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Family Court Orders of Ostensible "Protection": Silencing Survivors and Criminalizing Conduct in Civil Courtrooms

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**FAMILY COURT ORDERS OF OSTENSIBLE
“PROTECTION”: SILENCING SURVIVORS AND
CRIMINALIZING CONDUCT IN CIVIL
COURTROOMS**

Talia Gallo[†]

ABSTRACT

Survivors of intimate partner violence should not face further abuse at the hands of the state, let alone by a tool that is meant to protect them. This Note examines how orders of protections issued by family courts during child abuse and neglect proceedings fail survivors of violence and criminalize individuals in civil courtrooms. This research examines how orders of protection do not always afford individuals due process, despite depriving many of their individual autonomy and the right to parent. Orders of protection are just one example of how family courts punitively surveil marginalized communities, creating irreparable harm under the guise of being an essential civil service necessary to keep communities and families safe. Instead, violations of orders are used against survivors in their family court cases, damaging family bonds and discrediting survivors' insights into their own experiences. This Note begs its reader to think more deeply about the concept of safety and protection in a system that is meant to guard the interests of some at the expense of others. It implores the reader to shift their focus to the stories of survivors, especially those whose voices and experiences have been too long left out of the conversation and who cry for abolition and reparation as a response to violence.

[†] J.D. Candidate, 2025, CUNY School of Law. I would first like to recognize the survivors whose stories are reflected here. I also express my deepest gratitude to Professors Julia Hernandez and Tarek Z. Ismail, who work tirelessly to create the space for students to critically analyze family policing, inviting hope and imagination for the future. Thank you to Eliza McDuffie for her encouragement of my legal research and writing, and also to David Shalleck-Klein, whose expertise informed my understanding of some of the New York case law I include here. The inspiration for this Note stems in part from the mentorship and guidance of Adriana Simmons and Paola Rivera, for which I am grateful. Finally, thank you to the *CUNY Law Review* and its staffers for your thoughtful work in cultivating social justice scholarship.

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INTRODUCTION

“Survivors may feel as though they are forced to participate in their own dehumanization.”¹

Undermining a person’s self-worth through constant criticism. Belittling one’s abilities. Damaging a person’s relationship with their children. Isolating a person from friends or family. This is how the United Nations defines domestic violence in the context of emotional abuse.² Yet the same phrases could be used to describe the flagrant attacks on the personhood of parents, particularly survivors of violence, by family courts throughout the country.

This Note seeks to shed light on the carceral and dehumanizing response to domestic violence (“DV”) and Intimate Partner Violence (“IPV”)³ employed by family courts through orders of protection (“OPs”) that separate families, punish parents in civil court, and silence survivors

¹ S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1151 (2022).

² *What is Domestic Abuse?*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse> [<https://perma.cc/D8CF-XXJ8>] (last visited May 10, 2025).

³ IPV and DV are used interchangeably throughout this Note.

by weaponizing their trauma. Part I will describe the theoretical basis for this analysis by tracing the problematic nature of carceral feminism, epistemic injustice theory, and the intersection of DV and family policing. Part II focuses on strategies to prevent unnecessary family separation through increasing due process in family court, using New York caselaw as an example to follow. Part II will also explore how, despite the possibility of due process during emergency child removal hearings, the punitive use of OPs is inappropriate in civil court. It also argues that such orders can be misused and weaponized against survivors of violence in family court proceedings. Finally, Part III suggests how to obviate the issuance of OPs. The paper closes with a look at the shortcomings of a carceral approach to DV, shifting the reader towards focusing on alternatives to family policing and how they might be accomplished.⁴

I. PROBLEMATIC APPROACHES TO SAFETY: CARCERAL FEMINISM AND FAMILY POLICING

The proverbial elephant in the room in conversations surrounding abolishing either family policing or protections for survivors of DV is the desire to safeguard vulnerable populations, archaically stereotyped as women and children. This Note begins by laying the foundation other scholars have cemented—that, like with the criminal justice system, punitive responses are widely justified in the name of creating safe

⁴ In this Note, the term “survivors” describes those impacted by DV. As Professor S. Lisa Washington writes, “[I] intentionally . . . [use] the term to challenge the stereotypical narrative that women who become entangled in the family regulation system on the basis of domestic violence allegations are helpless victims and weak mothers.” Washington, *supra* note 1, at 1104-05. Following the lead of Professor Dorothy Roberts, in this Note “family policing system” describes what is commonly referred to as the child welfare system. *See infra* Section I.C. *See generally* DOROTHY E. ROBERTS, *TORN APART* (2022) (detailing the racist roots of the family policing system and calling for abolition of that system). Finally, in embarking on an analysis of these profoundly intimate realities, it is important to call attention to the voices of parents. For example, *Rise* magazine, a publication featuring work by parents impacted by the family policing system, published a series on the intersection of family policing and IPV. In this feature, they orient the reader to several points important to understand when discussing DV and IPV including 1) people have different experiences of DV and IPV; 2) leaving a relationship does not always end the harm or dynamics; 3) those impacted by IPV have experienced trauma, love their children, and want to advocate to end the cycle; and 4) in these conversations it is essential to recognize intersectionality. *The Intersection of Family Policing and Domestic and Intimate Partner Violence*, RISE (Nov. 1, 2022), <https://www.risemagazine.org/2022/11/intro-dv-series/> [<https://perma.cc/P7TQ-AXSA>]. *See generally Glossary of Terms*, RISE (Sept. 21, 2021), <https://www.risemagazine.org/2021/09/glossary-of-terms/> [<https://perma.cc/EP57-TQMK>] (including *Rise* magazine’s definitions of DV and IPV). This Note ventures to center these truths.

communities.⁵ These justifications, however, are often dog-whistle politics for the surveillance and oppression of marginalized communities.⁶ Despite recent mainstream criticism of the prison-industrial complex and racist policing, calls for change are slow to spread to other systems like family court, or incite cries for the abolition of harmful systems in tough-to-discuss areas of sexual and gender-based violence.⁷ Perhaps the first step in accomplishing abolitionist agendas in areas like family court is creating space for the perspectives of *all* survivors. Professor S. Lisa Washington writes, “[t]he hegemony of victimhood narratives continues to shape the criminal legal and family regulation responses to domestic violence, often to the detriment of survivor knowledge.”⁸ Washington explores how false narratives yielded an ossification of punitive reactions to violence in both criminal and family law spaces.⁹ Survivors admonish this reaction to violence from an intersectional perspective.¹⁰

A. *Carceral Feminism*

The approach of the anti-violence movement has been described as “carceral feminism,” or the commitment to a “law and order agenda.” This approach shifts focus from improving the redistributive welfare state with community support services for survivors, to strengthening the carceral state as the “enforcement apparatus for feminist goals.”¹¹

⁵ See, e.g., G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 293-94 (2005) (footnotes omitted).

⁶ ROBERTS, *supra* note 4 (“Family policing, like criminal law enforcement and prisons, is designed to serve the US racial capitalist power structure, governed by profit, wealth accumulation, and market competition for the benefit of a wealthy white elite, by regulating and disrupting the most disenfranchised populations in place of meeting human needs.”); see *infra* Section I.C.

⁷ See Erin Cloud, et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. 68, 69-72 (2016); see also Laura E. Ciolkowski, *What to Do with the Dangerous Few?: Abolition-Feminism, Monstrosity and the Reimagination of Sexual Harm in Miguel Piñero’s “Short Eyes,”* 12 HUMANITIES 25 (2023).

⁸ Washington, *supra* note 1, at 1111; see also Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 81-96 (2008) (arguing that “narratives are central to the development of the law and the operation of the legal system” and that the paradigmatic victim, and thus the narrative lifted, is passive, white, and straight).

⁹ See Washington, *supra* note 1, at 1111.

¹⁰ See *Statement on Gender Violence and the Prison Industrial Complex*, INCITE! (2001), <https://incite-national.org/incite-critical-resistance-statement/> [<https://perma.cc/9PCX-DEN5>] (last visited Sept. 20, 2025).

¹¹ Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 J. FEMINIST CULTURAL STUD. 128, 143 (2007).

Though it was born from the intention of feminist movements in the late nineteenth century to end abuse in the home, the legal repudiation of DV was siloed to certain groups and weaponized, from the start, to criminalize marginalized communities.¹² In the 1970s, "the battered women's movement" sought to combat female subordination in the public sphere and center self-determination, creating shelters for survivors of abuse.¹³ Instead of achieving these goals, the movement shifted its narrative in order to move the needle with policy and to compromise with legislators.¹⁴ As a result, the legislation originally catalyzed by well-intentioned activism increased criminalization, creating mandatory arrest laws for perpetrators of DV.¹⁵ By 1994, as the buzz surrounding the O.J. Simpson trials spurred legal uniformity,¹⁶ most states had mandatory arrest laws¹⁷ and some prosecution offices adopted "no drop" policies.¹⁸ The latter made it so that prosecution proceeded in DV cases regardless of the survivors' wishes, disallowing survivors from dropping cases against alleged perpetrators.¹⁹

The culmination of the movement's powerful efforts materialized in 1994 with the passage of a bill introduced by then-Senator Joseph R. Biden, Jr., along with Senator Barbara Boxer: the Violence Against Women Act ("VAWA").²⁰ The Act defines domestic violence as:

¹² The first case criminalizing DV was *Fulgham v. State*, which dealt with an emancipated slave who had assaulted his wife, and set the tone for the penalties for perpetrators of abuse to criminalize "dangerous classes" disproportionately targeting enforcement at the poor, immigrants, and Black men. Washington, *supra* note 1, at 1113-14.

¹³ Miccio, *supra* note 5, at 257.

¹⁴ Clara A. Van Eck, *Changing the Message: Battered Women's Advocates and Their Fight Against Domestic Violence at the Local, State, and Federal Level, 1970s-1990s*, at 45-49 (Summer 2017) (M.A. thesis, Old Dominion University) (on file with Old Dominion University).

¹⁵ Miccio, *supra* note 5, at 265 n.111 ("In retrospect and with the benefit of hindsight, our faith in a cultural shift was misplaced. The Messinger Report, a report issued by the Task Force on Family Violence in 1993, documented that police were still not making arrests even with mandatory arrest policies incorporated into New York City Police Department protocols. In short, the enormity of cultural change was not effectively confronted. Instead, activists in New York, myself included, continued to advocate for a statewide mandatory arrest policy." (citations omitted)).

¹⁶ *Id.* at 238.

¹⁷ *Id.* at 238, 278.

¹⁸ *Id.* at 266.

¹⁹ *Id.*

²⁰ VAWA was originally passed by Congress as Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 179. LISA N. SACCO, *THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING* 1-2 (2015), <https://sgp.fas.org/crs/misc/R42499.pdf> (on file with the CUNY Law Review).

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse or intimate partner.²¹

VAWA increases the criminalized response to DV in multiple ways. Notably, it creates penalties for violations of interstate protective orders, giving full faith and credit to orders issued elsewhere, and criminalizes possession of a firearm while subject to a protective order.²² However, at its core, VAWA is a funding bill, meant to create the Department of Justice's Office on Violence Against Women and awards billions of dollars in grants to support law enforcement, agencies supporting law enforcement, prosecutors, and courts.²³

VAWA works to bolster law enforcement and criminally prosecute perpetrators of domestic violence, creating terrifying and real consequences that could cause someone who has survived violence at home to take a serious pause before dialing their phone for help. As Professor Leigh Goodmark writes on VAWA, "it deprives people subjected to abuse of the opportunity to make decisions about whether and how the state will intervene in their relationships."²⁴ Echoing this sentiment, from a human perspective, DV is profoundly more complicated than a survivor wanting their partner to face consequences in the criminal legal system. Focusing on criminalization removes the raw and real reality that individuals dealing with IPV may share love, lives, homes, finances, and children. A carceral response may not be protective if it dissuades survivors of violence from deciding to seek help out of fear of the consequences to their partner, family, or community. A carceral response certainly does not dig deep enough to weed out the roots of IPV.

To conclude, and summarize, the abstract of a report released by the National Institute of Justice, presented at a 1995 conference, reads:

During the past 30 years, the criminalization of domestic violence has developed along three parallel but generally separate tracks: criminal punishment and deterrence of batterers, batterer treatment, and restraining orders designed to protect victims through the threat of civil or criminal legal sanctions. Each of these policy

²¹ The Violence Against Women Reauthorization Act of 2013 revised the definition of "domestic violence" to specifically include "intimate partners" in addition to "current and former spouses." 42 U.S.C. § 13925(a)(8).

²² Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like*, 27 VIOLENCE AGAINST WOMEN 84, 88 (2021).

²³ *Id.*

²⁴ *Id.* at 93.

tracks has been informed, advanced, and supported by advocacy groups for battered women.²⁵

Despite these efforts, there is no conclusive evidence that criminalization deters offenders from committing IPV.²⁶ Instead, as a result of criminalization, more survivors have been arrested through dual arrests and “failure to protect” laws for parents, and survivors are overall disempowered from making their own choices in their relationships.²⁷

A carceral feminist approach, though often well-intentioned and certainly critical to raising awareness and support for survivors of violence, has created increased funding and concentration on carceral responses as opposed to building community power. A large example of this is VAWA, which was reauthorized in 2000, 2005, and 2013 and is still the law today.²⁸ The contemporary punitive system may effectively serve some survivors. However, it is a system that risks isolating and abandoning survivors in communities that are already plagued by oversurveillance.

B. *Victimhood Narratives and Epistemic Injustice*

The narratives fueling the criminalization of DV are built on the idea that intervention is necessary because survivors are “psychologically damaged and unable to make rational choices for them and their family without state intervention.”²⁹ However, these ideas of victimhood fail to encapsulate the full range of survivor experiences.³⁰ The Eastern District of New York in an early proceeding for what would become the landmark case *Nicholson v. Scoppetta* wrote, “[m]yriad subtle reasons may prevent her from separating from the abuser . . . this case presents the most intricate and recondite relationships, the stuff of thousands of novels, poems, newspaper accounts, and legal proceedings.”³¹ Narratives of victimhood fail to take this complexity into account. Some survivors avoid carceral

²⁵ JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 40 (1996).

²⁶ Goodmark, *supra* note 22, at 90.

²⁷ *Id.* at 9.

²⁸ *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, THE WHITE HOUSE (Mar. 16, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-va-wa/> [<https://perma.cc/PVV3-WQY6>].

²⁹ Washington, *supra* note 1, at 1118.

³⁰ See generally Goodmark, *supra* note 8 (arguing that survivors of violence are encouraged to tailor their stories as closely as possible to the prevailing narrative confined to white heterosexual middle-class survivors of DV, a narrative shaped by the battered women’s movement in order to persuade the legal system of their need for protection).

³¹ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 164 (E.D.N.Y. 2002).

responses to escape re-traumatization at the hands of law enforcement and to prevent increased police presence in their community.³² Additionally, the process of prosecution can be emotionally violent, which may feel fruitless considering the carceral response's lack of systemic change addressing the root causes of violence.³³ Finally, as this Note addresses, fear of child removal and child protective intervention may scare survivors away from seeking help.³⁴

Systems like family court, as the next section will explore, enable the perpetuation of victimhood narratives.³⁵ Professor S. Lisa Washington uses epistemic injustice theory, a theoretical framework penned by Miranda Fricker, to explain the formation of victimhood narratives in the context of parents in family court.³⁶ Washington argues that in family court, epistemic injustice operates in three ways: 1) by reproducing victimhood narratives to justify the operation of family court proceedings, 2) by excluding survivors from “shaping knowledge” about child safety, and 3) by using a coercive environment as the tool to exclude and discredit survivor knowledge.³⁷ Playing on the pathologization of Black, poor women, epistemic injustice operates in family court through “testimonial” and “hermeneutical” injustice.³⁸ In this context, testimonial injustice is the reinforcement of stereotypes and narratives coupled with a silencing of authentic survivor knowledge.³⁹ Hermeneutical justice is the broader exclusion of marginalized experiences from the collective understanding of DV, leaving those with power, like white feminists or legislators, to write the narratives and manufacture “damaged knowledge” that misses key perspectives and, in turn, shapes our laws.⁴⁰

Epistemic injustice theory can be applied to the carceral feminist movement and its pitfalls as well. Survivors in marginalized communities, who do not experience violence the same way as those with epistemic power, have been left out of the conversation. An example is the following statement by a network of feminists of color, INCITE!, who are focused on the critical resistance of power and ending state violence.⁴¹ Their

³² Washington, *supra* note 1, at 1119; see Alanna Vagianos & Jenavieve Hatch, *Why These Sexual Assault Survivors Support Defunding The Police*, HUFFPOST (Aug. 15, 2020, 8:00 AM), https://www.huffpost.com/entry/these-sexual-assault-survivors-support-defunding-police_n_5f32b6f3c5b6960c066cda20 [<https://perma.cc/SZ3B-UBBZ>].

³³ Washington, *supra* note 1, at 1119; see Vagianos & Hatch, *supra* note 32.

³⁴ Washington, *supra* note 1, at 1120; see Vagianos & Hatch, *supra* note 32.

³⁵ See *infra* Section I.C.

³⁶ Washington, *supra* note 1, at 1108.

³⁷ *Id.* at 1134.

³⁸ *Id.* at 1135-39.

³⁹ *Id.* at 1138.

⁴⁰ See *id.* at 1139.

⁴¹ See INCITE!, *supra* note 10.

statement reads, “It is critical that we develop responses to gender violence that do not depend on a sexist, racist, classist, and homophobic criminal justice system.”⁴² The statement addresses the anti-violence movement, which they note was important in breaking the silence and increasing services for survivors of DV, yet has utilized a harmful vehicle of change: the criminal justice system.⁴³ They describe how the anti-violence approach has been damaging and note that it ignores the voices of the most marginalized, widens the net of criminalization to survivors, and isolates the anti-violence movement from other social justice movements.⁴⁴ This isolation alienates the perspective of gender violence from the anti-prison movement which has resulted in fewer conversations around community alternatives ensuring accountability and safety from sexual violence.⁴⁵

Without the perspective of intersectionality, which is excluded through the protraction of epistemic injustice, the carceral feminist movement seeking to protect survivors instead creates collateral damage for some. As this Note continues to explore, leaving out the perspectives of all survivors similarly allows problematic systems like family court to persist in the name of safer communities.

C. *The Intersection of Intimate Partner Violence and Family Policing*

[C]ritics of New York City’s child welfare system—including many survivors of domestic violence and their advocates—say that ACS interventions in domestic violence cases often go terribly wrong, turning victims into suspects and creating chaos for vulnerable families.⁴⁶

Some voices in the anti-carceral feminist movement, like Professor Joan Meier,⁴⁷ call for IPV to be dealt with in the civil realm of family law. However, as Professor Leigh Goodmark points out, “the family law system is not truly distinct from the criminal legal system” and “uses criminal mechanisms to punish those who violate family court orders or statutes

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ ABIGAIL KRAMER, BACKFIRE: WHEN REPORTING DOMESTIC VIOLENCE MEANS YOU GET INVESTIGATED FOR CHILD ABUSE 3 (2020); see also Washington, *supra* note 1, at 1130.

⁴⁷ See generally Joan S. Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law*, 110 GEO. L.J. 835 (2022) (arguing that domestic violence and child maltreatment have been sidelined in the family law discourse, and that reforms like loosening evidentiary standards are needed to seriously handle allegations).

governing family relations.”⁴⁸ She writes how the family policing system invokes the criminal system, resulting in a need to seek out the root causes of IPV instead of relying on family court.⁴⁹

The family policing system, despite the misconception that it is focused on the “welfare” of children, instead functions to punitively surveil parents through abuse and maltreatment investigations in a civil, “rehabilitative” court.⁵⁰ Family policing targets Black and Brown low-income communities, leading scholars and activists to draw comparisons between family policing and the criminal legal system.⁵¹ A 2020 report commissioned by the NYC Administration for Children’s Services (“ACS”) itself pooled together a policy audit and analysis, an ACS data review, and community-based participatory research⁵² to find that ACS is a “predatory system” that disrupts the safety of Black and Brown families, traumatizing them and making them feel “penaliz[ed] for their poverty and Blackness.”⁵³ Nationally, “more than half of all Black children will experience a child-welfare investigation by the time they reach age 18.”⁵⁴

The harmful misalignment of family court as a “service” becomes apparent through Professor Washington’s epistemic injustice theory as well as a look inside the landmark family court case, *Nicholson v. Scopetta*.⁵⁵

⁴⁸ Leigh Goodmark, *Why Centering the Family Court System Won’t Decrease Criminalization of Intimate Partner Violence - And Why That’s a Problem*, 30 VA. J. SOC. POL’Y & L. 56, 58 (2023).

⁴⁹ *Id.*

⁵⁰ See ROBERTS, *supra* note 4, at 19, 199 (explaining that although the family-policing system was designed “to regulate rather than support [families],” constitutional protections like the Fourth Amendment do not traditionally apply in the family-policing context “[b]ecause child welfare is classified as part of the civil legal system, [and] CPS workers are not considered to be law enforcement officers”).

⁵¹ See ROBERTS, *supra* note 4, at 48 (“The state deploys this disruptive force disproportionately on Black families . . . [who risk] being reported, investigated, torn apart, and demolished.”); see also Washington, *supra* note 1, at 1121.

⁵² ANTUWAN WALLACE ET AL., NEW YORK CITY ADMINISTRATION FOR CHILDREN’S SERVICES RACIAL EQUITY PARTICIPATORY ACTION RESEARCH & SYSTEM AUDIT: FINDINGS AND OPPORTUNITIES 31 (2020), <https://int.nyt.com/data/documenttools/draft-report-of-nyc-administration-for-children-s-services-racial-equity-survey/fc3e7ced070e17a4/full.pdf> [<https://perma.cc/2VXC-L3ZM>].

⁵³ *Id.* at 14-16.

⁵⁴ Janell Ross, *One in Ten Black Children in America Are Separated from Their Parents by the Child-Welfare System. A New Book Argues That’s No Accident*, TIME (Apr. 20, 2022, 9:30 AM), <https://time.com/6168354/child-welfare-system-dorothy-roberts/> [<https://perma.cc/BV3V-8G8B>].

⁵⁵ *Scopetta* was heard in the Second Circuit and the New York Court of Appeals. *Nicholson v. Scopetta*, 344 F.3d 154, 171 (2d Cir. 2003) (reinforcing that it does not violate due process to remove a child from parents without court authorization or parental consent when objectively reasonable evidence indicates that harm is imminent); *Nicholson v.*

Washington lays out several stages of the family court system that operate to pathologize parents and exclude their perspectives from the collective understanding of what survivors need.⁵⁶ First, she discusses emergency child removal hearings which coerce survivors to shape their narrative to meet the agency's standards for protective capacity, including admitting they are a "victim" and requiring them to "demonstrate their affirmative appreciation for 'help' from CPS and 'insight' through family regulation intervention."⁵⁷ Maintaining custody of one's children hinges on compliance with this process.⁵⁸

Another stage of the family court process Washington analyzes through epistemic injustice theory is testimony.⁵⁹ Testimony works to silence survivors who may not wish to testify against their current or ex-partner, facing contempt of court if subpoenaed.⁶⁰ Their testimony, in many situations, will also be used against them as evidence they failed to protect their child from witnessing domestic violence.⁶¹ This latter point was at issue in *Nicholson v. Scoppetta*, which as explored below, was a case that pointed to the problematic way courts handled survivors, but whose legacy failed thus far to dismantle family policing's destructive reach into survivors' lives.

"A few instances will illustrate how the ACS system results in the forcible and unjustified separation of abused mothers and their children," the Eastern Federal District Court in New York wrote in *Nicholson v. Williams*, an earlier proceeding in *Nicholson v. Scoppetta*.⁶² The opinion delineates the lives of plaintiffs in a class action against ACS, the agency responsible for family separations conducted routinely through child abuse and maltreatment investigations.⁶³ The following pages recount their stories.⁶⁴

Scoppetta, 3 N.Y.3d 357, 368 (2004) (holding that a showing of neglect under New York law requires more than the fact that the child was exposed to domestic abuse).

⁵⁶ See also Washington, *supra* note 1, at 1134.

⁵⁷ *Id.* at 1146.

⁵⁸ *Id.* at 1145-46.

⁵⁹ *Id.* at 1146.

⁶⁰ *Id.* at 1147.

⁶¹ *Id.* (citations omitted).

⁶² *Nicholson v. Williams*, 203 F. Supp. 2d 153, 168 (E.D.N.Y. 2002).

⁶³ See *id.* at 205-21.

⁶⁴ See *infra* pp. 336-38.

* * *

Bleeding with fractured ribs, a broken arm, and head trauma, Sharwline Nicholson arranged childcare to get into an ambulance after her partner assaulted her.⁶⁵ Her hospital stay was cut short when, frantic, she requested a discharge after she had been informed that her children were taken by ACS.⁶⁶ She later testified about the distress the agency subjected her to when she was told she would not be able to see her children until appearing at court the following week, left with no knowledge of her children's whereabouts or safety.⁶⁷ The ACS caseworker on Ms. Nicholson's case waited days to file a petition, and admitted under oath that he did not think she was neglectful and just hoped she would "cooperate."⁶⁸

Eight days passed until Ms. Nicholson was finally able to visit her children at the foster care agency where "Ms. Nicholson was able to locate her daughter within the building by following the sounds of her crying."⁶⁹ Her son's eye was swollen after his foster mom had slapped him, the child said, "You are not going to hit me, are you?" when introduced to the new foster parent at the end of his mom's visit.⁷⁰

Twelve days after the removal, Ms. Nicholson's son celebrated his sixth birthday.⁷¹ She was forbidden from seeing or speaking to him.⁷²

Twenty-one days later, Ms. Nicholson's children were returned. She sent her kids to her father temporarily, afraid the agency was going to separate them again.⁷³ As a result, she was handcuffed at the Post Office and brought to family court in Brooklyn until the whole case was eventually dismissed.⁷⁴ Remaining on the abuse and maltreatment registry, she appealed, and while awaiting the results, decided to participate in the class action suit.⁷⁵

⁶⁵ *Williams*, 203 F. Supp. 2d at 169.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.* at 171.

⁶⁹ *Id.* at 172.

⁷⁰ *Id.*

⁷¹ *Id.* at 172.

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.* at 173.

⁷⁵ *Id.* at 173.

* * *

After a verbal dispute, April Rodriguez was pushed onto the floor by her partner, Mr. Gamble, scraping her mouth.⁷⁶ No longer feeling safe, Ms. Rodriguez filed a police report against him and fled to a relative’s house after a DV counselor on the hotline told her she would need to quit her job to stay in a DV shelter.⁷⁷ A week or two later, an ACS caseworker called her asking to see the children, as a case was being filed against their father.⁷⁸

Despite this, Ms. Rodriguez was also served notice that Mr. Gamble was seeking legal custody of the children.⁷⁹ The agency then told Ms. Rodriguez to cooperate with an arrangement where the children would reside with Mr. Gamble until she could figure out a permanent living situation and daycare.⁸⁰ There were still no attorneys involved, still no court, and therefore no due process afforded before Ms. Rodriguez was separated from her children.⁸¹

Later, it was discovered by Ms. Rodriguez that Mr. Gamble had a previous child sexual abuse record, and that the agency knew and pressed forward with the arrangement anyway.⁸²

A month and a half after the original assault, a neglect petition was filed against Ms. Rodriguez for failing to enforce an OP between Mr. Gamble and their children.⁸³ In other words, she was reprimanded for signing a custody agreement the agency pressed her to sign.⁸⁴ The children were moved into foster care.⁸⁵ Ms. Rodriguez then quit her job so she could stay in a shelter, for the first time relying on public assistance—a term ACS required for reunification.⁸⁶ Ms. Rodriguez finally got her children back, however, “they were not the same kids I gave [ACS].”⁸⁷ The children’s conditions were so bad she took them to the emergency room.⁸⁸ In the opinion of the caseworker, the case was “in conformance with regular practice.”⁸⁹

⁷⁶ *Id.*

⁷⁷ *Id.* at 173.

⁷⁸ *Id.*

⁷⁹ *Id.* at 174.

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *See id.* at 174-75.

⁸³ *Id.* at 175.

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 176.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 176.

* * *

Ms. Tillet's newborn was removed from her, *before* the agency offered any services, because Ms. Tillet financially relied on her abusive partner who paid for the apartment she lived in.⁹⁰ Once she obtained her own place to live, her baby was not returned because the caseworker wanted Ms. Tillet to get a psychological evaluation.⁹¹ The caseworker testified that "I have learned that in domestic violence cases there exists sometimes a syndrome with the mothers, and they will replace one batterer for another."⁹²

* * *

A DV specialist found no reason for the children to be separated from Ms. Michele Garcia, the Court in *Nicholson* writing, "The children were, of course, hostages to compliance."⁹³

* * *

These are only some of the stories of the parents included in the class action suit, braiding together a strong pattern: responsible reporting of the assault, a delayed and nonsensical response from ACS, punitive and disempowering agency handling of survivors, the tears of child and parent alike after forced separation, and finally a reunion marred by the irreparable scars inflicted on families by the agency. Their stories are powerful. Carolyn Kubitschek, an attorney for the *Nicholson* plaintiffs stated that the caseworker testimony "was a real turning point in the hearings. You could feel the room change. People were saying, 'ACS is just like the batterers.'"⁹⁴

In 2002, the court decided in favor of the petitioning class.⁹⁵ The court held ACS's practices unconstitutional declaring, "as a matter of fact that the effect of the practice and policy of ACS is to punish both the faultless abused mother and her children by separating them from each other and by not providing them with adequate protection."⁹⁶ The judge granted a preliminary injunction to ensure that "battered mothers who are

⁹⁰ See *id.* at 181.

⁹¹ *Id.* at 182.

⁹² *Id.*

⁹³ *Id.* at 185.

⁹⁴ See KRAMER, *supra* note 46, at 4.

⁹⁵ See *Williams*, 203 F. Supp. 2d at 257.

⁹⁶ *Id.* at 252.

fit to retain custody of their children do not face prosecution or removal of their children solely because the mothers are battered” and, moreover, that “the child’s right to live with such a mother is protected.”⁹⁷ In 2004, after the agency appealed this decision, the NY Court of Appeals in *Nicholson v. Scopetta* found that DV may only be grounds for neglect when a parent failed to exercise a minimum degree of care, placing the child’s mental, physical, or emotional condition in imminent danger of harm.⁹⁸

Despite these favorable decisions dated over 20 years ago, the practice of removal based solely on DV continues, especially outside New York borders, and is further criminalized by “failure to protect” laws that incarcerate parents who expose their children to violence in the home.⁹⁹ A directly impacted parent, Shamara Kelly, wrote in 2022, “ACS actually made things worse for me because caseworkers weren’t sensitive about my needs and didn’t understand the domestic violence situation I was in.”¹⁰⁰ This gap between what survivors need and what ACS is willing to provide is Professor Washington’s focus in writing that:

[The] lack of interest in services for victims of domestic violence ostensibly proves that she has no “insight” into her own abuse experience The family regulation system pathologizes women who share knowledge that does not align with victimhood narratives and the need for state intervention by challenging their right to parent.¹⁰¹

II. THE LIMITS OF DUE PROCESS IN PREVENTING THE HARMS OF ORDERS OF PROTECTION

As established, a large response to DV is criminalizing alleged perpetrators of violence. This section will explore how punitive responses to DV are not limited to criminal court, but also occur in family court through Orders of Protections (“OP”). OPs are a dangerously inconspicuous tool at the disposal of family courts, considered by many to be important in, as the name suggests, “protection” of people from violent partners or parents. Instead, OPs are a prime example of how the civil court masquerades as a social service. In practice, family court OPs create

⁹⁷ *Id.*

⁹⁸ See *Nicholson v. Scopetta*, 3 N.Y.3d 357, 368 (2004).

⁹⁹ See Goodmark, *supra* note 48, at 62 (discussing an Oklahoma case in which a mother was sentenced to 30 years in prison after using her body to shield her daughter from her abusive boyfriend, who only received an 18-year sentence); Washington, *supra* note 1, at 1123-24.

¹⁰⁰ Shamara Kelly, *Stepping Into My Power: ‘I Made a Change Because My Kids Were Hurting’*, RISE (Oct. 31, 2022), www.risemagazine.org/2022/10/stepping-into-my-power/ (on file with the CUNY Law Review).

¹⁰¹ Washington, *supra* note 1, at 1141.

collateral consequences for families, by affording little due process and silencing survivors through weaponizing their trauma.¹⁰²

A. *Fighting for Due Process to Challenge Orders of Protection: New York, a Flawed Example*

Imagine an allegation of domestic violence has precipitated family court involvement, resulting in a full stay-away order of protection. This type of OP may exclude the respondent parent from the home and bar contact with their partner and children who remain in the custody of that partner. Before the order, the respondent parent had unfettered access to their right to care, custody and control of their own children, and after the government intervention, there are limitations on the respondent parent's liberty interests.

Parents have a reciprocal, fundamental liberty interest in the care, custody and control of their children.¹⁰³ This fundamental liberty interest triggers constitutional due process protections when the government removes a child from their parent.¹⁰⁴ Such protection is supported by a Supreme Court precedent that has acknowledged the long-standing fundamental right to family integrity, holding that procedural due process demands that a parent be given "a hearing on his fitness as a parent before his children [are] taken from him."¹⁰⁵

When the State removes a child from their parent, New York state courts, as well as the Second Circuit, have determined that due process requires the state to provide the parent with an opportunity to challenge the removal through a prompt post-deprivation hearing.¹⁰⁶ Prompt, according to the courts, is typically measured in hours and days, not weeks and months.¹⁰⁷

In New York, these constitutional due process protections are statutorily enshrined in the Family Court Act ("FCA") sections 1027 and 1028.¹⁰⁸ The FCA addresses procedural due process through expedited

¹⁰² See *infra* Section II.C.

¹⁰³ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

¹⁰⁴ See, e.g., *In re Elizabeth C.*, 156 A.D.3d 193, 203-204 (2d Dep't 2017).

¹⁰⁵ *Stanley v. Illinois*, 405 U.S. 645, 645 (1972).

¹⁰⁶ *In re Elizabeth C.*, 156 A.D.3d at 203-04; *Kia P. v. McIntyre*, 235 F.3d 749, 760 (2d Cir. 2000) ("The rule in this Circuit is that under these circumstances the State has the duty to initiate a 'prompt' post-deprivation hearing after the child has been removed from the custody of his or her parents.").

¹⁰⁷ *In re F.W.*, 183 A.D.3d 276, 281 (1st Dep't 2020).

¹⁰⁸ See N.Y. FAM. CT. ACT §§ 1027-28 (McKinney 2020).

hearings after child removal.¹⁰⁹ Additionally, the statute requires that the child be returned unless the agency can prove an “imminent risk” to the child, in an effort to comply with substantive due process.¹¹⁰ The standard for imminent risk was interpreted and set by the court in *Nicholson*, which noted that when analyzing a removal application under FCA section 1027 or an application for a child’s return under section 1028, “a court must engage in a balancing test of the imminent risk of harm with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal.”¹¹¹ In defining imminent risk, the court noted that the inquiry entails more than identifying the existence of a risk of serious harm to the child if they remain in the home, for that harm must be balanced against the harm removal might bring.¹¹²

However, when a parent is excluded from a home due to an OP, family separation occurs even though the child is not the one being removed. In New York, parental defenders have fought for the court to clarify that even if the parent is removed from the home, rather than the child, the government interference with the parent-child relationship still mandates the protections afforded in the FCA for child removal.¹¹³

In the case of *In re Elizabeth C.*, no hearing preceded the issuance of a temporary OP excluding a father from his residence and from contact with his children.¹¹⁴ The court orally advised counsel, on the record, that a hearing pursuant to either FCA section 1027 or section 1028 was “inappropriate” because the situation was not considered a removal and the standard to be applied was not imminent risk.¹¹⁵ ACS also took the position that “a hearing pursuant to FCA section 1028 was unwarranted because the children had not been removed from the family home, and their legal custody had not been transferred to another party.”¹¹⁶ ACS asserted that, since the father was the one excluded from the home, his remedy was

¹⁰⁹ *In re Elizabeth C.*, 156 A.D.3d at 204. A § 1027 hearing is required no later than the next court day after the filing of a petition; under § 1028 the hearing is statutorily required to take place within three days upon the application of the parent and may not be adjourned. N.Y. FAM. CT. ACT §§ 1027-28.

¹¹⁰ *In re Elizabeth C.*, 156 A.D.3d at 204.

¹¹¹ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 380 (2004).

¹¹² *Id.* at 378.

¹¹³ *See In re Elizabeth C.*, 156 A.D.3d at 206 (holding that a stay-away temporary order of protection against a parent on behalf of a child is a legal removal that triggers the same due process rights as if the child were removed from the home and placed in foster care); *see also In re Kevin W.*, 194 A.D.3d 663, 664 (1st Dep’t 2021) (determining a father was entitled to “the due process protections afforded by N.Y. FAM. CT. ACT § 1027” where a stay-away order of protection was issued).

¹¹⁴ *In re Elizabeth C.*, 156 A.D.3d at 196.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

to seek a hearing pursuant to FCA section 1061 to modify the order of protection.¹¹⁷

The court, however, found there was “no language” in the FCA that limited the due process protections solely to situations involving the physical removal of the child from the home.¹¹⁸ Rather, the references to the child’s “home” were only included because removal from the home is the traditional remedy used by child welfare agencies, but “it is the severance of contact between the child and the alleged offending parent . . . which concomitantly triggers the parent’s due process rights.”¹¹⁹

The Court also explicitly rejected a lower standard than the “imminent risk” standard used in FCA sections 1027 and 1028 hearings.¹²⁰ They explained that a temporary order of protection produces the “same cessation in his contact with the children, and the same severance of his relationship with them, that an order removing the children from the family residence would bring about.”¹²¹ In addition to using a lower standard than imminent risk, the court deemed that a different hearing under the FCA, like a section 1061 hearing, would be inadequate because section 1061 proceedings are discretionary in nature and need not be held within any particular time frame.¹²²

The court, in the end, held that “an exclusionary order of protection compromises the parent-child relationship in the same manner as the relocation of the child would,” and therefore, “it must be governed by the same legal standards as are provided for removal of a child in Family Court Act sections 1027 and 1028.”¹²³ They note, “[d]ue process demands nothing less.”¹²⁴ Though beyond the scope of this Note, it is relevant to note that the due process right to a prompt hearing to challenge OPs has also been recognized in New York for OPs issued by criminal courts as well.¹²⁵

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 206.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 208-09 (“To interpret Family Court Act § 1028 in such a manner as to deny the father a hearing under that statute in the circumstances presented is inconsistent both with due process and with the stated purpose of article 10 to provide a mechanism to protect children while preserving parental rights.” (citation omitted)).

¹²¹ *Id.* at 208.

¹²² *Id.* at 209.

¹²³ *Id.* at 210.

¹²⁴ *Id.* at 208.

¹²⁵ *See Crawford v. Ally*, 197 A.D.3d 27, 34 (1st Dep’t 2021) (“At a minimum . . . when the defendant presents the court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP [temporary OP], the Criminal Court should conduct a prompt evidentiary hearing” (citations omitted)). In this case, as a result of a criminal court TOP a mother was summarily

Emergency removal hearings in New York, pursuant to FCA sections 1027 and 1028, set a relatively high standard of proof through the imminent risk balancing test, which the court has expanded to situations of exclusionary OPs.¹²⁶ However, it is worth noting that at similar emergency removal hearings across the country, in at least twenty-two states and D.C., family courts use a lower standard of proof than the imminent risk balancing test.¹²⁷ Some states use the regular civil standard—preponderance of evidence.¹²⁸ Other states still employ lower standards.¹²⁹

Ensuring due process protections are afforded to parents nationally through a hearing to contest removal is an important step in minimizing the harm from child removal, as well as preventing undue separation through the issuance of OPs.

B. Orders of Protection: The Ticket from a Family Courtroom to Rikers Island

Despite the opportunity for limited hearings to protect due process in family court, this section will explore how OPs remain a punitive tool used by civil courts. It is a wrongful oversight that a civil court not only separates children from their parents, but also holds the power to criminalize their contact.

barred from her home, in which she is the sole lessee, and effectively separated from her children.

¹²⁶ *In re Elizabeth C.*, 156 A.D.3d at 196-97.

¹²⁷ ARIZ. REV. STAT. ANN. § 8-821 (2023); Del. Fam. Ct. R. Civ. P. 226; FLA. STAT. ANN. § 39.402(8)(d) (West 2024); GA. CODE ANN. § 15-11-146(a)(1) (2022); HAW. REV. STAT. ANN. § 587A-26(c)(2) (West 2010); 705 ILL. COMP. STAT. ANN. 405/2-10(1) (West 2024); IND. CODE ANN. § 31-34-2-3(a) (West 1997); KAN. STAT. ANN. § 38-2242(f)(1) (West 2019); LA. CHILD. CODE ANN. art. 626(A) (1999); MISS. CODE ANN. § 43-21-309(4)(a) (West 2017); MO. ANN. STAT. § 211.032 (West 2021); MONT. CODE ANN. § 41-3-432(2) (West 2025); NEV. REV. STAT. ANN. § 432B.390(1)(b) (West 2021); N.H. REV. STAT. ANN. § 169-C:15 (2023); N.M. STAT. ANN. § 32A-4-18(D)(2) (West 2022); N.D. CENT. CODE ANN. 27-20.3-10(2) (West 2023); Ohio R. Juv. P. 6; S.C. CODE ANN. § 63-7-710(C) (2008); TENN. CODE ANN. § 37-1-114(a) (2021); WASH. REV. CODE ANN. § 13.34.065(5)(a) (West 2024); WIS. STAT. ANN. § 48.21(b)(3) (West 2021); D.C. CODE § 16-2312(f) (2017).

¹²⁸ Seven states have clarified that the standard of proof in temporary custody hearings is the regular civil standard of preponderance of the evidence. *See In re Juvenile Appeal* (83-CD), 189 Conn. 276, 294-95 (1983); ME. REV. STAT. ANN. tit. 22, § 4034(2) (2016); *In re Marquee N.*, 30 Neb. App. 862, 869-70 (2022) (citations omitted); UTAH CODE ANN. § 80-3-301 (West 2023); VA. CODE ANN. § 16.1-252(G) (West 2019).

¹²⁹ At Oklahoma initial removal hearings, the courts use a standard even lower than reasonable cause—reasonable suspicion. OKLA. STAT. ANN. tit. 10A, § 1-4-203(A)(1) (West 2015). A seemingly lower standard also exists in Minnesota, where protective care of a child can be continued if there is “reason to believe” that child’s health or welfare would be immediately endangered if returned home. MINN. STAT. ANN. § 260C.178(c) (West 2024).

Family court is a civil court, and therefore it is meant to be rehabilitative, not punitive.¹³⁰ The ostensible purpose of family court as a “problem solving court” is dangerous. Professor Jane Spinak writes, “[i]f courts are not recognized as instruments of coercion and control but as places to solve problems, there is a domino effect on families, particularly vulnerable families.”¹³¹ The dichotomy between civil and criminal court is important, for the litany of constitutional protections many citizens are aware of in the criminal legal system are not afforded to parents entering the civil family court arena.¹³²

The basic distinctions between the two systems begin at the investigation stage. While the Fourth Amendment theoretically protects against the government conducting unreasonable searches and seizures, when an ACS caseworker knocks on a parent’s door, they look through the fridge and strip-search children without probable cause.¹³³ In New York, on average, caseworkers obtain a warrant fewer than 94 times a year despite conducting at least 56,000 searches annually.¹³⁴

Parents are also afforded fewer protections inside courtrooms. Specifically, the Fifth Amendment provides less robust protection in the civil context, and the Sixth Amendment is specific to criminal matters, leaving individuals to deal with the civil court system without many due process protections.¹³⁵ In criminal matters most people know to “plead the Fifth.” However, family courts can make an adverse inference when parents invoke the privilege against self-incrimination.¹³⁶ Further, the Sixth Amendment ensures the right to a public trial by jury, but family court cases are heard in closed courtrooms in at least 30 states, and fewer than a dozen states offer the option of a jury trial.¹³⁷ In many family court proceedings in New York, such as the issuance of orders of protection, the burden of proof is the lower evidentiary standard of a “preponderance of

¹³⁰ Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1, 12 n.52 (2019) (quoting *People v. Roselle*, 84 N.Y.2d 350, 355 (1994) (“The orientation of Family Court is rehabilitative, directed at protecting the vulnerable child, as distinct from the penal nature of a criminal action which aims to assess blame for a wrongful act and punish the offender.”)).

¹³¹ Jane M. Spinak, *Family Defense and the Disappearing Problem-Solving Court*, 20 CUNY L. REV. 171, 177 (2016).

¹³² Eli Hager, *In Child Welfare Cases, Most of Your Constitutional Rights Don’t Apply*, PROPUBLICA (Dec. 29, 2022, 6:00 AM), <https://www.propublica.org/article/some-constitutional-rights-dont-apply-in-child-welfare> [<https://perma.cc/TRG9-UJE7>].

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See U.S. CONST. amends. V, VI.

¹³⁶ Hager, *supra* note 132.

¹³⁷ *Id.*

the evidence,”¹³⁸ which translates to “more likely than not,” as opposed to the higher, more well-known standard of “beyond a reasonable doubt” used in criminal court.¹³⁹ The Sixth Amendment also affords the right to counsel. Yet in New York, the creation of the Family Court Act (FCA) failed to create a provision for assigning representation to indigent parents, and was not amended to do so until 1975.¹⁴⁰ Even then, litigation in the 90s established that parents were not being afforded effective assistance of counsel.¹⁴¹ Despite the lagging progress in New York, nationally it is ahead of the curve—the right to counsel in family court is not federally recognized nor provided in all states. Even parents at risk of having their parental rights terminated are not afforded the constitutional right “because they are ostensibly not at risk of losing their own physical liberty by going to jail.”¹⁴² Family court judges, however, do have the power to send a parent to jail.

When I was an intern in family court during the summer of 2023, a judge sent a father to the notorious Rikers Island jail, directly from a civil courtroom. The father had violated an OP. This exercise of power by a civil court judge outraged senior supervisors and quickly rippled through the family defense office. My supervising attorney explained to me, an intern trying to find footing in the intricacies of family court, why the judges actions were so egregious. No one should come to civil court, where respondents are not environed by the same constitutional protections, and be sentenced to jail. OPs are problematic because people who are ostensibly being protected by them don’t always choose them, and it is challenging to have zero contact with your partner when you share a history, home, bank account, and children.

In New York, FCA section 1056 grants family court judges the authority to issue OPs in FCA article 10, or abuse and neglect, proceedings.¹⁴³ This is not the only way to obtain an OP in family court, as the FCA grants the court power under several other articles to issue orders.¹⁴⁴ For example, individuals can file a petition themselves for an OP through Article 8 of the FCA governing family offense proceedings.¹⁴⁵ However,

¹³⁸ N.Y. FAM. CT. ACT § 832.

¹³⁹ See, e.g., *Difference Between Criminal and Family Orders of Protection*, N.Y. STATE UNIFIED CT. SYS., <https://nycourts.gov/Courthelp/Safety/differences.shtml> [<https://perma.cc/B33K-G9KS>] (last visited Mar. 6, 2025); FAM. CT. ACT § 832.

¹⁴⁰ Spinak, *supra* note 131, at 178-79.

¹⁴¹ *Id.* at 186.

¹⁴² Hager, *supra* note 132.

¹⁴³ See N.Y. FAM. CT. Act § 1056(1) (McKinney 2020).

¹⁴⁴ *Id.* §§ 352.3, 446, 551, 656, 759, 842.

¹⁴⁵ *Id.* § 812. Family offenses are enumerated actions that the family court and criminal court have concurrent jurisdiction over, and a petition for a family offense would indicate a

the scope of this Note focuses specifically on Article 10 proceedings, which are initiated by a report of alleged child neglect like earlier described in the *Nicholson* case. In these proceedings, the Court is granted authority by the FCA to issue orders “in assistance or as a condition” of any other order made under Part 5 of Article 10 of the FCA, which lays out the orders the court has the authority to issue in child protective proceedings.¹⁴⁶ This allows family court judges to issue compulsory court orders of protection that a survivor of violence may not even want. The orders may be issued against a parent or a person legally responsible for the child’s care, or the spouse of the parent or other person legally responsible for the child’s care and before the family court.¹⁴⁷ OPs may be entered against a former spouse and people who have a child in common, regardless of marriage status or living arrangements, or against a member of the same family or household as defined in FCA section 812(1).¹⁴⁸ The bottom line is that there is significant room for entering an order against a party involved in a child protective proceeding.¹⁴⁹ The length of orders under this section are limited to the duration of any other dispositional order in the case and must have an expiration date.¹⁵⁰

In practice, these protective orders are often issued at the inception of an abuse and neglect proceeding in family court, or may be initiated even before a petition is filed.¹⁵¹ Orders are requested by an attorney for the agency in a manner similar to the following: “The agency is recommending a full stay away order of protection with agency supervised visits,” meaning the parent is not allowed to see, contact, or visit with the child without a busy caseworker’s consent and availability to sit in on a visit.¹⁵² Sometimes there are less severe orders requested by ACS, for example, “the agency is recommending a temporary order of protection until the drug tests come back.” Or there is an order in place, but it allows visitation with an agency approved resource.¹⁵³ If the parent has a concurrent criminal case where a criminal OP has been issued, the judge will customarily check a box that says the order is “subject to family court

violation of an order of protection through alleging one or more prohibited behaviors enumerated in the statute. *See id.* § 846.

¹⁴⁶ *Id.* § 1056(1).

¹⁴⁷ *Id.*

¹⁴⁸ N.Y. FAM. CT. Act § 1056(3) (McKinney 2020).

¹⁴⁹ *See id.*

¹⁵⁰ *Id.* § 1056(1), (4); *see, e.g., In re Candace S.*, 38 A.D.3d 786, 788 (2d Dep’t 2007).

¹⁵¹ *See* N.Y. FAM. CT. Act § 1029(a) (McKinney 2010).

¹⁵² *Id.* §§ 1030, 1056.

¹⁵³ *New York City Family Court: Domestic Violence (Family Offenses)*, N.Y. STATE UNIFIED CT. SYSTEM, https://ww2.nycourts.gov/COURTS/nyc/family/faqs_domesticviolence.shtml [<https://perma.cc/X6S6-TCJ9>] (last visited Feb. 20, 2025).

modification,” passing the reins directly from criminal court to judges in family court.¹⁵⁴

The OP may outline “reasonable” conditions of behavior to be observed by the subject the OP is issued against, with the court retaining considerable discretion regarding the nature of the conditions.¹⁵⁵ The language of the statute specifically provides several examples that the order “may” require the individual to do or not to do.¹⁵⁶ General conduct is included, like staying away from the home, school, or place of business the person the OP protects.¹⁵⁷ There is also an option that the individual refrain from committing a family offense or any criminal offense against the person it protects, or from harassing, intimidating, or threatening them.¹⁵⁸ In observing family court, I have seen a modification of an order become so specific that it allowed a carve-out for the father in one case to only enter his apartment when his family was away for the summer to feed the family fish. The law rounds out with a catch-all provision that the order may require the subject to “observe such other conditions as are necessary to further the purposes of protection.”¹⁵⁹

Though FCA section 1056 does not explicitly state what may happen in the event of a violation, FCA section 846-a allows a willful violation of an OP to result in incarceration.¹⁶⁰ This separate Article of the FCA contains the important language beginning, “[i]f a respondent is brought before the court for failure to obey any lawful order issued under this article or an order of protection or temporary order of protection issued pursuant to this act or issued by a court of competent jurisdiction of another state.”¹⁶¹ The inclusion of “pursuant to this act” creates a legal hook for orders issued under the other articles of the FCA, including Article 10, to be handled through section 846-a.

¹⁵⁴ See *Ally*, 197 A.D.3d at 30 (showcasing an instance in which the “subject to family court modification” box was checked, but there was no concurrent family court case to modify the order).

¹⁵⁵ See generally N.Y. FAM. CT. ACT § 1056(1)(h) (McKinney 2020) (“[S]uch order may: (A) include any appropriate provision designed to ensure that any such document is available for use as evidence in this proceeding, and available if necessary for legitimate use by the party against whom such order is issued; and (B) specify the manner in which such return shall be accomplished.”). The only restriction, developed through case law, is that the condition be “reasonable” and necessary to promote the best interests of the child. See, e.g., *In re Naricia Y.*, 61 A.D.3d 1048, 1049 (3d Dep’t 2009).

¹⁵⁶ N.Y. FAM. CT. ACT § 1056(1) (McKinney 2020).

¹⁵⁷ *Id.* § 1056(1)(a).

¹⁵⁸ *Id.* § 1056(1)(c); see also *id.* § 812.

¹⁵⁹ *Id.* § 1056(1)(i).

¹⁶⁰ *Id.* § 846-a.

¹⁶¹ N.Y. FAM. CT. ACT § 846-a (McKinney 2013).

FCA Art. 8, governing family offenses, is meant to remove from criminal courts “a limited class of offenses arising in the family milieu.”¹⁶² Therefore, the very purpose of this Article is to perform criminal court functions. FCA section 846-a lays out the powers of the court when it finds willful failure to abide by an OP, including modifying or creating new orders as well as ordering the forfeiture of bail, payment of the petitioner’s reasonable and necessary counsel fees in connection with the violation petition, and *may commit the respondent to jail for a term not to exceed six months*.¹⁶³ Though the family court’s sentencing ability is limited, the court also has the ability to sentence consecutive terms for multiple violations of OPs.¹⁶⁴

The blurred line between civil and criminal courts for violations of OPs creates collateral consequences similar to criminal legal system involvement. For example, the orders issued by a family court judge are registered and shared with federal law enforcement, creating collateral consequences beyond incarceration, like increasing the risk of deportation for both undocumented individuals as well as legal permanent residents.¹⁶⁵ This phenomenon of criminalization stretches far past New York. In every state, violations of civil domestic violence protective orders are criminal offenses.¹⁶⁶ The punitive backing to the orders seeks to make OPs more effective, and since many orders are violated, the potential for criminal legal system involvement due to this mechanism is significant.¹⁶⁷ Despite the initial opportunity for a hearing to enable due process, OPs remain a problematic tool in a family court judge’s pocket because they grant the power to directly criminalize an individual in a court with fewer protections even though they are meant to “rehabilitate,” not punish.¹⁶⁸

¹⁶² 3 NEW YORK PRACTICE GUIDE: DOMESTIC RELATIONS § 36.07 (2025) (citing Lisa T. v. King E.T., 30 N.Y.3d 548, 552 (2017)) (internal quotation marks and citation omitted).

¹⁶³ N.Y. FAM. CT. ACT § 846-a (McKinney 2013) (emphasis added).

¹⁶⁴ Walker v. Walker, 86 N.Y.2d 624, 627 (1995) (“[T]he Family Court is not generally precluded from imposing, in the exercise of prudent and appropriate discretion, a maximum six-month jail commitment for each separate and distinct violation of an order of protection, to be served consecutively.”).

¹⁶⁵ Washington, *supra* note 1, at 1129; Sarah E. Corsico, Note, *Order of Protection or Deportation? How Civil Orders of Protection Entangle Noncitizens and their Families in the Immigration and Criminal Legal Systems, Creating the Harm that They Were Intended to Prevent*, 89 BROOK. L. REV. 295, 309-10 (2023) (describing how OPs stand out as the only removal ground that can be satisfied through a civil court order as opposed to a criminal conviction).

¹⁶⁶ Goodmark, *supra* note 48, at 59.

¹⁶⁷ See generally *id.* at 60 (finding that between 40-50% of orders are violated).

¹⁶⁸ See Jennings, *supra* note 130, at 12 n.52.

C. *Silencing Survivors and Weaponizing Trauma*

“[A] violent act against *them* led to questioning of *their* parenting abilities and in some cases, to the removal of their children, court-ordered services, or loss of employment.”¹⁶⁹

Beyond the violations of due process and the criminalization of alleged perpetrators of DV in civil court, this system and OPs also negatively affect the survivors themselves.

I met Ms. B. a few months after she had given birth to a baby girl; at the time, her three older children were in foster care. ACS first targeted Ms. B through a medical neglect allegation five years prior, and now another case was opened due to a domestic dispute with her partner at a shelter. The truth hung heavy in the air of the courtroom: her history of ACS involvement was the reason for the removal, even though the baby was not placed in imminent risk of harm during the incident. This situation is the kind the decision in *Nicholson* is meant to obviate—removing children after DV incidents when the child was not actually put in risk of harm.

Ms. B’s lawyer pursued a section 1027 emergency hearing to combat the removal of the nursing child from her mother. Emergency hearings run consecutively every day (willing the judge’s calendar has space) until they are concluded, and can be called at any time.¹⁷⁰ Ms. B would be unable to maintain employment—it was impractical due to the daily commute to the courthouse, waiting for the court officer to call her case, and then sitting through the hearing to fight for her daughter. This specific hearing would stretch through the first three weeks of June due to some postponements at the fault of the court, the short 30-minute windows where the continued hearings were squeezed in, and a long cross-examination from the attorney for the child. Ms. B’s court-aggravated lack of employment ensured she remained homeless.

At one point that month, we stood, Ms. B and her legal team, on the second floor of the court building outside the Safe Horizons office, ringing the bell to seek an opening in a DV shelter. Ms. B muttered she was never going to get a bed, fearing a return to the deplorable conditions of the single women’s shelter. It was well known that DV shelters were crammed with long waitlists.¹⁷¹ This was confirmed by the woman who

¹⁶⁹ Washington, *supra* note 1, at 1124.

¹⁷⁰ *See generally* N.Y. FAM. CT. ACT § 1027(a)(i) (McKinney 2016) (mandating that “such hearing shall be held no later than the next court day after the filing of a petition to determine whether the child’s interests require protection, including whether the child should be returned to the parent or other person legally responsible, pending a final order of disposition and shall continue on successive court days, if necessary, until a decision is made by the court”).

¹⁷¹ *See infra* Section III.C.

stepped out of the office with a clipboard, some bad news, and the advice to hop on the hotline and get on the waitlist. Ms. B had been in a family shelter before her baby was taken by the agency, but was not allowed to remain in a family shelter without custody of her children.¹⁷²

ACS called Ms. B as their chief witness in the hearing. The judge spoke directly to Ms. B and let her know that she needed to know where Ms. B was living and that she hadn't been seeing her partner, in compliance with the OP against him. The judge needed to know that "she could follow court orders." The Family Court Legal Services attorney (for ACS) started a clumsy line of direct questioning towards Ms. B about her memory of the events leading up to the loss of her first three children to the system. An objection for relevance was called out with almost every question, as the situation with the other children was out of the scope of the emergency hearing. The judge allowed them nearly every time. She shrugged and said this incident "didn't happen in a vacuum."

Several days into the § 1027 proceeding, the social worker on the defense team for Ms. B got a hysterical call from her. Ms. B had been assaulted by her partner. The social worker could hear him yelling in the background as he dragged her down the street. The call dropped. When the social worker was able to get back through to Ms. B, she indicated that she would not be able to make court that day, as she had called the police and gone to the hospital.

When the legal team appeared for the hearing later that day, the judge was livid. She began a direct examination of the social worker on the legal team, demanding to put the phone call with Ms. B on the record. No other parties were satisfied with the legal excuse for Ms. B's failed appearance at the hearing, and the judge announced that the proceeding would be put over until the next day. If the client did not appear, the emergency application would be denied. The judge's mind was clearly churning: *if* the legal excuse for not showing up was true, Ms. B couldn't listen to court orders—she had seen her partner in violation of the OP.

At the next appearance, the attorney for the child cross-examined Ms. B on the assault she had just suffered. He asked questions like *you saw him yesterday? Isn't it true he had an order of protection to stay away from you? You knew about this order?* He pried her to recount the abuse she faced. She steeled over, reciting a monotone description of the physical assault. She didn't know how he found her, maybe through friends.

¹⁷² See generally KENDRA HURLEY, *ADRIFT IN NYC: FAMILY HOMELESSNESS AND THE STRUGGLE TO STAY TOGETHER 2* (2017) ("When homeless parents reunify with children who have been removed to foster care, they can move as a family to a family shelter. However, Family Court typically requires parents to regularly host those children in their homes for overnight visits as a prelude to eventual reunification. A parent who is homeless and in a shelter for single adults, however, often has no suitable place for such visits.").

At one point she said she could show them the bruises if they didn't believe her. Although she had brought with her medical documentation of her hospital visit and she said she was willing to file another OP, her application was denied. She lost her hearing and her infant daughter would remain out of her care.

The injustice Ms. B faced illustrates how OPs are specifically used as a weapon against survivors of violence. Increasing due process protections does not ameliorate the harm faced by the parents and survivors of violence OPs are supposed to protect. When OPs are violated, survivors may not face jail time like their partners, yet they may still face the consequences of the violation through outcomes in their neglect cases. Moreover, the idea that a survivor should know better and stay away from a violent partner reinforces the aforementioned victimhood narratives, and discredits survivor experiences. Professor S. Lisa Washington argues that the coercive environment of family policing both discredits and excludes knowledge of survivors, leaving them out of the collective understanding of IPV.¹⁷³ Survivors, like Ms. B, who do not stay away from their partners because they don't have a realistic choice, violate the court orders described above and thus have lack of “insight” into their abuse, warranting removal and even sometimes a termination of rights.¹⁷⁴

In discussing epistemic injustice, Washington writes that women have been pathologized “for centuries” in the sexual assault context, their realities discounted more so when individuals have intersectional identities¹⁷⁵ like Ms. B, a black woman shouldering the burden of poverty. A factor in testimonial injustice is that survivor experiences are not regarded as “credible knowledge” until expressed with state coercion.¹⁷⁶ Ms. B's case presents a clear example of this: those with power in the courtroom were hesitant to believe Ms. B actually suffered an assault, despite her history of IPV, until she came into the room and testified under oath. Similarly, “[t]estimonial injustice dehumanizes a person by discrediting their status as a knower, based on stereotypical assumptions.”¹⁷⁷ This harmful abasing environment nurtured by the courts stands to exacerbate the emotional trauma of survivors. Dana Hanuszcak, a DV survivor and advocate, has said, “survivors need people to believe them. You've been told for whatever amount of time that you're nothing, you're ugly, you're fat. Then you get into the system and you have a caseworker who doesn't

¹⁷³ Washington, *supra* note 1, at 1151.

¹⁷⁴ *Id.* at 1100-02

¹⁷⁵ *Id.* at 1136.

¹⁷⁶ *Id.* at 1137.

¹⁷⁷ *Id.*

believe you. So then you're even more isolated and embarrassed and ashamed."¹⁷⁸

OPs play a role in both testimonial and hermeneutical injustice by creating a set of conditions and expected behaviors that the court can use as a tool to measure compliance, discredit survivor's judgement, and use as a weapon to enforce child removal. OPs may function less as a protection and more as a judicially imposed test. For example, in Ms. B's case, because the line of questioning was not related to her partner's conduct or violation, or Ms. B's safety, it twisted into an analysis of her judgment and failure to adhere to a court order she knew about, which was then projected on her ability to parent. In her work, Professor Washington cites an example of a case where a woman was not convinced her situation was DV, yet she testified it was to avoid continued separation from her children: "The disconnect between her authentic experience and the narrative that was expected of her caused so much internal pressure that it made her ill."¹⁷⁹ This drive to comply with the court and agree to OPs was also expressed by Ms. B, who agreed to be willing and able to accept court-recommended services, including OPs, even if she did not want one or knew it would be broken regardless. Similarly, as a 2020 report from the Child Welfare Watch writes:

Once ACS has made a charge of domestic violence, alleged victims have little say in the decisions ostensibly made to protect them Whether they agree that it's necessary or not, they are frequently ordered to cut off contact with their partners If caseworkers believe that an alleged victim is in contact with a domestic partner who's been excluded from the home, she may be required to pull her kids out of school and move to a domestic violence shelter in another borough.¹⁸⁰

Hermeneutical injustice in the context of the courtroom could be considered in different ways. Maybe it is a caseworker asserting what they think is best. Recall that for the *Nicholson* plaintiff, Ms. Tillet, the only barrier standing in the way of reunification with her baby was a caseworker who wanted her to get a psychological evaluation.¹⁸¹ Perhaps it is a white judge issuing the OP and deciding when it is necessary to have an OP, or even on a higher macro level, the white "battered women's groups" and privileged politicians and legislators who encouraged criminalization

¹⁷⁸ See KRAMER, *supra* note 46, at 7.

¹⁷⁹ Washington, *supra* note 1, at 1138.

¹⁸⁰ KRAMER, *supra* note 46, at 4.

¹⁸¹ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 181-82 (E.D.N.Y. 2002).

of DV, bolstering the importance of legal tools like OPs.¹⁸² If people like Ms. B were able to share their narratives and truths, our collective knowledge around DV and IPV may look very different.

States beyond New York must improve the due process protections afforded to parents who face family separation as a result of the enforcement of an OP. However, increasing due process protections alone is an insufficient method to overcome the problematic nature of OPs, which punish parents in civil court and silence survivors of violence. The solution, as explored below, likely lies in a de-carceral approach that centers the voices of those impacted and a part of the movement to end family policing.

III. KEEPING FAMILIES TOGETHER AND CREATING SAFER SOLUTIONS TO VIOLENCE

A. *Limiting the Power of Family Court*

The precedent in New York is one example of how due process hearings could one day exist for all parents who face separation from their children because of an OP in family court. In other states, courts have justified lower standards of proof during emergency removal hearings by emphasizing the state’s interest in child safety and the impermanence of a temporary removal hearing.¹⁸³ Additionally, there is consensus among states with lower standards that the proceeding is a temporary finding, still pending review at an adjudicatory hearing, and therefore a higher standard of proof is not necessary to protect against the unwarranted interference into parental rights.¹⁸⁴

¹⁸² See *supra* Section I.A (discussing carceral feminism).

¹⁸³ See, e.g., *In re O.P.*, 235 A.3d 40, 67 (Md. 2020); see also *In re Moloney*, 492 N.E.2d 805, 808 (Ohio 1986) (“An order of temporary shelter care is made in recognition that a person of tender years is defenseless, unable to care for himself and that his natural needs for food, clothing and shelter demand that someone immediately assume the responsibilities that the parents have ignored.”).

¹⁸⁴ See, e.g., *In re J.A.*, 962 P.2d 173, 177 (Alaska 1998) (“The existence of probable cause at the temporary custody hearing does not itself justify the child’s removal from the home; it merely allows the petition to proceed toward adjudication and gives the court authority to consider the issue of placement.”); *Jarrillo v. Div. of Child Protective Services*, 614 A.2d 1275, 2 (Del. 1992) (unpublished table decision) (“A party to the custody order shall have a right to request a review by the Court at any time during the pendency of the order.”); *In re N.A.C.*, 329 P.3d 458, 466-67 (Kan. 2014) (“But the temporary custody order is also designed to be short-lived.”). States use the *Mathews v. Eldridge* balancing factors to determine whether procedural due process is met: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative

In states with lower standards at initial removal hearings, advocates should look to the *Nicholson* standard of imminent risk which was achieved through litigation—the court ultimately influenced by the Family Court Act, as well as how the Second Circuit treated the Constitutional issues at bar.¹⁸⁵ While not all circuits have articulated a clear standard for ex-parte child removal, several, like the Second, have held that there must be something like imminent harm to justify a removal in the event of exigent circumstances.¹⁸⁶ Thus, changing the standard in the same method as New York requires both legislative efforts as well as strategic litigation. Moreover, other states should look to the opinion in *Elizabeth C.* where the court recognized that the separation of parent and child, even through an OP rather than an emergency removal, triggers the parent's due process right.¹⁸⁷

As established in part II, what has happened in New York shows that despite the opportunity for a Due Process hearing to challenge a judge-issued order, a limited opportunity for due process does not stop all OPs. Nor does it dim the effects of weaponized violations of OPs on survivors

burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁸⁵ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 372 (2004) (“While we do not reach the constitutional questions, it is helpful in framing the statutory issues to note the Second Circuit’s outline of the federal constitutional questions relating to removals.”).

¹⁸⁶ The Second Circuit permits the removal of a child pursuant to exigent circumstances only when “information possessed by a state officer would warrant a person of reasonable caution in the belief that a child is subject to the danger of abuse if not removed from [home] before court authorization can reasonably be obtained.” *Tenenbaum v. Williams*, 193 F.3d 581, 605 (2d Cir. 1999). In other words, “it is unconstitutional for state officials to effect a child’s removal on an ‘emergency’ basis where there is reasonable time safely to obtain judicial authorization consistent with the child’s safety.” *Id.* at 596. Similarly, in the Ninth Circuit, child removal without a court order violates the Fourth Amendment unless there is “specific, articulable evidence that provides reasonable cause to believe that a child is in imminent danger of abuse,” and further requires “that the scope of the intrusion is reasonably necessary to avert that specific injury.” *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000); see *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 790 (9th Cir. 2016); *Ram v. Rubin*, 118 F.3d 1306, 1311 (9th Cir. 1997). The Tenth Circuit recently clarified that “in the child welfare context, there must be a threat of imminent harm when officials . . . seize children without a warrant or judicial authorization.” *Lowther v. Child. Youth & Fam. Dep’t.*, 101 F.4th 742, 766 (10th Cir. 2024). The Fifth Circuit has laid out a totality of the circumstances test for removal under exigent circumstances to determine if the child is in imminent danger of physical or sexual abuse if he remains in his home. *Gates v. Tex. Dep’t of Protective & Regul. Servs.*, 537 F.3d 404, 429 (5th Cir. 2008). The Seventh Circuit has quoted other circuits in determining that exigent circumstances are present when state officers “have reason to believe that life or limb [of the child] is in immediate jeopardy.” *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1010 (7th Cir. 2000) (quoting *Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1094 (3d Cir. 1989)) (citing *Tenenbaum*, 193 F.3d at 605) (holding unspecified allegations of neglect do not amount to exigent circumstances).

¹⁸⁷ *In re Elizabeth C.*, 156 A.D.3d 193, 206 (2d Dep’t 2017).

in family court adjudicatory proceedings.¹⁸⁸ There is still work to be done to limit the carceral approach of family court judges, as well as the effect of orders on survivors of violence.

Beyond limiting the issuance of OPs, advocates must still combat the punitive power of family court. Enacting legislation to amend the language of FCA Article 8, effectively removing the option for judges to issue jail time for a violation of OPs, would be another way to ensure parents are not criminalized in a civil courtroom. However, this reform alone would still allow epistemic injustice to prevail. OPs would still be issued, and when violated, the survivor’s judgment and protective capability may still be questioned in family courtrooms.

To chip away at the influence on survivors, legal advocates in New York have also turned to limiting the supervisory power of family courts over the lives of survivors. For example, the Family Justice Law Center recently filed an appeal to prevent the “double-abuse” that the family policing system incurs when a child neglect case is filed against one parent accused of DV, who is then barred from the home, but also grants the agency “supervision” over the other parent who is a survivor.¹⁸⁹ The legal hook is upholding a survivor’s Fourth Amendment right to be free from searches without probable cause in the course of investigations.¹⁹⁰ The due process argument was not considered.¹⁹¹ However, the court ultimately determined in favor of the appellant, finding no statutory basis for a court to place a non-respondent parent under ACS supervision.¹⁹² This was a significant win for survivors of violence in New York, however, it does not shield survivors who remain respondents in their family court cases. As the next section details, in order to prevail completely over epistemic injustice and allow survivors to be free from further abuse at the hands of the court system, we must lift the voices of survivors and the growing movement calling for abolition of the family policing system in its entirety.

B. Abolition: Centering Family Safety by Addressing Root Causes

The family regulation system’s focus on pathologizing individuals instead of focusing on structural issues is an example of the pervasive effects of damaged knowledge. If marginalized parents’

¹⁸⁸ See *supra* Section II.C.

¹⁸⁹ Andy Newman, *Domestic Violence Victims Reported Abuse. Caseworkers Watched Them Too.*, N.Y. TIMES, (JULY 31, 2024), <https://www.nytimes.com/2024/07/31/nyregion/domestic-violence-victims-child-welfare-surveillance.html> [<https://perma.cc/35DQ-32ZT>]; see *In re Sapphire W.*, 237 A.D.3d 41 (2d Dep’t 2025).

¹⁹⁰ Newman, *supra* note 189; see *In re Sapphire W.*, 237 A.D.3d at 41.

¹⁹¹ See *In re Sapphire W.*, 237 A.D.3d at 55.

¹⁹² *Id.*

expressions of knowledge were truly credited, the discourse around child safety would center around a family's actual needs. The focus would be on public housing, employment, access to medical treatment, and other structural issues of poverty.¹⁹³

Correcting the damaged narrative enabled by epistemic injustice, recognizing the experience of survivors, and fully treating parents with dignity demands that, in an abolitionist fashion, the family policing system be eradicated. By pathologizing parents and deeming them unfit, the child welfare system denies parents support and fails to attack the root causes of issues that lead to reports of maltreatment in the first place. Discrediting mothers like Ms. B's account of their experiences and questioning their judgment is an example of what Ruth Wilson Gilmore wrote in *Golden Gulag* in the context of prison abolition: "dehumanization is also a necessary factor in the acceptance that millions of people (sometimes including oneself) should spend part or all of their lives in cages."¹⁹⁴

Some may consider advocating for the abolition of family policing as a radical measure. As Joyce McMillan, the founder and executive director of Just Making a Change for Families (JMAC for Families) expressed, "Everybody says I'm radical, but how much more radical can you be than snatching kids out of the home under the guise of protecting them and changing their rooms every three to four months?"¹⁹⁵ This Note seeks to support the movement against family policing that proclaims abolition is possible if society is willing to engage in creating safe communities.

Professor Dorothy Roberts writes, "We must abandon the fool's errand of tinkering with a system designed to tear families apart."¹⁹⁶ She argues that the child welfare system cannot be fixed, for it was designed to oppress, despite being effectively shrouded in propaganda that paints it as an essential helping agency that keeps children safe.¹⁹⁷ Professor Roberts addresses the common counterargument that withholding child protective services will enable severe child abuse, which she rebuts by illuminating the fact that resources and investigations focused on child removal don't help children who suffer devastating abuse.¹⁹⁸ She points to research that proves reducing poverty and expanding access to

¹⁹³ Washington, *supra* note 1, at 1140.

¹⁹⁴ RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 243 (2007).

¹⁹⁵ Roberts describes this quote in the context of Joyce McMillan organizing a protest on MLK day in 2021 on 125th Street in Harlem. ROBERTS, *supra* note 6, at 277.

¹⁹⁶ *Id.* at 284.

¹⁹⁷ *See id.* at 282.

¹⁹⁸ *Id.* at 287.

violence-prevention programs are more effective in protecting children from lethal abuse than surveilling and separating families.¹⁹⁹ She takes care to point out that out of all Western nations, the US continues to have the highest rates of child poverty and yet spends the least investing in families, instead spending the most on child removal and foster care.²⁰⁰

Professor Roberts reimagines what a safer society could look like, recalling Angela Y. Davis and W.E.B. Du Bois’ emphasis on the concepts of abolition democracy, and rebuilding a better society to replace the one that must be torn down.²⁰¹ Reinvesting resources can be effective, as evidenced by the 2020 pandemic, which shrank the scale of New York’s ACS involvement and kept families at home.²⁰² Less ACS involvement was coupled with an increase in federal government support for families through the CARES Act, as well as the rapid expansion of mutual-aid community projects.²⁰³ ACS’s own data from the period reported that children stayed safe with less surveillance and separation. The shutdown resulted in fewer reports and investigations and no rush of unreported cases surging in when the agency was able to fully operate again.²⁰⁴ Professor Roberts uses this as an example of how there can be a successful path forward if we abolish family policing.²⁰⁵

C. *Abolition in the Context of Orders of Protection*

In the context of IPV intersecting with family court, a major concern is how to keep survivors safe without OPs. Though OPs are a tool that many rely on in our current system to protect themselves, it is important to reiterate that in Article 10 cases it is not always the survivor seeking the order, as courts may also issue an OP.²⁰⁶ As described above, the idea that all survivors would want an OP to feel safe aligns with victimhood narratives that are not all-encompassing. Regardless, when examining issues related to OP violations, the deeper question is inevitable: why are these protective orders being violated in the first place?

According to the National Coalition Against Domestic Violence, there are numerous societal barriers that prevent survivors from “escaping” a relationship.²⁰⁷ Some of the factors they list include anxiety over

¹⁹⁹ *Id.* at 287-88 (footnote omitted).

²⁰⁰ *Id.* at 288.

²⁰¹ *Id.* at 290.

²⁰² *Id.* at 291.

²⁰³ *Id.* at 291-92.

²⁰⁴ *See id.* at 290-92.

²⁰⁵ *Id.*

²⁰⁶ N.Y. FAM. CT. ACT § 1029 (McKinney 2012); *see supra* Part II.

²⁰⁷ *Why Do Victims Stay?*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/why-do-victims-stay> [<https://perma.cc/N6FK-CXG7>] (last visited May 10, 2024).

concerns regarding a decrease in living standards for their children as there are still not enough shelters for victims to be safely housed despite increased availability and increasing societal awareness of domestic violence.²⁰⁸

Research has established a link between DV and housing instability, and that DV is a leading cause of homelessness for women in the US.²⁰⁹ In combating DV's negative effect on housing insecurity, there are different options for survivors seeking shelter. Individuals can typically stay for 30-60 days in emergency shelters. However, in many communities, these shelters are inadequate and full, resulting in thousands of survivors nationwide who are denied a bed each year.²¹⁰ Aside from emergency DV shelters, there are transitional housing programs, either facility or subsidy based, as well as federal permanent housing options like Section 8 housing, the well-known subsidized permanent housing program.²¹¹ These options are not always available due to criteria for eligibility and long waitlists for survivors who do qualify.²¹²

Despite the recognized link between DV, housing instability, and homelessness, another identified issue in providing housing for survivors is the disconnect between the DV service system and the housing/homeless service system.²¹³ Recall Ms. B's story. She was unable to access a space at a DV shelter. However, she was also unable to remain in a family shelter without her children. Creating a "housing safety net" for survivors may prevent violations of orders, by eliminating a need to remain with a partner, and may allow survivors to feel safe without the order in the first place.

Housing is just one example of support that could be realized in the absence of our current system. Professor Goodmark recommends an abolitionist reform to carceral feminism more broadly through divesting from law enforcement and redirecting funds from VAWA—which, as previously stated, serves primarily as a funding bill.²¹⁴ She provides multiple

²⁰⁸ *Id.*

²⁰⁹ Charlene K. Baker et al., *Domestic Violence, Housing Instability, and Homelessness: A Review of Housing Policies and Program Practices for Meeting the Needs of Survivors*, 15 *AGGRESSION & VIOLENT BEHAV.* 430, 431 (2010).

²¹⁰ *Id.*

²¹¹ *See id.* at 432-33; *see also Domestic Violence Information, Policy, and Resources*, N.Y.C. HOUSING AUTH. (last visited May 20, 2025), <https://www.nyc.gov/site/nycha/residents/domestic-violence.page> [<https://perma.cc/H26Z-WY5D>].

²¹² Baker et al., *supra* note 209; *see NYCHA Section 8 Waitlist*, NYC 311, <https://portal.311.nyc.gov/article/?kanumber=KA-03639> [<https://perma.cc/B4BY-C3HV>] (last visited May 20, 2025).

²¹³ *See* NYC 311, *supra* note 212. *See generally* Baker et al., *supra* note 209 (detailing the connection between intimate partner violence and housing instability).

²¹⁴ Goodmark, *supra* note 22, at 88.

examples of what the money could be used for, such as pooling emergency funding for survivors in need of rental housing, money for food or transportation, piloting restorative justice programs, or creating community accountability models.²¹⁵

Survivors themselves have also written about their vision for change.²¹⁶ Some of their recommendations for alternatives to the systems we have in place now include investing in “flexible, low-barrier economic assistance and parent-centered systems of care and support to address the harms and trauma caused by domestic and gender-based violence.”²¹⁷ They give examples such as community groups, peer-run services, mutual-aid groups, and directing philanthropic, private and public funding streams to grassroots organizations that provide immediate direct support to survivors in flexible ways that uphold their values.²¹⁸ They also recommend age-appropriate trauma-informed services available outside of ACS, and community-based supports for trauma recovery.²¹⁹ They note the need for intersectional services for healing from sexual violence and IPV.²²⁰ They also place heavy emphasis on improving and speeding up housing options, suggesting using a housing first approach, ending discrimination against housing vouchers, and improving shelters.²²¹

In the spring of 2024, an organization led by directly impacted parents, Black Families Love and Unite (“BLU”), hosted a convening to hear from communities affected by the family policing system about healing and a path forward.²²² The goal of the convening, followed by a focus group and a 230-participant survey, was to begin developing a reparations framework for families impacted by the over surveillance of child protective services.²²³ Convening participants expressed dissatisfaction with the current child welfare system, and specifically regarding DV, one

²¹⁵ *Id.*

²¹⁶ *The Intersection of Family Policing and Domestic and Intimate Partner Violence*, RISE (Nov. 1, 2022), <https://www.risemagazine.org/2022/11/intro-dv-series/> [<https://perma.cc/35FQ-W3U9>].

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² BLACK FAMS. LOVE & UNITE, FAMILIES BELONG TOGETHER, FAMILIES DEMAND REPAIR 6-7 (2024), https://issuu.com/blackfamiliesloveandunite/docs/2025_blu_report_draft_final_pages (on file with the CUNY Law Review); see also *Reparations for Family Policing*, BLACK FAMS. LOVE & UNITE, <https://cfny.org/event/families-belong-together-families-demand-repair-a-convening/> [<https://perma.cc/497B-HY73>] (last visited Jan. 14, 2024); Imani Worthy, *Why Aren't We Talking About Family Policing When We Talk About Reparations?*, IMPRINT (Apr. 21, 2025, 3:00 AM), <https://imprintnews.org/opinion/why-arent-we-talking-about-family-policing-when-we-talk-about-reparations/260100> [<https://perma.cc/BXR2-RQJE>].

²²³ BLACK FAMS. LOVE & UNITE, *supra* note 222 at 6-7.

participant said, “ACS threatened to remove children during DV investigations, adding to the trauma rather than helping. The system’s involvement often led to more surveillance and less support.”²²⁴

The report deriving from BLU’s convening opens a new conversation on how we can move forward as a society: reparations for those impacted. One specific tenet of the reparations framework BLU produced, “satisfaction”, stuck out when considering the path forward for survivors of both IPV and family policing. Satisfaction as a tenet of reparations requires government decision-makers and society at large to acknowledge the harm survivors have faced.²²⁵ Although many people recognize the harms of foster care, participants at the convening emphasized the need for widespread narrative shifting and education around the racist roots and punitive nature of family policing.²²⁶ To quote one convening participant, “Revealing how the system has been so violent is important – systems are isolating, [they] make you feel ashamed.”²²⁷ Reparations are not solely focused on compensating those affected by family policing, but as BLU explores, they should shift societal understanding of these issues and make space for the experiences of survivors of system-based violence and IPV alike.

CONCLUSION

OPs, ostensibly intended to protect survivors, harm parents interacting with the family policing system. OPs can be carceral tools used by the family courts to both punish parents and silence the experience of survivors. As one directly impacted parent wrote,

I will always be grateful for the support of my family and friends—they were my safe haven. They allowed me to tell my truth without judgment. That’s what I needed—and something I didn’t get from ACS or NYPD. I craved a truly safe space for survivors who don’t trust the systems that were supposedly created to keep us safe.²²⁸

The path forward, though it may be arduous, must be anti-carceral, and bend towards preserving families, recognizing their power and the sanctity of their experiences and stories.

²²⁴ *Id.* at 20.

²²⁵ *Id.* at 25.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Kelly, *supra* note 100.