coverage in response

withdrawal of police from the scene to obtain a warrant increases the victim's vulnerability).

5. See *Bedinghaus v. Adams*, No. 2-08-096-CV, 2009 WL 279388, at *3 (Tex. App.—Fort Worth Feb. 5, 2009, no. pet.) (mem. op.) (illustrating the inclusion of “dating violence” in the definition of “family violence” (citing TEX. FAM. CODE ANN. § 71.004(3) (West 2008))); James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1177–78 (1995) (summarizing revisions to Texas legislation that expanded coverage to include women in pending divorce actions, unmarried biological parents of a child, and former members of a household regardless of when the violence occurred); see also Regina DuFresne & Jonathan S. Greene, *Increasing Remedies for Domestic Violence: A Study of Maryland's 1992 Domestic Violence Act in the Courtroom*, 6 MD. J. CONTEMP. LEGAL ISSUES 155, 176 (1995) (concluding that amendments to expand eligibility to Maryland's Domestic Violence Act significantly improved the relief available); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 840 (1993) (discussing various states' statutes and the varying requirements for protective order eligibility).

6. See *Felton v. Felton*, 679 N.E.2d 672, 680 (Ohio 1997) (suggesting that education of judges will send a strong message about the severity of domestic violence and the need for enforcement); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 44 (1999) (explaining the training that judges receive in Washington, D.C., and the resulting positive effects); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 811 (1993) (discussing the changed attitudes of judges after receiving training on domestic violence); Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 175 (1990) (emphasizing the importance of training judges on domestic abuse statutes, courtroom attitudes, and the critical role they play in ending domestic violence).

7. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 13 (1999) (acknowledging that “[e]normous legal strides have been made in a relatively short period of time” regarding protective order legislation); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993) (contending that there have been significant legal reforms since the 1970s to combat domestic violence).

8. See Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 96 (2005) (stating that protection orders “are underused in part because they are not available to all victims or to victims of all types of crime”).

to the events that occurred in the fall of 2008.⁹ Leticia Arcos forced Kristy Appleby, who was dating Arcos's ex-husband, at gunpoint to ingest an overdose of sleeping pills and alcohol.¹⁰ After spending four days in the hospital, Appleby attempted to obtain a protective order against Arcos, but the request was denied.¹¹ Appleby was not eligible for a protective order because her acquaintance with Arcos did not meet the relationship requirements under the law at the time.¹² Additionally, due to lack of evidence, no criminal charges were brought against Arcos.¹³

Appleby discontinued her relationship with her attacker's

9. Kristy Appleby Act, 82d Leg., R.S., ch. 872, 2011 Tex. Sess. Law Serv. 2214 (West) (codified as amended in scattered sections of TEX. FAM. CODE ANN.).

10. Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A. Appleby's father reported that Arcos initially was very friendly to Appleby before the attacks occurred. Robert Crowe & Roger Croteau, *Confrontation Leads to Fatal Shooting*, SAN ANTONIO EXPRESS-NEWS, Feb. 11, 2009, at 1A. Text messages were also exchanged between the two women, but the content of the messages was not enough to pursue criminal charges for the attack or to show the relationship requirement to qualify for a protective order. *911 Calls Released from Appleby Shooting: Victim Tried to Get Protective Order*, KSAT (Mar. 7, 2009, 7:49 AM), <http://www.ksat.com/news/18875489/detail.html> (page removed online and on file with the *St. Mary's Law Journal*); see also Press Release, Susan D. Reed, Criminal Dist. Att'y for Bexar Cnty., DA Seeks Change to Law in Wake of Appleby Murder (Feb. 11, 2009), available at <http://www.bexar.org/da2/PressRelease/2009/0211.htm> (describing a gap in the law where third parties in a love triangle are not protected).

11. Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A; Sarah Lucero, *Murder Spurs Change in Law*, KENS5.COM (June 24, 2010, 2:56 PM), <http://www.kens5.com/on-tv/kens-reporters/sarah-lucero/Murder-spurs-change-in-law.html>. While she was in the hospital, Appleby met with a domestic violence advocate, who later assisted Appleby in filing a protective order request. Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A.

12. See Act of May 11, 2001, 77th Leg., R.S., ch. 91, § 1, 2001 Tex. Gen. Laws 176 (amended 2011) (current version at TEX. FAM. CODE ANN. § 71.0021(b) (West Supp. 2011)) (providing a relationship definition that did not include third parties); see also Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 121 (2005) (reporting that some states "simply do not provide criminal orders of protection to those who do not fall within the state's definition of domestic violence victims"); Lowell T. Woods, Jr., Note, *Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders*, 27 IND. L. REV. 449, 453 (1993) (illustrating how a victim's relationship to the attacker "may further limit the availability of protective orders").

13. Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A. Reportedly, the scene from the October 2008 incident at Appleby's apartment was never processed by law enforcement because Appleby's relatives had cleaned it up before the deputies arrived. *Id.*

former husband, but she still feared Arcos.¹⁴ As a result, she lived with family members for many months.¹⁵ Her fears were warranted. In February 2009, Arcos went to Appleby's place of work, waited for her in the parking lot, and fatally shot her.¹⁶ Appleby tried to protect herself, but at the time there was no legal protection available to third persons against violence occurring in a "love triangle."¹⁷

Part II of this Recent Development reviews the evolution of protective order coverage in Texas. Additionally, it samples other states' laws on protective orders and explores the effectiveness of protective orders in preventing threatened violence. Part III reviews the need for coverage and discusses the Kristy Appleby Act. Part IV introduces and analyzes a possible way to further increase coverage, and finally, Part V considers the beneficial and adverse effects of expanding protection under the law.

II. HISTORY

A. *Evolution of Protective Orders in Protecting Victims of Violence*

The creation and evolution of protective orders¹⁸ for domestic

14. *Id.*

15. *Id.*

16. *Id.*; Valentino Lucio, *Woman Is Handed Forty-Year Term*, SAN ANTONIO EXPRESS-NEWS, Aug. 21, 2010, at 1B; *Woman Gets Forty-Year Sentence in Slaying*, KDHNEWS.COM (Aug. 21, 2010, 11:28 PM), <http://www.kdhnews.com/news/story.aspx?s=43798>. On February 10, 2009, Leticia Arcos waited for Kristy Appleby in the parking lot of Appleby's place of work. Robert Crowe & Roger Croteau, *Confrontation Leads to Fatal Shooting*, SAN ANTONIO EXPRESS-NEWS, Feb. 11, 2009, at 1A. When Appleby arrived, Arcos yelled at Appleby, chased her around a car, and then fired multiple shots. *Id.* Appleby was struck twice and died from the gunshot wounds. *Id.* Arcos attacked and murdered Kristy Appleby because she was "upset at Appleby for having dated [her] ex-husband." Valentino Lucio, *Woman Is Handed Forty-Year Term*, SAN ANTONIO EXPRESS-NEWS, Aug. 21, 2010, at 1B. Leticia Arcos pleaded guilty to first-degree murder, and she will serve up to forty years with parole eligibility in twenty years. *Id.*

17. David Saleh Rauf, *Senator Files Bill to Change Law on Protective Orders*, SAN ANTONIO EXPRESS-NEWS, Feb. 14, 2009, at 2B; Sarah Lucero, *Murder Spurs Change in Law*, KENS5.COM (June 24, 2010, 2:56 PM), <http://www.kens5.com/on-tv/kens-reporters/sarah-lucero/Murder-spurs-change-in-law.html>. The term "love triangle" is used in this Recent Development to refer to situations involving two people being romantically interested in the same person.

18. A protective order is defined as "a court order prohibiting or restricting a party from engaging in conduct . . . that unduly annoys or burdens the opposing party . . ."

violence indicates that there has been a demand for protection from threats of violence and also suggests the effectiveness of protective orders in preventing crimes.¹⁹ Until the 1970s, there was little help for victims of family violence.²⁰ For example, in 1976, only two states offered civil protective orders for domestic violence, but within twenty years, all fifty states had some type of civil protective order.²¹

Lawmakers, responding to gaps in coverage, have continued to increase protection for victims of domestic abuse who have come to rely on protective orders for their safety.²² In 1979, the Texas

BLACK'S LAW DICTIONARY 1343 (9th ed. 2009). A temporary protective order is an emergency protective order that does not require notice, but does require that the perpetrator be served with the order and a hearing be held in a timely manner after it has been issued. TEX. FAM. CODE ANN. § 83.001(a) (West 2008). A temporary ex parte protective order is used when there is a threat of violence that cannot wait for a hearing. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 100 (2005); David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 85 (2008). In Texas, an application for a temporary ex parte order must include a detailed description of the facts and the reason for an immediate protective order. FAM. § 82.009 (West Supp. 2011). The temporary ex parte order lasts up to twenty days, unless extended. *Id.* § 83.002 (West 2008). Generally, a hearing is set within fourteen days after the application for the order has been filed. *Id.* § 84.001.

19. See COLO. REV. STAT. ANN. § 13-14-102 (2011) ("Protective orders promote safety, reduce violence, and prevent serious harm and death."); *D.C. v. F.R.*, 670 A.2d 51, 55 (N.J. Super. Ct. App. Div. 1996) (asserting the purpose of protective orders is the protection of victims and uniformity in prosecution); Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348 (1995) ("The primary legal antidote to domestic violence which is used today by all fifty states, the District of Columbia, the U.S. Virgin Islands, Guam, and Puerto Rico is the civil protection order." (citation omitted)).

20. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 11 (1999); David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 83-84 (2008).

21. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 99-100 (2005); see Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 165 (1993) (establishing that in the 1980s forty-eight states had statutes allowing victims of domestic violence to obtain a civil protective order).

22. See Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 356 (1992) (noting that the purpose of Title IV of the Texas Family Code is to provide civil protective orders as a "remedy for victims of family violence" (citing FAM. §§ 71.01-19 (West 1986 & Supp. 1992))); cf. *Styke v. Sotelo*, 228 P.3d 365, 371 (Haw. Ct. App. 2010) (stating that the legislature considered

Legislature recognized civil protective orders for domestic violence.²³ These orders were exclusively for victims of family violence.²⁴ Later, the legislature extended the definition of “family” to include women involved in divorce actions, unmarried parents of a child, and former members of the same household.²⁵ In 2001, the legislature further extended protection by adding a definition for “dating violence” and including dating violence under the definition of “family violence.”²⁶ In 2011, the definition was again expanded to include third parties to dating violence.²⁷ Given the history to date, it is likely that the law will continue to evolve and encompass additional unprotected victims.

Under the Texas Family Code, individuals who can present evidence of family violence and meet the relationship requirement may submit a request to the court for a protective order.²⁸ The term family violence includes dating violence²⁹ and requires a family, household, or dating relationship.³⁰ Family is defined to include individuals who are related by blood or marriage, former

victims’ reliance on protective orders when writing the law); Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 276 (2004) (conveying that most petitioners for protective orders have experienced physical abuse and half have suffered severe abuse).

23. Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979–1991*, 33 S. TEX. L. REV. 353, 356 (1992); James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1174 (1995).

24. James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1174 (1995).

25. *Id.* at 1177–78; see Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979–1991*, 33 S. TEX. L. REV. 353, 361 (1992) (indicating the expansion of the definition of the word “family” in 1985 to include biological parents regardless of marital status and the expansion in eligibility of former household members by the Texas Legislature in 1987).

26. See FAM. §§ 71.0021, .004 (West 2008 & Supp. 2011) (establishing that “dating violence” is included in the definition of “family violence”); *Rodriguez v. State*, No. 08-01-00308-CR, 2003 WL 550299, at *6 (Tex. App.—El Paso Feb. 27, 2003, no pet.) (mem. op., not designated for publication) (noting that the dating violence portion of Texas Family Code section 71.0021 “was added to the statute on September 1, 2001”).

27. FAM. § 71.0021(a)(1)(B).

28. *Id.* § 83.001 (West 2008); see *Teel v. Shifflett*, 309 S.W.3d 597, 603–04 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (illustrating how the relationship factor is decided by the court).

29. FAM. § 71.004.

30. *Id.* §§ 71.0021, .003, .005 (West 2008 & Supp. 2011).

spouses, or parents of the same child.³¹ People are considered to be of the same household if they live in the same residential unit, regardless of relation.³² In Texas, a dating relationship is defined as a present or past “continuing relationship of a romantic or intimate nature.”³³ It does not include a casual relationship or acquaintanceship.³⁴ Whether a dating relationship exists is based upon three considerations: the relationship’s length, the nature of the relationship, and the “frequency and type of interaction between the persons involved.”³⁵

If the court finds from the information contained in an application for a protective order that there is a clear and present danger of family violence, the court, without further notice to the individual alleged to have committed family violence and without a hearing, may enter a temporary *ex parte* order for the protection of the applicant or any other member of the family or household of the applicant.³⁶

An *ex parte* order is often the first step in obtaining protection that leads to a more permanent protective order.³⁷ After a

31. *See id.* § 71.003 (applying also to parents of same child regardless of marital status and to foster children and parents regardless of whether they live together).

32. *Id.* § 71.005.

33. *Id.* § 71.0021(b).

34. *Id.* § 71.0021(c).

35. *Id.* § 71.0021(b).

36. *Id.* § 83.001(a) (West 2008). Family violence is:

[A]n act by a member or a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

Id. § 71.004(1). Family violence includes in its definition the term “dating violence.” *Id.* § 71.004(3). Dating violence is defined by the code to include an “individual with whom that person has or has had a dating relationship.” *Id.* § 71.0021(a) (West Supp. 2011). A temporary *ex parte* order “may direct a respondent to do or refrain from doing specified acts.” *Id.* § 83.001(b) (West 2008). A violation of a protective order is committed if a person knowingly or intentionally commits family violence, threatens or harasses a protected individual, communicates in a prohibited manner with the protected individual, goes near the residence or place of employment of a protected individual, or possesses a firearm. TEX. PENAL CODE ANN. § 25.07(a) (West Supp. 2011).

37. *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1130 (2009) (explaining that most states allow an *ex parte* hearing for a temporary order until the final hearing on a more permanent protective order); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are*

required hearing, the court can render a more permanent protective order on a finding that “family violence has occurred” and “is likely to occur in the future.”³⁸ Generally, the order can last up to two years.³⁹ Until recently, protective orders did not cover violence against a third party that arises “from the third party’s dating relationship with the former spouse or boyfriend/girlfriend of an individual bent on violence.”⁴⁰ However, as of June 17, 2011, the term “dating violence” was expanded to include violence committed against a victim “because of the victim’s marriage to or dating relationship with an individual with whom the actor is or has been in a dating relationship or marriage.”⁴¹

The laws regarding protective orders throughout the United States illustrate various stages of the evolution of protective order eligibility.⁴² “Every state offers some remedy for domestic

Not, 67 IND. L.J. 1039, 1042 (1992) (“This order will protect the woman until the hearing when the permanent protection order is issued.”); Lowell T. Woods, Jr., Note, *Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders*, 27 IND. L. REV. 449, 453–54 (1993) (stating that most states will issue an ex parte order if the victim shows that she is in danger of being harmed before she can obtain a more permanent remedy).

38. FAM. § 85.001(a) (West Supp. 2011); see *Teel v. Shifflett*, 309 S.W.3d 597, 604 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (showing sufficiency for finding that violence was likely to occur in the future).

39. FAM. § 85.025(a) (West Supp. 2011).

40. Press Release, Susan D. Reed, Criminal Dist. Att’y for Bexar Cnty., DA Seeks Change to Law in Wake of Appleby Murder (Feb. 11, 2009), available at <http://www.bexar.org/da2/PressRelease/2009/0211.htm>; accord Sarah Lucero, *Murder Spurs Change in Law*, KENS5.COM (June 24, 2010, 2:56 PM), <http://www.kens5.com/on-tv/kens-reporters/sarah-lucero/Murder-spurs-change-in-law.html> (acknowledging a gap in the law for third parties); see Carlos Uresti, *Legislature Gets a Second Chance to Pass Kristy Appleby Protective Order Bill*, TEX. STATE SENATE (Dec. 10, 2010), <http://www.senate.state.tx.us/75r/senate/members/dist19/pr10/p121010a.htm> (advocating passage of an amendment to close the loophole).

41. FAM. § 71.0021(a).

42. See Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 514 (2008) (“State laws addressing domestic violence differ on whom the state recognizes as worthy of protection as a victim.”); see also Matthew Litsky, Note, *Explaining the Legal System’s Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 159–60 (1990) (illustrating the evolution of Montana’s legislation on protective orders). See generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 814–42 (1993) (surveying the different relationships that determine protective order eligibility among the fifty states). Some states use strict definitions of family, which require a blood, marriage, or co-parenting association. Orly

violence within marriage, and most states cover certain individuals who face domestic abuse outside of marriage.”⁴³ Oklahoma, for example, includes current spouses of former spouses in its definition of family in the Protection from Domestic Abuse Act.⁴⁴ Many states offer the same protections that Texas law provided before the Kristy Appleby Act was passed.⁴⁵ However, not all states require a relationship to obtain an ex parte protective order.⁴⁶ For example, Colorado allows anyone to obtain a protective order, ex parte or otherwise, to prevent “assaults and threatened bodily harm,” domestic abuse, “emotional abuse of the elderly or of an at-risk adult,” or stalking.⁴⁷ Georgia allows victims of stalking to obtain temporary ex parte protective orders by alleging the elements of the offense and establishing probable cause by a preponderance of the evidence.⁴⁸

Additionally, in Texas, temporary protective orders via a magistrate’s emergency order are available after an arrest for sexual assault and stalking.⁴⁹ For a conviction of stalking, Texas

Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 514 (2008). Other states look for both the relationship and spatial requirement, while others look to either the relationship or the spatial factors and allow courts broad discretion in determining what constitutes domestic violence. *Id.* at 514–15.

43. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1851 (2006) (citing Carla M. Da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN’S STUD. 251, 274 (1994)).

44. OKLA. STAT. ANN. tit. 22, § 60.1 (West Supp. 2012) (“Family or household members” means: . . . spouses, . . . ex-spouses, [and] present spouses of ex-spouses.”).

45. See 750 ILL. COMP. STAT. ANN. 60/103 (LexisNexis Supp. 2011) (including under “family or household members” those “persons who have or have had a dating or engagement relationship”); OHIO REV. CODE ANN. § 2919.26 (LexisNexis Supp. 2011) (detailing the process to file a motion for temporary protection order); WASH. REV. CODE ANN. § 26.50.010 (LexisNexis 2010) (establishing that persons sixteen-years-old-plus who have had a dating relationship qualify for protection).

46. See COLO. REV. STAT. ANN. § 13-14-102 (2011) (delineating the purposes qualifying for civil protective orders rather than which parties may obtain one); GA. CODE ANN. § 16-5-94 (2011) (allowing an ex parte order based on a petition alleging stalking behavior); see also Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 107 (2005) (stating that some states offer protective orders without a relationship requirement but that these orders do not “confer the same benefits as domestic violence protection orders”).

47. COLO. REV. STAT. § 13-14-102.

48. GA. CODE § 16-5-94; see *Rawcliffe v. Rawcliffe*, 641 S.E.2d 255, 257 (Ga. Ct. App. 2007) (utilizing the “preponderance of the evidence standard” in finding a stalking offense).

49. TEX. CODE CRIM. PROC. ANN. art. 17.292 (West Supp. 2011).

Penal Code section 42.072 requires that the offense be committed on “more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person.”⁵⁰ The offense must be committed with knowledge that it is threatening and cause fear in the other person based on a reasonable person standard.⁵¹ A magistrate “may issue an order for emergency protection” only *after* an arrest for an offense of stalking.⁵² This protection can be difficult to obtain if there is not enough evidence to move forward with criminal proceedings.

Nevertheless, a magistrate’s emergency order is only available after an arrest.⁵³ Notice and a hearing are prerequisites to the issuance of the protective order.⁵⁴ In contrast, a temporary protective order can be issued *ex parte* upon a showing of clear and present danger of family violence without notice or a hearing beforehand.⁵⁵

B. *Effectiveness of Protective Orders*

In *Manning v. Willet*,⁵⁶ the Kentucky Court of Appeals illustrated the legislative intent behind domestic violence laws—preventing further acts of violence and aiding domestic violence victims.⁵⁷ Protective orders have been shown to fulfill their intended role of improving the safety of the protected individual.⁵⁸

50. TEX. PENAL CODE ANN. § 42.072(a) (West Supp. 2011).

51. *Id.* § 42.072(a) (West 2009).

52. CODE CRIM. PROC. art. 17.292(a).

53. *Id.*

54. *Id.* art. 17.292(b).

55. TEX. FAM. CODE ANN. § 83.001(a) (West 2008).

56. *Manning v. Willett*, 221 S.W.3d 394 (Ky. Ct. App. 2007).

57. *Id.* at 396.

58. See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1138 (2009) (contending that protective orders have been successful in decreasing abuse); Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 95 (2005) (“Studies suggest that protection orders are effective in preventing and de[-]escalating some forms of domestic violence.”); Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 277 (2004) (asserting that protective orders generally deter violent acts and decrease the likelihood of subsequent abuse). The likelihood that future violence is prevented largely depends upon the intensity of the prosecution and the strength of restrictions placed on the abuser. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 12 (1999); Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of*

Furthermore, the “rise in the use of protective orders by victims of domestic violence evidences an extensive belief in their effectiveness.”⁵⁹ In fact, even when protective orders are violated,⁶⁰ the order still acts as an effective deterrent from repeated acts of violence.⁶¹ Furthermore, temporary or ex parte protective orders provide added security for immediate protection.⁶²

Preventing further violence is only one measure of the effectiveness of protective orders.⁶³ Another reason protective

Domestic Violence?, 4 WYO. L. REV. 271, 276–77 (2004).

59. Lowell T. Woods, Jr., Note, *Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders*, 27 IND. L. REV. 449, 456 (1993); accord Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 276–77 (2004) (reporting that victims request protective orders as a remedy to abuse); see *Teel v. Shifflett*, 309 S.W.3d 597, 600 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (noting that Shifflett filed for protective order as a remedy to family violence). See generally *Vongontard v. Tippit*, 137 S.W.3d 109, 114 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (illustrating the victim’s desire for protection via a protective order).

60. For example, a protective order may be violated when a perpetrator makes prohibited contact with the victim. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 277 (2004); see TEX. PENAL CODE ANN. § 25.07 (West Supp. 2011) (enumerating when a violation of a protective order has been committed in Texas).

61. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 277 (2004); Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 71–72 (2009); see Karen Tracy, Note, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 478–79 (1997) (contending that the court’s involvement makes a physical separation more likely, thereby decreasing physical assaults).

62. See Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 100 (2005) (explaining that most jurisdictions can issue a temporary order without a hearing for immediate protection); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1042 (1992) (indicating that the purpose of temporary orders is to protect the victim from harassment and intimidation while other matters are pending); Lowell T. Woods, Jr., Note, *Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders*, 27 IND. L. REV. 449, 453 (1993) (stating most states allow for issuance of an ex parte order for immediate protection).

63. See Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 277 (2004) (promulgating that creating a record of abuse is part of a protective order’s effectiveness); Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 69 (2009) (acknowledging some of the effects of protective orders—end to physical assaults, condemnation of the abuse, and creation of a public record of the violence); Karen Tracy, Note, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 478–79 (1997) (listing several factors that address the effectiveness of a protective order).

orders are effective is because they show that society recognizes the violent behavior as criminal.⁶⁴ Protective orders send a strong message to all concerned, particularly the abuser, that the court will do what is necessary to protect victims and hold abusers accountable for their actions.⁶⁵ For example, courts can enforce counseling where needed.⁶⁶ Moreover, a protective order draws attention to the problem, which interferes with the abuser's ability to keep the abuse quiet.⁶⁷

Another important role of protective orders is to empower the victim.⁶⁸ "Studies have shown that the mere act of applying for a protective order is associated with helping victims improve their sense of well-being and control."⁶⁹ Specifically, victims feel more

64. See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1129 (2009) (stating that an advantage of protective orders is that they tell the abuser the victim's objections to the abuser's behavior); Karen Tracy, Note, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 479 (1997) (opining that an abuser may not know his actions are wrong until the protective order is issued); see also Villarreal v. State, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009) (affirming a criminal conviction for violation of a protective order on a finding of family violence resulting from dating violence).

65. Manning v. Willett, 221 S.W.3d 394, 398 (Ky. Ct. App. 2007); cf. Bedinghaus v. Adams, No. 2-08-096-CV, 2009 WL 279388, at *4 (Tex. App.—Fort Worth Feb. 5, 2009, no. pet.) (mem. op.) (illustrating that threats, excessive emails and texts, contacting the victim's family, and following or having the victim followed were sufficient for a finding that family violence had occurred and was likely to occur in the future); *In re Epperson*, 213 S.W.3d 541, 544 (Tex. App.—Texarkana 2007, no. pet.) (supporting the contention that society takes family violence seriously in finding sufficient evidence warranting a protective order); Banargent v. Brent, No. 14-05-00574-CV, 2006 WL 462268, at *2 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, no. pet.) (mem. op.) (holding that the evidence was sufficient to affirm a protective order because the abuser repeatedly stabbed the victim and had a history of abuse).

66. Karen Tracy, Note, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 478–79 (1997); see Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 72 (2009) (noting that many abusers retreat after a protective order is issued due to the threat of having to go to court, mandatory counseling, or jail time).

67. Karen Tracy, Note, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 479 (1997); see Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 277 (2004) (evaluating effectiveness based on protective orders helping to create a record that documents the abuse).

68. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 120 (2005); Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 72 (2009).

69. Manning, 221 S.W.3d at 399; see Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 73 (2009) (summarizing four studies that support the contention that women who obtain protective orders are satisfied with the effectiveness of the orders); Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order*

secure in pursuing legal remedies when they know they are protected throughout the entire process.⁷⁰ Protective order proceedings provide victims with the opportunity to regain some control over their lives by telling their stories, informing the abuser that his actions are wrong, and “making a public record of the abuse.”⁷¹ A victim who applies for a protective order is empowered to make decisions and is more likely to leave the abuser.⁷² Additionally, filing for the order brings victims into contact with community resources that aid and support them.⁷³

C. Enforcement of Protective Orders

Originally, a finding of contempt was the method used to enforce protective orders.⁷⁴ Over time, however, arrest was found to be the most effective way to protect victims of abuse.⁷⁵ This

Coverage: A Call for Reform, 23 YALE L. & POL'Y REV. 93, 95 (2005) (stating that one way protective orders do their job is “by giving a victim a sense of control”). A study by the National Center for Courts found that having protective orders made 80% of the surveyed victims feel safer. Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 73 (2009). A Wisconsin study indicated that 94% of those surveyed felt good about obtaining a protective order, while another study of four states reported that 72% of women rated the protective orders as effective. *Id.* Furthermore, 84% of the victims surveyed in Colorado felt safer after receiving a protective order. *Id.*

70. Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1042 (1992); accord Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 119 (2005) (portraying how temporary protective orders provide a sense of security because they can be obtained quickly as opposed to a criminal conviction or more permanent order).

71. Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1129 (2009); see Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 72 (2009) (agreeing that the victim is empowered by having her “day in court”).

72. Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 72–74 (2009).

73. See *id.* at 73 (filing a protective order brings the victim “into contact with the legal system, which can lead her to other community resources like social services agencies and battered women’s support groups”).

74. See Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979–1991*, 33 S. TEX. L. REV. 353, 367 (1992) (showing that protective orders were punishable by contempt until the legislature made violating protective orders a crime); James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1176 (1995) (stating that courts may use their contempt powers to enforce protective orders).

75. See Matthew Litsky, Note, *Explaining the Legal System’s Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 163

issue was significant enough to incorporate into the Texas Constitution:

The legislature by general law may provide that any person who violates an order for emergency protection . . . or who violates an active protective order rendered by a court in a family violence case, including a temporary ex parte order . . . , or who engages in conduct that constitutes an offense involving the violation of an order described by this section may be taken into custody.⁷⁶

Consequently, the Texas Code of Criminal Procedure was amended to provide better protection.⁷⁷ The amended language provided a statutory exception to the requirement of an arrest warrant.⁷⁸ The exception includes situations where there is probable cause that an individual is violating a protective order.⁷⁹ An arrest most pointedly conveys to the attacker and to society that the abusive behavior is wrong and will not be tolerated.⁸⁰

(1990) (contending that an arrest is the most effective protection for victims even if it does not lead to a conviction); *see also* Helen L. Monaco, *The Special Relationship Doctrine in Domestic Protective Order Cases*, 61 DEF. COUNS. J. 383, 391 (1994) (asserting the importance of arrests in deterring domestic violence: “a repeat assault occurred to only [15%] of victims who telephoned the police following the attack, but to [41%] of those who did not contact the police” (citing Sheila M. Murphy, *Orders of Protection & the Battered Woman Syndrome*, 23 LOY. U. CHI. L.J. 397, 399 n.11 (1992))).

76. TEX. CONST. art. I, § 11c.

77. Act of June 15, 1991, 72d Leg., R.S., ch. 542, § 9, 1991 Tex. Gen. Laws 1877, 1879–80 (West) (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(3) (West Supp. 2011)); *accord* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 369 (1992) (considering the amendment to Texas Code of Criminal Procedure article 14.03 to be a major change advancing enforcement of protective orders); *see* James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1180 (1995) (noting the change in the law authorizing warrantless arrests for protective order violations).

78. Act of June 15, 1991 § 9; *see* Subia v. State, 836 S.W.2d 711, 713–14 (Tex. App.—El Paso 1992, no writ) (listing the circumstances under which a warrantless arrest is authorized); *see also* Dixon v. State, No. 13-04-433-CR, 2005 WL 2060628, at *2 (Tex. App.—Corpus Christi Aug. 26, 2005, pet. denied) (mem. op., not designated for publication) (illustrating a justified warrantless arrest under article 14.03(a)(3)).

79. CODE CRIM. PROC. art. 14.03(a)(3).

80. Matthew Litsky, Note, *Explaining the Legal System’s Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 163 (1990); *accord* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 366 (1992) (emphasizing the importance of a consequence to violating a protective order and specifically naming arrest as the most effective).

Clearly, law enforcement personnel are an important piece in the effectiveness of protective orders.⁸¹

Attorneys also play a significant role in obtaining protection.⁸² Abusers are more likely to plead guilty when the prosecutor has done a thorough and careful job.⁸³ But even when there are no criminal proceedings, “[v]ictims of domestic violence are in ‘direct need of assistance from attorneys in civil protection order proceedings’” as well.⁸⁴ Victims that have legal representation are more likely to obtain the type of protection they need.⁸⁵

Moreover, courts play a crucial role in preventing violence.⁸⁶

81. See Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1853 (2006) (reporting that arrest is the appropriate response to abusive scenarios); Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 160 (1990) (stating that “law enforcement personnel are in a position to help” victims of domestic violence).

82. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 845 (1993) (suggesting the importance of attorneys in the protective order process by stating that “[i]deally, the country needs more attorneys who are able and willing to act as battered women’s advocates” (citing TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS, D.C. COURTS, FINAL REPORT 146, 161 (1992))); Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 166 (1990) (contending that attorneys need to use their power in the legal system to help stop violence).

83. Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 167 (1990); cf. Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1043–44 (1992) (illustrating the benefit of having an attorney for cross-examination, preparation of the victim, protection from opposing attorney’s tactics and questions, and controlling the direction of testimony).

84. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 309 (2004) (quoting Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 812 (1993)).

85. *Id.*; accord Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 812 (1993) (reporting that women who have attorneys are more likely to obtain protective orders, and the orders they obtain are more effective than orders obtained by women without attorneys).

86. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 303 (2004) (asserting that courts are integral to preventing domestic violence); cf. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 13 (1999) (indicating that a failure of the courts to uphold protective order laws hinders the prevention of violence).

The presiding judge has the authority to address the needs of the victim, monitor and mandate interventions of the attacker, and send the message to the public that violence and threats thereof will not be tolerated.⁸⁷ As a result, the attitudes and behaviors of judges impact the effectiveness of protective orders on a foundational level.⁸⁸ “By ensuring that all parties are provided with procedural justice, judges can influence responsiveness to their orders.”⁸⁹

D. *Due Process Concerns*

There are also due process concerns with the issuance of protective orders.⁹⁰ For the most part, these concerns regard property interests or liberty interests involving parent-child relationships.⁹¹ However, due process considerations also concern limits to movement.⁹² Yet, when the person whose movement is restricted is deemed a danger to others, the restriction is “not necessarily a violation of due process.”⁹³ The Supreme Court of

87. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 302 (2004); see James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1199 (1995) (“Judges must employ the wide variety of remedies available in forming and enforcing protective orders, including incarceration and orders to submit to counseling.” (citing GENDER BIAS TASK FORCE OF TEX., SUPREME COURT OF TEX., FINAL REPORT 9 (1994); Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 210 (1993); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1050 (1992))).

88. Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 172 (1990).

89. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 48–49 (1999).

90. David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 94 (2008).

91. *Id.* at 94–95.

92. See *Coyle v. Compton*, 940 P.2d 404, 413–14 (Haw. Ct. App. 1997) (noting that protective orders issued pursuant to Hawaii law “appear to impinge upon a person’s fundamental freedom of movement”).

93. Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 79 (2009); see *Coyle*, 940 P.2d at 414 (“However, a person’s freedom of movement is not absolute. Rather, [i]t is generally recognized that in the exercise of its police power the

the United States has stated, “the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.”⁹⁴

Nevertheless, even if there are due process concerns, courts have held that protecting victims of violence outweighs individual liberty concerns when the deprivations of liberty are temporary and a hearing is promptly held.⁹⁵ In Texas, the court must set a

State may curtail or restrict acts of individuals unless the curtailments or restrictions unreasonably infringe upon the fundamental personal rights of individuals.” (alteration in original) (quoting *State v. Shigematsu*, 483 P.2d 997, 999 (Haw. 1971))).

94. *Zemel v. Rusk*, 381 U.S. 1, 14 (1965) (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 505–14 (1964); *Schachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955); *id.* at 944 (Edgerton, J., concurring); ZECHARIAH CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 192 (1956); *FREEDOM TO TRAVEL, REPORT OF SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES, ASS’N OF THE BAR OF THE CITY OF NEW YORK* 53, 55 (1958)).

95. *See Ex parte Flores*, 130 S.W.3d 100, 106–07 (Tex. App.—El Paso 2003, pet. ref’d) (examining judicial decisions in other jurisdictions that have held statutes authorizing the issuance of protective orders without a hearing to be constitutional (citing *Sanders v. Shepard*, 541 N.E.2d 1150, 1155 (Ill. App. Ct. 1989); *State v. John Doe*, 765 A.2d 518 (Conn. Super. Ct. 2000); *People v. Koertge*, 701 N.Y.S. 2d 588, 593–96 (Dist. Ct. 1998)); *accord Rogers v. State*, 183 S.W.3d 853, 867 (Tex. App.—Tyler 2005, no pet.) (“The temporary and emergency nature of emergency protective orders allows them to pass constitutional muster.” (citing *Flores*, 130 S.W.3d at 107)); *see also Blazel v. Bradley*, 698 F. Supp. 756, 763–64, 768 (W.D. Wis. 1988) (weighing the need for prompt action for the victim and the use of the courts to issue the order against the short amount of time that the accused is deprived of liberty before the hearing, and concluding that due process protections were sufficient); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1058 (1992) (explaining that the court will weigh the victim’s interest in safety, the attacker’s interest in not being erroneously deprived of due process, and any governmental interests in deciding “what level of process is due”). *See generally Coyle*, 940 P.2d at 414 (“[T]here is no constitutionally protected right to remain free in [one’s] home after physically harming someone.” (second alteration in original) (quoting *State v. Karmeenui*, 753 P.2d 1250, 1252 (Haw. 1988))); David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL’Y 83, 97 (2008) (recognizing judicial acceptance that the victim’s immediate need for protection “outweighs the [abuser’s] interest in ‘prior notice and hearing’”). Generally, there are three elements used to determine what due process requires: private interests, “government’s interest, and the risk that the procedures used will lead to erroneous decisions.” *Striedel v. Striedel*, 15 S.W.3d 163, 167 (Tex. App.—Corpus Christi 2000, no pet.) (quoting *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 28–33 (1981) (internal quotation marks omitted)). When the government seeks to terminate a protected interest, due process requires that the individual must first have “notice and an opportunity to be heard.” *Blazel*, 698 F. Supp. at 761 (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974)) (internal quotation marks omitted); *accord Flores*, 130 S.W.3d at 106 (reiterating that notice and opportunity for an appropriate hearing must be given prior to the

date and time for the hearing no “later than the [fourteenth] day after the date the application is filed.”⁹⁶ Additionally, “[a] temporary ex parte order is valid for the period specified in the order, not to exceed [twenty] days,” illustrating that it is, in fact, temporary.⁹⁷ Moreover, the requirement for affidavits to detail the harm or threat of harm provides further protection from unsound deprivations of liberty interests.⁹⁸

Texas requires that an application for a temporary ex parte order “contain a detailed description of the facts and circumstances concerning the alleged family violence.”⁹⁹ The application must also illustrate the need for immediacy, including “a description of the threatened harm that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault.”¹⁰⁰ These safeguards are sufficient to satisfy due process when used in conjunction with careful consideration by the presiding judge in determining that the harm is immediate and irreparable.¹⁰¹

termination of a protected interest by the government). There is, however, an exception in emergency situations by “a showing of exigent circumstances”—the threat of violence that warrants a protective order. *Flores*, 130 S.W.3d at 106.

96. TEX. FAM. CODE ANN. § 84.001 (West 2008).

97. *Id.* § 83.002.

98. David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL’Y 83, 98 (2008). The Supreme Court has held that deprivation of rights without a hearing is not a violation of due process if certain safeguards are met. *Blazel*, 698 F. Supp. at 764 (citing *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 605 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 90–91 (1972); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 338 (1969)).

99. FAM. § 82.009 (West Supp. 2011).

100. *Id.* § 82.0085(a)(2) (West 2008).

101. See *Blazel*, 698 F. Supp. at 768 (holding that a Wisconsin statute required “the procedural safeguards necessary to satisfy the due process clause”); David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL’Y 83, 116–17 (2008) (stressing the importance of a judge’s application of procedural safeguards in the protection of due process). Specifically, there must be “participation by a judicial officer; a prompt post-deprivation hearing; verified petitions or affidavits containing detailed allegations based on personal knowledge; and risk of immediate and irreparable harm.” *Blazel*, 698 F. Supp. at 763–64 (citations omitted); see Mary Schouvieller, *Leaping Without Looking: Chapter 142’s Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota*, 14 LAW & INEQ. 593, 622 (1996) (identifying that due process mandates an opportunity to be heard and to make a meaningful response, such that the hearing is fair).

III. ILLUSTRATION OF EVOLUTION FROM NEED TO LAW

A. *Incidence: Violence Against a Third Party to a Relationship*

Kristy Appleby's situation brought to light a lack of protection in the Texas Family Code due to its relationship requirement.¹⁰² Adriana Biggs, Chief of White Collar Crimes Division in the Bexar County District Attorney's Office, stated that her office often sees love triangles "end in such things as criminal mischief, tire slashing[,] or destruction of property."¹⁰³ Additionally, Policy Director for Texas Council on Family Violence (TCFV) Aaron Setliff indicated "third parties too often use threats against third parties as a method of power and control over their intimate partners."¹⁰⁴ Finally, Texas Representative Joaquin Castro stated: "As somebody who does family law, I see folks who come into my office and who are being threatened and harassed by third parties, by their spouse's ex-husband or an ex-boyfriend or girlfriend."¹⁰⁵

Murders resulting from love triangles are singled out in Federal Bureau of Investigation (FBI) crime statistics.¹⁰⁶ The FBI statistics indicate that there were eighty-seven murders involving love triangles in 2009.¹⁰⁷ Of those, twenty of the victims would fall under the definition for family in most states.¹⁰⁸ On the other hand, fifty-three acquaintances or strangers were murdered.¹⁰⁹ The numbers illustrate that deadly conflicts do result from love

102. See Press Release, Susan D. Reed, Criminal Dist. Att'y for Bexar Cnty., DA Seeks Change to Law in Wake of Appleby Murder (Feb. 11, 2009), *available at* <http://www.bexar.org/da2/PressRelease/2009/0211.htm> (describing a gap in the law where third parties in a love triangle are not protected).

103. Sarah Lucero, *Murder Spurs Change in Law*, KENS5 (June 24, 2010, 2:56 PM), <http://www.kens5.com/on-tv/kens-reporters/sarah-lucero/Murder-spurs-change-in-law.html>.

104. Telephone Interview with Aaron Setliff, Policy Dir., Tex. Council on Family Violence (Nov. 8, 2010).

105. Gilbert Garcia, *Two San Antonio Democrats Think Safety First*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2010, at 1B.

106. *Expanded Homicide Data Table 10: Murder Circumstances by Relationship 2009*, THE FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2009> (last visited Dec. 31, 2010).

107. *Id.*

108. See *id.* (reporting one husband, six wives, one father, two boyfriends, and ten girlfriends were murdered in circumstances involving a love triangle in 2009).

109. See *id.* (naming forty-three acquaintances and ten strangers as love triangle murder victims for 2009).

triangles.¹¹⁰ Furthermore, a search of recent news outlets reveals several stories in which third parties in love triangles committed violence, including deadly violence, against their rivals in particular.¹¹¹

There are several noted behaviors that jealousy may induce against a rival.¹¹² The instigator might try to seek information from the rival in an effort to learn more about the rival or the rival relationship.¹¹³ Jealousy might also cause the instigator to try to sabotage the rival relationship by communicating “negative information (whether true or untrue) about the” love interest.¹¹⁴ The instigator might also threaten the rival.¹¹⁵ Threats could include “aggressive communication, hostility, and warnings.”¹¹⁶ Social science research shows that threats and harassment that are not stopped often escalate to greater violence.¹¹⁷ This escalation to violence would be the most damaging behavior, causing “harm

110. *Id.*

111. See Stephen Dean, *HPD: Women Kills Ex-Boyfriend's Girlfriend, Self*, CLICK 2 HOUS. (Dec. 24, 2008, 4:51 PM), <http://www.click2houston.com/news/18351736/detail.html> (page removed online and on file with the *St. Mary's Law Journal*) (reporting the murder committed by a man's ex-girlfriend against his new girlfriend in Houston, Texas); Meg Farris, *Infant Killed, Mother and Father Shot in Biloxi; Ex-Wife Arrested*, WWLTV (Oct. 21, 2009, 4:26 PM), <http://www.wwltv.com/archive/65310282.html> (telling the account of the violent crime committed by a man's ex-wife against his current girlfriend, infant child, and him); Alejandro Martinez-Cabrera & Marvin Hurst, *Man Charged with Stabbing Ex-Girlfriend's New Beau*, MY SAN ANTONIO (Oct. 30, 2008, 12:50 PM), http://www.mysanantonio.com/news/local_news/Man_charged_with_stabbing_ex-girl_friends_new_beau.html (describing the violence committed by a man against his ex-girlfriend's new boyfriend in San Antonio, Texas); Matt Phelps, *Woman Who Stabbed Boyfriend's Ex 18 Times Is Convicted Murderer*, KIRKLAND REP. (Nov. 27, 2009), <http://www.kirklandreporter.com/news/73836597.html> (relaying the story of a man's girlfriend violently attacking his ex-girlfriend in an office building parking garage); Jessica Testa, *Boyfriend Sought in Ex-Boyfriend's Stabbing*, AZCENTRAL (Mar. 22, 2010, 9:54 AM), <http://www.azcentral.com/news/articles/2010/03/22/20100322phoenix-stabbing-abrk0322.html> (recounting the events in which a woman's boyfriend attacked her ex-boyfriend after a disagreement).

112. Laura K. Guerrero & Peter A. Andersen, *The Dark Side of Jealousy and Envy: Desire, Delusion, Desperation, and Destructive Communication*, in *THE DARK SIDE OF CLOSE RELATIONSHIPS* 33, 53 (Brian H. Spitzberg & William R. Cupach eds., 1998).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *HOFSTRA L. REV.* 801, 859 (1993).

to the rival or the rival's property," just as in a case of domestic violence.¹¹⁸

B. *Similarities to Victims Protected*

Victims of violence or threats of violence from a romantic rival are similar to victims of family or dating violence in that they are frightened and have their liberty restricted by their attackers.¹¹⁹ Similar to domestic violence, third-party victims are more vulnerable because of their relationship with the person with whom the attacker also has a relationship.¹²⁰ Because "emotions are deep and conflicted" due to the relationships, "[t]he perpetrator has a greater interest in returning to, and is more vested in continuing with, his criminal activity towards the victim."¹²¹ Emotions stemming from jealousy are considered "complex and negative" and include varying levels of "anger, hostility, resentment, and suspicion" that "may be generated toward the mate and the rival," but notably, anger is the dominant emotion.¹²²

Harassing and threatening behavior is known to escalate to

118. Laura K. Guerrero & Peter A. Andersen, *The Dark Side of Jealousy and Envy: Desire, Delusion, Desperation, and Destructive Communication*, in *THE DARK SIDE OF CLOSE RELATIONSHIPS* 33, 53 (Brian H. Spitzberg & William R. Cupach eds., 1998). See generally *Teel v. Shifflett*, 309 S.W.3d 597, 600 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (illustrating the escalation of behaviors from threatening to violent); *In re Epperson*, 213 S.W.3d 541, 543 (Tex. App.—Texarkana 2007, no pet.) (showing the type of harm that qualifies as domestic violence).

119. See Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, *SAN ANTONIO EXPRESS-NEWS*, Feb. 12, 2009, at 1A (detailing how restricted Appleby's freedom was while she lived in fear; she lived with family members and had them drive her to work); cf. Nicole Rodriguez Naeser, Comment, *The Oregon Court's Stalking Failure*, 41 *U. TOL. L. REV.* 703, 734 (2010) (referring to the loss of autonomy and liberty for a victim of stalking).

120. Cf. *911 Calls Released from Appleby Shooting: Victim Tried to Get Protective Order*, *KSAT* (Mar. 7, 2009, 7:49 AM), <http://www.ksat.com/news/18875489/detail.html> (page removed online and on file with the *St. Mary's Law Journal*) (indicating that the victim was vulnerable because of her dating relationship and was unable to obtain a protective order against her boyfriend's former wife); Meg Farris, *Infant Killed, Mother and Father Shot in Biloxi; Ex-Wife Arrested*, *WWLTV* (Oct. 21, 2009, 4:26 PM), <http://www.wwltv.com/archive/65310282.html> (relaying the events in which a woman and her child, who was killed, were victimized because of their relationship with the attacker's ex-husband).

121. Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 *HASTINGS WOMEN'S L.J.* 339, 345 (1995). Where there is a familial relationship, perpetrators have more at stake. *Id.*

122. AARON BEN-ZE'EV, *THE SUBTLETY OF EMOTIONS* 301 (2000).

violent conduct, and as this conduct continues, it becomes increasingly dangerous as the level of harm increases.¹²³ This type of escalation is seen in domestic violence, stalking, and cases like Appleby's.¹²⁴ For this reason, victims of domestic abuse are able to obtain protection "based on a wide range of abuse in order to permit early intervention and prevention of more serious injuries."¹²⁵

In one Texas case, behaviors that were found sufficient to qualify as domestic violence included taking and hiding the partner's possessions, throwing household items, kicking pets, threatening with a weapon, slashing the partner's clothes and other belongings, burning a partner with a cigarette, and slashing a partner with a knife.¹²⁶ A comparison to the type of violence

123. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 848 (1993).

124. *Id.*; see Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 7 (1999) (discussing the escalation of violence in domestic situations); Laura K. Guerrero & Peter A. Andersen, *The Dark Side of Jealousy and Envy: Desire, Delusion, Desperation, and Destructive Communication*, in THE DARK SIDE OF CLOSE RELATIONSHIPS 33, 53 (Brian H. Spitzberg & William R. Cupach eds., 1998) (addressing the potential for escalation of behaviors from harassing to violent when jealousy is involved); Lowell T. Woods, Jr., Note, *Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders*, 27 IND. L. REV. 449, 452 (1993) (reporting that violence escalates in stalking behaviors). See generally Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A (detailing the violent episodes ending in the murder of Appleby).

125. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 848 (1993).

126. See *Teel v. Shifflett*, 309 S.W.3d 597, 600, 604 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (referring to the trial court's finding that an episode involving the listed behaviors constituted family violence, and holding that there was sufficient evidence to support the determination that future violence was likely to occur). A reviewing court will find that "the evidence is legally sufficient" to support a protective order based on a likelihood of future violence "[i]f more than a scintilla of evidence exists." *Banargent v. Brent*, No. 14-05-00574-CV, 2006 WL 462268, at *1 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, no pet.) (mem. op.); see *Kennell v. Rogers*, No. 03-08-00282-CV, 2008 WL 4951301, at *3 (Tex. App.—Austin Nov. 20, 2008, no pet.) (mem. op.) (affirming a protective order issued after two incidents involving hitting and pushing and after a firearm that had been missing was returned by the respondent); see also *Martauz v. Martauz*, No. 08-MA 135, 2009 WL 1581185, at *1-2 (Ohio Ct. App. June 3, 2009) (concluding that one incident of family violence coupled with a day where husband texted, called, and banged on the house constituted evidence sufficient for a protective order). An Ohio court noted the first family violence incident involved the husband hitting a box out of his wife's hands, which caused a scratch. *Martauz*, 2009 WL 1581185, at *2. The

Kristy Appleby was subjected to shows similar levels of danger.¹²⁷ Appleby was “forced . . . at gunpoint to write [a] suicide note and swallow about [twenty] sleeping pills with whiskey and beer,” and her wrists were cut.¹²⁸ She spent four days in the hospital as a result of the incident.¹²⁹ Accordingly, it is reasonable to provide similar protection to those at risk of similar dangers and abuse.¹³⁰

Members of the Texas Legislature proposed that the Family Code should expand its protection to meet the needs of a victim in a similar situation to Kristy Appleby.¹³¹ There are several reasons for amending the Family Code to extend protection to third-party victims.¹³² Significantly, a victim's relation to his or her attacker is through a family or dating relationship, and thus he or she shares similar vulnerabilities to individuals currently eligible for

second incident consisted of the husband calling the wife twenty times, texting her eleven times, banging on the door and window of her house, and ringing the doorbell ten times. *Id.* at *1-2. Another case in Texas shows that a violent incident is not necessary for issuance of a protective order. *Bedinghaus v. Adams*, No. 2-08-096-CV, 2009 WL 279388, at *1 (Tex. App.—Fort Worth Feb. 5, 2009, no. pet.) (mem. op.). Here, the appellant sent hundreds of emails and text messages, some threatening, hired a private investigator to watch the victim, sent derogatory statements about her to family and friends, and came to her home and place of work. *Id.*

127. See *Woman Shot in Animal Hospital Parking Lot Dies*, KSAT (Feb. 10, 2009, 8:40 PM), <http://www.ksat.com/news/Woman-Shot-In-Animal-Hospital-Parking-Lot-Dies/-/478452/3589016/-/edu4mrz/-/index.html> (indicating that Appleby was subject to danger before her murder).

128. Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A.

129. *Id.*

130. *Cf.* Guillermo Contreras, *No Change in Protective Order Law*, SAN ANTONIO EXPRESS-NEWS, June 5, 2009, at 2B (asserting that there is a loophole in the Texas protective order law); David Saleh Rauf, *Senator Files Bill to Change Law on Protective Orders*, SAN ANTONIO EXPRESS-NEWS, Feb. 14, 2009, at 2B (advancing the proposition that the law needs to be amended because it does not cover third parties to romantic relationships).

131. See Gilbert Garcia, *Two San Antonio Democrats Think Safety First*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2010, at 1B (describing a bill filed by Representative Joaquin Castro); Valentino Lucio, *Woman Is Handed 40-Year Term*, SAN ANTONIO EXPRESS-NEWS (Aug. 20, 2010, 10:18 PM), http://www.mysanantonio.com/news/local_news/article/Woman-is-handed-40-year-term-624499.php (acknowledging the Kristy Appleby Bill introduced by Senator Carlos Uresti).

132. See Press Release, Sen. Carlos I. Uresti, Tex. Sen. Dist. 19, Legislature Gets a Second Chance to Pass Kristy Appleby Protective Order Bill (Dec. 10, 2010), *available at* <http://www.senate.state.tx.us/75r/senate/members/dist19/pr10/p121010a.htm> (stating that Senator Uresti “worked with police, prosecutors, [and] domestic violence advocates” in writing the proposed legislation).

protection.¹³³ The relationships in the love triangle may lead to the sharing of information, which could lead the attacker to the victim.¹³⁴

Furthermore, a protective order under the Family Code is the fastest and least expensive means for the individual and the court to obtain protection.¹³⁵ Notably, laws were already in place for eligible victims to have access to both temporary *ex parte* and more permanent protective orders in the Family Code.¹³⁶ All that was needed was to make third parties to romantic relationships eligible.¹³⁷ A simple change in the language now offers protection to individuals “endangered by a broken or dysfunctional relationship.”¹³⁸

C. *Amended Definition: The Kristy Appleby Act*

Civil protective orders were originally needed because family violence victims were uniquely vulnerable¹³⁹ and law

133. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1882 (2006); see Laura K. Guerrero & Peter A. Andersen, *The Dark Side of Jealousy and Envy: Desire, Delusion, Desperation, and Destructive Communication*, in THE DARK SIDE OF CLOSE RELATIONSHIPS 33, 58 (Brian H. Spitzberg & William R. Cupach eds., 1998) (explaining that some people react violently to feelings of jealousy, and that when the rival is someone they know, the rival may become a target of these intense feelings); Robert Crowe & Roger Croteau, *Confrontation Leads to Fatal Shooting*, SAN ANTONIO EXPRESS-NEWS, Feb. 11, 2009, at 1A (reporting that “[t]he victim and [the] man in the middle were having a relationship” and that the attacker was upset that her ex-husband was in a relationship (internal quotation marks omitted)).

134. Cf. Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 500 (2008) (describing how knowledge gained from relationships can lead to opportunities for domestic violence to occur).

135. See Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 119, 122 (2005) (explaining that protective orders are easier to obtain than criminal solutions and that they are less costly for the victim and the courts); James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1175 (1995) (stating that the Family Code provides for “a relatively expedient and inexpensive scheme for obtaining protective orders” (citing TEX. FAM. CODE ANN. § 71.04(e) (West 1986); *id.* § 71.09(a) (West Supp. 1995))).

136. See FAM. § 83.001 (West 2008) (providing requirements for temporary *ex parte* protective orders); *id.* § 85.001 (West Supp. 2011) (stating what is necessary for the court to issue protective orders).

137. Press Release, Sen. Carlos I. Uresti, Tex. Sen. Dist. 19, Legislature Gets a Second Chance to Pass Kristy Appleby Protective Order Bill (Dec. 10, 2010), available at <http://www.senate.state.tx.us/75r/senate/members/dist19/pr10/p121010a.htm>.

138. *Id.*

139. See Kathryn E. Litchman, Mentorship Article, *Punishing the Protectors: The*

enforcement, judges, and society generally considered domestic violence to be a private issue not warranting police or judicial intervention.¹⁴⁰ However, as the law encompassing protective orders has evolved, so too has its goal.¹⁴¹ Today, the main goal is putting an end to violence.¹⁴²

A significant contributing factor to domestic violence is jealousy.¹⁴³ While it is much more likely that a partner will bear the brunt of violence, the same jealousy does sometimes result in injury or threats of violence to the rival.¹⁴⁴ Accordingly, victims of third-party abuse should be afforded the same protections. While romantic rivals do not have the exact same vulnerabilities with regard to the attacker as partners, the fact that violence

Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct, 38 LOY. U. CHI. L.J. 765, 832 (2007) (contending that victims of domestic violence are vulnerable and dependent upon protection orders for their safety).

140. *See id.* at 771 (stating that even after domestic violence became criminal, it was still considered to be a private issue and seldom reported to law enforcement); David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 83–84 (2008) (describing how the judicial process was slow and largely unavailable to victims).

141. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1867–68 (2006).

142. *See Felton v. Felton*, 679 N.E.2d 672, 674 (Ohio 1997) (noting that the Ohio domestic violence statutes were enacted to ensure the safety of potential domestic violence victims); Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 97 (2005) (“[O]ver time, the domestic violence movement has attempted to refocus the goal from family cohesion to violence termination.”); *see also D.C. v. F.R.*, 670 A.2d 51, 55 (N.J. Super. Ct. App. Div. 1996) (claiming that the purpose of the New Jersey Prevention of Domestic Violence Act of 1991 was to protect victims); Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348 (1995) (expressing that protective orders are the “primary legal antidote to domestic violence” in the United States); Karen Tracy, Note, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 477 (1997) (stating that physical protection is a primary goal of protective orders).

143. Paul E. Mullen, *Jealousy and Violence*, 5 H.K.J. OF PSYCHIATRY 18, 18 (1995).

144. *Id.* at 19; accord Hara Estroff Marano, *Jealousy: Love's Destroyer*, PSYCHOL. TODAY (Dec. 28, 2011), <http://www.psychologytoday.com/articles/200906/jealousy-loves-destroyer> (writing that jealousy can lead to behaviors such as yelling at and derogating the partner or threatening violence against the partner or rival); *see Andrade v. State*, No. 01-07-00780-CR, 2008 WL 2611929, at *1, 3 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet.) (mem. op., not designated for publication) (finding a man's jealousy to be admissible testimony in a trial in which he was convicted of murdering a man who worked with his wife).

results from a relationship and associated feelings of jealousy makes them susceptible for similar reasons.¹⁴⁵

Before the passage of the Kristy Appleby Act, the law did not allow third parties in a love triangle access to civil protective orders.¹⁴⁶ These victims of violence were left without an effective means of protection.

145. See AARON BEN-ZE'EV, *THE SUBTLETY OF EMOTIONS* 291 (2000) (explaining that jealous individuals “want to ‘get even’ with both the mate and the rival”); Paul E. Mullen, *Jealousy and Violence*, 5 H.K.J. OF PSYCHIATRY 18, 20 (1995) (stating that suspicion or knowledge of a rival relationship can lead to jealousy, and lack of control of jealous feelings can lead to violence in some people).

146. See generally Kristy Appleby Act, 82d Leg., R.S., ch. 872, 2011 Tex. Sess. Law Serv. 2214, 2214–15 (West) (codified at TEX. FAM. CODE ANN. § 71.0021(a) (West Supp. 2011) (expanding Family Code protections to third parties of a relationship). The Texas Family Code currently defines “family” as “individuals related by consanguinity or affinity, . . . individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together.” FAM. § 71.003 (West 2008). Texas Family Code section 71.0021(a) formerly defined “dating violence” as:

[A]n act by an individual that is against another individual with whom that person has or has had a dating relationship and that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the individual in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

Act of May 11, 2001, 77th Leg., R.S., ch. 91, §1, 2001 Tex. Gen. Laws 176 (West) (amended 2011) (current version at FAM. § 71.0021(a) (West Supp. 2011)). Dating violence is now defined as:

[A]n act, other than a defensive measure to protect oneself, by an actor that:

- (1) is committed against a victim:
 - (A) with whom the actor has a dating relationship; or
 - (B) because of the victim’s marriage to or dating relationship with an individual with whom the actor is or has been in a dating relationship or marriage; and
- (2) is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim in fear of imminent physical harm, bodily injury, assault, or sexual assault.

FAM. § 71.0021(a) (West Supp. 2011).

A “dating relationship” is defined as:

[A] relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of:

- (1) the length of the relationship;
- (2) the nature of the relationship; and
- (3) the frequency and type of interaction between the persons involved in the relationship.

In states where victims fall outside statutory relationship definitions, victims are unable to obtain domestic violence civil protection orders. In such situations, individuals must rely on criminal courts or creative civil courts to obtain protection. It can be difficult and expensive, and the remedies provided under civil protection order statutes may not be otherwise available. The criminal system may also not suffice because there may not be evidence to sustain proof beyond a reasonable doubt, or the government may simply be unwilling to prosecute.¹⁴⁷

It was a situation like the one described above that prompted the Bexar County District Attorney to propose a change to the protective order laws.¹⁴⁸ Appleby did not qualify for a protective order, and there was not enough evidence for a criminal charge.¹⁴⁹ The intent of the legislation is to “protect a third party from violence arising from the third party’s dating relationship with the former spouse” or dating partner of an individual tending toward violence.¹⁵⁰

In the 81st Texas Legislative Session, the house and senate both proposed an amendment to the definition of dating violence used in the Family Code.¹⁵¹ This proposed change sought to expand protection to individuals like Appleby.¹⁵² Although it did pass

Id. § 71.0021(b). “Family violence” means:

- (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, . . . ;
- (2) abuse, . . . , by a member of a family or household toward a child of the family or household; or
- (3) dating violence

Id. § 71.004 (West 2008).

147. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 107–08 (2005).

148. Press Release, Susan D. Reed, Criminal Dist. Att’y for Bexar Cnty., DA Seeks Change to Law in Wake of Appleby Murder (Feb. 11, 2009), *available at* <http://www.bexar.org/da2/PressRelease/2009/0211.htm>.

149. *Id.*

150. *Id.*

151. Tex. S.B. 843, 81st Leg., R.S. (2009); Tex. H.B. 1986, 81st Leg., R.S. (2009).

152. *See, e.g.*, Tex. S.B. 843 (establishing proposed amendment to Family Code chapter 71). The 2009 proposed legislation sought to redefine “dating violence” in Texas Family Code section 71.0021(a) to include “an act by an actor that is against an individual with whom the actor has or has had a dating relationship, or against another individual who is in a dating relationship with an individual with whom the actor is or has been in a

through the senate, the legislation did not pass in the session because it was held up in the house.¹⁵³

In the 82nd Texas Legislative Session, Senator Carlos Uresti and Representative Joaquin Castro again proposed legislation that would expand the definition of dating violence to include third parties.¹⁵⁴ The proposal sought to add the words “or by an individual against another individual who is in a dating relationship with a third individual with whom the actor is or has been in a dating relationship or marriage.”¹⁵⁵ Their proposal was the same as the 2009 proposed legislation in the Texas House of Representatives.¹⁵⁶ The proposal used the current structure of the law and simply expanded the definition of dating violence.¹⁵⁷

Eventually, more changes were made to the wording of the proposal before the code was amended to include third parties to marriage or dating relationships.¹⁵⁸ Known as the Kristy Appleby Act, the legislation expanded the definition of “dating violence” to include acts of violence against a victim as a result of her marital or

dating relationship or marriage.” *Id.* It also sought to amend Family Code section 71.004 to redefine “family violence” to include “an act by a member of a family or household against . . . an individual with whom another member of the family or household is or has been in a dating relationship.” *Id.*

153. Guillermo Contreras, *No Change in Protective Order Law*, SAN ANTONIO EXPRESS-NEWS, June 5, 2009, at 2B; *see* H.J. of Tex., 81st Leg., R.S. 575 (2009) (referring HB 1986 to judiciary and civil jurisprudence); Valentino Lucio, *Woman Is Handed Forty-Year Term*, SAN ANTONIO EXPRESS-NEWS, Aug. 21, 2010, at 1B (reporting that the senate passed the bill, but it never passed a house vote). In 2009, the senate passed the legislation thirty-one to zero. S.J. of Tex., 81st Leg., R.S. 847 (2009); Telephone Interview with Jason Hassay, Chief of Staff & Gen. Counsel for Tex. Sen. Carlos I. Uresti (Oct. 29, 2010).

154. Tex. S.B. 116, 82d Leg., R.S. (2011); Tex. H.B. 119, 82d Leg., R.S. (2011).

155. Tex. S.B. 116; Tex. H.B. 119.

156. *Compare* Tex. S.B. 116 (proposing expanding the definition of “dating violence” in the Family Code as proposed to the House of Representatives in 2009), *and* Tex. H.B. 119 (suggesting expanding the definition of “dating violence” in the Family Code as proposed to the Texas House of Representatives in 2009), *with* Tex. S.B. 843 (expanding and redefining the definitions for “dating violence” and “family violence” in the Family Code), *and* Tex. H.B. 1986 (recommending expanding the definition of “dating violence” in the Family Code).

157. *See* Tex. S.B. 116 (amending the statute by adding language to protect third parties); Tex. H.B. 119 (same).

158. *See* Kristy Appleby Act, 82d Leg., R.S., ch. 872, § 5, 2011 Tex. Sess. Law Serv. (West) (codified at TEX. FAM. CODE ANN. § 71.0021(a) (West Supp. 2011)) (including acts “against a victim . . . because of the victim’s marriage to or dating relationship with an individual with whom the actor is or has been in a dating relationship or marriage” as dating violence).

dating relationship with the actor.¹⁵⁹ It was passed unanimously in both the Texas senate¹⁶⁰ and house,¹⁶¹ and it took effect on June 17, 2011.¹⁶²

IV. POSSIBILITIES FOR INCREASED COVERAGE: ELIMINATE THE RELATIONSHIP REQUIREMENT

It is likely that protective order law will continue to expand and evolve. Another possible modification is to eliminate the relationship requirement for protective orders and look to substantive factors instead.¹⁶³ This approach addresses the inadequacy of the current system to meet the needs of all potential victims.¹⁶⁴ Moreover, the cyclical and repetition of abuse, along with the psychological harm, is further evidence of the need for heightened protection from recurring abuse without regard to the relationship of the parties.¹⁶⁵

The suggestion is to look to four characteristics that justify heightened protection for domestic violence victims: “accessibility and familiarity; violation of trust; imbalanced power dynamics and control; and dependence.”¹⁶⁶ Accessibility and familiarity exist because of the relationship the attacker has in common with the victim.¹⁶⁷ This relationship provides the attacker with continued access to the victim.¹⁶⁸ Trust enters the equation because people who know each other are more apt to let down their guard due to an expectation that the other person will be trustworthy and not

159. *Id.*

160. S.J. of Tex., 82d Leg., R.S. 2992–93 (2011).

161. H.J. of Tex., 82d Leg., R.S. 4213–14 (2011).

162. *Actions S.B. 116*, TEX. LEGIS. ONLINE, <http://www.legis.state.tx.us/BillLookup/Actions.aspx?LegSess=82R&Bill=SB116> (last visited Mar. 2, 2012).

163. See generally Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1849–50 (2006) (asserting that the current system does not protect all the individuals affected by domestic violence); Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 497–501 (2008) (proposing a change in how victims of abuse are recognized).

164. Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 497 (2008).

165. *Id.* at 507.

166. *Id.* at 500.

167. See *id.* at 500–01 (distinguishing an attack where the victim is known from a random attack).

168. *Id.*

cause harm.¹⁶⁹ Violence makes the attacker feel more powerful and generally leads to the submission of the victim.¹⁷⁰ In domestic violence situations, the victim is often dependent on the abuser emotionally and financially.¹⁷¹ Additionally, the victim may be dependent on the relationships the abuser and victim have in common.¹⁷² The theory is that these four factors should be used in place of the relationship requirement in determining eligibility for protective orders.¹⁷³

V. POSSIBLE EFFECTS OF EXPANDING PROTECTIVE ORDER COVERAGE

A. *Benefits of Coverage*

Expanding the coverage under the Family Code allows third parties to benefit from protective orders¹⁷⁴ that serve to “ensure a victim’s short-term physical protection.”¹⁷⁵ For example, an ex parte temporary protection order can be obtained with a lower burden of proof than protective orders from a criminal court and “can be issued upon the victim’s sworn statement.”¹⁷⁶ Moreover, even the hearing for a longer or more permanent order is held

169. *Id.* at 502.

170. *Id.* at 503.

171. *Id.* at 506–07.

172. *Id.* at 507.

173. *See id.* at 500 (explaining in detail the inadequacy of the current category-based domestic violence jurisprudence and using a formula of personalized abuse as a substantive alternative to the current jurisprudence).

174. *Cf.* Regina DuFresne & Jonathan S. Greene, *Increasing Remedies for Domestic Violence: A Study of Maryland’s 1992 Domestic Violence Act in the Courtroom*, 6 MD. J. CONTEMP. LEGAL ISSUES 155, 156–57 (1995) (reporting that amendments to Maryland law allowed a new class of victims to benefit from protective orders).

175. Karen Tracy, Note, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 477 (1997) (stressing that the first goal of protective orders is to make the victim safer); *see* Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 140 (2005) (stating that the purpose of protective orders is stopping the violence and preventing its escalation).

176. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 119 (2005) (citing Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 165 (1993)); *see* Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1047–48 (1992) (stating a primary advantage of a civil protection order is it is easier to obtain due to the lesser standard of proof and lack of criminal procedural safeguards, and further detailing other advantages of civil protection orders).

within a specified and reasonable amount of time afterwards;¹⁷⁷ in Texas, it is held within two weeks.¹⁷⁸ In contrast, more permanent criminal orders can take months or years to obtain.¹⁷⁹ Accordingly, civil protective orders are a more immediate form of relief to the individual needing protection.¹⁸⁰ As such, they offer better protection than criminal remedies for threatened violence.¹⁸¹

Another benefit to victims is that civil protective orders also offer a wider range of remedies than criminal protective orders.¹⁸² In Texas, civil protective orders can require the attacker to attend counseling, to pay for the costs associated with the protective order, and to surrender firearms.¹⁸³ In contrast, an emergency order issued by a magistrate does not require counseling or the payment of fees and attorney costs.¹⁸⁴

Additionally, civil protective orders give victims more control¹⁸⁵ by enabling them to choose the remedy for the abuse, whether civil, criminal, or no intervention.¹⁸⁶ Many factors can influence a victim's decision to prosecute.¹⁸⁷ Third-party victims

177. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 119 (2005).

178. TEX. FAM. CODE ANN. § 84.001 (West 2008).

179. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 119–20 (2005).

180. Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1048 (1992).

181. See *id.* at 1047–49 (explaining the advantages of civil protection orders and comparing civil protection orders to other criminal and civil remedies).

182. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 121 (2005) (listing numerous examples of the wider range of remedies available from civil protective orders as compared to criminal protective orders).

183. FAM. § 81.003 (West 2008); *id.* § 81.005 (West Supp. 2011); *id.* § 85.022; Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 121 (2005).

184. TEX. CODE CRIM. PROC. ANN. art. 17.292 (West 2005).

185. See Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1047–49 (1992) (explaining the advantages of civil protection orders and comparing civil protection orders to other criminal and civil remedies).

186. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 121 (2005); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1048 (1992).

187. See Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective*

might be reluctant to press charges due to their relationships, financial concerns, or fear of how their attackers may respond.¹⁸⁸ Because these considerations are important to a victim, who is otherwise powerless, the option of a temporary protective order can keep her safe while she is deciding.¹⁸⁹

Now victims like Appleby¹⁹⁰ can benefit from the ease and flexibility of a civil protective order.¹⁹¹ More importantly, a temporary civil protective order, with the potential of becoming more permanent, could be lifesaving¹⁹² because it offers immediate protection without having to meet the criminal burden of proof.¹⁹³

B. *Potential Adverse Effects of Increasing the Number of Protective Orders*

Historically the concerns regarding expanding coverage of protective orders include the potential to overburden family

Remedies for Domestic Violence but Mutual Protective Orders Are Not, 67 IND. L.J. 1039, 1048 (1992) (delineating factors a victim might consider in obtaining legal assistance).

188. Cf. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 122 (2005) (listing finances, legal concerns, and the relationship as reasons why victims might be reluctant to prosecute); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1048 (1992) (suggesting that many victims are reluctant to press charges because they do not want their attacker jailed or because they fear retaliation).

189. Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1048–49 (1992) (stating that a protective order can protect a victim while she is deciding what to do or while awaiting legal proceedings).

190. Appleby could not legally prove a criminal charge for the first violent incident and, likewise, would not be able to prove a criminal stalking charge. Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A.

191. See Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1047–49 (1992) (explaining the reasons why a civil protective order is easier to obtain and offers more flexibility than a criminal protective order).

192. See Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 107–08 (2005) (stating the difficulty in proving a criminal charge and obtaining protection).

193. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 875 (1993) (noting that a federally funded task force on anti-stalking legislation recommends civil protection orders as an early means to help stalking victims protect themselves before potential violence occurs).

courts, increase frivolous claims,¹⁹⁴ and increase the potential for abuse.¹⁹⁵ TCFV Policy Director Aaron Setliff has similar concerns about expanding the coverage in Texas.¹⁹⁶ One concern stems from the possible last-minute changes to legislation that could adversely affect the current population.¹⁹⁷ Additionally, he is cautious because in some parts of the state, abuse victims are not currently well protected.¹⁹⁸ Expanding coverage to increase availability could mean even greater challenges in obtaining this type of protection for victims of domestic abuse.¹⁹⁹

The concern that expanding the eligibility for protective orders may make victims easier to abuse stems mostly from the abuser using the protective order law to manipulate other proceedings, such as divorce.²⁰⁰ However, this is not an issue in expanding protection to additional victims. Alternatively, an abuser could be the first to apply for a protective order and use the order as a weapon against the victim.²⁰¹ Such abuse can be thwarted with

194. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 146 (2005).

195. See David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 88-93 (2008) (discussing several problems created when civil protective order relief is too easily obtained).

196. Telephone Interview with Aaron Setliff, Policy Dir., Tex. Council on Family Violence (Nov. 8, 2010).

197. *Id.*

198. *Id.*; see Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 4 (1999) (writing that despite legislative progress, in the area of domestic violence, the enforcement of such laws is often inadequate and unresponsive); cf. James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1183 (1995) (asserting that a protective order is useless to those who "cannot avail themselves of it").

199. Telephone Interview with Aaron Setliff, Policy Dir., Tex. Council on Family Violence (Nov. 8, 2010); see also David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 93 (2008) ("Combining increasing case numbers with a summary proceeding makes it less likely the individual petitions receive the scrutiny appropriate to weed out the justified from unjustified.").

200. See David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 86-87 (2008) (contending that abusers will use protective order law to "gain [a] strategic advantage in a related matter, such as a divorce" (citing *People v. Stiles*, 779 N.E.2d 397, 402 (Ill. App. Ct. 2002))).

201. See *id.* at 88 (claiming that a person who has not been abused can improperly use the law and obtain a protective order).

effective application of protective order statutes by law enforcement officers and the judicial system.²⁰² Additionally, it is always important that judges carefully review the allegations and only issue pre-hearing orders after determining that the applicant is at risk of imminent harm.²⁰³

Furthermore, there is some concern that expanding coverage for protective orders will create more challenges for victims of abuse.²⁰⁴ The system already does not fully protect victims of abuse in many parts of Texas and expanding coverage could compound this problem.²⁰⁵ Nevertheless, the judicial system does have a great impact on the effectiveness of protective orders when it utilizes efficient and effective methods of enforcement.²⁰⁶ For example, “[w]omen who appear in court with legal representation are much more likely to receive civil protection orders than those women who appear pro se, and those orders are much more likely to contain more effective and complete remedies.”²⁰⁷ Moreover,

202. See Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 151 (1990) (stressing that there must be “coordinated intervention among legislators, police, prosecutors[,] and judges”).

203. David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 116 (2008); see also Sean D. Thueson, *Civil Domestic Violence Protection Order in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 302 (2004) (“Courts are a ‘crucial part of the system, bearing the ultimate responsibility for case outcomes;’ courts have ‘leverage’ others do not” (quoting EMILY SACK, *CREATING A DOMESTIC VIOLENCE COURT 1* (Lindsey Anderson et al. eds. 2002))).

204. Telephone Interview with Aaron Setliff, Policy Dir., Tex. Council on Family Violence (Nov. 8, 2010); accord Mary Schouvieller, Note, *Leaping Without Looking: Chapter 142's Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota*, 14 LAW & INEQ. 593, 634–35 (1996) (listing some potential disadvantages of expanded protective orders: (1) victim control is illusory; (2) increasing the volume of orders without solving the underlying problems exacerbates the situation; and (3) abusers will not be forced to go to court and accept that their behavior is improper).

205. Telephone Interview with Aaron Setliff, Policy Dir., Tex. Council on Family Violence (Nov. 8, 2010); see Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 188 (1993) (reporting that there are still a “number of counties” that have long delays in obtaining orders).

206. See Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 302 (2004) (asserting that many resources are available for courts, judges, and attorneys to ensure an effective judicial process for victims of violence).

207. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered*

there is evidence that expanding eligibility will not overburden the courts.²⁰⁸ Accordingly, the concern regarding access to protective orders seems to stem more from lack of education than from insufficient resources.²⁰⁹ Furthermore, courts are able to link victims to services, monitor perpetrators, order counseling, and demonstrate to the public “the commitment that the system has to ending” violence.²¹⁰ Hence, it seems that the concerns are better addressed by increasing education than by limiting coverage to victims.²¹¹

Women: An Analysis of State Statutes and Case Law, 21 HOFSTRA L. REV. 801, 813 (1993).

208. See Regina DuFresne & Jonathan S. Greene, *Increasing Remedies for Domestic Violence: A Study of Maryland's 1992 Domestic Violence Act in the Courtroom*, 6 MD. J. CONTEMP. LEGAL ISSUES 155, 176 (1995) (reporting that amendments to Maryland's protective order laws did not “clog[] the courts”).

209. See Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 187 (1993) (reporting that almost one-half of all emergency orders were issued within the hour and most within twenty-four hours); Mary Schouvieller, Note, *Leaping Without Looking: Chapter 142's Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota*, 14 LAW & INEQ. 593, 642 (1996) (emphasizing the importance of education for judges regarding protective orders); James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1199–2000 (1995) (stressing the importance of judicial education in protecting victims of domestic violence).

210. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 302 (2004) (quoting EMILY SACK, CREATING A DOMESTIC VIOLENCE COURT 1 (Lindsey Anderson et al. eds. 2002)) (internal quotation marks omitted); see *State v. Dejarlais*, 944 P.2d 1110, 1112 (Wash. Ct. App. 1997) (holding that a violation of a protective order is a crime and that the order is issued to give the victim “the full protection of the laws”), *aff'd*, 969 P.2d 90 (Wash. 1998).

211. See James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1200–01 (1995) (concluding that the major obstacle to protective order coverage is a “fundamental ignorance” of the issues of domestic violence and that not all members of the judicial system take the issues seriously (citing Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 269 (1985))). The Supreme Court of Ohio reversed the lower court's dismissal of an application for a protective order. *Felton v. Felton*, 679 N.E.2d 672, 680 (Ohio 1997). The Ohio Supreme Court stated that because the statutes gave the courts the ability to make decisions, those courts were obligated “to carry out the legislative goals to protect the victims of domestic violence.” *Id.* The court further stressed that it is important for judges to be aware of the severity of the domestic violence problem and to keep up to date with the legislation designed to stop the violence. *Id.*

C. *Potential Issues in Eliminating the Relationship Requirement*

Expanding eligibility for protective orders by eliminating the relational requirement and instead looking for characteristics that justify the protection may not be adequate to meet the needs of victims.²¹² For example, applying the facts in Kristy Appleby's case, it is hard to find all four characteristics.²¹³ The easiest to find are accessibility and familiarity because the relationship Appleby and Arcos had in common might have led to information that would enable Arcos to have access to Appleby.²¹⁴ Violation of trust might be found in Appleby's case because Arcos was initially very friendly to her.²¹⁵ However, it is more difficult to find imbalance of power or dependence in a love triangle situation.²¹⁶ The victim is not tied to the relationship with the attacker so power struggles and dependency are less likely to occur.²¹⁷

Finally, eliminating the relationship requirement altogether could have a greater impact on the ability of the judicial system to process requests than expanding it only to third parties to romantic relationships.²¹⁸ Eliminating this requirement would greatly increase the number of individuals who would have access to protective orders, which could overload the judicial system.²¹⁹

212. See Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 500 (2008) (replacing the relationship requirement with a requirement that four characteristics be met).

213. Cf. Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A (reporting that Appleby was fearful of Arcos and stayed with family to avoid her). The four characteristics are "accessibility and familiarity; violation of trust; imbalanced power dynamics and control; and dependence." Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 500 (2008).

214. See Robert Crowe & Roger Croteau, *Confrontation Leads to Fatal Shooting*, SAN ANTONIO EXPRESS-NEWS, Feb. 11, 2009, at 1A (suggesting that the attacker was upset because the victim and the "man in the middle" were in a relationship).

215. *Id.*

216. Cf. Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A (showing that Appleby was dependent on her family and not on Arcos).

217. Cf. *id.* (noting that, not only had Appleby discontinued her relationship with her attacker, she also ended her relationship with her boyfriend).

218. David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 93 (2008).

219. See Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. &

Another concern with eliminating the relationship requirement is that it could make obtaining a protective order too easy, thereby allowing a person who is not abused to misuse the law and use the order as another weapon against the victim.²²⁰ Expanding the protection to include third parties likely would have less of an impact on the judicial system than eliminating the requirement.

VI. CONCLUSION

Over the last four decades, the laws regarding civil protective orders for victims of domestic violence have evolved, expanding the coverage to more individuals, making enforcement more effective, and sending a strong message that domestic violence will not be tolerated.²²¹ In light of this evolution, expanding civil protective orders to include former or current dating or marital partners from threats and violence by current or former dating or marital partners of a third person was a reasonable next step.²²²

While there are valid concerns regarding the expansion of coverage, these concerns can be resolved in two significant ways.²²³ One way is to continue educating those involved in

MARY L. REV. 1841, 1866 (2006) (“Some courts justify narrow interpretation of the domestic violence statutes as necessary to limit the swelling case loads of courts that hear domestic violence cases.”).

220. David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 88 (2008).

221. See generally Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 356-65 (1992) (summarizing some of the legislative changes to the Texas Family Code that have led to greater protection for victims).

222. Gilbert Garcia, *Two San Antonio Democrats Think Safety First*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2010, at 1B; see Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 74 (2009) (stating that protective orders should be available to victims who do “not fall under the state’s existing statutory definition for eligibility for a domestic violence protective order” (quoting Carol E. Jordan et al., *Stalking: Cultural, Clinical and Legal Considerations*, 38 BRANDEIS L.J. 513, 579 (2000))); Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 107, 110 (2005) (suggesting that expanding protective coverage is warranted due to the difficulty of obtaining protection when an individual falls outside of the relationship requirement); cf. Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 374-75 (1992) (contending that changing the language of the law will lead to changes in how the law protects victims).

223. See Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 146-47 (2005) (explaining some potential pitfalls to expanding coverage and how they are resolved or outweighed).

enforcement of the laws.²²⁴ Additionally, the judicial system needs to be committed to carefully applying its discretion and to enforcing the orders.²²⁵ Accordingly, because of the nature of the harm resulting from the lack of protection, these concerns should be addressed and resolved to ensure the safety of more individuals facing the threat of violence.²²⁶

Third-party violence involves potentially intense emotion and escalates over time; thus, its victims will benefit from the availability of civil protective orders.²²⁷ An individual like Kristy Appleby will have a better chance of escaping violence with a protective order.²²⁸ The recent legislative decision to include third parties in the definition of dating violence makes this protection available, and so, the evolution of protective order law continues.²²⁹

224. See Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 302 (2004) (“In order for anyone, including judges, to be effective in the battle against domestic violence, one must have the necessary training, understanding, and resources to do the job.”).

225. See Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 167 (1993) (“In practice, however, the effectiveness of protection orders depends on the willingness of judicial and law enforcement officials to issue and enforce them to the extent authorized by statute.”).

226. See Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 146 (2005) (stressing that overburdened courts is not an excuse that justifies the denial of protections to victims of violence).

227. Cf. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 848 (1993) (encouraging protective orders that offer protection for a wide array of abuse because abuse has a tendency to escalate and become increasingly more dangerous); Brian Chasnoff & Robert Crowe, *Claim of Attack Preceded Slaying*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2009, at 1A (illustrating how third-party violence escalated against Kristy Appleby).

228. Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 74 (2009) (suggesting that protective orders should be made available to those victims of violence not currently protected).

229. Kristy Appleby Act, 82d Leg., R.S., ch. 872, 2011 Tex. Sess. Law Serv. 2214, 2214–15 (West) (codified as amended in scattered sections of TEX. FAM. CODE ANN.).