



## Kentucky Law Journal

Volume 102

Issue 2 *Special Feature: Medicaid Matters*

Article 11

2014

# Expanding the Scope of Who May Petition for Domestic Violence Protective Orders in Kentucky

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### Recommended Citation

Lawson, Sarah (2014) "Expanding the Scope of Who May Petition for Domestic Violence Protective Orders in Kentucky," *Kentucky Law Journal*: Vol. 102 : Iss. 2 , Article 11.

Available at: <https://uknowledge.uky.edu/klj/vol102/iss2/11>

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# Expanding the Scope of Who May Petition for Domestic Violence Protective Orders in Kentucky

*Sarah Lawson*<sup>1</sup>

## INTRODUCTION

JERI Stewart and Jimmy Randall had been dating for more than a year in May of 2006 when their relationship became troubled.<sup>2</sup> On May 17, Jeri went to her boyfriend's apartment and told him she did not want to date him anymore. A confrontation ensued. Before Jeri could leave, Jimmy attacked her. He pushed her onto the sofa and then onto the floor. He hit her in the face. He tried to suffocate her several times, first with his hand and then with a balled up sock that he forced into her mouth while he held her nose. Jeri struggled, fighting back. She was able to break free and calm Jimmy down, only to be attacked again. This second attack brought on screams loud enough to alert the neighbors, who called the police. The officers arrived, restrained Jimmy, asked questions, and completed the required investigation, but made no report or arrest. They told Jeri to get an emergency protective order. She obtained the order granting temporary protection. Following a hearing the court found that Jeri was at risk for future abuse and issued a second, more permanent, domestic violence order. But Jimmy appealed the order, and because Jeri did not live with Jimmy, the order was reversed and Jeri's petition dismissed. Jeri was left without protection from her abuser.<sup>3</sup>

Kentucky law should be changed to allow victims like Jeri to petition the court for protection against their abusive partners. Currently, the law provides comprehensive protections for victims of domestic violence.<sup>4</sup> But the law limits *who* may ask for protection. In Kentucky, only those who are married to, share a child in common with, or live with their abuser may petition the court.<sup>5</sup> In

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1 J.D. expected May 2014, University of Kentucky College of Law. I would like to thank Professor Franklin Runge and Carol Jordan for bringing this important Kentucky issue to my attention; Notes Editor Julie Rosing for her helpful comments that improved my Note a great deal; and the Kentucky Law Journal for its hard work on this (and every) piece.

2 *Randall v. Stewart*, 223 S.W.3d 121, 122 (Ky. Ct. App. 2007).

3 *Id.* at 122–25.

4 The terms “domestic violence” and “intimate abuse” are used throughout this Note because of their common usage in Kentucky's laws and in current debate surrounding the issue. However, this author notes that these terms do not accurately represent the type of abuse they describe, as will be explained in the following pages.

5 KY. REV. STAT. ANN. § 403.725 (West 2006); KY. REV. STAT. ANN. § 403.720(1)–(2), (4) (West Supp. 2012); *Rivers v. Howell*, 276 S.W.3d 279, 281–82 (Ky. Ct. App. 2008) (quoting *Barnett v. Wiley*,

essence, a victim like Jeri must move in with her abuser in order to ask the court to be protected from abuse.<sup>6</sup>

Kentucky is one of few remaining states with such a restricted domestic violence law.<sup>7</sup> Even then, many of the state statutes that extend protection to members of dating relationships do so in a way that inaccurately reflects the realities of this type of violence, thus failing to protect all victims of domestic abuse. Against this backdrop, there have been several recent pushes in the Kentucky legislature to expand the definition of who may petition the court for protection from violence.<sup>8</sup> This Note analyzes the approaches of other states, current theoretical understandings of domestic violence, and the recent debates in Kentucky to conclude that such limited access to protection should change. Part I explores the current state of domestic violence law across the country and to whom it extends in each state. Part II identifies problems with existing laws by examining theoretical explanations of domestic violence and its political history. Part III proposes two amendments to Kentucky law and addresses opponents' concerns.

## I. CURRENT STATE LAWS ON DOMESTIC VIOLENCE

### A. Kentucky

This Part will initially examine the categories of victims who are protected under Kentucky's current law. In order to gauge what is at stake once a victim is able to ask the court for help, it is helpful to understand the assistance that is

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103 S.W.3d 17, 18 (Ky. 2003)). Additionally, the scope of this note is limited to victims of domestic violence over the age of eighteen. However, the related case for more comprehensive protections of teens subject to dating violence is compelling and serious. "According to community-based surveys, more than half of adolescent girls who reported being sexually assaulted were assaulted while on dates." KY. DOMESTIC VIOLENCE ASS'N, EFFECTS OF DOMESTIC VIOLENCE ON TEENS (2001), available at [http://www.kdva.org/clearinghouse/factsheets/DV\\_Effects\\_Teens\\_FS.pdf](http://www.kdva.org/clearinghouse/factsheets/DV_Effects_Teens_FS.pdf).

6 About four in five victims of domestic violence are women. See SHANNAN CATALANO, U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2010, at 1 (2012), available at <http://bjs.gov/content/pub/pdf/ipv9310.pdf>. As such, this Note will use the female gender when referring to victims. However, men can also be victims of domestic violence. In fact, around 2800 incidents of same-sex domestic violence were reported in 2003 in which the victim was male. See Tara R. Pfeifer, Comment, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN ST. L. REV. 1251, 1253 (2005) (discussing the similar issues regarding same-sex domestic violence). This is indeed a serious problem, but is beyond the scope of this Note.

7 The nine states that provide no protections to parties in dating relationships are Kentucky, Florida, Georgia, Maryland, Ohio, South Carolina, South Dakota, Utah, and Virginia. See *infra* note 51.

8 See H.B. 9, 2013 Gen. Assemb., 13th Reg. Sess. (Ky. 2013); H.B. 498, 2012 Gen. Assemb., 12th Reg. Sess. (Ky. 2012); H.B. 35, 2011 Gen. Assemb., 11th Reg. Sess. (Ky. 2011). While this Note was in its editing stages, another similar proposal, H.B. 8, was introduced in the House on January 7th, 2014, and assigned to the Judiciary Committee. See H.B. 8, 2014 Gen. Assemb., 14th Reg. Sess. (Ky. 2014).

available to the victim. Therefore, this Part will also identify the four different types of protective orders available to victims—the emergency protective order and domestic violence order under the civil law, and the restraining order and conditional release order under the criminal law.

*1. Who May Petition the Court for Protection.*—Kentucky passed its first law specifically addressing domestic violence in 1984.<sup>9</sup> Among its stated legislative purposes was “[t]o allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse.”<sup>10</sup> This law established the legal framework still used today to combat domestic violence. Supporters of the law saw these provisions as “additional protections to victims” that would “address holes in the criminal code and also provide additional legal support for victims of abuse.”<sup>11</sup> Among these provisions was the emergency protective order that, if granted by the court, would provide immediate, temporary protection against abuse.<sup>12</sup>

However, only a “spouse, parent, child, stepchild or any other person related by consanguinity or affinity within the second degree”<sup>13</sup> was eligible to petition the court for this protection order under the original 1984 law. This has changed over time, but the definition is still limited. Today, “[a]ny family member or member of an unmarried couple” may file a petition with the court for protection from abuse.<sup>14</sup> Family members include spouses, former spouses, children, grandparents, parents, stepchildren, or any other persons living in the same household as the child if the child is the alleged victim.<sup>15</sup> Unmarried couples are defined as those who have a child in common or live together or have lived together.<sup>16</sup>

*2. Kentucky’s Civil Law: The Emergency Protective Order and Domestic Violence Order.*—Kentucky’s civil domestic violence law, although imperfect, offers a number of essential protections for victims. The first is immediate and easy access. Any qualified party seeking protection from abuse can file a petition for an emergency protective order (EPO) with the district court in the county in

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9 Act of Mar. 28, 1984, ch. 152, 1984 Ky. Acts 389.

10 *Id.*

11 Carol E. Jordan & Karen Quinn, *Kentucky Domestic Violence and Abuse Act: Civil Remedies for Victims*, KY. BENCH & BAR, Winter 1998, at 11, 11 (describing the new law as the “unique strength of pairing civil protective orders and criminal prosecution means that victims can seek relief under both systems to maximize protection”).

12 Act of Mar. 28, 1984, ch. 152, sec. 6, 1984 Ky. Acts 389, 390.

13 Act of Mar. 28, 1984, ch. 152, sec. 2–3, 1984 Ky. Acts 389, 389. Consanguinity is “the relationship of persons of the same blood or origin.” BLACK’S LAW DICTIONARY 344 (9th ed. 2009). Affinity is that relationship because of marriage. *Id.* at 67.

14 KY. REV. STAT. ANN. § 403.725(i) (West 2006).

15 KY. REV. STAT. ANN. § 403.720 (West 2006 & Supp. 2012).

16 *Id.*

which they reside.<sup>17</sup> The court is required to allow twenty-four hour access<sup>18</sup> and is prohibited from charging filing fees.<sup>19</sup> The district judge will issue the EPO if she determines that there is an “immediate and present danger of domestic violence and abuse.”<sup>20</sup> If an EPO is issued, the “adverse party” must, among other things, vacate the residence and make no contact with the victim.<sup>21</sup> A great deal of discretion is given to the judge in this determination, allowing her to “[e]nter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse.”<sup>22</sup> Violation of an EPO is a criminal offense,<sup>23</sup> and the order protects the petitioner until a hearing is held to determine whether she is eligible for a domestic violence order (DVO).<sup>24</sup>

Second, Kentucky’s civil system offers more permanent protection in the form of the DVO. At the DVO hearing, both the petitioner and the adverse party are given a chance to be heard under oath—the petitioner to explain the reasons for her requests and the respondent to express any concerns.<sup>25</sup> If the court “finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur,” then the court may issue a DVO.<sup>26</sup> The DVO lasts up to three years and can be renewed for another three years an unlimited number of times.<sup>27</sup>

Third, the civil law is constructed in a way that allows for tailored protection for victims and harsh penalties for violations. The law gives the court discretion to tailor the provisions of the order to the specific circumstances of each case,<sup>28</sup> ensuring that each victim is protected to the greatest extent legally possible. The DVO must be entered into the Law Information Network of Kentucky (LINK).<sup>29</sup> This computerized system gives police access from their cruisers to updated information on the specific protections provided to each victim, based on her individualized DVO.<sup>30</sup> The party subject to a protective order (the party found to be abusive) must surrender his license to carry a concealed deadly

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17 KY. REV. STAT. ANN. § 403.725(1) (West 2006).

18 KY. REV. STAT. ANN. § 403.735(3)(a) (West 2006 & Supp. 2012).

19 KY. REV. STAT. ANN. § 403.730(3) (West 2006).

20 KY. REV. STAT. ANN. § 403.740 (West 2006 & Supp. 2012).

21 *Id.*

22 *Id.*

23 KY. REV. STAT. ANN. §§ 403.763(2), 403.760 (West 2006).

24 *See* KY. REV. STAT. ANN. § 403.760 (West 2006).

25 KY. REV. STAT. ANN. § 403.747 (West Supp. 2012).

26 KY. REV. STAT. ANN. § 403.750 (West 2006 & Supp. 2012).

27 *Id.*

28 KY. REV. STAT. ANN. § 403.750(1)(j) (West Supp. 2012) (“[T]he court . . . may . . . enter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse.”).

29 KY. REV. STAT. ANN. § 403.770 (West 2006).

30 15 LOUISE GRAHAM & JAMES E. KELLER, KENTUCKY PRACTICE: DOMESTIC RELATIONS LAW § 5:15 (3d ed. 2008).

weapon.<sup>31</sup> Also, he is prohibited from purchasing or attempting to purchase a firearm under federal law.<sup>32</sup> Violation of the DVO is a criminal offense.<sup>33</sup>

3. *Protections for Victims Under Kentucky Criminal Law.*—The provisions of Chapter 403 are, by far, the most comprehensive protections offered to victims of domestic abuse in Kentucky.<sup>34</sup> However, the criminal code establishes some protections for victims (separate from the EPO and DVO) in the form of the restraining order and the conditional release order.<sup>35</sup>

Restraining orders are available through Kentucky's criminal stalking laws.<sup>36</sup> A party is found guilty of stalking in the second degree when he "intentionally . . . stalks another person; and . . . makes an explicit or implicit threat with the intent to place that person in reasonable fear of . . . sexual contact . . . physical injury; or . . . death."<sup>37</sup> Stalking in the first degree is the same, with the added requirement that the threat or stalking happens while the party is subject to a *protective order*<sup>38</sup> or criminal complaint.<sup>39</sup> A conviction of stalking

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31 KY. REV. STAT. ANN. § 237.110(13)(k) (West 2006).

32 18 U.S.C. § 922(g)(8) (2012) (barring persons who are subject to court protective orders from possessing firearms); see also KY. REV. STAT. ANN. § 237.095 (West 2006 & Supp. 2012) (requiring local law enforcement to notify protective order petitioners that party has purchased a firearm in violation of federal law).

33 KY. REV. STAT. ANN. § 403.763 (West 2006); see also KY. REV. STAT. ANN. § 403.761 (West Supp. 2012) (describing a "substantial violation" as a violation of a protection order combined with another crime that allows the court, in certain circumstances, to also require the violator to wear a global positioning monitoring bracelet).

34 A restraining order (not necessarily related to domestic abuse) is also available under the civil code, which may be awarded before or during a trial if "it clearly appears from specific facts shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party." KY. R. CIV. P. 65.03(1)(a). The procedures related to this order are sparse. There is no evidence that the restraining order requires any of the safeguards that come with the DVO. Most notably, the statute does not provide that a restraining order must be entered into the LINK system. Therefore, even if it could be formulated to reflect specific protections for potential victims of violence, there is no indication that police officers would have any knowledge of those protections and would be limited in their authority to enforce them quickly. KY. R. CIV. P. 65.03. In recent years, the restraining order has mostly been used for injunctions to stop redistricting procedures, *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 908–09 (Ky. 2012), false defamatory speech, *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302, 313 (Ky. 2010), and preventing transfers of assets, see *Goldstein v. Feeley*, 299 S.W.3d 549, 551–55 (Ky. 2009). Not one of the cited cases referenced use of this rule to prevent abusers from targeting the abused.

35 KY. REV. STAT. ANN. § 431.064 (West 2006 & Supp. 2012) (referring to this order as a "protective order" or "order"). For clarity, the author has dubbed this order the "conditional release order."

36 KY. REV. STAT. ANN. § 508.155 (West 2006). Kentucky's criminal stalking laws are codified at KY. REV. STAT. ANN. §§ 508.130–.150 (West 2006).

37 KY. REV. STAT. ANN. § 508.150(1) (upper case format altered).

38 The statute does not specify any difference between an EPO and DVO, but it is assumed that both are considered protective orders for the purpose of this statute. Thus, the existence of an EPO or DVO increases the level of the crime, further illustrating its significance.

39 KY. REV. STAT. ANN. § 508.140 (West 2006).

in the first or second degree serves as an automatic application for a restraining order.<sup>40</sup> The statute provides that the restraining order can restrict the adverse party from entering certain places (residences, schools, etc.) or making contact with the victim<sup>41</sup> and the provisions of the order must be submitted to the LINK system.<sup>42</sup> Violation of the criminal restraining order carries criminal sanctions.<sup>43</sup> Unlike the EPO and DVO statutes, there is no provision in the criminal law that allows the court to add “other” protections for the victim as needed. Additionally, the criminal restraining order has a ten-year limit, with no provision allowing for the possibility of renewal.<sup>44</sup> Nor does the existence of the restraining order alone ban the abusive party from purchasing or possessing a firearm.<sup>45</sup>

Conditional release orders are essentially protective orders that may be attached as a condition of bail under Kentucky’s criminal assault law. Since the order accompanies a pretrial release, the provisions only apply after a party has been arrested for an assault crime, sexual offense, or violation of an EPO, DVO, or criminal restraining order.<sup>46</sup> Consideration of whether conditions should be attached to a release order are based on a recommendation report from the pretrial services officer, who is required to interview the defendant, but not the victim.<sup>47</sup> If the court, based on this report, finds that the defendant is a “threat to the alleged victim” then it can impose conditions of bail restraining the defendant from contacting the victim, entering certain areas, and using or purchasing a firearm or alcohol.<sup>48</sup> The order must be entered into Kentucky’s LINK system<sup>49</sup> and a violation of the order carries criminal sanctions.<sup>50</sup>

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40 KY. REV. STAT. ANN. § 508.155(1). Also, the party against whom the restraining order is sought may request a hearing if they choose on the application of the restraining order *Id.* § 508.155(2).

41 *Id.* § 508.155(4).

42 *Id.* § 508.155(8).

43 *Id.* § 508.155(10) (violation is a class A misdemeanor).

44 *Id.* § 508.155(5).

45 *Id.* § 508.155(6) (a party subject to a restraining order is only banned from purchasing a firearm if he has previously been convicted of a felony).

46 KY. REV. STAT. ANN. § 431.064 (West 2006 & Supp. 2012). Rather than a warrant (which would lead to an arrest), the court may alternatively issue a summons “if there are reasonable grounds to believe that the defendant will appear in response.” KY. R. CRIM. P. 2.04(1).

47 *See* KY. R. CRIM. P. 4.06.

48 KY. REV. STAT. ANN. § 431.064 (West 2006 & Supp. 2012).

49 *Id.* § 431.064 (9).

50 *Id.* § 431.064 (10).

*B. State Law—Extending Protection to Members of Dating Relationships*

Kentucky is one of only nine states<sup>51</sup> that restrict their domestic violence protections to married couples, couples that share a child, or those that live together. Forty-one states extend protections to members of dating relationships in some form.<sup>52</sup> Interestingly, almost no state extends protection to relationships like friendships or roommates. North Dakota is (potentially) the exception, including within its definition of who may petition the court for protection “any other person with a sufficient relationship to the abusing person as determined by the court.”<sup>53</sup> The North Dakota courts have not yet employed this language to cover any particular victim, but it could broaden the scope of who may ask for protection outside the bounds of “romantic” relationships.

The remaining state statutes employ a variety of terms and strategies to describe what is meant by a “dating relationship” and who, exactly, is protected.<sup>54</sup> The following categories explore these approaches in detail.

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51 The other eight states that provide no protections to parties in dating relationships are Florida, Georgia, Maryland, Ohio, South Carolina, South Dakota, Utah, and Virginia. *See* FLA. STAT. ANN. § 741.28(3) (West 2010) (requiring that petitioners live with abuser); GA. CODE ANN. § 19-13-1 (2010) (requiring that petitioners currently or formerly lived with abuser); MD. CODE ANN., FAM. LAW § 4-501(m) (LexisNexis Supp. 2012) (requiring that petitioners at least live with abuser); OHIO REV. CODE ANN. § 2919.25(F) (LexisNexis Supp. 2013) (requiring at least that petitioner has cohabitated with abuser within five years of the abuse); S.C. CODE ANN. § 16-25-10 (Supp. 2011) (requiring that petitioner and abuser live or have lived together); S.D. CODIFIED LAWS § 25-10-1(2) (Supp. 2012) (requiring that petitioner and abuser live or formerly lived in the same household); UTAH CODE ANN. § 78B-7-102(2) (LexisNexis 2012) (requiring that petitioner and abuser either reside or have resided in the same residence); VA. CODE ANN. § 16.1-228 (Supp. 2012) (requiring that petitioner and abuser either cohabit or have done so within one year).

52 *See generally* Orly Rachmilovitz, *Bringing down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495 (2008) (examining different state laws on dating relationships); Devon M. Largio, Note, *Refining the Meaning and Application of “Dating Relationship” Language in Domestic Violence Statutes*, 60 VAND. L. REV. 939 (2007) (categorizing different state statutes on domestic violence law).

53 N.D. CENT. CODE § 14-07.1-01(4) (2009).

54 One aspect of state statutes that has not been explored in this analysis is the focus on gender in the definition of a dating relationship. Some states require the courts to consider the “individuals involved in the relationship,” MISS. CODE ANN. § 93-21-3(d) (West Supp. 2012), while others more explicitly require those individuals to be members of the opposite sex, N.C. GEN. STAT. § 50B-1 (2011). This aspect of state domestic violence laws is outside the scope of this Note, but is by no means any less serious of a problem. It is yet another obstacle that must be overcome in the fight against domestic violence. *See generally* Tara R. Pfeifer, Comment, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN ST. L. REV. 1251 (2005) (discussing the similar issues regarding same-sex domestic violence).



1. *Intimate*.—A number of states require a dating relationship to be an intimate relationship.<sup>55</sup> However, very few state legislatures have provided any more specificity as to what is meant by intimacy.<sup>56</sup> Thus, courts are left to interpret the meaning of the term.

Some courts have determined that intimacy exists by looking at a relationship as it relates to third parties, requiring that it is “direct” (the two parties know each other directly, rather than through a common third party),<sup>57</sup> “exclusive,”<sup>58</sup> or “monogamous.”<sup>59</sup> Courts have also described intimacy in terms of the depth of the relationship, as an “emotional investment,”<sup>60</sup> or an “emotional bond.”<sup>61</sup> Similarly, intimate relationships are described as those relationships in which the parties are emotionally dependent on one another and have frequent, or even daily, interaction.<sup>62</sup>

Whether intimacy means that the relationship must have a sexual component varies widely from state to state. Three state statutes describe intimacy as “primarily characterized by the expectation of affectional or sexual involvement.”<sup>63</sup> By contrast, other states do not explicitly require or mention a “sexual” relationship. These statutes require intimacy<sup>64</sup> or describe

55 ARK. CODE ANN. § 9-15-103(2) (2009); CAL. FAM. CODE § 6210 (West 2004) (characterized by the expectation of affection); COLO. REV. STAT. § 18-6-800.3(2) (2012); LA. REV. STAT. ANN. § 46:2151(B) (2010); MISS. CODE ANN. § 93-21-3(d) (West Supp. 2012); MO. ANN. STAT. § 455.010(7) (West Supp. 2013); N.H. REV. STAT. ANN. § 173-B:1(XV) (LexisNexis Supp. 2012); N.M. STAT. ANN. § 40-13-2(A) (West 2013); N.Y. SOC. SERV. LAW § 459-a(2)(f) (McKinney Supp. 2013); 23 PA. CONS. STAT. ANN. § 6102(a) (West 2010); TEX. FAM. CODE ANN. § 71.0021(b) (West Supp. 2012); WIS. STAT. ANN. § 813.12(1)(ag) (West Supp. 2012).

56 Only Michigan, Nebraska and Nevada elaborate on what is meant by “intimate associations.” See *infra* note 63.

57 Mark W. v. Damion W., 887 N.Y.S.2d 822, 824 (Fam. Ct. 2009) (“For a relationship to be ‘intimate’ within the meaning of the statute, it must be direct, not one that is based upon multiple degrees of separation or that exists only through a shared connection with a third party.”).

58 People v. Disher, 224 P.3d 254, 259 (Colo. 2010) (en banc).

59 Shannon M. v. Michael C., 948 N.Y.S.2d 831, 839 (Fam. Ct. 2012) (holding that a relationship established through an online dating website did not constitute an intimate relationship for the purposes of the domestic violence statute).

60 *Id.*

61 Scott v. Shay, 928 A.2d 312, 315 (Pa. Super. Ct. 2007).

62 Pennsylvania’s Superior Court describes an intimate relationship as “functional interdependence,” in which “individuals interface in very practical areas of private life . . . [such as] shared involvement in the affairs of day-to-day living.” *Id.*; see also Oriola v. Thaler, 100 Cal. Rptr. 2d 822, 832-33 (Ct. App. 2000) (“[A] ‘dating relationship’ refers to serious courtship. It is a social relationship between two individuals who have or have had a reciprocally amorous and increasingly exclusive interest in one another, and shared expectation of the growth of that mutual interest, that has endured for such a length of time and stimulated such frequent interactions that the relationship cannot be deemed to have been casual.”).

63 MICH. COMP. LAWS ANN. § 764.15a(b) (West Supp. 2013); NEB. REV. STAT. § 28-323(7) (2008); NEV. REV. STAT. § 33.018(2) (2011).

64 ARK. CODE ANN. § 9-15-103(2) (2009); KAN. STAT. ANN. § 21-5111(i)(1) (West 2012); N.Y. SOC. SERV. LAW § 459-a(2)(f) (McKinney Supp. 2013).

a dating relationship as intimate *or* sexual,<sup>65</sup> thus implying that a non-sexual relationship may still qualify as a dating relationship as long as it is found to be an intimate one. When the statute is not specific, courts have also held that the sexual relationship of the parties is not determinative of whether they are in an “intimate relationship.”<sup>66</sup>

A small number of states also describe a dating relationship as an engagement relationship.<sup>67</sup> Because this term is always used in addition to “dating” or “intimacy” in the wording of the statute, it follows that no state requires an individual be engaged in order to petition the court for protection. This term is most useful, however, in interpreting the intent of the respective legislatures, as it most assuredly connotes a relationship that is similar to that of marriage.

In her Note relating domestic violence law to teen dating, Devon M. Largio argues that use of terms like “intimate” is not as helpful as other approaches in defining dating relationships.<sup>68</sup> “When a statute merely provides a definition, it is harder for a victim to fall into that specific category.”<sup>69</sup> Furthermore, Largio points out that the use of a term like “engagement” is out of step with modern day dating relationships.<sup>70</sup>

2. *Romantic*.—Some states also describe dating relationships as romantic relationships.<sup>71</sup> This term is often used in addition to other terms (the relationship is romantic *or* intimate, romantic *or* sexual) to describe a dating relationship. However, in a small number of states, a dating relationship is defined as one that is romantic along with a list of factors that might indicate such a relationship.<sup>72</sup>

65 HAW. REV. STAT. § 586–1 (West 2008); N.H. REV. STAT. ANN. § 173–B:1(XV) (LexisNexis Supp. 2012); 23 PA. CONS. STAT. ANN. § 6102(a) (West 2010).

66 *People v. Disher*, 224 P.3d 254, 259 (Colo. 2010) (en banc) (“An intimate relationship is not synonymous with a sexual relationship. Intimate relationships can be sexual, but they need not be.”).

67 CAL. PENAL CODE § 13700(b) (West 2012); HAW. REV. STAT. § 586–1 (West 2008); 725 ILL. COMP. STAT. ANN. 5/112A–3(3) (West Supp. 2013); MASS. ANN. LAWS ch. 209A, § 1 (LexisNexis 2011); OKLA. STAT. ANN. tit. 22, § 60.1(5) (West Supp. 2013); R.I. GEN. LAWS § 12–29–2(b) (Supp. 2011).

68 Largio, *supra* note 52, at 962–64.

69 *Id.* at 964.

70 *See id.* at 967, 975.

71 ARIZ. REV. STAT. ANN. § 13–3601(A)(6) (West Supp. 2012); HAW. REV. STAT. § 586–1 (West 2008); IDAHO CODE ANN. § 39–6303(2) (2011); KAN. STAT. ANN. § 21–5111(i)(1) (West 2012); MINN. STAT. ANN. § 518B.01, subdiv. 2(b) (West Supp. 2012); N.C. GEN. STAT. § 50B–1 (2011); VT. STAT. ANN. tit. 15, § 1101(2) (2010); WASH. REV. CODE § 26.50.010(3) (2008).

72 IDAHO CODE ANN. § 39–6303(2) (2011); KAN. STAT. ANN. § 21–5111(i)(1) (West 2012); N.C. GEN. STAT. § 50B–1 (2011); VT. STAT. ANN. tit. 15, § 1101(2) (2010); WASH. REV. CODE § 26.50.010(3) (2008). These statutes describe “dating” as “romantic” and then provide additional factors for consideration, implying that a relationship must be “romantic” and survive the factor balancing test. However, Minnesota courts define “romantic” in terms of the factors themselves. *Sperle v. Orth*, 763 N.W.2d 670, 674 (Minn. Ct. App. 2009) (“[A] mere assertion that parties were once involved

Like intimacy, no state statute or court explicitly defines what “romantic” means. Certain cases hint at the meaning of “romantic relationship” by identifying facts supporting the perceived “romantic” nature, such as couples beginning to cohabitate shortly after their relationship begins.<sup>73</sup> Since the term “romantic” is often used interchangeably with “intimate” or “sexual,” it follows that a romantic relationship should be construed similarly.<sup>74</sup>

However, the term remains unclear. In order to be romantic, must the relationship have a sexual component? How long must a couple with romantic feelings toward one another have known each other? Does the term include love at first sight? To complicate matters, some courts seem to require not only that the relationship be romantic, but that it is “significant” as well.<sup>75</sup> The American Heritage Dictionary defines romance as “ardent emotional attachment or involvement between people; love; a strong, sometimes short-lived attachment, fascination, or enthusiasm for something.”<sup>76</sup> Similar to terms like “intimate,” whether a relationship is “romantic” varies from person to person and judge to judge. Describing relationships in this way is not only outdated,<sup>77</sup> but it increases the potential that a victim who needs protection cannot obtain it merely because her relationship does not fit the court’s idea of what is “romantic.”<sup>78</sup>

3. *Sexual*.—Often the description of what constitutes a dating relationship in state statutes relates to sexuality.<sup>79</sup> In some states, the statute appears to require that a relationship be sexual in order to qualify as a dating relationship.<sup>80</sup> Even if the state’s statute does not *require* sex, the existence or frequency of sexual

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in a significant romantic or sexual relationship does not, by itself, satisfy the family-or-household-member requirement of the Domestic Abuse Act. The district court must consider the four statutory factors . . .”).

73 See *State v. Potts*, 135 P.3d 1054, 1056 (Kan. 2006); *Judson v. Weiss*, No. COA12-403, 2013 WL 599956, at \*1 (N.C. Ct. App. Feb. 19, 2013) (finding that petitioner and defendant moved in together after beginning a romantic relationship).

74 See *Scott v. Shay*, 928 A.2d 312, 315 (Pa. Super. Ct. 2007) (holding that a past sexual assault does not, by itself, establish a romantic or intimate relationship for purposes of seeking a protective order). In Minnesota, whether a romantic relationship exists is not conditioned upon when it occurred. See *Sperle*, 763 N.W.2d at 675 (“[A] former relationship may qualify as a significant romantic or sexual relationship under the Domestic Abuse Act.”).

75 *Sperle*, 763 N.W.2d at 675.

76 AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1511 (4th ed. 2000).

77 See *Largio*, *supra* note 52, at 967, 975.

78 *Id.* at 962-64.

79 ARIZ. REV. STAT. ANN. § 13-3601(A)(6) (Supp. 2012); CAL. FAM. CODE § 6210 (West 2004); HAW. REV. STAT. § 586-1 (West 2008); MINN. STAT. ANN. § 518B.01, subdiv. 2(b) (West Supp. 2012); NEB. REV. STAT. § 28-323(7) (2008); NEV. REV. STAT. § 33.018(2) (2011); N.H. REV. STAT. ANN. § 173-B:1(XV) (LexisNexis Supp. 2012); OR. REV. STAT. § 107.705(3) (2011); 23 PA. CONS. STAT. ANN. § 6102(a) (West 2010); VT. STAT. ANN. tit. 15, § 1101(2) (2010).

80 CAL. FAM. CODE § 6210 (West 2004); NEB. REV. STAT. § 28-323(7) (2008); NEV. REV. STAT. § 33.018(2) (2011); OR. REV. STAT. § 107.705(3) (2011).

intercourse is often an important factor in the court's determination of whether the parties are intimate or dating. However, no state has explicitly defined what a "sexual relationship" actually entails.<sup>81</sup> The common understanding of the term is no help either—interpretations of whether a relationship is sexual vary from person to person.<sup>82</sup>

When state statutes define dating relationships in terms of sex, problems arise. First, such attention to sexual relationships fails to cover the broad range of relationships subject to domestic violence.<sup>83</sup> Not all violent relationships have a sexual component and thus, some victims who need protection are unable to obtain it from the court because of a technicality.<sup>84</sup> Second, the term "sexual relationship" is ambiguous. This makes it difficult for courts to apply the term with uniformity and has the potential to lead to arbitrary decisions.<sup>85</sup>

*4. Not Casual.*—Many states define dating relationships in the negative, explaining what a dating relationship *is not*, rather than attempting to describe all it can be. These state statutes most often use a variation of this phrasing: "[a dating relationship] does not include a casual acquaintanceship or ordinary fraternization."<sup>86</sup> As with other terms, "casual relationship" and "ordinary fraternization" are not explicitly defined, leaving courts to substitute their own interpretations. In an Illinois case, a casual relationship was found to relate to the frequency of the party's interaction—a single date is a casual relationship and thus does not qualify as a dating relationship.<sup>87</sup> In addition, the court found that as the exclusivity in the relationship increases, so does the likelihood of the relationship being a "dating relationship,"<sup>88</sup> similar to how increasing "intimate" or "romantic" involvement indicates the same.<sup>89</sup>

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81 See Beth Goldstein Lewis Trimmer, Comment, *A Sexual Relationship, Did We Have One? A Review of the Definition of "Sexual Relationship" Within the Context of Alaska's Domestic Violence Laws*, 24 ALASKA L. REV. 237, 243–44 (2007).

82 *Id.* at 243.

83 See Largio, *supra* note 52, at 964.

84 See *id.* at 969.

85 See Trimmer, *supra* note 81, at 248–51.

86 HAW. REV. STAT. § 586–1 (West 2008); ARK. CODE ANN. § 9–15–103(2) (2009); DEL. CODE ANN. tit. 10, § 1041 (Supp. 2012); 750 ILL. COMP. STAT. ANN. 60/103(6) (West Supp. 2013); MICH. COMP. LAWS ANN. § 764.15a(b) (West Supp. 2013); MISS. CODE ANN. § 93–21–3(d) (West Supp. 2012); NEB. REV. STAT. § 28–323(7) (2008); NEV. REV. STAT. § 33.018(2) (2011); N.Y. SOC. SERV. LAW § 459–a(2)(f) (McKinney Supp. 2013); N.C. GEN. STAT. § 50B–1 (2011); OKLA. STAT. ANN. tit. 22, § 60.1(5) (West Supp. 2013); TENN. CODE ANN. § 36–3–601(5)(C) (2010); TEX. FAM. CODE ANN. § 71.0021(c) (West Supp. 2012); W. VA. CODE ANN. § 48–27–204(4) (LexisNexis 2009); WIS. STAT. ANN. § 813.12(1)(ag) (West Supp. 2012).

87 See *Alison C. v. Westcott*, 798 N.E.2d 813, 816–17 (Ill. App. Ct. 2003).

88 *Id.* at 817.

89 *People v. Young*, 840 N.E.2d 825, 831–32 (Ill. App. Ct. 2005) (holding that the relationship was more like a companionship rather than involving romantic feelings and thus not a dating relationship for purposes of domestic violence law).

5. *List of Factors*.—A number of states provide a list of factors to guide the court in its determination as to whether a dating relationship exists.<sup>90</sup> Every state using this method includes length, frequency of interaction between petitioner and defendant, and type or nature of the relationship as factors indicating the existence of a dating relationship.<sup>91</sup> Type and nature have been explained in some states as “either party’s expectation of sexual or romantic involvement,”<sup>92</sup> but in other states these terms are specifically unrelated to the existence of a sexual relationship.<sup>93</sup> Some states also ask whether the relationship has terminated,<sup>94</sup> or how long it has been since the relationship was terminated.<sup>95</sup> In most states, the factors listed are not exclusive, and the courts are free to consider additional relevant facts.<sup>96</sup>

Largio argues that using factors to describe a “dating relationship” is ideal “because it is more flexible and permissive, allowing greater consideration of relational aspects and greater examination of the situation surrounding the relationship.”<sup>97</sup> For example, in a state that employs a non-exclusive list of factors for the court to consider, a petitioner is not immediately disqualified

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90 ARIZ. REV. STAT. ANN. § 13-3601(A)(6) (Supp. 2012); ARK. CODE ANN. § 9-15-103(2) (2009); DEL. CODE ANN. tit. 10, § 1041 (Supp. 2012); IDAHO CODE ANN. § 39-6303(2) (2011); IOWA CODE ANN. § 236.2(2)(e)(i) (West Supp. 2013) (referring to ‘duration’ rather than length); KAN. STAT. ANN. § 21-5111(i)(1) (West 2012); LA. REV. STAT. ANN. § 46:2151(B) (2010); MASS. ANN. LAWS ch. 209A, § 1 (LexisNexis 2011); MINN. STAT. ANN. § 518B.01, subd. 2(b) (West Supp. 2012); MISS. CODE ANN. § 93-21-3(d) (West Supp. 2012); N.Y. SOC. SERV. LAW § 459-a(2)(f) (McKinney Supp. 2013) (referring to “intimate” relationship rather than “dating” relationship); N.C. GEN. STAT. § 50B-1 (2011) (referring to a relationship “over time”); R.I. GEN. LAWS § 12-29-2(b) (Supp. 2011); TEX. FAM. CODE ANN. § 71.0021(b) (West Supp. 2012); VT. STAT. ANN. tit. 15, § 1101(2) (2010); WASH. REV. CODE § 26.50.010(3) (2008); WIS. STAT. ANN. § 813.12(1)(ag) (West Supp. 2012).

91 See *supra* note 90.

92 IOWA CODE ANN. § 236.2(2)(e)(1)(d) (West Supp. 2013). Additionally, Largio advocates for interpreting “nature of the relationship” language more broadly than has been interpreted by current state law, “[t]he nature of the relationship includes the activities in which the parties partake, how the parties interact with one another, and any other circumstances surrounding the type of relationship itself.” Largio, *supra* note 52, at 977.

93 N.Y. SOC. SERV. LAW § 459-a(2)(f) (McKinney Supp. 2013); see also *Pablo v. Crowder*, 236 S.W.3d 559, 563 (Ark. Ct. App. 2006) (interpreting “type” of relationship based on it lasting “a couple of months,” described by victim as “serious,” rather than the sexual nature of the relationship).

94 ARIZ. REV. STAT. ANN. § 13-3601(A)(6)(d) (Supp. 2012); IOWA CODE ANN. § 236.2(2)(e)(1)(c) (West Supp. 2013).

95 ARIZ. REV. STAT. ANN. § 13-3601(A)(6)(d) (Supp. 2012); IDAHO CODE ANN. § 39-6303(2) (d) (2011); KAN. STAT. ANN. § 21-5111(i)(1) (West 2012); MASS. ANN. LAWS ch. 209A, § 1 (LexisNexis 2011); MINN. STAT. ANN. § 518B.01, subd. 2(b) (West Supp. 2012); VT. STAT. ANN. tit. 15, § 1101(2) (2010).

96 See Largio, *supra* note 52, at 964-67. Compare ARK. CODE ANN. § 9-15-103(2) (2009) (emphasis added) (“‘Dating relationship’ means a romantic or intimate social relationship between two (2) individuals that *shall* be determined by examining the following factors . . .”), with IOWA CODE ANN. § 236.2(2)(e)(1) (West Supp. 2013) (“[T]he court may consider the following nonexclusive list of factors . . .”).

97 Largio, *supra* note 52, at 967.

from seeking protection when her relationship does not meet one of the listed factors.

Another strength of the factor approach rests in its ability to stand up against constitutional arguments of vagueness. Appellants have challenged the Texas definition of “dating relationship” on several occasions, arguing that the term is vague and thus, that the statute is unconstitutional.<sup>98</sup> Yet the factor approach employed by the Texas statute was upheld as sufficiently straightforward.<sup>99</sup> One Texas appeals court stated, “[t]he statute’s definition of ‘dating relationship’ is defined by commonly used terms; the definition is not complicated. It takes a common-sense approach to describing a dating relationship.”<sup>100</sup>

*6. No Definition.*—A large number of states decline to describe the relationship altogether by simply providing protection for those in a dating relationship.<sup>101</sup> Interestingly, Hawaii’s and Oklahoma’s statutes use the term “courtship” rather than “dating.”<sup>102</sup> With no qualifying language, these statutes grant courts broad discretion to determine who is, and who is not, in a dating relationship. Notably, courts often respond to this breadth of discretion by either referring to other states with factor approaches or creating their own factors. For example, New Jersey courts have adopted a six-question test that asks whether the relationship was casual, how frequent the interactions were, and whether the relationship was public.<sup>103</sup> Other states with broadly defined statutes rely on guidance from laws outside their own state to construct their own definitions. For example, after an analysis of other states’ statutes, Alaska’s courts have defined a dating relationship as “a relationship that either is marked by emotional intimacy or whose purpose is to allow two people to evaluate each other’s suitability as a partner in an intimate relationship or in marriage.”<sup>104</sup>

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98 *Childress v. State*, 285 S.W.3d 544, 551–52 (Tex. App. 2009); *see also* *Ochoa v. State*, 355 S.W.3d 48, 55 (Tex. App. 2010).

99 *Childress*, 285 S.W.3d at 551–52.

100 *Id.* at 552.

101 ALA. CODE § 13A-6-130(a) (LexisNexis Supp. 2012); ALASKA STAT. § 18.66.990(4), (5)(C) (2012); CONN. GEN. STAT. ANN. § 46b-38a(2)(F) (West Supp. 2013); IND. CODE ANN. § 34-6-2-44.8(a)(2) (LexisNexis Supp. 2012); ME. REV. STAT. ANN, tit. 19-A, § 4002(3-A) (Supp. 2012); N.J. STAT. ANN. § 2C:25-19(d) (West 2005); N.D. CENT. CODE § 14-07.1-01(4) (2009); WYO. STAT. ANN. § 35-21-102(a)(iv)(H) (2011).

102 HAW. REV. STAT. § 586-1 (West 2008); OKLA. STAT. ANN. tit. 22, § 60.1(5) (West Supp. 2013).

103 The six-question test asks: (1) Was there a minimal social interpersonal bonding of the parties over and above a mere casual fraternization? (2) How long did the alleged dating activities continue prior to the acts of domestic violence alleged? (3) What were the nature and frequency of the parties’ interactions? (4) What were the parties’ ongoing expectations with respect to the relationship, either individually or jointly? (5) Did the parties demonstrate an affirmation of their relationship before others by statement or conduct? (6) Are there any other reasons unique to the case that support or detract from a finding that a “dating relationship” exists? *S.K. v. J.H.*, 43 A.3d 1248, 1250 (N.J. Super. Ct. App. Div. 2012).

104 *Bates v. State*, 258 P.3d 851, 862 (Alaska Ct. App. 2011).

7. *Strategies Combined.*—While some states employ only the factor list or simply describe a relationship as an “intimate” one, most states combine the above terms and strategies in different ways. These combinations result in a broad spectrum of protection by allowing courts more or less flexibility in their determination of who may ask for protection.

Some approaches are better than others. The factor approach provides guidance to courts in what should be considered a dating relationship, but it isn’t exclusive. Because of this increased flexibility, a court can make determinations on a case-by-case basis. On the other hand, those statutes that “describe[] what the relationship entails, either by stating what a dating relationship is, what it is not, or both,”<sup>105</sup> have been criticized as less helpful than the factor approach.<sup>106</sup> These are statutes that refer to dating relationships with terms like intimate, romantic, sexual, or not casual. The problem with this approach is that it creates situations in which a victim who needs a protective order cannot obtain one because of a court’s particular interpretation of the words in the statute.<sup>107</sup> To illustrate this problem, Largio describes a long-term relationship between two people who care about each other and see each other frequently but who have not had sex, are not necessarily romantic nor have future plans of engagement or marriage.<sup>108</sup> If this relationship becomes abusive, it would seem that the victim should be able to protect herself. But since the relationship isn’t “intimate” or “romantic” and could even be viewed as “casual,” she could be disqualified.<sup>109</sup>

## II. PROBLEMS WITH THE CURRENT DOMESTIC VIOLENCE LAW

### A. *Historical Foundations for Today’s Domestic Violence Laws*

The extensive protections available to victims of domestic violence under the law are an exciting example of how social activism leads to positive change. For most of American history, the mainstream political and legal community ignored violence in the home. The prevailing opinion in American culture was that marriage was a private matter—affairs within the home should be dealt with *in* the home, not by any outside legal framework.<sup>110</sup> The influence of patriarchy on those who made and interpreted the laws can also explain this reluctance to address domestic violence. Whether consciously or not, men in charge maintained male power and control by either ignoring or

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<sup>105</sup> Largio, *supra* note 52, at 962.

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

<sup>107</sup> *See id.* at 964; *see also* Trimmer, *supra* note 81, at 248–51 (using vague terms such as “sexual relationship” that are often left undefined in state statutes, opens up the possibility that a victim intended to be protected by legislature will be denied help due to subjective judicial interpretation).

<sup>108</sup> Largio, *supra* note 52, at 964.

<sup>109</sup> *Id.* at 964.

<sup>110</sup> KAREL KURST-SWANGER & JACQUELINE L. PETCOSKY, *VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES* 27 (Oxford Univ. Press 2003).

perpetuating violence against children and women.<sup>111</sup> It was not until the women's movement of the 1970s challenged the status quo that the law began to recognize and protect against domestic abuse.<sup>112</sup> These second wave feminists argued violence in the home was "both a symptom of patriarchal values and a tool of maintaining gender dominance, in which the state was complicit for its failure to intervene."<sup>113</sup> After several unsuccessful attempts, proponents of domestic violence protections began to chip away at the legal framework that had protected abusers in the past. The 1980s saw changes to almost all state laws and the first federal recognition of domestic violence under the Reagan administration.<sup>114</sup>

But domestic violence laws often protected married women only.<sup>115</sup> As previously noted, the first version of the domestic violence legislation in Kentucky allowed only members of "married couples" to petition the court for an emergency protective order.<sup>116</sup> In her article *Marriage Mimicry: The Law of Domestic Violence*, Professor Ruth Colker notes that critics viewed these new laws as "an unacceptable federal intrusion into the domestic realm" and "an attack on the American family."<sup>117</sup> Thus, Colker concludes, limiting protection to married women was a type of compromise. Although radically stepping into the domestic sphere, these laws were not so brazen as to go even further by protecting people living outside the bounds of traditional marriage.<sup>118</sup>

#### B. Focus on Marriage or Marriage-Like Relationships

Even though protections for victims have been expanded outside of marriage, domestic violence law remains constructed around the idea of marriage-like relationships.<sup>119</sup> This is evident in most of the laws in existence today. Kentucky's law no longer requires marriage in order to seek protection, but it does require relationships that look like marriage: couples who live together or share a child.<sup>120</sup>

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<sup>111</sup> *Id.* at 28.

<sup>112</sup> See Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1851 (2006).

<sup>113</sup> Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 754 (2007).

<sup>114</sup> See Colker, *supra* note 112, at 1853–55.

<sup>115</sup> *Id.* at 1856.

<sup>116</sup> Act of Mar. 28, 1984, ch. 152, sec. 2, 1984 Ky. Acts 389, 389 (providing for protections of married couples or "any other person related by consanguinity or affinity within the second degree").

<sup>117</sup> Colker, *supra* note 112, at 1856 n.62 (quoting Bernadette Dunn Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 999 (1989)).

<sup>118</sup> *Id.* at 1856.

<sup>119</sup> See *id.* at 1856–57.

<sup>120</sup> Act of Apr. 9, 1988, ch. 258, sec. 4, 1988 Ky. Acts 633, 635 (amending the statute to include a "former spouse" or an "unmarried couple which has a child in common"); Act of Apr. 1, 1992, ch. 172, sec. 2, 1992 Ky. Acts 443, 444 (amending the statute to protect the "member of an unmarried



However, victims who are married to or live with their abuser are not the only ones at risk. Violence in dating relationships is a well-documented phenomenon.<sup>121</sup> A national study on dating violence reported that approximately one-third of women had experienced physical dating violence by their fourth year of college.<sup>122</sup> As a result, most states have included members of dating relationships in their definitions of who may be protected under the state domestic violence law.<sup>123</sup>

Allowing members of “dating” couples to petition the court for protection serves an immediate purpose, but it doesn’t get to the root of the problem. Even laws extending protection to members of dating relationships most often require the petitioner to be involved in a relationship that still looks a lot like a traditional marriage.<sup>124</sup> Many states require that the relationship have a sexual or romantic component.<sup>125</sup> The factor approach emphasizes long-term, monogamous, close relationships as those that qualify as dating relationships. The problem with what Colker calls this “marriage-mimicry model” is that state legislatures that constructed laws on this model failed to ask the most important questions: “who is most in need of legal recourse and how the law can best provide that recourse?”<sup>126</sup> Women have reported violence long after their dating relationship ended or violence perpetuated by a “friend or acquaintance.”<sup>127</sup> Colker argues that domestic violence law should not be concerned with the status of a victim’s

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couple,” defined as “each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together”).

121 See Judith A. Smith, *Battered Non-Wives and Unequal Protection—Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 94 (2005).

122 The average age of female participants in the study was 21. Paige Hall Smith, Jacquelyn W. White & Lindsay J. Holland, *A Longitudinal Perspective on Dating Violence Among Adolescent and College-Age Women*, 93 AM. J. PUB. HEALTH 1104, 1104–06 (2003) (reporting that by their fourth year of college 77.8% of women had experienced violence from a “romantic partner,” usually identified as a boyfriend); see also Jonathan Neufeld, John R. McNamara & Melissa Ertl, *Incidence and Prevalence of Dating Partner Abuse and Its Relationship to Dating Practices*, 14 J. INTERPERSONAL VIOLENCE 125, 128–30 (1999) (reporting 90% of female undergraduates, average age 18, reported some form of psychological abuse and 40% reported physical abuse).

123 See discussion *supra* Part I.B.

124 750 ILL. COMP. STAT. ANN. 60/103(6) (West Supp. 2013) (allowing petitioners in a “dating or engagement relationship” to petition the court for protection, so long as the relationship is “neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social context”); OKLA. STAT. ANN. tit. 22, § 60.1(5) (West Supp. 2013) (“Dating relationship” means a courtship or engagement relationship. For purposes of this act, a casual acquaintance or ordinary fraternization between persons in a business or social context shall not constitute a dating relationship . . .”).

125 See discussion *supra* Part I.B.

126 Colker, *supra* note 112, at 1845.

127 Colker also points out that the research on abuse outside of marriage-like relationships is slim, simply because research itself is still framed around the marriage-mimicry model. See *id.* at 1879–80.

relationship with her abuser.<sup>128</sup> Instead, the law should reflect the reasons why we protect domestic violence differently than other types of violence.<sup>129</sup>

### C. *The Reality of Domestic Violence*

In her article, *Bringing down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, Orly Rachmilovitz responds to Colker by identifying four characteristics of domestic violence that set it apart from stranger violence.<sup>130</sup> These characteristics, combined with other similar theories, provide insight into the importance of extending protection outside the realm of marriage-like relationships.

Heightened accessibility is the first characteristic Rachmilovitz identifies as particular to domestic violence. When an abuser is familiar with his victim, her schedule, and habits, the victim is more vulnerable to abuse.<sup>131</sup> Scholars in this area have also used power theory to explain the occurrence of domestic violence. This theory encompasses Rachmilovitz's second and third characteristics of domestic violence: power imbalance.<sup>132</sup> Power theory identifies patterns in abusive relationships of the "stronger" partner abusing the "weaker" partner.<sup>133</sup> Societal gender norms can be the basis for this power, as often it is men who abuse women.<sup>134</sup> Power can also be economic, based on which partner has access to certain resources.<sup>135</sup> Rachmilovitz relates power to control, arguing that abuse results from one partner's desire to maintain power or control over the other *or* as a response to perceived powerlessness.<sup>136</sup> Power dynamics are related to dependence in a relationship, which Rachmilovitz identifies as her fourth characteristic of domestic violence. Emotional dependence (created by a history of shared experience), financial dependence, or social dependence (when a victim's only social support system is her abuser) can create an environment where one partner is more powerful and create an opportunity for abuse.<sup>137</sup>

Other theories attempt to explain why domestic violence occurs by looking at human interaction on a slightly broader scale. For example, stress theory argues that economic, social, or personal stressors, including substance abuse,

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128 *Id.*

129 *Id.* at 1881–82.

130 See Rachmilovitz, *supra* note 52, at 500–07.

131 See *id.* at 500–01.

132 Rachmilovitz cites as her second characteristic "violation of trust" and points out that an abusive partner manipulates his victim's trust to facilitate the abuse. This trust power-struggle seems particularly related to Rachmilovitz's third characteristic about power imbalances and thus, I have combined the two for the purposes of this summary. See *id.* at 502–05.

133 KURST-SWANGER & PETCOSKY, *supra* note 110, at 39.

134 Rachmilovitz, *supra* note 52, at 503–05.

135 See KURST-SWANGER & PETCOSKY, *supra* note 110, at 39.

136 Rachmilovitz, *supra* note 52, at 503–05.

137 *Id.* at 505–07.

often lead to “family violence.”<sup>138</sup> Social learning theory argues that violence occurs because abusers learn to abuse in childhood, either as victims of abuse themselves or as witnesses to intimate abuse. Abusers then repeat this learned behavior into adulthood.<sup>139</sup>

Domestic violence happens for a number of reasons. The nature of the abuse is also complex. What is fairly straightforward is that domestic violence does not occur just because two people are married, share a child, or live together. Instead, violent relationships are typically those that are characterized by heightened accessibility, the opportunity for power imbalances, or dependence. The data clearly show that violence can occur outside the traditional marriage, and it is plausible that other types of relationships can also lead to violence. Rachmilovitz argues that even friends and roommates, while not romantic, share all of the same key characteristics as marital relationships.<sup>140</sup> Roommates have heightened accessibility to each other and relationships can include imbalances of power and dependence, most likely related to money or strong emotional connections. Therefore, abuse in this type of relationship can be just as dangerous and just as crippling as abuse in “intimate” relationships.<sup>141</sup>

Acknowledging that the law must not be overbroad but should encompass all victims of abuse, Rachmilovitz’ solution is basic—focus on substance rather than form. She argues that rather than defining victims based on their relationship, the determination of whether they are victims qualified to seek protection under the law should be based on what is happening in their relationships and whether it rises to the level of “personalized abuse.”<sup>142</sup>

### III. A PROPOSAL FOR CHANGE

Kentucky’s current law does not reflect the reality of domestic violence. This section will propose two amendments that could more adequately protect victims: amend Kentucky law to include members of dating relationships and amend Kentucky law to protect all victims of domestic violence. The issue has faced significant opposition in Kentucky’s legislature, so this section will also respond to critiques of those who oppose changing the law.

#### *A. Amend Kentucky Law to Include Members of Dating Relationships*

At the very least, Kentucky’s legislature should change the law to include and define members of dating relationships among those who may petition the court for protection. Kentucky’s last three legislative sessions have addressed this issue. In 2011, 2012, and 2013, the proposals to amend the law failed in the

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<sup>138</sup> KURST-SWANGER & PETCOSKY, *supra* note 110, at 38–39.

<sup>139</sup> *Id.* at 43–44.

<sup>140</sup> Rachmilovitz, *supra* note 52, at 532.

<sup>141</sup> *See id.* at 532–33.

<sup>142</sup> *Id.* at 536–37.

Senate Judiciary Committee.<sup>143</sup> In 2014, the fourth proposal was introduced in the House.<sup>144</sup>

Under current Kentucky law, “members of an unmarried couple” may petition the court for an EPO or DVO. The 2014 proposal amends the current definition of “member of an unmarried couple” to include “persons who are or have been in a dating relationship.”<sup>145</sup> As proposed, dating relationship means:

[A] relationship between individuals who have or have had a relationship of a romantic or intimate nature. The following factors may be considered in determining whether the relationship between the petitioner and the respondent is currently or was previously a romantic or sexual relationship: (a) The nature of the relationship was characterized by the expectation of affection between the parties; (b) The frequency and type of interaction between the persons involved in the relationship included the fact that the persons have been involved over time and on a continuous basis during the course of the relationship; (c) The relationship existed within the past three years; and (d) The term does not include violence in a casual acquaintanceship or violence between individuals who only have engaged in ordinary fraternization in a business or social context.<sup>146</sup>

This proposal combines a number of strategies used by other states. It employs the factor approach, providing a non-exclusive list of factors that can guide the court in its determination of whether the petitioner is in a “dating relationship.” One of the biggest advantages to this approach is that it can be broad enough to allow the court to be flexible and base its decisions upon individual circumstances, but detailed enough to provide a court with guidance in its determination.

However, as read, the definition appears to require that a relationship be “romantic” or “intimate.” The definition then goes on to say that the factors

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143 The 2011 and 2012 proposals defined “dating relationship” as

a relationship between individuals, each of whom is eighteen (18) years of age or older, who have or have had a relationship of a romantic or intimate nature, but does not include a casual acquaintanceship or ordinary fraternization in a business or social context. The existence of a dating relationship shall be determined based on consideration of the length and nature of the relationship and the frequency and type of interaction between the persons involved in the relationship.

H.B. 498, 2012 Gen. Assemb., 12th Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/HB498.htm>; H.B. 35, 2011 Gen. Assemb., 11th Reg. Sess. (Ky. 2011), available at <http://www.lrc.ky.gov/record/11rs/HB35.htm>. See also H.B. 9, 2013 Gen. Assemb., 13th Reg. Sess. (Ky. 2013), available at <http://www.lrc.ky.gov/record/13rs/HB9.htm>.

144 See H.B. 8, 2014 Gen. Assemb., 14th Reg. Sess. (Ky. 2014), available at <http://www.lrc.ky.gov/record/14RS/HB8.htm>. Although less popular in the past, the bill was introduced with twenty-four sponsors, both Republican and Democrat. For this reason, and because of new leadership in the Senate Judiciary Committee (freshman Republican Senator Whitney Westerfield replaced Sen. Tom Jensen as chair in late 2012), it seems likely that such an amendment will be added to Kentucky’s books in the near future. In that event, this Note is timely because it analyzes the proposed language for courts interpreting it, and it argues that the amendment is still not enough to provide victims with the protection they need.

145 H.B. 8, 2014 Gen. Assemb., 14th Reg. Sess. (Ky. 2014), available at <http://www.lrc.ky.gov/record/14RS/HB8.htm>.

146 *Id.*

are to aid in the determination of whether the relationship is “romantic” or “sexual.”<sup>147</sup> This wording presents several problems. The definition appears to use “intimate” and “sexual” interchangeably. If this is the case, it would follow that in order for a petitioner to qualify for protection, she must either be in a romantic relationship or a sexual relationship. This in turn raises questions as to what, exactly, is meant by “romantic” and “sexual,” or the phrase “expectation of affection” found in the factor list. Interpretations of these terms can vary, and other state’s courts have not established explicit meanings that would be helpful.<sup>148</sup> Since the statute appears to require the existence of romance or sex, rather than balancing these aspects of the relationship along with other factors, the ambiguity of these terms is problematic. This could lead to a situation in which a victim cannot seek protection merely because her relationship fails to meet whatever definition that particular court applies to these terms.

*B. Amend Kentucky Law to Protect All Victims of Domestic Violence*

By including dating relationships under Kentucky’s domestic violence protection statute, state representatives would help victims who really need it. But like domestic violence laws across the country, Kentucky’s law is still based on a model that focuses on marriage or marriage-like relationships. This focus is largely political rather than realistic.<sup>149</sup> Violence can occur in many different types of relationships, whether they are romantic, intimate, marriage-like, or not. Therefore, I suggest adding a provision that would provide members of non-romantic relationships the option to seek protection.

Currently, a “family member” or “member of an unmarried couple” may petition the court for protection in Kentucky.<sup>150</sup> I propose adding to this list: “any other person with a sufficient relationship to the abusing person as determined by the court.”<sup>151</sup> This additional “sufficient relationship” category should be determined based on a non-exclusive list of factors. While the factor approach is similar in form to those factors used in the 2014 proposal to describe a dating relationship, the factors themselves should change to reflect the reality of domestic violence. Thus, the factors should require the court to consider the potential in the relationship for dependency, heightened accessibility, and the existence of power imbalances that Rachmilovitz describes<sup>152</sup> as common characteristics of violent relationships.<sup>153</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> See discussion *supra* Part I.B.

<sup>149</sup> See discussion *supra* Part II.

<sup>150</sup> KY. REV. STAT. ANN. § 403.725(1) (West 2006).

<sup>151</sup> If adopted, KY. REV. STAT. ANN. § 403.725(1) would be amended to read: “any family member, member of an unmarried couple, or any other person with a sufficient relationship to the abusing person as determined by the court who is a resident.”

<sup>152</sup> See Rachmilovitz, *supra* note 52, at 500–07.

<sup>153</sup> Thus, an additional section of KY REV. STAT. ANN § 403.725 would read as follows:

This proposal is modeled after North Dakota's domestic violence law that includes in its definition of petitioners "any other person with a sufficient relationship to the abusing person as determined by the court."<sup>154</sup> While North Dakota's provision successfully steers clear of requiring marriage-like relationships, it also provides little in terms of definitiveness and guidance. However, by using factors to guide the court in what is meant by a "sufficient relationship," Kentucky's legislature can provide courts with more direction to make their determination without losing the flexibility of the language.

### C. Response to Criticism

The recent debate in Kentucky surrounding the addition of dating relationships to the domestic violence statute has sparked several critiques from those in favor of maintaining the current law. The following sections respond to these critiques both in the context of the dating relationship amendment and as related to the provision broadening the law to include other relationships the court deems appropriate.

1. *Protection Under Criminal Law.*—Critics dispute the necessity of any change to the law given the alternative options available for protection under Kentucky's criminal justice system.<sup>155</sup> There are several problems with this argument. First, the criminal assault and stalking laws in Kentucky do not provide the comprehensive protections that are available under the civil system. The most significant difference between the criminal and civil system is the ease and immediacy with which a petitioner may ask the court for protection. Courts granting an EPO offer twenty-four hour access and free filing to a victim.<sup>156</sup> When a court issues an EPO, it is immediately entered into the LINK system, accessible from every police cruiser in the state. By contrast, criminal restraining orders are only available after a defendant is convicted of stalking,<sup>157</sup>

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"Sufficient relationship" may be determined based on the following factors: (a) the length of the relationship, (b) the frequency of interaction between the persons involved in the relationship, (c) how the parties interact with one another, (d) heightened accessibility of one or both parties to the other; (e) whether and the existence of or potential for dependence within the relationship. These factors shall not be exclusive and other considerations may be taken into account.

*Id.* See generally Largio, *supra* note 52, at 977 (advocating that "nature of the relationship" language should be more broad to include "how the parties interact with one another").

<sup>154</sup> N.D. CENT. CODE § 14-07.1-01(4) (2009).

<sup>155</sup> Sen. Tom Jensen, a London Republican who was chairman of the Senate Judiciary Committee during the 2011 and 2012 session, expressed the hesitancy of Senators to consider the bill. "We don't have a lot of people in the Senate who think it's even necessary," Jensen said, adding that some senators believe existing criminal laws against assault, stalking, or other offenses are adequate in such cases. Deborah Yetter, *Bill to Extend Domestic Violence Protection Advances*, COURIER-J. (Louisville) (Mar. 14, 2012, 9:24 PM), <http://www.courier-journal.com/article/20120314/NEWS01/303140094/>.

<sup>156</sup> See *supra* Part I.A.2.

<sup>157</sup> See KY. REV. STAT. ANN. § 508.155 (West 2006).

and conditional release orders are only available after a party has been arrested for an assault or sexual offense.<sup>158</sup> Thus, under the criminal code, the best-case scenario following abuse is that the victim is able to alert the police; they respond quickly and arrest her abuser; *then* she applies for a restraining order. Even in this best-case scenario the victim is dependent on the efficiency and immediacy of the police force and has no way to take preventative measures before involving the criminal justice system.

Additionally, the criminal system cannot offer a tailored approach to protection. Under the civil system, a judge (after reading the victim's petition or hearing her testimony) has complete discretion to include any orders in an EPO or DVO that relate to the victim's particular needs or circumstances. On the other hand, a judge issues a criminal restraining order (the quickest restraining order available under the criminal system) at a pretrial release hearing. The judge hears the report of the pretrial release officer, who has interviewed the defendant, but is not required to speak to the victim. Although the judge has discretion to include any "other" provisions necessary, this decision does not necessarily involve the victim and therefore, cannot be adequately tailored to fit her needs.

Furthermore, criminal restraining orders do not offer a permanent solution. The conditional release order, arguably the best criminal option for emergency protection, lasts only until trial. The other available criminal restraining order, available only for defendants convicted of stalking, has a ten-year limit.<sup>159</sup>

Second, the inequalities inherent in the criminal justice system make it the least impressive solution to problems of domestic violence. Those punished under criminal domestic violence laws are disproportionately minority men.<sup>160</sup> Critics of the criminal justice system argue that this disproportion reflects the prevailing racism and classism ingrained in society's institutions and point out that often abusers are victims of inequality themselves.<sup>161</sup> Also, given the unhappy history between law enforcement and minority or low-income communities and many other pressures, minority and low-income women are often wary of turning to the criminal justice system for help.<sup>162</sup> Moreover, many women who may depend on their abuser economically do not necessarily want him to have a criminal record, which would make it harder to find a job.<sup>163</sup>

There is value in punishing those who hurt innocent victims. But pro-punishment rationales steer the domestic violence issue away from its feminist

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158 KY. REV. STAT. ANN. § 431.064(1) (West 2006 & Supp. 2012). Although a court may also issue a summons, therefore simply requiring the defendant to appear before the judge and not to jail, it is unlikely that a mere summons would issue in domestic violence situations, where impending violence is often likely.

159 KY. REV. STAT. ANN. § 508.155(5) (West 2006).

160 Gruber, *supra* note 113, at 805.

161 *Id.* at 751 n.45.

162 *Id.* at 758 n.80.

163 *See id.* at 805 n.271.

roots that focused more on the autonomy of women. “Reformers have abandoned the basic premise that the well-being and equality of women is the basis for policy reform and instead espouse the view that reform is defensible on the garden-variety ground that ‘criminal prosecution vindicates society’s injuries.’”<sup>164</sup>

2. *Indefiniteness.*—Critics also argue that the proposed definition of what constitutes a dating relationship is too vague or indefinite to be applied uniformly across the state.<sup>165</sup> However, approaches that employ factor lists have passed muster against challenges of vagueness.<sup>166</sup> There is no evidence that any statute using a similar factor approach has caused confusion among the judiciary or has been applied in a manner that is inconsistent across the state. Most importantly, state legislatures simply cannot foresee how and to whom domestic violence will occur. The civil law allows for flexibility in order to offer the most comprehensive protection for victims of domestic violence.

3. *Potential for Abuse of the Protection Order System.*—The restrictive language in the domestic violence statute establishes a threshold limit on who may ask the court for protection. Thus, theoretically, it prevents those who would use the court system for dishonest or unnecessary reasons from filing a petition in the first place. Without limiting language, *anyone* can petition the court for protection, whether or not they are actually victims of domestic violence. Opponents argue that, in turn, this increases the load on an already overburdened court system.<sup>167</sup>

However, it is important to remember that restrictive language also has the effect of denying those who are victims of violence protection based on technicalities. This was the case for Jeri Stewart.<sup>168</sup> Domestic violence is a

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<sup>164</sup> *Id.* at 811–12 (internal footnote omitted).

<sup>165</sup> Opponents point out that dating could be construed as a couple who has gone on one date or a couple that has gone on ten dates. Interview by Bill Goodman with Senator Tom Jensen, Chair, Ky. Senate Comm., *Bills Relating to Domestic Violence*, KET’s Kentucky Tonight, Feb. 22, 2010, available at [http://www.ket.org/cgi-bin/cheetah/watch\\_video.pl?nola=KKYTO+001713](http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=KKYTO+001713). Also, critics argue that the definition should be precise, given the huge cost impact on a party who is subject to a protective order. Interview by Bill Goodman with Ernie Lewis, Ky. Ass’n of Criminal Def. Lawyers, *Bills Relating to Domestic Violence*, KET’s Kentucky Tonight, Feb. 22, 2010, available at [http://www.ket.org/cgi-bin/cheetah/watch\\_video.pl?nola=KKYTO+001713](http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=KKYTO+001713).

<sup>166</sup> See *Childress v. State*, 285 S.W.3d 544, 551–52 (Tex. App. 2009); see also *Ochoa v. State*, 355 S.W.3d 48, 55 (Tex. App. 2010).

<sup>167</sup> Linda B. Blackford & Valerie Honeycutt Spears, *Advocates Push for Protections against Dating Violence in Kentucky*, LEXINGTON HERALD-LEADER, Jan. 1, 2012, available at <http://www.kentucky.com/2012/01/01/2011930/advocates-push-for-protections.html>.

<sup>168</sup> *Randall v. Stewart*, 223 S.W.3d 121, 125 (Ky. Ct. App. 2007) (Paisley, J. noting that “while we lack the authority to expand the scope of KRS 403.725 to cover dating relationships, this case illustrates the compelling need for the General Assembly to consider such an expansion”); see also *Alison C. v. Westcott*, 798 N.E.2d 813, 817 (Ill. App. Ct. 2003) (holding that “dating relationship” did not apply to high school student who petitioned for order of protection from classmate she saw every



crippling problem and a burdened court system is no rationale for denying victims the protections they need. Besides, there are remedies already in place to prevent abuse of the system. At the initial EPO or DVO hearing, the judge reviews all of the facts and the testimony of the alleged victim and alleged abuser. The judge will issue an EPO only after finding an “immediate and present danger of domestic violence and abuse”<sup>169</sup> or, in the case of a DVO, only after finding “from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur.”<sup>170</sup> There is no one size fits all scenario when it comes to incidents of domestic violence. As such, the judge is in the best position, after reviewing all the evidence, to siphon out those who do not need protection from those that do.

Furthermore, the civil EPO and DVO provide preventative measures that can stop problems before they escalate to arrest, criminal proceedings, and prison. Thus, broadening the net of who can seek these preventative measures would only serve to decrease the burden on Kentucky’s criminal system.<sup>171</sup>

### CONCLUSION

This Note has explored the protections available to victims of domestic violence through Kentucky’s civil law. Like many states across the country, these protections are extensive and beneficial. However, these protections are only available in Kentucky to parties who are married, live together, or have a child together. This Note has shown that although forty-one states extend protection to members of dating relationships, even these statutes are problematic. By defining dating relationships with terms like intimate, romantic, or sexual, state statutes lack specificity and clarity, and are thus subject to uneven interpretation by courts. By examining domestic violence law through a historical and theoretical lens, this Note argues that most state definitions of “dating relationship” reflect an outdated focus on protecting relationships that are like marriages. But domestic violence does not occur just because two people are married or because their relationship fits the definition of a “romantic” relationship. Rather, violence can occur in many different types of relationships, particularly those characterized by heightened accessibility, the opportunity for power imbalances, or dependence.

Therefore, this Note proposes that the Kentucky legislature amend its definition of who may petition our courts for emergency protective orders or domestic violence orders. At least, Kentucky should join the forty-one states that

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day at school that violently and sexually assaulted her on a lunch break because parties only spoke on the phone and went on the lunch date where petitioner was assaulted, they were not dating).

169 KY. REV. STAT. ANN. § 403.740(1) (West 2006 & Supp. 2012); see also discussion *supra* Part I.A.

170 KY. REV. STAT. ANN. § 403.750(1) (West 2006 & Supp. 2012).

171 See also Smith, *supra* note 121, at 146–47 (similarly arguing that New York proposals should not fail because of the burden on courts).

include members of “dating relationships” within the class of victims allowed to ask the court for protection. Even better, Kentucky’s state representatives should enact legislation that would define a petitioner’s eligibility for protection based on the substance of her relationship, rather than whether it conforms to outdated concepts of “romantic” relationships.

