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THE LAW OF EQUITABLE DISTRIBUTION: WHEN IS DOMESTIC VIOLENCE MORE THAN JUST A FACTOR IN DIVORCE?

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INTRODUCTION

Imagine you are married. After many years there are problems in your marriage. Some of these issues are beyond your control. You find out that your spouse is cheating on you. You plan to come home from work and confront your spouse about their infidelities. You even begin to think about the divorce process, confronting the concerns raised in your mind. *I'll be okay. I have a great career, I have worked my entire life, and I have saved. I will be okay.*

That night you approach your spouse. After an argument breaks out, you tell your spouse that you are leaving them. But they get angry. They get so enraged that they attack you in the basement of your marital home. “You’re never going to go anywhere [.]” they say, strangling you.¹ “Now you are going to die.”²

In 2011, Laura Panek’s husband attacked her, tied a rope around her neck, and attempted to strangle her.³ Miraculously, she survived the near-death ordeal.⁴ Laura’s husband pled guilty to first-degree strangulation and was sentenced to eleven years in

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¹ *No Way Out: Months-long Investigation Reveals Abusers Profiting Off Victims*, NEWS 12 (Mar. 14, 2019, 7:30 PM), <https://bronx.news12.com/no-way-out-months-long-investigation-reveals-abusers-profiting-off-victims-40130180> [<https://perma.cc/MPM4-UNFV>].

² *Id.*

³ *See id.*

⁴ *See id.* Laura was reportedly thirty seconds from death. *See id.*

prison.⁵ Soon after, she filed for divorce.⁶ Laura's attempt for justice was met by months of litigation, during which she was forced to relive her harrowing ordeal in civil court.⁷ And in the end, justice was not served. Concerning the parties' marital assets, the judge awarded Laura's abuser-spouse a significant portion of her pension fund.⁸ Therefore, after retiring in 2019, Laura was forced to make monthly pension distributions to her ex-husband while he continued serving his prison sentence for attempting to kill her.⁹

Domestic violence comes in many shapes and sizes, devastating all types of communities regardless of age, sex, or economic status.¹⁰ It includes "willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control" by an intimate partner, such as a spouse.¹¹ Unfortunately, Laura's story is not unique—20% of marriages involve domestic violence.¹² In the United States, 25% of women and 10% of men will experience domestic violence by their intimate partner in their lifetime.¹³ In addition to the physical and emotional impact, victims also face financial

⁵ See William Demarest, *Pearl River Man Gets 11 Years In Prison for Attack On His Wife*, PATCH, <https://patch.com/new-york/pearlriver/pearl-river-man-gets-11-years-in-prison-for-attack-on-his-wife> [<https://perma.cc/9C9S-MWJK>] (last updated Jan. 13, 2012, 6:16 PM).

⁶ See *No Way Out: Months-long Investigation Reveals Abusers Profiting Off Victims*, *supra* note 1.

⁷ See *id.* ("[T]he divorce case dragged on for many months and ultimately ended with a judge ordering Panek to pay a portion of her pension to the man who nearly killed her.").

⁸ See *id.*

⁹ See *id.* Pension benefits earned by each spouse during a marriage are marital assets and a party's loss to the right of these funds is considered by divorce courts. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(4) (McKinney 2021). Courts may order pension funds to be distributed to the opposing party once the retiree begins to receive them. See *The Ex-spouse's Share*, OFF. N.Y. STATE COMPTROLLER, <https://www.osc.state.ny.us/retirement/members/divorce/ex-spouses-share> [<https://perma.cc/BF6X-DS44>] (last visited Mar. 11, 2021). The equitable distribution of marital assets will be further discussed throughout this Note. See *infra* Part I.

¹⁰ See *Domestic Violence*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596811079991 [<https://perma.cc/MXD3-5FMT>] (last visited Mar. 10, 2021).

¹¹ *Id.*

¹² *Domestic Violence*, AM. ASS'N FOR MARRIAGE & FAM. THERAPY, https://www.aamft.org/Consumer_Updates/Domestic_Violence.aspx [<https://perma.cc/F9CG-DU42>] (last visited Mar. 9, 2021).

¹³ *Id.*

devastation.¹⁴ Medical costs directly related to intimate partner violence are estimated at more than \$4 billion per year, and additional economic hardships are attributable to the loss of work survivors face.¹⁵

Laura's story reached former New York State Senator David Carlucci, who proposed a bill to amend the Domestic Relations Law of New York.¹⁶ Carlucci wanted "[t]o ensure that domestic violence victims are protected from having to pay their abusers, [by] adding certain restrictions on the equitable division of assets."¹⁷ The bill called for an end to the abuse suffered by victims in divorce court by prohibiting spouses convicted of domestic violence from receiving awards in the form of marital asset distributions.¹⁸ The bill recommended adding an additional factor to section 236(B)(5)(d) of the Domestic Relations Law (hereinafter "DRL 236"),¹⁹ which would "establish that parties convicted of domestic violence [offenses] . . . are not extended the right to equitable distribution of assets with the parties that they have been convicted of domestic violence [] against."²⁰ Mandating that domestic violence be made a formal consideration would

¹⁴ See NAT'L CTR. FOR INJ. PREVENTION & CONTROL, *Costs of Intimate Partner Violence Against Women in the United States* 2 (2003), <https://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf> [<https://perma.cc/85LB-SGBG>].

¹⁵ See *id.*

¹⁶ See *No Way Out: Months-long Investigation Reveals Abusers Profiting Off Victims*, *supra* note 1; S.B. 6782, 242 Leg. Sess. (N.Y. 2019). Until this point, the state of New York had never formally protected victims of domestic violence concerning the distribution of marital assets. See S.B. 6782, 242 Leg. Sess. (N.Y. 2019). In other words, under New York divorce law, marital assets were distributed to violent and oftentimes criminally convicted abuser-spouses, solely because such property had been accumulated during the marriage. See *id.* New York's Legislature amended its Domestic Relations Law to include domestic violence as a factor in the equitable distribution of marital assets after the dissolution of a marriage. See 2020 Sess. Law News of N.Y. Ch. 55 (S. 7505-B) (McKinney 2020).

¹⁷ S.B. 6782, 242 Leg. Sess. (N.Y. 2019).

¹⁸ See *id.* The bill proposed that matrimonial courts be prohibited from awarding spousal maintenance and marital assets to parties convicted of abusing their spouses. See *id.* However, the focus of this Note is solely on the distribution of marital assets under DRL § 236(B)(5)(d). See N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 2021). The equitable distribution law will be discussed throughout this Note.

¹⁹ See DOM. REL. § 236(B)(5)(d). The provisions under DRL § 236(B) include various issues regarding new matrimonial actions or proceedings, such as maintenance awards and child support, but this is outside the scope of this Note. See *generally* DOM. REL. § 236(B). This Note focuses on the equitable distribution of marital property under DRL § 236(B)(5)(d).

²⁰ SB. 6782, 242 Leg. Sess. (N.Y. 2019). The proposal further defined domestic violence as "several offenses and attempts to commit offenses under New York State statute, like assault, menacing, strangulation, unlawful imprisonment, coercion, criminal tampering, criminal contempt, aggravated harassment, criminal trespass, and arson." *Id.*

“ensure that the impact that abuse has on a relationship and the awards of divorce proceedings are not subject to unreliable and inconsistent interpretations by the divorce courts.”²¹

In its proposal to amend the Domestic Relations Law, the New York Senate drew inspiration from legislation enacted in California, which advocates for domestic violence victims in divorce proceedings.²² Section 4325 of the California Family Code (hereinafter “California Code”) creates a rebuttable presumption that a criminally convicted abuser cannot receive spousal maintenance from their victim-spouse.²³ By acknowledging the very serious realities of abuse, the California Code shields victims from becoming a payor of spousal maintenance.²⁴ However, the California Code is also limited in its application: it pertains solely to spousal support and only considers convictions that occurred within five years of the divorce action.²⁵ Nevertheless, California’s use of the penal code to protect victims from cutting future checks to their abusers opened a similar door for marital property distribution in New York.²⁶

In April 2020, the New York Legislature accepted the Senate’s proposal and amended the Domestic Relations Law to add a new factor: section 236(B)(5)(d)(14) (hereinafter “Factor 14”).²⁷ This factor addresses domestic violence when resolving equitable distribution during divorce proceedings.²⁸ Factor 14 reads: “[i]n determining an equitable disposition of property . . . the court shall consider whether either party has committed an act or acts of domestic violence . . . against the other party and the nature,

²¹ *Id.*

²² *See id.* (“This legislation will . . . allow for the healing of domestic violence victims. Similar legislation has been enacted in California.”); CAL. FAM. CODE § 4325(a)(1) (West 2020).

²³ *See* FAM. § 4325(a)(1). California Family Code § 4325 creates a rebuttable presumption that prohibits “an award of spousal support to the convicted spouse from the injured spouse.” FAM. § 4325(a)(1). “The rebuttable presumption . . . may be rebutted by a preponderance of the evidence.” FAM. § 4325(c). The issue of spousal maintenance awards is beyond the scope of this Note.

²⁴ *See* FAM. § 4325(a)(1).

²⁵ *See* FAM. § 4325(a)(1).

²⁶ *See* S.B. 6782, 242 Leg. Sess. (N.Y. 2019) (relying on legislation enacted in California regarding spousal support to abusive spouses).

²⁷ *See* N.Y. DOM. REL. LAW § 236(B)(5)(d)(14) (McKinney 2021); Adam Turbowitz, *NY Adds a New Factor to Consider For Equitable Distribution: Domestic Violence*, 264 N.Y. L. J. 9 (July 27, 2020).

²⁸ *See* DOM. REL. § 236(B)(5)(d)(14).

extent, duration and impact of such act or acts.”²⁹ DRL 236 now lists sixteen factors that divorce courts must use to balance the distribution of marital property.³⁰ Leaving the weight and consideration of each factor to the court’s discretion, the equitable distribution law states:

In determining an equitable disposition of [marital] property [between the parties], the court shall consider: (1) the income and property of each party . . . ; (2) the duration of the marriage and the age and health of both parties; (3) the need of a custodial parent to occupy or own the marital residence . . . ; (4) the loss of inheritance and pension rights upon dissolution of the marriage . . . ; (5) the loss of health insurance benefits upon dissolution of the marriage; (6) any award of maintenance . . . ; (7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party . . . ; (8) [T]he liquid or non-liquid character of all marital property; (9) the probable future financial circumstances of each party; (10) the impossibility or difficulty of evaluating any component asset or any interest . . . ; (11) the tax consequences to each party; (12) the wasteful dissipation of assets by either spouse; (13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

²⁹ DOM. REL. § 236(B)(5)(d)(14). Factor 14 refers to the Social Services Law to describe acts of domestic violence: “[A]n act which would constitute a violation of the penal law, including, *but not limited to* acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, strangulation, identity theft, grand larceny or coercion . . . [and other] acts [that] have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm” N.Y. SOC. SERV. LAW § 459-a (McKinney 2019) (emphasis added). The Social Services Law provides examples of acts of domestic violence rather than a concrete definition, and it is not within the focus of this Note.

³⁰ See DOM. REL. § 236(B)(5)(d)(1)–(16).

(14) *whether either party has committed an act or acts of domestic violence . . . against the other party and the nature, extent, duration and impact of such act or acts*; (15) in awarding the possession of a companion animal, the court shall consider the best interest of such animal . . . ; [A]nd (16) any other factor which the court shall expressly find to be just and proper.³¹

Adding domestic violence to the list of factors now instructs courts to consider the impact of abuse on victim-spouses. Unlike spousal maintenance, which can later be modified, equitable distribution is determined *for* the judgment of divorce.³² It is therefore key to “ensure that judges consider the immeasurable burden placed on survivors when determining equitable distribution of property.”³³ “Domestic violence has very damaging effects on survivors, and they deserve to have those costs weighed during a divorce.”³⁴

This Note discusses domestic violence within the scope of matrimonial law, pointing out the several hardships and obstacles that victim-spouses face in divorce proceedings. Importantly, it highlights the systematic issues that are present in our judicial system. Through a comprehensive case law analysis, this Note examines the history of uncertainties surrounding the egregious and shocking standard, a threshold of spousal misconduct that has been routinely disagreed on by New York courts.³⁵

This Note also discusses the addition of domestic violence under Factor 14 and the legislative policy and intended protection behind the codification. It examines how the amendment to DRL 236

³¹ DOM. REL. § 236(B)(5)(d)(1)–(16) (emphasis added).

³² See *Family Court: Final Judgment of Divorce*, FINDLAW, <https://www.findlaw.com/family/divorce/family-court-and-final-judgment.html> (last updated Oct. 15, 2018). Once the judge decides on all the issues of the parties, including the division of the parties’ marital property, the judge will grant the judgment of divorce. See *id.* Spousal support may be changed following a final judgment of divorce. See *id.*; see also *Modification of Final Judgments*, JUSTIA, <https://www.justia.com/family/divorce/the-divorce-process/modification-of-final-judgments/> [<https://perma.cc/V8JN-NK8H>] (last visited Sept. 2021) (noting that spousal support may be changed following a final judgement of divorce).

³³ Press Release, Assembly Speaker Carl E. Heastie, Assembly Passes Legislation to Bring Justice to Domestic Violence Survivors During Divorce (Mar. 11, 2020), <https://assembly.ny.gov/Press/files/20200311.php> [<https://perma.cc/6JT2-H58W>].

³⁴ *Id.*

³⁵ See generally Turbowitz, *supra* note 27.

continues to foster the same concerns over the egregious and shocking standard. If left without further statutory direction, the objective of including domestic violence under Factor 14 will be lost as a result of the discretion permitted in awarding equitable distribution. The risks surrounding judicial discretion under DRL 236 are especially apparent when courts must determine whether the severity of abuse was “egregious enough” to support the distribution of marital property in the victim’s favor. What pivots the distribution of marital property in favor of the victim-spouse? Must the abuser be criminally convicted of a heinous crime, or is a credible history of spousal violence enough?

Therefore, as an alternative to Factor 14, this Note suggests that legislators establish mandatory equitable distribution guidelines to restrict judicial discretion and better protect victim-spouses. This proposed legislation would create a pre-determined mandatory minimum for victim-spouses, guaranteeing that their equitable distribution award is no less than a set percentage of the parties’ marital assets. In turn, this would automatically cap the abuser-spouse’s interest in the marital assets. Like the California Code, this legislation would better protect victim-spouses by taking a punitive stance against abuser-spouses.

Further, this Note proposes that the mandatory minimum/maximum guidelines be determined by a two-pronged test. If a spouse in a divorce proceeding is or has been criminally convicted for a domestic violence misdemeanor or felony under New York’s Penal Law,³⁶ then that conviction would trigger the mandatory equitable distribution guidelines under the first prong. Here, the mandatory distribution guidelines will reflect the abuser’s conviction under the Penal Law, taking into account the ranges of felony and misdemeanor classifications. Upon conviction, the victim-spouse would automatically receive a mandatory minimum distribution of marital property in line with the offense committed subject to the Penal Law. A conviction for domestic violence of the lowest felony offense under the Penal Law would trigger a mandatory minimum equitable distribution award of 75% of the parties’ marital assets to the victim-spouse. Likewise, a conviction for domestic violence of the lowest

³⁶ See N.Y. PENAL LAW § 70.00 (McKinney 2019).

misdeemeanor offense under the Penal Law would trigger a mandatory minimum distribution of 60% of the parties' assets to the victim. The remaining division of the marital assets will be left to the judge's discretion. As the classification of the offense committed by the abuser increases, so would the mandatory percentage of marital assets awarded to the victim-spouse.³⁷

Additionally, if during a divorce proceeding a spouse makes allegations of domestic violence for which there is no criminal conviction, then this Note proposes that courts assess abuse claims under the second prong. Here, the victim-spouse will have to offer evidence of violent conduct that resulted in serious bodily injury or evidence of a history of marital domestic violence.³⁸ If a court finds that the victim-spouse has sufficiently proved their allegations, then this second prong will trigger a rebuttable presumption that invokes a mandatory minimum equitable distribution award of 75% of the parties' marital assets to the victim-spouse. Judicial discretion may be used to determine the remaining distribution of property using DRL 236 factors. Like the California Code, the alleged perpetrator may rebut the presumption by a preponderance of the evidence.³⁹ If the alleged abuser-spouse can do so, then the mandatory guidelines would no longer be invoked. The court would be left with full discretion to balance the remaining factors under DRL 236 to equitably distribute the marital property. Similarly, if the court finds that the alleged victim-spouse did not provide credible evidence of domestic violence to trigger the second prong, then the court remains with full discretion under DRL 236. This Note suggests that legislative enactment of mandatory minimum/maximum guidelines would restrict judicial discretion in matrimonial cases that deal with domestic violence. This would bring legislators closer to ensuring that courts are consistent when interpreting the impact of domestic violence on parties and reliably determining equitable distribution awards.

³⁷ The greater the classification of the offense committed by the abuser-spouse against the victim, the higher the mandatory minimum percentage of marital assets will be awarded to the victim-spouse for the abuser's misconduct.

³⁸ See *infra* Part III.A.ii.

³⁹ See *infra* Part III.A.ii.

Part I of this Note discusses the hardships that domestic violence victims face when attempting to commence a divorce, pointing out the procedural obstacles that the legal system currently has. It briefly discusses the rise of the domestic violence movement and the slow evolution of New York's divorce law. Part I also critiques the development of the egregious and shocking standard through an analysis of case law, pointing out the problems victims continue to face today, even with New York's newly amended equitable distribution law. It discusses the excessive discretion given to judges due to a lack of statutory guidance, which results in inconsistent case law. In Part II, this Note analyzes Factor 14, pointing out the issues left unresolved even by the new amendment addressing domestic violence in equitable distribution. Part III proposes new legislation to ensure that victims of domestic violence no longer face inconsistent and unjust distributions of marital property as a result of divorce proceedings. It then applies the new legislation to cases discussed throughout this Note to show its effectiveness in achieving consistent and equitable results.

I. THE LAW OF EQUITABLE DISTRIBUTION

A. *Domestic Violence and Divorce Law*

Generally, when people find themselves in irreparably unhappy marriages, they seek to leave their relationship by filing for divorce.⁴⁰ Couples break their union by working out financial and parenting issues in ways that are legally recognized.⁴¹ Victims of domestic violence are no different—some want the option of

⁴⁰ See *Divorce Basics*, N.Y. STATE UNIFIED CT. SYS., <https://nycourts.gov/courthelp/family/divorceBasics.shtml> [https://perma.cc/YY89-CFSF] (last updated May. 5, 2021) (explaining how “[a] marriage doesn’t legally end until a Judge signs the Judgment of Divorce”).

⁴¹ See *id.*

divorce.⁴² They want freedom, to no longer be attached to their abuser and to move on without living in fear.⁴³ Like most divorcees, victim-spouses look to separate their finances, including marital properties and assets, efficiently and legally.⁴⁴ They also want to prevent their abusers from making future decisions for them, ones that spouses can make for one another.⁴⁵ And often most importantly, victim-spouses want to restart their lives.⁴⁶

i. The Legal System Poses Challenges for Victim-Spouses to Divorce

Victims of domestic violence face many issues when trying to divorce.⁴⁷ First, for those who are financially dependent on their abuser or are otherwise economically disadvantaged, the expenses of divorce proceedings are simply not feasible. On average, the cost of a divorce is approximately \$15,000.⁴⁸ Unlike in other areas of law,⁴⁹ New York does not provide free legal representation for domestic violence victims in divorce proceedings.⁵⁰ Even if a

⁴² See Zoe Greenberg, *Their Husbands Abused Them. Shouldn't Divorce be Easy?*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/nyregion/divorce-domestic-abuse-survivors.html?smid=url-share> [<https://perma.cc/88X5-E4NN>].

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.* Unless otherwise limited, spouses are legally allowed to make healthcare decisions for one another while they are married. See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.* (explaining that domestic violence in a relationship further burdens the already imperfect and often dreaded divorce process).

⁴⁸ See Terin Miller, *How Much Does a Divorce Cost on Average?*, THESTREET, <https://www.thestreet.com/personal-finance/education/how-much-does-divorce-cost-14882536> [<https://perma.cc/V33V-NDKW>] (last updated Apr. 3, 2020, 12:41 PM).

⁴⁹ See Jillian Jorgensen, *New York City Councilman Pushes Free Divorce Lawyers for Domestic Violence Victims*, N.Y. DAILY NEWS (Aug. 7, 2018, 4:30 PM), <https://www.nydailynews.com/news/politics/ny-pol-divorce-lawyers-domestic-violence-20180807-story.html> [<https://perma.cc/C9DX-D4KR>]. New York passed legislation that provides free legal representation for those fighting deportation and for low-income tenants facing eviction. See *id.*

⁵⁰ See *id.* Petitioners are not provided counsel for divorce proceedings because they take place in Supreme Court. See *id.* Their only resort is a nonprofit or city-funded agency, where there are not nearly enough attorneys to meet the needs of everyone. See *Legal Help*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/get-help/domestic-violence->

victim were to appear *pro se*, court filing fees tend to be hundreds of dollars, especially if the divorce is contested, as most are.⁵¹

Second, there are procedural obstacles within the legal system. The spouse who files for divorce must also serve process on the other.⁵² For those who are fortunate to afford an attorney, this usually involves paying an additional fee to a third party to locate the abuser and serve them with divorce papers.⁵³ The harder it is to locate the abuser-spouse, the more costly and time-consuming the divorce proceeding becomes, making it nearly impossible for those with limited resources to meet this first step of the process.⁵⁴ Moreover, if both spouses still reside in the marital home, the victim-spouse may face further danger after serving notice of the divorce proceeding to his or her abuser.

Once the divorce proceeding reaches the court, abusers often continue to mistreat the victim-spouse throughout the litigation in what is deemed an “overlooked form of abuse.”⁵⁵ Abuser-spouses often use the court system as a platform to control the victim by filing fraudulent paperwork to conceal their true net worth, an important factor for judges when deciding the distribution of marital assets.⁵⁶ Moreover, such parties file frivolous claims to financially burden their victim and delay the final judgment of

legal-help/ [https://perma.cc/5LXK-PH36] (last visited Feb. 6, 2021) (providing a list of legal resources).

⁵¹ See Jorgensen, *supra* note 49. In 2020, New York’s initial filing fee was \$210 alone. See Maddy Teka, *How to File for Divorce in New York*, FINDLAW, <https://statelaws.findlaw.com/new-york-law/new-york-divorce-process.html> [https://perma.cc/6KTS-2WAT] (last updated June 12, 2020).

⁵² See Greenberg, *supra* note 42.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ Sheila Burke, *New State Law Seeks to Stop ‘Stalking by Way of the Courts,’* AP NEWS (June 25, 2018), <https://apnews.com/article/0249e6d67b1d419b9787cb6adb297cb7> [https://perma.cc/9RHZ-CSVV].

⁵⁶ See Lindsay Dodgson, *The Manipulative Tactics Psychological Abusers Use in Court to Keep Control Over Their Victims*, INSIDER (July 29, 2018, 5:05 AM), <https://www.insider.com/psychological-abusers-use-the-courts-to-control-their-victims-2018-7> [https://perma.cc/DQ9Y-5UN2]. As part of the equitable distribution of marital assets, judges consider the income and property of each party throughout the marriage as well as during the commencement of the divorce action. See N.Y. DOM. REL. LAW § 236(B)(5)(d)(1) (McKinney 2021).

divorce.⁵⁷ Often termed “stalking by way of the court,”⁵⁸ the abuse may even continue throughout hearings and cross-examinations, where victims are forced to face their abusers and relive the details of their relationship, as private information about their personal lives is used to humiliate them.⁵⁹

ii. The Rise of the Anti-Domestic Violence Movement and Changes in Divorce Law

Domestic violence became commonly recognized in the United States in the late 1800s.⁶⁰ However, it was not until shelters first began to open in the early 1970s that the disadvantages faced by victims of domestic violence became apparent.⁶¹ In 1977, hospitals started to formally identify procedures on how to recognize cases and handle victims’ traumas.⁶² Finally, in 1980, response agencies were formally established to advocate for victims of domestic violence, particularly to “reform the criminal justice system” in

⁵⁷ See Burke, *supra* note 55. States like Tennessee have taken measures to advocate for domestic violence victims by passing a law aimed to prevent batterers from purposely “[f]iling frivolous lawsuits designed to bankrupt or inflict more harm on the people they already have abused.” *Id.* This law will allow judges to determine whether a spouse has filed a lawsuit simply to “harass or maliciously injure” a victim by way of attacking their finances during divorce or child custody hearings. *Id.* New York has not passed similar legislation and matrimonial courts continue to see this “very insidious form of domestic violence committed through vexatious/abusive litigation.” *Jessica T. v. Kieth T.*, 128 N.Y.S.3d 429, No. 33914/2013, 2020 WL 3163793, at *1–3, *8 (Sup. Ct. June 12, 2020) (finding that the defendant used the judicial system as a platform to harass, intimidate, and abuse the plaintiff for over six years by filing frivolous lawsuits, purposely prolonging conferences, failing to pay court-ordered support, and bringing forth unsubstantiated arguments).

⁵⁸ Burke, *supra* note 55.

⁵⁹ See Dodgson, *supra* note 56.

⁶⁰ See Sydney Hyer, *History of the Battered Women’s Movement*, DEL. COAL. AGAINST DOMESTIC VIOLENCE, <https://dcadv.org/blog/history-of-the-battered-womens-movement.html> [<https://perma.cc/6S3E-W7BU>] (last visited Mar. 10, 2021). In 1871, Alabama and Massachusetts made it a crime for husbands to assault their wives. *See id.* The same law was later adopted by North Carolina in 1874. *See id.*

⁶¹ *See id.* The first officially recognized shelter for domestic violence victims opened in 1974. *See id.*

⁶² *See id.*

recognition that victims had “little recourse when being assaulted by their intimate partners.”⁶³

The rise of the domestic violence movement in 1980 coincided with changes in New York’s divorce law when the State joined the majority and adopted the law of equitable distribution.⁶⁴ This new law now required courts to identify and distribute marital properties *equitably* between divorcing spouses, while “considering the circumstances of the case and of the respective parties.”⁶⁵

Since its enactment in 1980, the equitable distribution law has received much criticism for its implementation.⁶⁶ A 1986 Task Force Report noted the law’s unfair application, observing that judges were “predisposed to ensure that the [law did] not ‘make reluctant Santa Clauses out of ex-husbands.’”⁶⁷ Furthermore, the equitable distribution law did not address marital fault anywhere within its factors.⁶⁸ It was five years after its enactment that the

⁶³ *About Us*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/about-us/> (last visited Feb. 3, 2021) [hereinafter *Duluth Model*]. The Domestic Abuse Intervention Program (“DAIP”) was created in 1980, opening the door for coordinated response programs. See Hyer, *supra* note 60. Under DAIP, activists in the domestic violence movement created “The Duluth Model,” implementing an interactive approach between agencies to improve the response to domestic violence. See *id.*; *Duluth Model*, *supra* note 63. The Duluth Model has gained ongoing global recognition as agencies have come together “to make positive change in the criminal justice system around battering.” *Duluth Model*, *supra* note 63.

⁶⁴ See ALAN D. SCHEINKMAN, INTRODUCTION TO PRACTICE COMMENTARIES, N.Y. DOM. REL. LAW § 236 (McKinney 2021).

⁶⁵ N.Y. DOM. REL. LAW § 236(B)(5)(c) (McKinney 2021). Prior to the establishment of the equitable distribution law in 1980, the allocation of marital property was largely based on which spouse held legal title to a respective title. See SCHEINKMAN, *supra* note 64. Generally, the working male held title in his name alone. See *id.* Oftentimes, upon dissolution of a marriage, the non-working spouse would not be awarded interest in the marital property, unless joint tenancy was established in the respective property. See *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L. J. 11, 65 (1986) [hereinafter *Task Force*].

⁶⁶ See SCHEINKMAN, *supra* note 64 (“[N]ational surveys have reported that women and children tend to suffer an immediate decline in their standard of living in the aftermath of divorce while men enjoy an increased standard of living.”).

⁶⁷ *Task Force*, Abstract, *supra* note 65, at 67 (quoting Foster & Freer, *Law and the Family: O’Brien v. O’Brien*, N.Y.L.J. (Jan. 9, 1986)). The Report of the New York State Task Force on Women in the Courts is created by the New York Task Force on Women, a group comprised of judges, attorneys, and academics who report on gender biases in the New York court system and legal industry. See *id.*, at Abstract.

⁶⁸ See ALAN D. SCHEINKMAN, PRACTICE COMMENTARIES, C236B:25, N.Y. DOM. REL. LAW § 236 (McKinney 2021). The 1980 statute listed ten factors under

New York Court of Appeals determined that “[e]xcept in egregious cases which shock the conscience of the court . . . [fault] is not a ‘just and proper’ factor for consideration in the equitable distribution of marital property.”⁶⁹

The concept of “fault” has remained a significant consideration in divorce law, especially in domestic violence cases.⁷⁰ Even with its Domestic Relations statute, New York has a hearty history of case law that has produced inconsistent holdings due to unsettled judicial discretion surrounding domestic violence in divorce proceedings. In all, the law of equitable distribution is “codified in vague and uncertain directives, [and] will produce confused, inconsistent, and unexpected results.”⁷¹

B. New York’s Recognition of Domestic Violence Under the Equitable Distribution Law

Before the addition of Factor 14, New York courts took on different approaches concerning domestic violence and spousal abuse. This Note gives an overview of the various ways New York courts dealt with domestic violence under the “no-fault” equitable distribution law.

i. The Rise of the Egregious and Shocking Standard

Upon its enactment, the law of equitable distribution codified a catch-all provision under DRL 236: “[i]n determining an equitable disposition of property . . . the court shall consider . . . any other factor which the court shall expressly find to be just and proper.”⁷²

DRL § 236(B)(5)(d), nine specific guidelines, with the tenth to serve as a catch-all provision. *See id.*

⁶⁹ O’Brien v. O’Brien, 489 N.E.2d 712, 719 (N.Y. 1985).

⁷⁰ *See* J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 561, 599 n.284 (2007).

⁷¹ Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 739 (1991).

⁷² N.Y. DOM. REL. LAW § 236(B)(5)(d)(16) (McKinney 2021). When first enacted in 1980, the catch-all factor was under DRL § 236(B)(5)(d)(10). *See* SCHEINKMAN, *supra* note

By relying solely on this catch-all factor, courts adopted a standard of “egregious fault,” which led to various definitions of egregiousness within a marriage.⁷³

In 1984, the Second Department in *Blickstein v. Blickstein* held that a spouse’s financial abandonment of his wife should not be a consideration in an equitable distribution because it was not so egregious as to shock the conscience of the court.⁷⁴ The *Blickstein* court discussed the catch-all factor, reasoning that it was included in the law “because the Legislature was unable to reach agreement on whether fault was to be considered under equitable distribution.”⁷⁵ It was not until a year later that the Court of Appeals declared that fault may *only* be considered under the catch-all factor when circumstances are so egregious as to shock the conscience of the court.⁷⁶

For many years, the egregious and shocking standard under the catch-all factor of equitable distribution was mostly considered by lower courts. These courts developed their own definitions of the standard and fashioned inconsistent equitable distribution awards. Egregiousness in the realm of domestic violence arose in *Venkursawmy v. Venkursawmy*, where the court awarded 100% of the couple’s only asset to the victim-spouse.⁷⁷ Here, testimony centered on two instances of domestic violence.⁷⁸ The first was when the abuser-spouse had “rushed [the victim] with a knife.”⁷⁹ In the second instance of violence, the abuser-spouse set his victim on fire by pouring a can of gasoline over her head and lighting a match, leaving her with permanent injuries throughout her entire

68. With the addition of each factor under DRL § 236(B)(5)(d), the catch-all provision has been renumbered to remain the last listed factor. *See id.* at C236B:36. This Note has taken these additions and renumbering into account.

⁷³ *See* Harriet Newman Cohen & Tim James, *Egregious to a Fault: When Does Bad Behavior Affect Financial Determinations?*, N.Y. L. J. (July 28, 2008).

⁷⁴ *See* *Blickstein v. Blickstein*, 472 N.Y.S.2d 110, 111–14 (App. Div. 1984).

⁷⁵ *Id.* at 112. The court stated that the catch-all factor is clear, and its use is based on “whether marital fault is a ‘just and proper’ consideration in determining [the] distribution of marital property in light of the overall purpose of the equitable distribution law.” *Id.*

⁷⁶ *See* *O’Brien v. O’Brien*, 489 N.E.2d 712, 719 (N.Y. 1985).

⁷⁷ *See* *Venkursawmy v. Venkursawmy*, 1990 N.Y. Misc. LEXIS 782, at *1–2, *5 (Sup. Ct. Mar. 16, 1990).

⁷⁸ *See id.* at *3–4.

⁷⁹ *Id.* at *4.

body.⁸⁰ The abuser-spouse pled guilty to attempted murder and was sentenced to a minimum of five and a half years in prison.⁸¹

Clearly, the severity of the domestic violence in *Venkursawmy* rose to a standard of egregiousness that shocked the court's conscience.⁸² Referring to the catch-all factor, the New York County Supreme Court noted that this case "cries out for determination on that basis alone."⁸³ However, it was only after it considered other factors under DRL 236 that the *Venkursawmy* court awarded the victim-spouse 100% of the marital assets.⁸⁴ First, the victim-spouse contributed almost the entire down payment on the house and made most of the mortgage payments throughout the marriage.⁸⁵ Second, she remained the custodial parent for the parties' minor child while the abuser-spouse served his sentence.⁸⁶ As such, the victim-spouse in *Venkursawmy* had the advantage of two additional factors under the Domestic Relations Law to weigh the division of marital property in her favor. Even after acknowledging its strength, the court missed an opportunity to rely on domestic violence as the decisive factor in its equitable distribution of property.

Not all court decisions result in convictions. Cases may involve a lengthy history of domestic violence throughout the marriage and never result in criminal charges. In *Debeny v. Debeny*, the court admitted oral and written evidence to determine whether the victim-spouse's allegations of domestic violence were credible.⁸⁷ The Nassau County Supreme Court concluded that the defendant violated the victim-spouse's physical and mental well-being when he subjected her to abuse throughout their thirty-six-year marriage.⁸⁸ Specifically, the court found that in 1965, the abuser-spouse broke the victim-spouse's foot; in 1970, he caused her to

⁸⁰ *See id.*

⁸¹ *See id.* at *1.

⁸² *See id.* at *4-5.

⁸³ *Venkursawmy v. Venkursawmy*, 1990 N.Y. Misc. LEXIS 782, at *5 (Sup. Ct. Mar. 16, 1990).

⁸⁴ *See id.* at *4-5.

⁸⁵ *See id.* at *2, *5.

⁸⁶ *See id.* at *1-2, *5.

⁸⁷ *See Debeny v. Debeny*, 1991 N.Y. Misc. LEXIS 844, at *1 (Sup. Ct. Jan. 24, 1991).

⁸⁸ *See id.* at *1, *10. The court based its determination on credible evidence produced at trial. *See id.* at *4.

break her ankle when he shoved her; in 1971, he broke her finger, leaving her with permanent injuries; in 1979, he caused her to break her other foot; in 1982, he pushed her, causing her to break her arm, again leaving her with permanent injuries.⁸⁹ The court also noted that since 1951, the defendant slapped the victim between fifty and seventy times a year.⁹⁰ The court held that the defendant's assault of the victim was "at the very least, egregious and . . . must be considered in determining equitable distribution of the parties' marital property."⁹¹ Describing the defendant's conduct as "so severe and so brutal as to clearly demonstrate gross and complete disregard of the marital relationship[.]" the court made it a point to highlight the significantly smaller stature of the plaintiff compared to her abuser.⁹² Yet even while relying heavily on the catch-all factor in its determination of equitable distribution, the court found that the victim was entitled to *only* 60% of the parties' marital property, leaving the rest to her abuser.⁹³

Even though *Debeny* met the egregious and shocking standard as a result of its history of domestic violence,⁹⁴ in its discretion, the court did not seem to view the domestic violence under the catch-all factor significant enough to award the victim any more than 60% of the parties' assets.⁹⁵ Once the high standard of egregious and shocking conduct is met, what ought to be considered egregious "enough" to overcome the remaining factors

⁸⁹ See *id.* at *1–2.

⁹⁰ See *id.* The court recounted additional instances of abuse, including the abuser-spouse pulling the victim's shoulder out of its socket, punching her in the face causing two of her teeth to break, and preventing her from having friends or family at the parties' marital residence. See *id.* at *2–3.

⁹¹ *Id.* at *6. The victim-spouse, sixty-five years old, became epileptic, lost nearly half of the use of her left arm, and was unemployed for over three decades. See *id.* at *7–8.

⁹² *Id.* at *5–6.

⁹³ See *Debeny v. Debeny*, 1991 N.Y. Misc. LEXIS 844, at *6–7 (Sup. Ct. Jan. 24, 1991). The marital property included net proceeds from the sale of the marital residence, investment accounts, savings accounts, and pension. See *id.* at *4–5.

⁹⁴ See *id.* at *1–3, *6.

⁹⁵ See *id.* at *4 ("From the credible evidence adduced at trial, the court finds that plaintiff wife is entitled to sixty (60%) percent and defendant husband is entitled to forty (40%) of the . . . marital property."). Clearly disgusted by the history of violence at the hands of the defendant, the court *still* went on to distribute the marital assets almost *equally* among both parties, even though the victim remained the less-monied spouse. See *id.* at *6–9.

under DRL 236 so that victims can see a fair and just award of marital property? Today's Factor 14 has yet to provide courts with guidance.

ii. Discretion Becomes a Risk Under DRL 236

In *Orofino v. Orofino*, the Third Department upheld an award of 60% of a joint stock portfolio, valued at nearly two million dollars, to the abuser-spouse.⁹⁶ Granting a divorce on the ground of cruel and inhumane treatment, the lower court found that the husband “was verbally abusive to plaintiff on a biweekly basis; was physically abusive and threw an ashtray at plaintiff causing a laceration to her scalp; threatened to commit arson; and placed the muzzle of a rifle to plaintiff’s head and threatened to kill her.”⁹⁷ However, the court concluded that such conduct by the abuser-spouse “did not rise to the level of that rare occasion where marital fault should be considered[,]” thus not deserving greater consideration in the equitable distribution of marital property.⁹⁸ In balancing the factors of DRL 236, the lower court considered each party’s contributions to the marital property and placed greater weight on the abuser’s sole and direct responsibility for the joint investment portfolio throughout the marriage, noting that the victim was simply a “caretaker of the children and the marital residence.”⁹⁹ The Third Department affirmed and declared that the lower court was “vested with discretion” and may distribute marital assets any which way it deemed fit.¹⁰⁰

Orofino brings to light the problems surrounding an absence of statutory guidance under the equitable distribution law. As a discretionary balancing test, DRL 236 gives courts the power to determine the weight that domestic violence ought to be allocated in comparison to other factors. In fact, for forty years following its

⁹⁶ See *Orofino v. Orofino*, 627 N.Y.S.2d 460, 462 (App. Div. 1995). The Third Department also upheld the 50% distribution of the rest of the marital assets to the abuser-spouse. See *id.* at 462 n.2.

⁹⁷ *Id.* at 461.

⁹⁸ *Id.* at 461–62.

⁹⁹ *Id.* at 462.

¹⁰⁰ *Id.*

enactment, the equitable distribution law left it in judges' discretion to determine whether spousal abuse should even be considered.¹⁰¹ For example, the Third Department reversed an equitable distribution award that favored the victim-spouse because it found that the abusive spouse's conduct, which included verbal abuse, harassment, and several instances of physical violence, did not rise to a level of egregiousness that *this* court viewed as "outrageous or extreme as to shock the conscience . . . and to justify [the abuser-spouse's] divestiture of . . . marital property."¹⁰² Although today's Factor 14 provides that courts shall regard domestic violence when determining the division of marital property, there remains a substantial risk that judges will not consider the seriousness of abusive conduct unless provided with more clear guidance on its application.

iii. The Egregious and Shocking Standard Under *Havell v. Islam*¹⁰³

When determining the distribution of marital property, may a court admit evidence to show a history of domestic violence under the catch-all factor?¹⁰⁴ The New York County Supreme Court addressed this issue of first impression in *Havell v. Islam*, holding that "a pattern of domestic violence, properly proven by competent testimony and evidence, is a 'just and proper' factor to be considered by the court in connection with the equitable distribution of marital property"¹⁰⁵ Justice Silbermann

¹⁰¹ See Cohen & James, *supra* note 73. Until the enactment of Factor 14 in 2020, domestic violence could only be considered, if at all, under the catch-all factor of DRL § 236(B)(5)(d). See *id.*; Joel R. Brandes, *The Resurrection of Marital Fault*, N.Y. L. J. (May 18, 2020). Hence, from 1980 until 2020, courts had the power to determine that a spouse's admitted abusive actions were not extraordinary and shocking enough to be a quantifiable factor in its determination of equitable distribution. See Cohen & James, *supra* note 73.

¹⁰² *Kellerman v. Kellerman*, 590 N.Y.S.2d 570, 571 (App. Div. 1992). The complaint alleged twenty-seven instances of abuse, supported by dates and times. See *id.* The Third Department found the victim-spouse's review of her pleading and testimony as to the truth of each allegation sufficient to support cruel and inhumane treatment for granting a divorce. See *id.*

¹⁰³ See *Havell v. Islam*, 718 N.Y.S.2d 807 (Sup. Ct. 2000).

¹⁰⁴ See *id.* at 808.

¹⁰⁵ *Id.* at 811.

analyzed the facts of *Havell* under the Domestic Relations Law's catch-all factor and awarded the abused spouse nearly 100% of the parties' marital assets even though the victim was the sole economic provider throughout the marriage.¹⁰⁶

In *Havell*, the victim-spouse commenced the divorce action after her husband assaulted her with the intent of murder.¹⁰⁷ Wearing yellow rubber gloves, the abuser-spouse pinned his wife down and beat her over the head with a barbell and pipe, causing severe injuries such as a broken nose, jaw, and teeth, and leaving her with permanent brain damage and several surgeries to follow.¹⁰⁸ The abuser-spouse was indicted for second-degree attempted murder and first-degree assault and sentenced to nearly eight years in prison after pleading guilty to first-degree assault.¹⁰⁹

In the divorce action, the victim-spouse expressed instances of domestic violence against both her and the parties' children that led up to her attempted murder.¹¹⁰ The victim-spouse described the abuser-spouse's physical threats, including raising his fists, a telephone, and a book to her; regular use of obscene language and physical violence against her and the parties' minor children, often beating them, and intentional exposure of his sexual organs to the parties' children and their young friends through the clothing he wore in the house.¹¹¹ The abuser-spouse requested that the court exclude such evidence, arguing that since the alleged abuse throughout the marriage had not prevented the victim-spouse from being financially self-supporting, it, therefore "d[id] not

¹⁰⁶ See *Havell v. Islam*, 751 N.Y.S.2d 449, 451–52, 454 (App. Div. 2002) (affirming the trial court's equitable distribution of marital assets by properly weighing the factors under DRL § 236(B)(5)(d)). In total, the victim-spouse received 95.5% of the parties' marital assets, which was estimated at \$13 million. See *id.* at 455. Since the abuser-spouse had been unemployed, for living expenses he received \$377,500 of the \$4 million net proceeds from the sale of the marital residence. See *id.* at 451.

¹⁰⁷ See *id.* at 450–51.

¹⁰⁸ See *id.*

¹⁰⁹ See *Havell v. Islam*, 718 N.Y.S.2d 807, 808 (Sup. Ct. 2000). In his guilty plea, the abuser-spouse confessed that he attacked his wife with the intent to cause her serious physical injury. See *id.*

¹¹⁰ See *id.* at 808–10. The victim-spouse testified to this abuse during her Examination Before Trial. See *id.*

¹¹¹ See *id.* at 809–10. The victim-spouse also described the abuser-spouse's vulgar language against their housekeepers, him calling her a "f***ing idiot" and "old hag," and his use of vulgar language towards the parties' son as a result of his learning difficulties. *Id.*

amount to egregious conduct” that should be considered in the distribution of their marital assets.¹¹²

Generally, an important factor for courts to consider under the equitable distribution law is the income of each spouse during the marriage and at the time the divorce proceeding is commenced.¹¹³ Thus, having a higher income and income potential may result in a lower allocation of marital assets.¹¹⁴ The lower court found that the abuser’s violent assault was “so egregious and shocking” that consideration of financial impact was unnecessary and distribution of nearly all the marital assets to the victim was equitable and just.¹¹⁵ Further, the court held that evidence offered by the victim-spouse, such as testimony regarding violence against her and the parties’ children was admissible to prove a history of abuse throughout the marriage.¹¹⁶ On appeal, the First Department upheld the lower court’s use of the catch-all factor in its consideration of the abuser-spouse’s violent conduct during the marriage as well as his attempt to murder his wife and affirmed

¹¹² *Id.* at 810. In his argument, the abuser-spouse relied on two cases, *Wenzel v. Wenzel* and *Thompson v. Thompson*, both of which the court found to be “unsupported,” “not binding,” and “unpersuasive.” See *Havell v. Islam*, 751 N.Y.S.2d 449, 453 (App. Div. 2002). In *Wenzel v. Wenzel*, the victim’s inability to financially support herself after her husband’s physical attack was a factor in the analysis and ultimate award of equitable distribution. See *Wenzel v. Wenzel*, 472 N.Y.S.2d 830, 833 (Sup. Ct. 1984) (explaining how the abuser-spouse was convicted for attempted murder after he attacked the victim-spouse with a knife). The second case, *Thompson v. Thompson*, applied the same analysis as in *Wenzel* after the abuser-spouse raped the victim-spouse’s daughter, his stepdaughter, which prevented the victim-spouse from keeping full-time employment. See *Thompson v. Thompson*, 1990 N.Y. Misc. LEXIS 792, at *1, *9 (Sup. Ct. Jan. 5, 1990) (finding that the adverse effect on the victim-spouse, as a result of her daughter’s rape, prevented her from being able to financially support herself and constituted egregious conduct, determinative in equitable distribution).

¹¹³ See N.Y. DOM. REL. LAW § 236(B)(5)(d)(1) (McKinney 2021). “[T]he income and property of each party at the time of marriage, and at the time of the commencement of the action[]” has been the first factor listed since the enactment of the equitable distribution law. DOM. REL. § 236(B)(5)(d)(1).

¹¹⁴ See DOM. REL. § 236(B)(5)(d)(1).

¹¹⁵ *Havell v. Islam*, 718 N.Y.S.2d 807, 811 (Sup. Ct. 2000) (“[C]onduct resulting in lasting emotional and physical harm to [the victim-spouse] and the parties’ children[] . . . if proven, is so egregious and shocking that the court must invoke its equitable power so that justice may be done between the parties.”).

¹¹⁶ See *id.* In order to prove a history of domestic violence, the victim-spouse may testify to the abuser-spouse’s conduct against their children so long as she witnessed the said acts. See *id.*

the distribution of nearly all the marital property to the victim.¹¹⁷ Although the victim-spouse had been the sole economic provider throughout the twenty-one-year marriage and remained in a financially superior position compared to her husband, the egregious and shocking standard under the catch-all factor overcame the weight of all other factors under DRL 236.¹¹⁸

Havell set the stage for courts to recognize the severity of domestic violence in divorce.¹¹⁹ It illustrated the application of the law of equitable distribution to an abusive marriage, finding that domestic violence trumped a victim's financial advantages.¹²⁰ Importantly, the court highlighted that "a person should not be allowed to profit from his own wrongdoing"¹²¹ Although *Havell* provided a template for considering past instances of spousal abuse and successfully awarded nearly 100% of marital assets to a domestic violence victim, it was unable to effectuate real change in the law. The parties' abusive marriage spanned two decades, likely restricting *Havell* from being used to support claims of domestic violence in cases involving shorter marriages.¹²² Moreover, the exceptional facts of *Havell* also limit its application and reach. The abuser's attempt to murder his

¹¹⁷ See *Havell*, 751 N.Y.S.2d at 454 ("We find that the trial court properly exercised its broad discretion in determining equitable distribution . . . [and] its determination is firmly based on record evidence, and should not be disturbed.")

¹¹⁸ See *Havell v. Islam*, 751 N.Y.S.2d 449, 451–52, 454 (App. Div. 2002). In addition to the catch-all factor, the court looked at "the duration of the marriage and the age and health of both parties" under DRL § 236(B)(5)(d)(2), finding that the victim-spouse's health was deterred as a result of her abuser-spouse's violent assault. *Id.* at 451–52. Further, the court also examined "any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of [the] marital property by the party not having title . . . and to the career or career potential of the other party" under today's DRL § 236(B)(5)(d)(7), finding that the abuser-spouse "had assisted only minimally with child-rearing and managing the household." *Id.*

¹¹⁹ See *id.* at 451–52, 454 (applying the catch-all factor to acknowledge that spousal abuse deserved the greatest weight under DRL § 236).

¹²⁰ See *id.* at 452–53 (rejecting the argument that when the victim is able to financially support herself, consideration of past abuse ought to be disregarded with respect to equitable distribution). Relying on *McCann v. McCann*, the *Havell* court narrowed egregious and shocking conduct to apply "only when 'the act in question grievously injures some highly valued social principle.'" *Id.* at 453 (quoting *McCann v. McCann*, 593 N.Y.S.2d 917, 921 (Sup. Ct. 1993)).

¹²¹ *Id.* (noting that fault is a consideration in cases that deal with the "preservation of human life and 'the integrity of the human body'" (citing *McCann*, 593 N.Y.S.2d at 922)).

¹²² See *id.*

spouse was extremely gruesome and horrific, egregious enough to shock the conscience of any court, thus restricting its applicability to domestic violence cases that rise to a similar level of heinous conduct.¹²³ Without an alternative to the egregious and shocking standard, *Havell* is limited to “cases where one spouse attempts to murder the other spouse.”¹²⁴ Were the domestic abuse of a financially superior victim to fall short of a murderous assault, it is unlikely that *Havell* could be used to institute a similar limit on an abuser’s award of marital property.¹²⁵

Nearly a decade later, the New York Court of Appeals revisited the egregious and shocking standard and recognized *Havell* as the prime example of the high standard of vicious assault necessary to constitute egregious behavior that limits equitable distribution.¹²⁶ Importantly, the Court of Appeals stated that egregious conduct in a divorce “should be only a truly exceptional situation, due to outrageous or conscience-shocking conduct on the part of one spouse, that will require the court to consider whether to adjust the equitable distribution of the assets.”¹²⁷ Citing *Havell*’s “vicious assault of [the] spouse in [the] presence of children,” it went on to say that “[a]bsent these types of extreme circumstances, courts are not in the business of regulating how spouses treat one another.”¹²⁸ The State’s highest court has not revisited the egregious and shocking standard under the equitable distribution law since. And today’s addition of domestic violence as a consideration in equitable distribution does not provide clarity on the efficacy of this decision.

¹²³ See *Havell*, 751 N.Y.S.2d at 454. Affirmed by the First Department, the trial court held that evidence of domestic violence can only be acknowledged in equitable distribution if it is “so egregious and shocking that the court must invoke its equitable power so that justice may be done between the parties.” *Havell v. Islam*, 718 N.Y.S.2d 807, 811 (Sup. Ct. 2000).

¹²⁴ Cohen & James, *supra* note 73 (describing the standard in *Havell* as the “de facto ‘serious violent felony’ standard”).

¹²⁵ See *id.* (“Because of the extreme nature of that attack, the court noted that it ‘did not reach the issue of whether the acts of domestic violence committed by the husband prior to April 22, 1999, should further reduce the husband’s award.’”).

¹²⁶ See *Howard S. v. Lillian S.*, 14 N.Y.3d 431, 436 (2010) (holding that adultery by a spouse was not considered egregious conduct for the purposes of determining equitable distribution).

¹²⁷ *Id.*

¹²⁸ *Id.*

iv. A Lost Attempt to Limit the Egregious and Shocking Standard

Six years after deciding *Havell*, Justice Silbermann loosened some of its factual distinctions when she awarded 100% of the marital assets to the victim-spouse in *DeSilva v. DeSilva*.¹²⁹ The facts of *DeSilva* differed from *Havell*. The parties in *DeSilva* were married for eleven years as opposed to the twenty-one in *Havell*.¹³⁰ And although the abuser-spouse had an arrest record, he was never arrested as a result of domestic violence, nor had he attempted to murder his wife.¹³¹ But what the two cases had in common was a history of domestic violence abuse.

In *DeSilva*, the victim-spouse testified that throughout her marriage, the abuser-spouse verbally abused her, spat on her, and threw items at her (including a duffle bag at her stomach while she was pregnant).¹³² Concerning equitable distribution, the court conducted a balancing of factors under DRL 236, noting that the victim-spouse earned nearly double her husband's salary,¹³³ and further pointed out that "[t]he future circumstances of defendant may be problematic due to his alcohol abuse and anger management problems which affect his ability to retain a job."¹³⁴

Important was the analysis under the catch-all factor. Justice Silbermann highlighted that a history of spousal abuse alone may rise to the level of fault, significantly lowering the attempted murder or violent felony standard offered in *Havell*.¹³⁵ The court

¹²⁹ See *DeSilva v. DeSilva*, No. 350818/05, 2006 N.Y. Misc. LEXIS 2489, at *10 (Sup. Ct. Aug. 18, 2006).

¹³⁰ See *id.* at *1 ("The wife testified to a long history of abuse during the parties' 11-year marriage . . .").

¹³¹ See *id.* at *4 (noting that the abuser-spouse was arrested for various non-domestic incidents, including a physical confrontation with a cab driver, a dispute on the subway, and a physical altercation involving the victim-spouse's family).

¹³² See *id.* at *2-3. The victim-spouse testified that the abuser-spouse would verbally abuse her in front of the parties' children by calling her a "c****" and "w****." See *id.* at *2.

¹³³ See *id.* at *6 (evaluating income and property of each party at the time of commencement of the divorce action under DRL § 236(B)(5)(d)(1)).

¹³⁴ *Id.* at *7 (evaluating the future financial circumstances of the parties under what is today's DRL § 236(B)(5)(d)(7)).

¹³⁵ See *DeSilva v. DeSilva*, No. 350818/05, 2006 N.Y. Misc. LEXIS 2489, at *10 (Sup. Ct. Aug. 18, 2006).

held that the victim's testimony proved "a pattern of domestic violence warranting an unequal division of marital assets[]" and awarded 100% of the property to the abused spouse.¹³⁶ Therefore, under the catch-all factor, a history of abuse throughout the marriage, even without a criminal conviction for domestic violence, garnered the greatest weight and trumped all other factors including the superior financial position of the victim-spouse.

Most significantly, the *DeSilva* court attempted to lower the egregious and shocking standard for misconduct in divorce proceedings involving spousal abuse.¹³⁷ The court made no reference to the egregious and shocking standard, nor did the court base its decision on a conviction of domestic violence.¹³⁸ The court's decision to distribute the entirety of the marital property to the financially superior victim-spouse hinged on the fact that there was a history of domestic violence that was supported by sufficient evidence.¹³⁹ Moreover, the court recognized that abuse need not be predominantly physical to constitute domestic violence under the equitable distribution law.¹⁴⁰

The *DeSilva* court got it right when it tackled the limitations of *Havell* and persisted to penalize spousal abuse, identifying domestic violence as a significant factor in equitable distribution.¹⁴¹ *DeSilva* recognized the importance of all spousal abuse, not just those that led to criminal convictions or severe

¹³⁶ *Id.* In addition to the court awarding the plaintiff all marital assets, the judgment assigned the defendant sole responsibility for all marital loans, except for an Auto Loan. *See id.* As such, the abuser-spouse was liable for 92% of the marital debts. *See id.*

¹³⁷ *See* Joanna Grossman, *The Financial Penalty for Spousal Abuse: A New York Judge Ups the Ante, By Awarding All Marital Property to the Abuse Victim*, FINDLAW (Sept. 5, 2006), <https://supreme.findlaw.com/legal-commentary/the-financial-penalty-for-spousal-abuse-a-new-york-judge-ups-the-ante-by-awarding-all-marital-property-to-the-abuse-victim.html> [<https://perma.cc/BKY2-U4Q7>].

¹³⁸ *See id.*

¹³⁹ *See DeSilva*, 2006 N.Y. Misc. LEXIS 2489, at *7, *10 ("[I]t is the opinion of this court that there has been proven by competent testimony a pattern of domestic violence warranting an unequal division of marital assets.").

¹⁴⁰ *See* Cohen & James, *supra* note 73 (noting that majority of the abuser-spouse's violent conduct was verbal).

¹⁴¹ *See DeSilva v. DeSilva*, No. 350818/05, 2006 N.Y. Misc. LEXIS 2489, at *10 (Sup. Ct. Aug. 18, 2006). Justice Silbermann recognized the permanent emotional difficulties faced by domestic violence victims and the positive effect that a justifiable and equitable distribution of marital assets may bring to victims. *See id.* at *9–10.

assault. It attempted to expand the *Havell* decision beyond cases of attempted murder, with minimal reference to a standard of egregiousness.¹⁴² *DeSilva* also recognized the relevance of systemic spousal abuse throughout a marriage, even in those not as lengthy as *Havell*'s. Notably, the *DeSilva* decision prevented an abusive spouse without a domestic violence conviction from acquiring marital assets.

Although *DeSilva* produced a strong holding and rationale, as a New York County Supreme Court decision, its authority is limited: *DeSilva* was never appealed. Thus, judges are free to overlook the importance of *DeSilva* and rely on various prior definitions of the egregious and shocking standard. Without proper statutory direction under today's Factor 14, the *DeSilva* standard risks falling through the cracks.¹⁴³

II. AN ANALYSIS OF FACTOR 14

Effective May 3, 2020, New York courts are required to consider “the nature, extent, duration and impact” of domestic violence under Factor 14 to determine equitable distribution.¹⁴⁴ Questions surrounding the application of Factor 14 and the use of the egregious and shocking standard emerged as litigators raised concerns over the amendment's effect on divorce proceedings.¹⁴⁵ How should allegations of domestic violence play into a court's

¹⁴² See Cohen & James, *supra* note 73 (expanding the significance of fault in determining the equitable distribution of marital property).

¹⁴³ For example, were a court to place the greatest weight on economic factors like DRL § 236(B)(5)(d)(1) and DRL § 236(B)(5)(d)(9), as opposed to non-economic factors (such as a history of domestic violence under Factor 14), the abuser's small salary and job instabilities would outweigh the victim's higher salary and earning potential. See *DeSilva*, 2006 N.Y. Misc. LEXIS 2489, at *6–7. Thus, disregarding the *DeSilva* standard puts Factor 14 at risk of being balanced out. See Grossman, *supra* note 137 (noting that a failure to utilize *DeSilva* to rely on a finding of domestic violence may have awarded the abuser-spouse greater than 50% of the marital assets and a far smaller share of their debts).

¹⁴⁴ See N.Y. DOM. REL. LAW § 236(B)(5)(d)(14) (McKinney 2021) (“In determining an equitable disposition of property . . . the court shall consider . . . whether either party has committed an act or acts of domestic violence . . . against the other party and the nature, extent, duration and impact of such act or acts . . .”).

¹⁴⁵ See Turbowitz, *supra* note 27; see also Brandes, *supra* note 101.

analysis of other factors under DRL 236?¹⁴⁶ Moreover, how much should spousal abuse “skew” judicial discretion in the distribution of marital property?¹⁴⁷

A. Outcomes Continue To Be Far From Just

The flaws of the Domestic Relations Law were observed in July 2020. In *Y.L. v. L.L.*, the New York Supreme Court applied the equitable distribution law in a divorce action regarding a forty-year marriage overcome with systematic abuse.¹⁴⁸ The parties married in 1969, immigrated to the United States, and had two children by 1982.¹⁴⁹ They grew increasingly wealthy during the marriage, both parties contributing to business endeavors and jointly purchasing real estate.¹⁵⁰

At trial, the victim-spouse testified to instances of domestic violence that began as early as 1972, when the abuser-spouse punched the victim in her mouth and knocked her teeth out.¹⁵¹ Court records indicated that the attack resulted in “permanent injury, impairment and pain to [the victim’s] jaw and mouth which she still suffers from [today].”¹⁵² The victim-spouse underwent various surgeries and dental procedures and continues to regularly receive medical attention for this injury.¹⁵³ At trial, the abuser-spouse did not refute the victim’s testimony and acknowledged that “it took place ‘a long time ago.’”¹⁵⁴ In another incident, the abuser-spouse kicked the victim in her stomach while she was pregnant, causing her to be hospitalized.¹⁵⁵

¹⁴⁶ See Turbowitz, *supra* note 27.

¹⁴⁷ See *id.*

¹⁴⁸ See *Y.L. v. L.L.*, 129 N.Y.3d 669, 2020 WL 4516937, at *1–2 (Sup. Ct. July 29, 2020).

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* Prior to the marriage, the parties had no pre-marital assets or separate property. However, during the course of their marriage, they lived an affluent lifestyle and acquired significant wealth. See *id.* at *2.

¹⁵¹ See *id.* at *2.

¹⁵² *Id.*

¹⁵³ See *id.*

¹⁵⁴ *Y.L. v. L.L.*, 129 N.Y.S.3d 669, 2020 WL 4516937, at *2 (Sup. Ct. July 29, 2020).

¹⁵⁵ See *id.*

In addition to the physical violence, there was also significant emotional abuse throughout the marriage.¹⁵⁶ At trial, the victim-spouse provided credible testimony indicating that the abuser-spouse had an overbearing personality and was “unpredictable, angry, controlling, manipulative, secretive and cold[]” throughout their marriage.¹⁵⁷ She recalled instances when the abuser-spouse turned off the water in her home and purposely deactivated the elevator after her knee surgery.¹⁵⁸ The parties’ adult children provided testimony in support of the victim-spouse’s allegations, stating that the abuser-spouse “had a ‘very aggressive temper,’ would ‘hit’ [their] mother, and ‘sometimes choke her when he got very aggressive.’”¹⁵⁹ This pattern of abuse spanned from the beginning of the marriage in 1969 until the parties’ separation in 2012.¹⁶⁰

On the issue of equitable distribution, the *Y.L.* court recognized eight factors it deemed worthy of evaluation.¹⁶¹ With regard to the domestic violence incurred by the victim-spouse throughout the marriage, the court only considered its effect under Factor 2, “the duration of the marriage and the age and health of both parties[.]”¹⁶² The court noted that the abuser’s 1972 assault on the victim-spouse left permanent physical damage to her mouth

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* (stating that when the abuser-spouse felt jealous or threatened by the victim, he would force her to resign from work and forego career opportunities).

¹⁵⁸ *See id.* at *3.

¹⁵⁹ *Id.* (noting that the victim-spouse and the parties’ adult daughter also testified that the abuser-spouse had several extramarital affairs in the parties’ marital residence).

¹⁶⁰ *Y.L. v. L.L.*, 129 N.Y.S.3d 669, 2020 WL 4516937, at *3 (Sup. Ct. July 29, 2020) (emphasizing the victim-spouse supported the abuser-spouse’s businesses, worked full time, and functioned as the primary caretaker of the parties’ children throughout their marriage).

¹⁶¹ *See id.* at *14; *see also* N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 2021) (stating that, “[i]n determining an equitable disposition of property . . . the court shall consider: (1) the income and property of each party . . . at the time of the commencement of the action; (2) the duration of the marriage and the age and health of both parties; . . . (6) any award of maintenance . . . ; (7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title . . . ; (8) [T]he liquid or non-liquid character of all marital property; (9) the probable future financial circumstances of each party; (10) the impossibility or difficulty of evaluating any component asset or any interest in a business . . . ; (12) the wasteful dissipation of assets by either spouse . . .”).

¹⁶² DOM. REL. § 236(B)(5)(d)(2).

and law.¹⁶³ Comparing the health of both parties, the court also found that the victim-spouse suffered from “depression and anxiety at least partially related to instances of domestic violence in her marriage[,]” whereas the abuser was significantly healthier despite being older than the victim.¹⁶⁴ The court cited *Havell* and noted that the victim-spouse’s continued pain and discomfort as a result of the injuries caused by the violence are pertinent to the issue of equitable distribution, weighing Factor 2 in her favor.¹⁶⁵ Proceeding to evaluate the remaining factors under the equitable distribution law, the court found that the abuser-spouse was in a superior financial position, had greater assets available to him, owned a largely profitable business, and had invested interests that allowed him to retire.¹⁶⁶ In comparison, the victim-spouse had less of an earning capacity, maintained a struggling business, and needed to work full-time, the possibility of which was diminishing due to her age and chronic health issues.¹⁶⁷

Without further consideration of the history of domestic violence, which was sufficiently proven by the credible evidence presented at trial, the court still held that “marital assets should be distributed as equally as possible[]” because of the long duration of the marriage.¹⁶⁸ Moreover, by weighing Factor 2 in her favor, the court merely granted the victim-spouse a chance “to attempt to retain [the marital] homes by *purchasing* [the abuser-spouse’s] equitable share thereof.”¹⁶⁹

Y.L. demonstrates the discretionary risks that remain in the law of equitable distribution. The court did not independently regard domestic violence under DRL 236. Although it discussed the permanent effects of the abuse on the victim-spouse, the sole

¹⁶³ See *Y.L.*, 129 N.Y.S.3d 669, 2020 WL 4516937, at *2, *17.

¹⁶⁴ *Id.* at *17 (“[T]here is no doubt that Wife’s health is more precarious than Husband’s.”).

¹⁶⁵ See *id.*

¹⁶⁶ See *Y.L. v. L.L.*, 129 N.Y.S.3d 669, 2020 WL 4516937, at *16–17 (Sup. Ct. July 29, 2020).

¹⁶⁷ See *id.*

¹⁶⁸ *Id.* at *23 (noting that the marriage began with no separate property and lasted forty-seven years). “While these parties may have contributed to certain assets unequally, they accumulated *everything* that they currently own together.” *Id.*

¹⁶⁹ *Y.L.*, 129 N.Y.S.3d 669, 2020 WL 4516937, at *17, *48 (emphasis added) (granting the victim-spouse a right to purchase the abuser’s share of the equity in both their marital homes).

weight of the victim's health under Factor 2 did no more than provide a near-equal split of the marital property.¹⁷⁰ Moreover, the court failed to consider the catch-all factor, which historically served as a safety net for victims in equitable distribution proceedings.¹⁷¹ Further, the facts of *Y.L.* easily met the elements addressed in *DeSilva*.¹⁷² Like in *DeSilva*, a history of abuse throughout the marriage, sans criminal conviction, was sufficiently proven by multiple credible witnesses. *Y.L.* even surpassed the *DeSilva* standard because it involved both emotional and physical violence, which caused permanent injuries, and the victim-spouse was in a financially inferior position compared to her abuser. The extent of judicial discretion allowed in *Y.L.* counters the advocacy for domestic violence victims, which supported the enactment of Factor 14 in the first place.

B. Factor 14 Raises Additional Concerns

Even though New York amended DRL 236 to expressly codify domestic violence as a factor in property division, it has yet to compel courts to follow a substantive outline. The lack of statutory language brings to light many risks. First, the egregious and shocking standard has not been explicitly abrogated by the courts.¹⁷³ Presumably, Factor 14 *still* maintains a standard of misconduct for domestic violence to be met.¹⁷⁴ If so, where does this leave the judicial system?¹⁷⁵ The concern here is that courts will continue to rely on case law like *Havell* in their application of

¹⁷⁰ See *id.* at *16–17.

¹⁷¹ See *id.* at *14 (finding that many factors did not apply and were therefore given minimal or no weight at all).

¹⁷² See *DeSilva v. DeSilva*, No. 350818/05, 2006 N.Y. Misc. LEXIS 2489, at *10 (Sup. Ct. Aug. 18, 2006) (holding that “a pattern of domestic violence warrant[ed] an unequal division of marital assets”).

¹⁷³ See Brandes, *supra* note 101 (raising the uncertainty of whether the amendment under DRL § 236 has abrogated the egregious and shocking standard); see also Howard S. v. Lillian S., 14 N.Y.3d 431, 436 (2010) (confirming the high threshold of the egregious and shocking standard that must be met under the equitable distribution law).

¹⁷⁴ See Brandes, *supra* note 101 (reasoning that the former egregious and shocking standard now may be replaced with a “lesser standard than egregious misconduct”).

¹⁷⁵ See Turbowitz, *supra* note 27.

Factor 14, which may unnecessarily create a higher standard for the domestic violence factor.¹⁷⁶ In turn, Factor 14 will carry little weight in the grand scheme of the sixteen equitable distribution factors. This would defy the legislative intent of the amendment, which aimed to guide courts in preventing awards from domestic violence victims to their abusers.¹⁷⁷ Although evoking a proper outcome, the egregious and shocking standard under the facts of *Havell* should not be relied on by judges when considering domestic violence in equitable distribution cases, as it can counteract loopholes that the amendment aimed to resolve.

Second, even if Factor 14 is considered, there is a great risk that judicial discretion may allow a victim-spouse's superior financial position to outweigh the consideration of domestic violence, especially in the absence of heinous misconduct like an attempted murder of the victim-spouse. There is no guarantee that a criminal conviction of domestic violence will trump the remaining factors unless a court, by preference, decides that it ought to. Furthermore, it leaves unaddressed the range of physical or emotional abuse that is required to be shown to support a pattern of domestic violence, especially in the absence of a criminal conviction. How much judicial discretion should be allowed when balancing the "nature, extent, duration and impact" of spousal abuse to meet the legislature's goal of protecting victim-spouses?¹⁷⁸ The amended statute does not provide the consistent and just outcomes that the Senate sought to invoke.¹⁷⁹

¹⁷⁶ The New York Court of Appeals found *Havell* as the principal case addressing domestic violence in divorce proceedings as they pertain to the equitable distribution of marital assets. See *Howard S.*, 14 N.Y.3d at 436.

¹⁷⁷ See S.B. 6782, 242 Leg. Sess. (N.Y. 2019) ("This absence of law has led to numerous cases where victims of domestic violence, are re-traumatized and are forced to compensate their abusers, because of their income and the duration of their marriage. An egregious example of this lack of legal certainty is what occurred in Laura Panek's case.").

¹⁷⁸ See Turbowitz, *supra* note 27 ("Will [judges] seem callous in issuing a decision acknowledging the veracity of the abuse allegations but finding the abuse insufficient to skew the asset division percentage?").

¹⁷⁹ See S.B. 6782, 242 Leg. Sess. (N.Y. 2019) (proposing an amendment to ensure "that the impact that abuse has on a relationship and the awards of divorce proceedings are not subject to unreliable and inconsistent interpretations by the divorce courts").

III. PROPOSED LEGISLATION

Although DRL 236 mandates that courts account for domestic violence, the uncertainties surrounding Factor 14 risk producing unreliable and inconsistent interpretations. Analogous to the protection offered to victim-spouses under the California Code, which creates a rebuttable presumption that a criminally convicted abuser cannot receive spousal maintenance from his or her victim-spouse,¹⁸⁰ this Note suggests new legislation takes a more punitive stance concerning marital asset distributions to abuser-spouses, expands the *DeSilva* standard, and provides courts with clearer guidelines on the application of domestic violence under DRL 236. This legislation will also abrogate the egregious and shocking standard in New York and bring just outcomes for victims of abuse.

A. Mandatory Minimum/Maximum Equitable Distribution Guidelines Using a Two-Pronged Test

To meet the legislative goals of DRL 236, this Note proposes that equitable distribution under Factor 14 be rewritten to implement a two-pronged test that uses mandatory minimum/maximum equitable distribution guidelines. Establishing pre-determined mandatory guidelines restricts judicial discretion and protects victims while penalizing abusers for their wrongdoings. The pre-determined mandatory minimum serves as a *floor* for victim-spouses, guaranteeing that their equitable distribution award is no less than a set percentage of the parties' marital assets. In turn, this will counter and serve as a *ceiling* for the abuser-spouses, automatically capping their interest in the marital assets.

¹⁸⁰ See CAL. FAM. CODE § 4325(a)(1) (West 2020).

i. Prong One

The mandatory minimum/maximum distributions will be determined by a two-pronged test. In a proceeding for the dissolution of marriage, if a spouse is or has been criminally convicted of a domestic violence misdemeanor or felony under New York's Penal Law,¹⁸¹ that conviction will trigger the mandatory minimum/maximum equitable distribution guidelines under prong one. Here, the mandatory distribution guidelines will follow the abuser-spouse's offense under the Penal Law, taking into account the ranges of felony and misdemeanor classifications.¹⁸² Upon the abuser's conviction, the victim-spouse will automatically receive a mandatory minimum distribution of marital property that is in line with the offense committed subject to the Penal Law. The greater the classification of the offense committed by the abuser-spouse against the victim, the higher the mandatory minimum percentage of marital assets that will be awarded to the victim-spouse for the abuser's misconduct. Importantly, courts shall look at the conduct of the crime on its face as well as any admissions of intent made by the defendant.¹⁸³ And courts are "not bound by [a] defendant's generous plea bargain."¹⁸⁴

Under this new legislation, a conviction for domestic violence of the lowest felony offense under the Penal Law will trigger a mandatory minimum equitable distribution award of 75% of the

¹⁸¹ See N.Y. PENAL LAW § 70.00 (McKinney 2019).

¹⁸² Felony classifications are based on the category of conviction, ranging from Class A felony to Class E felony. Within each classification, there are further distinctions, such as Class A-I and A-II felony or Class B violent or Class B non-violent felony. For example, felonies in New York range from a minimum of twenty years in prison for attempted murder in the first degree to one and a half years in prison for a Class E Violent felony. PENAL § 70.00. Therefore, this Note proposes that a similar minimum punitive scale be administered for equitable distribution: the greater the grade of felony, the higher the mandatory distribution of marital property is awarded to the victim.

¹⁸³ See *Havell v. Islam*, 751 N.Y.S.2d 449, 454 (App. Div. 2002) (characterizing the abuser-spouse's attack on his wife as an attempted murder rather than assault in the first degree to which he pled guilty to); *Havell v. Islam*, 718 N.Y.S.2d 807, 808 (Sup. Ct. 2000) (confirming that the defendant intended to cause his wife serious physical injury even though he pled guilty to assault).

¹⁸⁴ *Havell*, 751 N.Y.S.2d at 454 ("Based upon the evidence of defendant's conduct presented to the court, the court had ample evidence . . . to find that his conduct was an attempted murder.").

parties' marital assets to the victim-spouse. The remaining division of the marital assets is left to the judge's discretion. Therefore, once a party is convicted of a felony offense, the domestic violence factor will automatically outweigh all remaining factors under DRL 236, barring the abuser from receiving more than 25% of the marital assets. The mandatory minimum equitable distribution scale will proceed to increase, keeping in line with the grading system under the Penal Code, and will reach a mandatory 100% distribution to the victim-spouse for Class A felonies.

The same principles apply when an abuser-spouse is convicted for a domestic violence misdemeanor under the Penal Law. Under the new legislation, a conviction for domestic violence of the lowest misdemeanor offense under the Penal Law will trigger a mandatory minimum equitable distribution award of 60% of the parties' marital property to the victim. The remaining division of assets is left to the judge's discretion. Hence, the domestic violence factor will outweigh the remaining factors under DRL 236, maximizing the abuser's distribution to less than half of the marital property. The concept of mandatory minimum/maximum distribution guidelines will serve as a tool to restrict judicial discretion in matrimonial cases dealing with domestic violence. It will make the law of equitable distribution more consistent and reliable.¹⁸⁵ Prong one of the new legislation provides an alternative to the egregious and shocking standard developed under *Havell*, such that equitable distribution awards predominantly favoring victim-spouses are not limited to cases of egregious misconduct like attempted murder.

ii. Prong Two

If a spouse has not been criminally convicted for domestic violence, then this Note proposes that spousal abuse claims in divorce proceedings be assessed under prong two. If a spouse

¹⁸⁵ See S.B. 6782, 242 Leg. Sess. (N.Y. 2019) ("This legislation would ban divorce courts from . . . allowing the equitable division of marital assets if the spouse that would receive these awards are convicted of domestic violence and supplemental charges against the other person in the relationship.").

makes allegations of domestic violence for which there is no criminal conviction, then they must provide credible evidence for the trial court to make specific findings of violence. To do so, the alleged victim-spouse must provide evidence of at least one instance of violent conduct by the alleged abuser that resulted in serious bodily injury¹⁸⁶ or credible evidence of a history of domestic violence throughout the marriage.¹⁸⁷ For example, to prove the former, the alleged victim may produce medical records showing permanent physical injuries caused by the alleged abuser, for which the victim continues to receive medical attention.¹⁸⁸ To show that a history of domestic violence existed throughout the marriage, the victim-spouse may offer testimony depicting instances of the abuser's conduct, such as physical threats using fists or objects, use of obscene language, vulgar name-calling, spitting, and other physical violence.¹⁸⁹ Moreover, the victim-spouse "may testify to acts of physical or emotional abuse committed upon [the victim] or the children, to the extent the acts were committed in [the victim's] presence."¹⁹⁰ If witnessed by the victim-spouse, conduct against the children may include the use of vulgar language or name-calling, physical violence or threats thereof, and intentional exposure of the abuser-spouse's sexual organs.¹⁹¹ On the contrary, evidence of conduct like adultery or

¹⁸⁶ Serious bodily injury includes permanent injury, such as the loss of use of a body part as a result of physical violence. *See Debeny v. Debeny*, 1991 N.Y. Misc. LEXIS 844, at *2 (Sup. Ct. Jan. 24, 1991) ("[T]he defendant pushed the plaintiff, causing her to break her left arm. She now suffers 40% loss of use thereof.").

¹⁸⁷ *See Havell*, 718 N.Y.S.2d at 811 ("Pattern of domestic violence, properly proven by competent testimony and evidence, is a 'just and proper' factor to be considered by the court in connection with the equitable distribution of marital property . . .").

¹⁸⁸ *See Y.L. v. L.L.*, 129 N.Y.3d 669, 2020 WL 4516937, at *2 (Sup. Ct. July 29, 2020) (describing the permanent injuries caused by the abuser-spouse, which forced the victim-spouse to undergo various surgeries and dental procedures and receive medical attention to this day).

¹⁸⁹ *See Havell v. Islam*, 718 N.Y.S.2d 807, 809–10 (Sup. Ct. 2000); *see also DeSilva v. DeSilva*, No. 350818/05, 2006 N.Y. Misc. LEXIS 2489, at *2–3 (Sup. Ct. Aug. 18, 2006) (spitting, cursing, throwing duffle bag at pregnant wife).

¹⁹⁰ *Havell*, 718 N.Y.S.2d at 811.

¹⁹¹ *See id.* at 809–10.

infidelity would be insufficient to support a victim-spouse's claim of domestic abuse throughout the marriage.¹⁹²

Once a court finds that the victim-spouse has sufficiently proven their allegations of domestic violence using credible evidence, prong two triggers a rebuttable presumption that invokes a mandatory minimum equitable distribution award of 75% of the parties' marital assets to the victim-spouse. Similar to the California Code, the alleged perpetrating spouse may rebut the presumption by a preponderance of the evidence showing the contrary.¹⁹³ To meet this burden, the accused must, at the very least, offer evidence that shows that the single incidence claimed by the alleged victim-spouse did not result in serious bodily injury and that it was the alleged victim-spouse who acted violently against the alleged perpetrator in a way that was not in self-defense, or any other evidence deemed sufficient by the trial court to rebut the accusation. If the alleged perpetrator is unable to meet its burden by a preponderance of the evidence, then the mandatory minimum/maximum equitable distribution guidelines will be triggered, and the victim-spouse will be awarded a minimum of 75% of the parties' marital property. Judicial discretion may be used to determine the remaining distribution of property under the factors of DRL 236, so long as neither party becomes incapable of self-support as a result.

However, if the alleged abuser-spouse can successfully rebut the presumption of domestic violence by a preponderance of the evidence, then the court has full judicial discretion to balance the remaining factors under DRL 236 to equitably distribute the marital property, without invoking the mandatory minimum/maximum guidelines. Similarly, if the court finds that the alleged victim-spouse did not provide credible evidence of domestic violence to trigger prong two, then the court remains with full discretion under DRL 236.

¹⁹² See *Howard S. v. Lillian S.*, 14 N.Y.3d 431, 436 (2010) ("While adultery, and many of its unintended consequences, will undoubtedly cause a great deal of anguish and distress for the other spouse, it does not fit within the legal concept of egregious conduct.").

¹⁹³ See CAL. FAM. CODE § 4325(a) (West 2020) (creating a rebuttable presumption that prohibits "an award of spousal support to the convicted spouse from the injured spouse"); FAM. § 4325(c) ("The rebuttable presumption . . . may be rebutted by a preponderance of the evidence.").

The mandatory minimum/maximum equitable distribution guidelines under the two-pronged test meet the legislative goals of DRL 236.¹⁹⁴ The new legislation adds restrictions on the equitable division of assets to ensure that domestic violence victims are protected from unjust awards to their abusers. Moreover, it goes beyond former Senator Carlucci's initial proposal by addressing domestic violence not resulting in convictions.¹⁹⁵ Importantly, the new legislation incorporates the *DeSilva* standard by eliminating the egregious and shocking standard, penalizing spousal abuse, recognizing the various types of abuse in divorce cases, and acknowledging domestic violence as the factor deserving the most significance in equitable distribution. The clearer guidelines under the proposed legislation will ensure consistent interpretations by courts and will generate just and reliable awards, shielding victims from continued abuse.

B. Application of the Proposed Legislation

To demonstrate the effectiveness of the new legislation, the following is an application of the mandatory minimum/maximum equitable distribution guidelines under the two-pronged test to select cases previously discussed.

*i. Venkursorawmy v. Venkursorawmy*¹⁹⁶

After the abuser-spouse pled guilty to attempted murder, the court in *Venkursorawmy* awarded the victim-spouse 100% of the marital home, basing its determination on the catch-all factor, the victim's contributions to the marital property, and her status as the custodial parent to the parties' minor child.¹⁹⁷ There is a question of whether the same decision would have been reached

¹⁹⁴ See S.B. 6782, 242 Leg. Sess. (N.Y. 2019).

¹⁹⁵ See *id.*

¹⁹⁶ See *Venkursorawmy v. Venkursorawmy*, 1990 N.Y. Misc. LEXIS 782 (Sup. Ct. Mar. 16, 1990).

¹⁹⁷ See *supra* Part I.B.i and accompanying text.

using Factor 14 had other factors under DRL 236 not been used in the victim-spouse's favor. What if the parties' children were already grown, not requiring custodianship by the victim-spouse? Or what if the victim-spouse had not been in a financial position that allowed her to make most of the payments for the marital property throughout the marriage?

Under the new legislation, the abuser-spouse's conviction for attempted murder triggers the mandatory minimum/maximum guidelines under prong one. Here, the conviction of attempted murder, regardless of the abuser-spouse's plea, is a Class A felony. This classification of the offense committed by the abuser-spouse automatically invokes a mandatory minimum distribution of 100% of the marital property to the victim-spouse. No additional factors, such as the victim's contributions to the marital property or her custodianship of a minor child are considered in the determination of the equitable distribution award. There is no need for judicial discretion, thus all matrimonial proceedings involving attempted murder convictions and the like would receive the same treatment, allowing for consistent and reliable awards.

ii. *Debeny v. Debeny*¹⁹⁸

To demonstrate the severity of the abuse, the *Debeny* court provided a comprehensive list of the heinous domestic violence caused by the abuser-spouse throughout the parties' marriage, yet the court distributed *only* 60% of the marital assets to the victim.¹⁹⁹ Were the facts of *Debeny* evaluated today, nothing prevents a court from using Factor 14 to support the same award of nearly 40% of the marital assets to an abuser-spouse. What protection does Factor 14 even guarantee?

Without a criminal conviction, the new legislation would require that the court evaluate the victim-spouse's allegations under prong two. In *Debeny*, the victim-spouse provided credible evidence of multiple instances of abuse that resulted in serious, permanent bodily injuries and also showed a pattern of abuse

¹⁹⁸ See *Debeny v. Debeny*, 1991 N.Y. Misc. LEXIS 844 (Sup. Ct. Jan. 24, 1991).

¹⁹⁹ See *supra* Part I.B.i and accompanying text.

throughout the marriage. This would trigger the rebuttable presumption under prong two, allowing the abuser-spouse an opportunity to overcome the presumption of domestic violence. Based on the facts in *Debeny*, it is unlikely that the abuser-spouse would meet his burden by a preponderance of the evidence. The domestic violence was not the result of an isolated incidence, nor were there allegations of the abuser-spouse acting in self-defense. As such, the mandatory minimum/maximum guidelines of equitable distribution would be triggered, creating a minimal distribution award of 75% to the victim-spouse. Therefore, under the new legislation, the victim-spouse in *Debeny* would have received, at the very least, an additional 15% of the marital assets that accumulated throughout the parties' nearly forty-year marriage. The protection originally sought through the addition of Factor 14 would come to fruition under this proposed legislation.

iii. *Y.L. v. L.L.*²⁰⁰

Acknowledging the permanent physical injuries and the devastating emotional abuse caused by the abuser-spouse, the *Y.L.* court considered eight factors under DRL 236 only to hold that the marital assets should be distributed equally between the parties.²⁰¹ No rationale was provided as to why the remaining DRL 236 factors were irrelevant. Nor did the court explain why the domestic violence sufficiently proven by the victim was solely considered under Factor 2, which analyzes the health of the parties. This raises concern whether courts will assess domestic violence under the DRL 236 factor dedicated solely to considering domestic violence, or instead, as part of a different, less focused factor, thereby lessening the impact on equitable distribution intended by Factor 14.

Under the new legislation, the domestic violence claims made by the victim-spouse in *Y.L.* would trigger the rebuttable presumption under prong two. The victim offered sufficient evidence of conduct that resulted in permanent bodily injury *and*

²⁰⁰ See *Y.L. v. L.L.*, 129 N.Y.3d 669, 2020 WL 4516937 (Sup. Ct. July 29, 2020).

²⁰¹ See *supra* Part II.A and accompanying text.

proved a pattern of abuse throughout the parties' marriage using credible witness testimony. These findings of domestic violence under prong two would invoke a mandatory minimum equitable distribution award of 75% of the parties' marital assets to the victim-spouse. The abuser-spouse would have an opportunity to rebut the presumption with a preponderance of the evidence. But under the facts of *Y.L.*, it is unlikely that the abuser-spouse would meet his burden: he did not refute nor deny causing the victim's permanent injuries, which require regular medical attention and he even acknowledged instances of his abusive conduct. Therefore, the victim-spouse would be awarded a minimum of 75% of the parties' assets, leaving room for judicial discretion to determine the remaining 25% using other factors under DRL 236.

CONCLUSION

As incidences of domestic violence continue to rise,²⁰² the goals of New York lawmakers regarding Factor 14 have become ever so clear.²⁰³ Legislators aim to ban courts from distributing awards of marital assets to spouses convicted of domestic violence.²⁰⁴ Their goal is to "ensure that the impact that abuse has on a relationship and the awards of divorce proceedings are not subject to unreliable and inconsistent interpretations by the divorce courts."²⁰⁵ The addition of domestic violence to the list of factors gives courts the express instruction to consider the impact of abuse on victim-spouses. Perhaps the physical, emotional, and psychological effects of domestic violence on community members are unlikely to disappear. However, the financial hardships that victim-spouses face can and should be alleviated with the passage of firmer legislation and stricter guidance.

Yet Factor 14 falls short. It is imperative that the inadequacies of a well-intentioned statute that advocates for victims of domestic

²⁰² See *Domestic Violence*, *supra* note 10. Domestic violence by intimate partners has surged, increasing by over 40% between 2016 and 2018 alone. See *id.*

²⁰³ See S.B. 6782, 242 Leg. Sess. (N.Y. 2019).

²⁰⁴ See *id.*

²⁰⁵ *Id.*

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violence be given a chance to succeed through more meaningful statutory guidance so that equitable distribution awards can help divorcing victims overcome the burdensome issues they face. We must ensure that courts are consistent in their interpretations of the impact of domestic violence on parties and reliably decide equitable distribution awards. Or else, Factor 14 risks creating indecisive reasonings and questionable holdings under the law of equitable distribution, leading to more decisions in the future like *Laura Panek's*.²⁰⁶

²⁰⁶ See *No Way Out: Months-long Investigation Reveals Abusers Profiting Off Victims*, *supra* note 1; Demarest, *supra* note 5 and accompanying text.