Fordham Law Review

Volume 91 | Issue 1 Article 7

2022

The Collateral Effects of Criminal Orders of Protection on Parent Defendants in Cases of Intimate Partner Violence

Isabelle Leipziger
Fordham University School of Law

THE COLLATERAL EFFECTS OF CRIMINAL ORDERS OF PROTECTION ON PARENT DEFENDANTS IN CASES OF INTIMATE PARTNER VIOLENCE

*Isabelle Leipziger**

Intimate partner violence is a serious public health problem that affects people from all cultures, ethnicities, and socioeconomic backgrounds. Although courts have historically refused to get involved due to the intimate and private nature of these offenses, widespread reforms have led to some judicial intervention. Through the issuance of criminal orders of protection, courts have alleviated some of the difficulties associated with prosecuting cases of intimate partner violence and have provided immediate protection for victims. However, criminal orders of protection also pose significant challenges for defendants who live and co-parent with their accuser.

In New York, issuance of these orders is often a procedural default in criminal court, and their impact on criminal defendants can be significant, leaving many defendants—often people of color from low socioeconomic backgrounds—without a place to live. These orders are even more consequential for defendants who are parents, as they can effectively separate parents from their children and deprive them of their fundamental right to parent. In order to limit the consequences that stem from these criminal orders of protection, courts must be clear about the procedural protections and evidentiary standards required and must ensure that parent defendants are afforded these protections before issuing a criminal order of protection. Recently, the Supreme Court of the State of New York, Appellate Division, First Judicial Department, held in Crawford v. Ally *that where a temporary order of protection would deprive a defendant of significant property or liberty interests, the court must hold an evidentiary hearing in order to protect the defendant's due process rights. Although this decision was a step in the right direction, its vague language left room for judges to skirt the new requirements. This Note considers* Crawford *and its effect on parent defendants, positing that a legislative response that codifies the First*

* J.D. Candidate, 2023, Fordham University School of Law; B.S., 2017, Cornell University. I would like to thank Professor Clare Huntington for her invaluable guidance and the staff of the *Fordham Law Review* for their assistance and review. For helpful comments and conversations, I am grateful to Eli Northrup and Edward Soto at the Bronx Defenders and to David Shalleck-Klein at the Family Justice Law Center. Thank you to Shamika Crawford for your bravery and for allowing me to share your story. And finally, thank you to my family—I am so lucky to have your support, encouragement, and unwavering patience.

Department's recent decision would address some of the concerns surrounding criminal orders of protection and would ensure that parent defendants are afforded adequate protections when they are accused of intimate partner violence.

INTRODUCTION

At the time of her arrest, Shamika Crawford was the mother of a ten-year-old daughter and a five-year-old son.[1] Ms. Crawford worked two jobs in order to support herself and her family.[2] The father of her children, Keivian Mayers, sometimes stayed with her in her apartment, which she shared with her children and her sixteen-year-old brother.[3] On November 3, 2019, officers arrested Ms. Crawford after Mr. Mayers accused her of assaulting him.[4] At her arraignment, the Bronx County Criminal Court

1. Brief for Petitioner at 6, Crawford v. Ally, 150 N.Y.S.3d 712 (App. Div. 2021) (No. 2020-04520).
2. *Id.* at 10. Ms. Crawford worked as a caretaker for individuals with developmental and intellectual disabilities. *Id.* at 6.
3. *Id.* at 6–7.
4. *Id.* at 7.

issued a temporary order of protection[5] (TOP) prohibiting her from contacting Mr. Mayers and ordering her to stay away from their "shared" residence.[6] Although she was legally free to leave, the TOP prevented her from returning home.[7] Unable to go home, where was she supposed to go? How would she care for and maintain her relationship with her children? For Ms. Crawford, "freedom" meant living in her car and sleeping on her friend's couch.[8]

In criminal cases, prosecutors often request a TOP as a pretrial precaution to immediately shield victims[9] from the alleged abuse.[10] Typically, the TOP remains in place for the duration of the case, but judges can modify or terminate the order at their discretion.[11] For many individuals, however, a TOP becomes a "sentence unto itself" because of the restrictions imposed by the order.[12] In Ms. Crawford's case, she was left unhoused and separated from her two young children because of an unsubstantiated misdemeanor assault complaint signed by Mr. Mayers.[13] With the TOP in place and her criminal case still pending, Ms. Crawford did not see her children for months and only kept in contact with her daughter over the phone.[14]

At Ms. Crawford's arraignment, prosecutors requested a full stay-away order,[15] and the court granted this request.[16] Five days later, Bronx County Criminal Court Judge Shahabuddeen Ally denied Ms. Crawford's request for a modification of the order of protection and refused to hold an evidentiary hearing to substantiate the allegations in the complaint and show that a full

---

5. The term for temporary orders of protection varies by jurisdiction. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 7 n.10 (2006). This Note refers to temporary orders of protection, stay-away orders, no-contact orders, and restraining orders interchangeably. These orders can be issued either in the civil or criminal context. *See id.* at 15–16.

6. *See* Crawford v. Ally, 150 N.Y.S.3d 712, 714–15 (App. Div. 2021). Mr. Mayers periodically stayed with Ms. Crawford in her apartment, but he was not listed on the lease and was not legally authorized to reside there. *See id.* at 715.

7. Andy Newman, *Barred from Her Own Home: How a Tool for Fighting Domestic Abuse Fails*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/17/nyregion/order-of-protection-domestic-violence-abuse.html [https://perma.cc/3AMY-CQX3].

8. *See id.* Moreover, a full stay-away order meant that she was not only deprived of her property, but also separated from her children. *Id.*

9. This Note refers to individuals who have experienced IPV as "victims" solely for clarity, but with the recognition that these individuals are "survivors" and are not defined by the abuse that has been perpetrated against them.

10. *See* Newman, *supra* note 7.

11. Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 364 (2002).

12. Newman, *supra* note 7.

13. *See id.*

14. Interview by Eli Salamon-Abrams, Co-President of Fordham L. Defs., and Yash Ramesh, Intergroup Coordinator of Fordham L. Defs., with Shamika Crawford and Edward Soto, at Fordham Univ. Sch. of L. in New York, N.Y. (March 3, 2021).

15. Under a full stay-away order of protection, the parties must "stay away" from each other and may not contact each other "directly or through third parties." *Orders of Protection*, N.Y.S. OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, https://opdv.ny.gov/orders-protection [https://perma.cc/MVS5-WWYP] (last visited Sept. 2, 2022).

16. *See* Crawford v. Ally, 150 N.Y.S.3d 712, 714 (App. Div. 2021).

TOP was necessary.[17] A couple of months later, with the full stay-away order still in place, Ms. Crawford sought a writ of mandamus directing the Bronx County Criminal Court to hold an evidentiary hearing on the appropriateness and scope of the TOP issued in her case.[18] Ms. Crawford's application was dismissed as moot following the dismissal of her criminal case in March 2020.[19] On appeal, the First Department found an exception to the mootness doctrine and held that the criminal court's initial failure to hold an evidentiary hearing violated Ms. Crawford's due process rights.[20]

Ms. Crawford's situation is not unusual.[21] Thousands of New Yorkers face similar challenges every year.[22] In 2019, there were over 230,000 orders of protection issued in family court and criminal court.[23] The issuance of these TOPs have disproportionately affected New York's communities of color.[24] Although these orders have protected those in dangerous situations, criminal orders of protection have also deprived defendants of significant protected interests without giving them the opportunity to refute the allegations against them.[25] This presents a serious due process issue, particularly for defendants who are the parents of young children.[26]

This Note focuses on criminal orders of protection in New York and analyzes the First Department's recent decision in *Crawford v. Ally*,[27] which held that a hearing is necessary to safeguard a defendant's due process rights where a TOP would not only deprive defendants of their homes but also separate them from their children.[28] This Note argues that *Crawford* was a step in the right direction, but that more is needed to protect the rights of parent defendants. This Note proceeds in three parts. Part I discusses the prevalence of intimate partner violence (IPV), its effects, and the legal system's response. Part I also explains the decision in *Crawford*. Part II then examines the rights of parent defendants in cases of IPV and explains how criminal orders of protection present a challenge to those rights. Part III

17. *See id.* at 716.
18. *Id.* at 715.
19. *Id.* at 716.
20. *Id.* at 717.
21. *See generally* Brief of Brooklyn Def. Servs., et al. as Amici Curiae in Support of Petitioner-Appellant at 8–29, Crawford v. Ally, 150 N.Y.S.3d 712 (App. Div. 2021) (No. 2020-04520) (describing stories of other individuals who were left without a home upon the issuance of a full order of protection in cases where the charges were ultimately dismissed).
22. *Id.* at 3.
23. N.Y. STATE OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, NEW YORK STATE DOMESTIC VIOLENCE DASHBOARD 2019, at 8, https://opdv.ny.gov/system/files/documents/2021/09/opdv-dashboard-2019.pdf [https://perma.cc/8WW4-Q5W4]. Statistics on the number of criminal orders of protection issued in New York are not available, but this number reflects the orders of protection issued in family court and in domestic violence cases in criminal court that were required for entry in the New York State Order of Protection Registry pursuant to section 221-a of the New York Executive Law. *Id.*
24. *See* Brief of Brooklyn Def. Servs., et al. as Amici Curiae in Support of Petitioner-Appellant, *supra* note 21, at 5–7.
25. *See id.* at 3.
26. *See infra* Part II.A.
27. 150 N.Y.S.3d 712 (App. Div. 2021).
28. *Id.* at 717.

argues that the decision in *Crawford* was regrettably vague and risks the possibility that courts will allow violations of defendants' rights. Part III contends that *Crawford* was a good decision, but that stricter procedural protections and a higher evidentiary standard are necessary to fully safeguard parent defendants' constitutional rights.

I. ORDERS OF PROTECTION AS REMEDIES FOR IPV

Intimate partner violence—which the Centers for Disease Control and Prevention classifies as a serious public health problem[29]—affects millions of individuals in the United States.[30] Although traditionally recognized as instances of physical or sexual violence between intimate partners, IPV can also include threats, economic abuse, and emotional or psychological abuse.[31]

Before the 1970s, violence in the home was generally not considered to be within "the reach of criminal law."[32] Judges declined to intervene in what they deemed a private family matter.[33] In addition to issues of privacy, warrantless arrest laws[34] precluded officers from arresting a defendant on allegations of a misdemeanor where officers did not witness the act themselves.[35] This presented a substantial barrier because most acts of IPV are not committed in the presence of a police officer.[36] Without the involvement of criminal courts, victims were left with the limited remedy of

29. *See Fast Facts: Preventing Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 21, 2021), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html [https://perma.cc/FY2G-UUCS] (classifying intimate partner violence as a serious health problem). Aside from the risk of injury and death, IPV also significantly increases the risk of other mental and physical health problems, including cardiovascular problems, diabetes, depression, stroke, and asthma. *See Intimate Partner Violence (IPV)*, NYC HEALTH, https://www1.nyc.gov/site/doh/providers/resources/public-health-action-kits-ipv.page [https://perma.cc/TX2Z-T9MN] (last visited Sept. 2, 2022).

30. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE (2020), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457 [https://perma.cc/VNJ3-B3VS] (noting that, in the United States, more than ten million adults experience domestic violence annually).

31. *Id.* By engaging in psychologically abusive behavior, abusers seek to isolate their victims from support networks, strip away their independence, and micromanage their daily life. *See* Erin Sheley, *Criminalizing Coercive Control Within the Limits of Due Process*, 70 DUKE L.J. 1321, 1323–24 (2021) (discussing behavior known as "coercive control").

32. *See* Suk, *supra* note 5, at 11–12 ("Indeed wife beating, as a form of chastisement and discipline of wives, was overtly approved and reserved as a right of the man of the house."); Hannah Brenner, *Transcending the Criminal Law's One Size Fits All Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 302–03 (2013) (describing the shift from domestic violence as a private matter "confined within the four walls of the home" to a public matter addressed by the legal system).

33. *See* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 47 (2000) (citing congressional testimony by the National Organization for Women Legal Defense and Education Fund in support of the Violence Against Women Act).

34. *See* D. KELLY WEISBERG, MODERN FAMILY LAW: CASES AND MATERIALS 332 (7th ed. 2020) ("A police officer could make a warrantless arrest for a misdemeanor *only* in cases in which the suspect committed the criminal act in the officer's presence.").

35. *See id.*

36. *See id.*

seeking an order of protection in family court—an arduous process that was initially available only to married individuals.[37]

The women's rights movement aimed to help women suffering from IPV as part of its larger goal of increasing autonomy and independence for women.[38] The movement's work led to statutory reforms that strengthened the legal response to IPV.[39] One such reform focused on eliminating warrantless arrest laws.[40] Some jurisdictions went so far as to mandate arrest in cases of IPV.[41] Legislatures enacted mandatory arrest laws in order to limit the discretion of law enforcement and ensure the protection of victims from their abusers.[42] In the early years, criminal law reforms were implemented to punish offenders who commit violent acts, prevent future acts of violence, and empower victims to stand up against their abusers.[43] In addition to mandatory arrest laws, which limited the discretion of law enforcement officers, some jurisdictions sought to limit prosecutorial discretion by following "hard" no-drop policies requiring prosecutors to proceed in an IPV case regardless of a victim's wishes.[44] Issuing temporary orders of protection in conjunction with an ongoing criminal case is one of the ways in which courts have stepped in to address IPV.[45]

Part I of this Note explores IPV and the legal system's response. Part I.A discusses the prevalence and severity of IPV in the United States, specifically in New York. Part I.B reviews the legal system's response to IPV through civil and criminal orders of protection, with a focus on criminal orders of protection in cases where there is an allegation of physical violence. Part I.C then discusses the First Department's decision in *Crawford.*

---

37. *See* Suk, *supra* note 5, at 13 n.29.

38. *See* David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1451 (2010). *But see* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750 (2007) (describing feminist criminal law reform as "increasingly mirror[ing] the victims' rights movement and its criminalization goals"). Professor Gruber argues that, instead of increasing autonomy, the domestic violence system treats women with "paternalism and disdain, as more advocates and jurists buy into the belief that female victims are weak, damaged, and unable to recognize their own interests." *Id.* at 751.

39. *See* Brenner, *supra* note 32, at 303.

40. *See* WEISBERG, *supra* note 34, at 332.

41. *See id.* at 333.

42. *See* Suk, *supra* note 5, at 12.

43. *See* EVA SCHLESINGER BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 6 (3d ed. 2002).

44. *See* WEISBERG, *supra* note 34, at 333. Other jurisdictions adopted more lenient "'soft' no-drop policies, in which prosecutors merely encouraged (but did not force) victims to proceed and provided them with support services." *Id.* Although the impetus for civil protection orders arose out of the women's rights movement, women are not always the victim in situations of IPV. *See* Corey Nichols-Hadeed, Catherine Cerulli, Kimberly Kaukeinen, Karin V. Rhodes & Jacquelyn Campbell, *Assessing Danger: What Judges Need to Know*, 50 FAM. CT. REV. 150, 151 (2012) (noting that men can also be victims of IPV even though it is more common for victims to be women).

45. *See* Jaros, *supra* note 38, at 1454.

A. The Prevalence of IPV

About one in five women experience "severe physical violence" from an intimate partner in their lifetime.[46] According to the National Coalition Against Domestic Violence (NCADV), IPV is "prevalent in every community and affects people regardless of age, socioeconomic status, sexual orientation, gender, race, religion, or nationality."[47] In New York, 31.7 percent of women and 29 percent of men experience IPV in their lifetimes.[48] In 2018, New York City police officers responded to 250,447 domestic incidents, and officers in the rest of New York State responded to 182,893 domestic incidents.[49] Every year, New York City emergency rooms treat approximately 4,000 women and 900 men following IPV-related incidents.[50] Additionally, 44 percent of the women killed in New York City each year are killed by their intimate partners.[51] Where an abuser has access to a firearm, intimate partner femicide increases by 400 percent.[52] In 2018, IPV accounted for 20 percent of all violent crime.[53]

IPV affects children as well. Futures Without Violence, a health and social justice nonprofit organization, estimates that 275 million children worldwide are exposed to IPV in the home.[54] 15.5 million children live with families in which IPV occurred at least once in the past year, and "seven million children live with families in which severe IPV has occurred."[55] In incidents of IPV involving female victims, children live in the home 43 percent of the time.[56]

---

46. *Fast Facts: Preventing Intimate Partner Violence*, *supra* note 29.

47. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 30. There are, however, some racial differences. *See* Brenner, *supra* note 32, at 311–12 ("American Indian and Alaskan Native women experience a higher rate of violence than any other group, including African-American men and other marginalized groups." (quoting Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 456 (2005))).

48. *See* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE IN NEW YORK (2020), https://assets.speakcdn.com/assets/2497/ncadv_new_york_fact_sheet_2020.pdf [https://perma.cc/XP7R-FE3A].

49. *Id.*

50. *Intimate Partner Violence (IPV)*, *supra* note 29.

51. *Id.*

52. *See* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 30; *see also* Julia Hatheway, Note, *Disarming Abusers and Triggering the Sixth Amendment: Are Domestic Violence Misdemeanants Guaranteed the Right to a Jury Trial?*, 90 FORDHAM L. REV. 179, 182 (2021) (discussing an increase in lethality in situations involving firearms).

53. RACHEL E. MORGAN & BARBARA A. OUDEKERK, CRIMINAL VICTIMIZATION, 2018, at 4 (2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf [https://perma.cc/5WUP-MTUB]. There is also evidence to suggest that the prevalence of IPV has increased since 2018. *See* Caroline Newman, *The Pandemic Is Increasing Intimate Partner Violence. Here Is How Health Care Providers Can Help.*, UAB NEWS (Oct. 21, 2020), https://www.uab.edu/news/health/item/12390-the-pandemic-is-increasing-intimate-partner-violence-here-is-how-health-care-providers-can-help [https://perma.cc/2WMA-2C6F] (suggesting an increase in domestic violence cases globally and locally).

54. FUTURES WITHOUT VIOLENCE, THE FACTS ON CHILDREN AND DOMESTIC VIOLENCE (2008), https://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Children.pdf [https://perma.cc/LUA3-3YTF].

55. *Id.*

56. *Id.*

The impact that exposure to IPV can have on children is long-lasting and devastating.[57]

B. Legal Responses

Historically, individuals were only able to seek a civil order of protection against an intimate partner by initiating a divorce proceeding.[58] This wrongly assumed that IPV happened only between married couples and failed to provide any sort of protection for people in abusive, nonmarital relationships.[59] Following the push to address IPV in the home through statutory reforms,[60] the New York State Legislature passed the Family Court Act[61] (FCA) in 1962.[62] The FCA created the modern family court system and granted courts jurisdiction to hear justiciable family-related disputes, without limitations based on parties' marital status.[63] Importantly, the FCA gave courts the authority to issue orders of protection in proceedings separate from cases involving child support or custody issues.[64] The process of seeking an order of protection through family court was intended to be accessible to pro se litigants requiring immediate protection.[65] However, there is conflicting research on whether protective orders have been successful at decreasing subsequent physical violence.[66] Following the FCA's enactment, individuals could seek an ex parte civil protection order against their abusive partner by filing a petition in family court.[67] Should the court issue a TOP at the preliminary hearing, the named respondent is then served with the order and is given the opportunity to be heard at the next court date.[68]

---

57. *See infra* Part II.B.3.

58. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1844–45 (2006) ("Legislatures first began to provide legal recourse to married women who were victims of domestic violence in the 1970s and 1980s through the development of warrantless arrest statutes, the availability of civil protection orders, and the funding of battered women's shelters.").

59. *See* Suk, *supra* note 5, at 13 n.29.

60. *See* Jaros, *supra* note 38, at 1452 (describing the initiation of class actions against police officers who refuse to arrest abusers and the promotion of mandatory arrest laws, "no-drop" policies, and warrantless arrest laws as advocacy strategies).

61. N.Y. FAM. CT. ACT (McKinney 2022).

62. *Id.* Some scholars have been critical of the FCA because it "effectively decriminalized domestic violence by stripping the New York criminal courts of jurisdiction" over such acts, since IPV was still viewed as a private matter that should not be dealt with in criminal court. *See, e.g.*, Jaros, *supra* note 38, at 1453 n.47 (citing Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 127 (2005)).

63. *See* Jaros, *supra* note 38, at 1453.

64. N.Y. FAM. CT. ACT §§ 841–842.

65. *See* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 88 (2013). However, securing such orders without the assistance of counsel has proved challenging for many victims seeking protection. *Id.* at 89 ("[W]omen are far more successful in obtaining protective orders when they are represented.").

66. *See id.* at 88.

67. *See* Jaros, *supra* note 38, at 1453–54.

68. *See* Ko, *supra* note 11, at 365.

Two years after its passage, the FCA was amended to permit family court judges to issue a preliminary TOP prior to the adjudicatory hearing "for good cause shown."[69] The "good cause" requirement served as a procedural safeguard for the alleged perpetrator of abuse.[70] In a recent case before the First Department, the court held that a father showed good cause for a tailored TOP based on a petition alleging that the respondent sent him several unsolicited messages threatening to leave with their child, to destroy his property, and to leave the child unattended.[71]

Courts in New York also use a standard of good cause when deciding whether to extend an order of protection.[72] Although "good cause" is not defined in the statute, the legislature has noted that, in granting a request for an extension of a TOP, courts should consider the present circumstances of a case, past abuse, threats of abuse, and any information that is relevant to ensuring the petitioner's safety and preventing a recurrence of abuse.[73] In *Jacobs v. Jacobs*,[74] the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, found that there was good cause to extend a TOP based on evidence that the respondent's statements to the petitioner's employer caused a "significant police response" to the petitioner's home in the presence of her eight-year-old son.[75] The court extended the TOP after determining that there was credible evidence that the respondent "continued to interfere with petitioner's peaceful existence and well-being" through means other than direct contact.[76]

A civil order of protection can prohibit an alleged abuser from contacting the victim and require them to vacate the shared home—even if that individual owns the property.[77] These orders may vary widely in scope and length, but they generally cover a wider range of concerns than criminal orders of protection do.[78] When there are children in the home, civil orders of protection may have implications for child custody.[79]

The advent of civil protection orders marked an important step toward greater protections for individuals in abusive relationships, allowing those who have experienced the abuse to remain in their homes (while excluding

69. N.Y. FAM. CT. ACT § 828 (McKinney 2022).
70. *See* Jaros, *supra* note 38, at 1454.
71. *See* Matthew P. v. Linnea W., 154 N.Y.S.3d 59, 61 (App. Div. 2021).
72. N.Y. FAM. CT. ACT § 842.
73. *See* Molloy v. Molloy, 24 N.Y.S.3d 333, 337–38 (App. Div. 2016).
74. 90 N.Y.S.3d 131 (App Div. 2018).
75. *Id.* at 133.
76. *Id.*
77. *See* Suk, *supra* note 5, at 14 n.30 (describing exclusion of abusers from their family homes as "perhaps the key provision of protection order statutes" (quoting PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 33 (1990))). A "practical obstacle to avoiding continued violence" occurs when victims share a home with their abuser. *Id.* at 14.
78. *See* Leigh S. Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 10 (2004) (explaining that civil protection orders provide more comprehensive relief than criminal protection orders).
79. *See* WEISBERG, *supra* note 34, at 325.

their abusers) and to regain a sense of autonomy and safety.[80] Studies have shown that obtaining orders of protection can have a positive psychological effect on victims,[81] but there are many methodological issues with these studies, and they may not be representative of the population.[82] Still, civil protection orders for victims of IPV may be one of the few widely available interventions that have demonstrated effectiveness.[83]

Although the FCA and its amendments provided a path toward autonomy and safety for victims of IPV in family court, the lack of overlap between family court and criminal court created a concern that individuals would feel pressured to choose between seeking redress through the family court system—which unquestionably had the authority to issue civil orders of protection—and pursuing charges against their abusers in criminal court.[84] Yet for some victims, it may be important to pursue criminal charges to hold their abusers accountable with a criminal conviction.[85] Thus, in 1977, the New York State Legislature authorized criminal courts to issue criminal protective orders in cases alleging a narrow set of "family offense" crimes[86] between household members.[87] This meant that a victim of IPV could press charges and receive a protective order against their abuser for the duration of the criminal case.

Civil orders of protection provide a remedy for individuals who voluntarily go to court to seek assistance where law enforcement officers have not necessarily made an arrest, whereas criminal orders of protection are typically granted postarrest at the prosecutor's request as a condition of pretrial release.[88] Criminal orders of protection constitute an important legal response to IPV, as they are often an effective and efficient means of

80. *See* Suk, *supra* note 5, at 14.

81. *See* Ko, *supra* note 11, at 369–70 (describing studies revealing improvements in emotional well-being and an increased sense of security in women who obtained orders of protection against their abusers).

82. *See id.* at 369–71. There are also studies that "confirm the common perception that [orders of protection] are ineffective." *Id.* at 372–73.

83. *See* Goodmark, *supra* note 78, at 11 (discussing recent study in which lead researcher noted the effectiveness of civil orders of protection).

84. *See* Jaros, *supra* note 38, at 1454. In New York, however, individuals may "commence a proceeding in either or both Family Court and Criminal Court [and e]ach court has the authority to issue temporary or final orders of protection." Molloy v. Molloy, 24 N.Y.S.3d 333, 336 (App. Div. 2016) (quoting People v. Wood, 742 N.E.2d 114, 116 (N.Y. 2000)).

85. KARIN V. RHODES, CATHERINE CERULLI, CATHERINE L. KOTHARI, MELISSA E. DICHTER & STEVE MARCUS, VICTIM PARTICIPATION IN INTIMATE PARTNER VIOLENCE PROSECUTION: IMPLICATIONS FOR SAFETY 95 (2011), https://www.ojp.gov/pdffiles1/nij/grants/235284.pdf [https://perma.cc/R2RT-L7WK] ("[V]ictims whose abusive partners were under the influence of drugs or alcohol at the time of the index event were more likely to want to proceed with pressing charges (to hold the offender accountable and protect herself from further risk) and less likely to express a wish to drop the charges.").

86. These crimes included "disorderly conduct, harassment, menacing, reckless endangerment, assault, attempted assault, or attempted murder." Jaros, *supra* note 38, at 1454–55 n.57.

87. *Id.* at 1454.

88. Christopher R. Frank, Comment, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919, 922 (1996).

punishing a perpetrator of IPV.[89] In some states, the issuance of a criminal order of protection is mandated.[90] In other states, criminal orders of protection are not mandated, but courts consider factors such as whether an order of protection is "reasonably necessary to protect the alleged victim, whe[ther] release without condition would be inimical to public safety, whe[ther] the safety and protection of the petitioner may be impaired, and whe[ther] there is possible danger or intimidation to the alleged victim or another."[91]

In New York, Criminal Procedure Law section 530.12[92] authorizes a criminal court to issue a criminal order of protection when an action involving "any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household" is pending.[93] Courts may issue either a "limited" TOP or a "full" TOP.[94] In deciding whether to issue a criminal order of protection, the statute instructs courts to consider a number of factors.[95] These factors include access to weapons; prior incidents of abuse; conduct subject to prior orders of protection; past or present injury, threats, or substance abuse; and whether a TOP will be effective in the absence of a certain condition (e.g., exclusion from the home or a prohibition on contact).[96]

Since the statute describes factors that a court should consider[97] but fails to provide guidance on what a prosecutor must show or what evidentiary standard the court should apply when deciding whether to issue a TOP, courts rely on precedent.[98] In *People v. Forman*,[99] for example, the New York County Criminal Court held that it must determine whether there is a "danger of intimidation or injury" to the complainant, and that there must be a "reasonable foundation" for that determination.[100] The court also held that the reasons for a decision should be evident from the record.[101]

---

89. *See infra* Part II.B.1.

90. *See* Suk, *supra* note 5, at 16–17 (citing statutes).

91. *See* Frank, *supra* note 88, at 928–29 (footnotes omitted).

92. N.Y. CRIM. PROC. LAW § 530.12 (McKinney 2022).

93. *Id.* § 530.12(1); *see also* The Comm. on Crim. Cts., *Paper Shield: Order of Protection in the New York City Criminal Court*, 48 REC. ASS'N BAR CITY N.Y. 891, 891 (1993) ("Statutory authority for the issuance of orders of protection in criminal cases has existed for victims of family offenses since 1977 and for victims of crimes other than family offenses since 1981.").

94. A limited order of protection allows for contact between the parties but prohibits the subject of the order from abusing, harassing, or threatening the alleged victim. *See Resources & Services Orders of Protection*, NYPD, https://www1.nyc.gov/site/nypd/services/victim-services/resources-services-orders-protection.page [https://perma.cc/MCW3-XJNF] (last visited Sept. 2, 2022). A full order of protection prohibits all contact between the parties. *See id.*

95. N.Y. CRIM. PROC. LAW § 530.12(1)(a).

96. *Id.* Judges are permitted to consider other factors as well, as this list is not exhaustive. *Id.*

97. *Id.*

98. *See* Frank, *supra* note 88, at 928–30.

99. 546 N.Y.S.2d 755 (Crim. Ct. 1989).

100. *Id.* at 763.

101. *Id.*

In addition to the various factors that courts consider when deciding whether to issue a TOP in a criminal case, courts must apply a standard of proof.[102] Courts disagree on the proper evidentiary standard to apply in cases where a criminal order of protection is sought by the prosecutor as a condition of bail.[103] Most states have declined to apply an evidentiary standard of "beyond a reasonable doubt," which is the usual standard in criminal proceedings.[104] For example, in *Forman*, the court required "[r]easonable factual support," which is closer to the "preponderance of the evidence" standard typical of most civil proceedings.[105] But, as discussed in Part II.A, an indeterminate standard puts parent defendants at risk of effectively losing custody of their children and being barred from their homes.[106]

C. Crawford v. Ally

On June 24, 2021, the First Department considered a case in which a criminal order of protection barred a parent defendant from her home and effectively separated her from her children.[107] This was an important decision because it finally addressed a situation that has presented a significant problem for so many IPV defendants in New York: the issuance of a TOP that deprives the defendant of significant liberty and property interests without an evidentiary hearing.[108] Although Ms. Crawford's TOP was eventually modified and her criminal charges dismissed, the First Department heard her appeal because the issue she faced was likely to recur for other defendants.[109] In a groundbreaking opinion, the First Department ruled that the Bronx County Criminal Court should have held an evidentiary hearing on whether a full stay-away order was necessary due to the significant property and liberty interests at stake.[110]

1. Procedural History

On November 3, 2019, Ms. Crawford was arrested on a criminal complaint charging third-degree assault, petit larceny, obstruction of breathing or blood circulation, and second-degree harassment.[111] The complaint alleged that Crawford and two unnamed men acted "in concert" and "struck" Mayers with

102. *See* Frank, *supra* note 88, at 929.
103. *See id.* at 928–29.
104. *See id.* at 929–30.
105. *See id.* at 930 (comparing the *Forman* standard of "reasonable factual support" to the civil standard "preponderance of the evidence"); *Forman*, 546 N.Y.S.2d at 759 n.1. The court in *Forman* expressly declined to decide whether a higher standard of proof might be constitutionally required, although the answer to such a question is critical. *See* Frank, *supra* note 88, at 930.
106. *See infra* Part II.A.
107. Crawford v. Ally, 150 N.Y.S.3d 712, 717 (App. Div. 2021).
108. *See id.*
109. *Id.* ("[W]hile this proceeding is moot as to petitioner, it falls within the exception to the mootness doctrine because it implicates substantial issues that will likely recur elsewhere and that typically evade review . . . .").
110. *See id.* at 717–18.
111. *Id.* at 714.

"a closed fist and kicked him multiple times."[112] The complaint also stated that one of the men had grabbed him by his neck and took his gold chain.[113] The complaint did not, however, articulate any specific act of violence that Crawford herself allegedly perpetrated against Mayers.[114] Nonetheless, Mayers signed a criminal complaint naming her as an assailant.[115]

At Ms. Crawford's arraignment in Bronx County Criminal Court, the prosecutors consented to her release but requested a full TOP.[116] Judge Jeffrey Rosenblueth granted this request.[117] Ms. Crawford petitioned the court for a limited TOP,[118] but the court denied her request and issued a full stay-away order.[119] Because Mr. Mayers told the arresting officers that he lived at Ms. Crawford's address—despite the fact that he stayed there intermittently and was not named on the lease—the court order prohibited Ms. Crawford from entering her own home.[120] The court did, however, grant Ms. Crawford's request that the order of protection be "subject to family court modification."[121] In making an order subject to family court modification, a criminal court acknowledges that it has temporarily imposed a restriction on a parent's right to association with their child and grants another court the opportunity to alter the order if appropriate.[122]

On November 8, 2019, still in criminal court but this time before Judge Ally, Ms. Crawford renewed her request for a limited TOP, arguing that Mr. Mayers was not an authorized occupant of her apartment,[123] and that the order, in effect, had taken away her home and separated her from her children.[124] The order did not prevent Ms. Crawford from seeing her children but did not specify how she would be able to see them, nor was there any mention of visitation.[125] The prosecutors requested that the TOP remain a full TOP due to the nature of the charges and the visible injuries on Mr. Mayers at the time of the arrest,[126] but again failed to articulate Ms. Crawford's alleged role in the incident.[127]

In support of their application for the TOP to remain in full, the prosecutor informed the court of an "extensive DIR [(domestic incident report)] history"

---

112. Brief for Petitioner, *supra* note 1, at 7.
113. *See id.*
114. *See id.*
115. *See id.*
116. *Crawford*, 150 N.Y.S.3d at 714.
117. *See id.*
118. *See supra* note 94 and accompanying text (describing difference between limited and full TOPs).
119. *Crawford*, 150 N.Y.S.3d at 714–15.
120. *Id.* at 714.
121. *Id.*
122. *See* Jaros, *supra* note 38, at 1459.
123. Ms. Crawford's lease addendum listed only herself, her brother, and her two children as authorized occupants of the New York City Housing Authority (NYCHA) unit. *Crawford*, 150 N.Y.S.3d at 715.
124. *Id.*
125. *Id.*
126. *Id.*
127. *See* Brief for Petitioner, *supra* note 1, at 9.

between Ms. Crawford and Mr. Mayers.[128] Notably, however, the prosecutor failed to mention that the seventeen prior DIRs named Mr. Mayers as the abuser and Ms. Crawford as the victim.[129] The prosecutor did not provide these reports to defense counsel or to the court, and Judge Ally failed to request them or conduct a further inquiry.[130] Had Judge Ally inquired further, he would have discovered the prosecutor's misleading representation of the prior DIRs.

Ultimately, Judge Ally denied Ms. Crawford's request for a limited TOP[131] and denied her request for a due process hearing that would have required the prosecution to show that the full stay-away order was necessary.[132] A date to return to court was set for December 20, 2019.[133]

Prior to the December 20 hearing, Ms. Crawford again moved for a modification of the full TOP.[134] Ms. Crawford attached her lease addendum, which included her family composition and listed herself, her brother, and her two children as the only authorized occupants of her New York City Housing Authority apartment, in order to show the court that she was in danger of violating her lease.[135] Ms. Crawford was in danger of losing her apartment permanently because only authorized occupants were permitted to reside in her subsidized apartment, and Mr. Mayers refused to leave.[136] Nonetheless, Judge Ally denied the request, finding "no change of circumstances," and extended the full TOP until January 30, 2020.[137]

Prior to the January 30 hearing, Ms. Crawford sought a writ of mandamus directing the Bronx County Criminal Court to hold a hearing on the scope and appropriateness of the TOP issued in her case.[138] At the next court appearance, approximately two months after the court's issuance of the full stay-away order against Ms. Crawford on November 3, 2019, another criminal court judge—Judge Audrey Stone—performed a more extensive analysis of the prosecution's request to extend the TOP and modified the

128. *See id.* A domestic incident report (DIR) is a report that law enforcement officers create in response to a domestic violence incident. *Frequently Asked Questions*, NYPD, https://www1.nyc.gov/site/nypd/services/victim-services/frequently-asked-questions.page [https://perma.cc/E9P2-5AQ3] (last visited Sept. 2, 2022) ("A DIR is a report made by an officer in response to a domestic violence incident. It includes a summary of the situation and a victim's statement about what happened.").

129. *See* Brief for Petitioner, *supra* note 1, at 10.

130. *See id.*

131. *Crawford*, 150 N.Y.S.3d at 715 (reasoning that there was still a "remedy to see the children" and to "gain[] access to the home").

132. *Id.* ("The court further stated that unless petitioner was prepared to present additional information as to the issuance of the TOP, it would remain in effect.").

133. *Id.*

134. *Id.*

135. *See id.*

136. *See* Brief for Petitioner, *supra* note 1, at 10–11. According to NYCHA protocol, possession or use of an apartment by a person other than the tenant of record can be a ground for termination. *See id.* at 32 (citing N.Y.C. HOUS. AUTH., NYCHA MANAGEMENT MANUAL CH. IV: TERMINATION OF TENANCY 4 (2016)).

137. *Crawford*, 150 N.Y.S.3d at 715.

138. When the criminal case was later dismissed, the petition for writ of mandamus was dismissed as moot. *Id.* at 716.

TOP after considering several factors.[139] The court concluded that, under Criminal Procedure Law section 530.12(1)(a), "it would not be appropriate to require [petitioner] to stay away from the home, school, business or place of employment of the individual whom she has children in common with."[140] The court then modified the order of protection, requiring Ms. Crawford only to "refrain from any act that would create an unreasonable risk to the health, safety, and welfare of any family member and in particular . . . not to engage in any family offences against the complainant."[141] In making this decision, Judge Stone did not hear any witnesses or place any particular burden on the prosecution. The case was adjourned until March 5, 2020, at which time the case was dismissed upon application by the prosecution.[142]

2. The First Department's Decision

In order to deprive a defendant of significant liberty or property interests, there must be an articulated reasonable basis for doing so.[143] Before *Crawford*, there was no precedent explicitly allowing defendants to request a hearing when they opposed the prosecutor's request for a TOP. Indeed, Judge Stone stated that it was not the Bronx County Criminal Court's practice to hold such a hearing.[144]

On appeal, the First Department concluded that when a defendant faces the risk of such deprivation, the court should conduct a "prompt evidentiary hearing" that enables the judge to ascertain whether the order of protection should be issued.[145] Even though Ms. Crawford's case had already been dismissed, and the issue was moot as to her, the First Department found an

---

139. *See* Brief for Petitioner, *supra* note 1, at 17.

> [I]t is in the court's view that there has been no prior order of protection issued against the defendant [(Ms. Crawford)] here. There ha[ve] been many prior incidents of abuse against the defendant that were perpetrated by the complainant. As to past and present injury, there were photos demonstrated to the court relating to injuries that the complainant in this case had. However, th[ere] was nothing of any specificity indicating that the defendant was in fact responsible for those injuries. As to threats, drug or alcohol abuse and access to weapons, I have not heard that defendant has made any threat, that the defendant has a drug or alcohol issue, or that the defendant has access to any weapons. In fact, the record that was made today before the court is that the complainant has threatened this defendant, that the complainant has an alcohol intoxication issue. And in fact, that whatever mention that there was of weapons seem[s] to have not been corroborated when the People discussed whether or not there was actually a weapon at the time of the writing of this complaint.

Id.

140. *Crawford*, 150 N.Y.S.3d at 716.

141. *Id.*

142. *Id.* Upon the dismissal of a criminal case, any TOPs issued in conjunction with that case, unless otherwise stated, are no longer valid. *See* Ko, *supra* note 11, at 364.

143. *Crawford*, 150 N.Y.S.3d at 717.

144. *Id.* at 716 ("The District Attorney's Office conceded that temporary orders of protection are 'regularly' issued in domestic abuse cases in the Bronx . . . .").

145. *Id.*

exception to the mootness doctrine,[146] noting that this issue was "likely to recur 'among other members of the public.'"[147]

In ruling that the Bronx County Criminal Court should have held a hearing on whether a TOP was necessary, the First Department found that Ms. Crawford being barred from her home—even temporarily—had "far-reaching" consequences.[148] Where a defendant is deprived of a valuable property right to a lease or tenancy by a criminal order of protection, as was the case here, the defendant is entitled to the protections of due process.[149] Moreover, the court noted that Ms. Crawford was barred from access to her children for almost three months and held that this was a violation of her due process rights.[150] In *In re F.W.*,[151] the First Department held that a parent is entitled to a prompt hearing on a determination to remove their children from the parent's physical custody, in accordance with the parent's and children's rights to due process.[152] Although *In re F.W.* involved a family court's decision to remove a child from their parent, the fundamental liberty interest at stake—a parent's interest in the care, custody, and control of their children—was the same in both cases and thus required the protections of procedural due process.[153]

Although the order in *Crawford* did not explicitly remove Ms. Crawford's children from her custody, it had the same effect. In *In re F.W.*, the court found that the delay in holding an expedited evidentiary hearing interfered with the petitioner father's fundamental liberty interest in the care, custody, and control of his children and violated his due process rights. Similarly, the *Crawford* court held that Judge Ally's refusal to hold an evidentiary hearing on the necessity of the full TOP violated Ms. Crawford's due process rights because, as with the father in *In re F.W.*, the lack of a hearing interfered with Ms. Crawford's fundamental liberty interest in seeing her children.[154]

146. An exception to the mootness doctrine exists where "(1) [there is] likelihood of repetition, either between the parties or among other members of the public; (2) [it involves] a phenomenon typically evading review; and (3) [there is] a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Id.* (quoting Hearst Corp. v. Clyne, 409 N.E.2d 876, 878 (N.Y. 1980)).

147. *Id.*

148. *Id.* at 717.

149. *See id.*

150. *See id.* (citing *In re* F.W., 122 N.Y.S.3d 620 (App. Div. 2020)). The court also referenced a decision from Nassau County Supreme Court, in which a full evidentiary hearing was deemed permissible but not mandatory. *See* Lopez v. Fischer, No. 17025/09, 2009 N.Y. Misc. LEXIS 5612, at *6–7 (Sup. Ct. Dec. 2, 2009).

151. 122 N.Y.S.3d 620 (App. Div. 2020).

152. *Id.* at 622. Although this Note focuses on a parent defendant's right to due process, the New York Court of Appeals has also recognized that children have a parallel "right to be reared by [their] parent." *Id.* at 623 (quoting Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976)).

153. *See id.*

154. *See Crawford*, 150 N.Y.S.3d at 717.

II. THE ISSUANCE OF CRIMINAL ORDERS OF PROTECTION AGAINST PARENT DEFENDANTS IN CASES OF IPV

Although criminal orders of protection have alleviated some of the difficulties[155] associated with prosecuting cases of IPV and have provided immediate protection for victims, they have also posed a significant challenge to parent defendants accused of IPV.[156] Part II.A will examine the rights that are at stake in criminal proceedings for alleged perpetrators of IPV. Part II.B will then discuss the value of criminal orders of protection. Part II.C will evaluate the impact of the *Crawford* decision in New York criminal courts.

A. The Need to Protect a Parent Defendant's Rights

In determining whether to issue a temporary order of protection, courts must balance the state's interest in protecting victims of IPV with the defendant's substantive and procedural due process rights. Courts encounter a particularly difficult problem when a parent defendant lives and co-parents with their accuser.[157]

1. The Fundamental Right to Parent

The U.S. Supreme Court has long recognized a parent's fundamental right to parent.[158] Courts view the family as an autonomous unit free from state interference, with parents permitted to direct their children's lives as they see fit.[159] This includes matters such as a parent's right to direct the upbringing and education of their children.[160] For example, the state cannot dictate whether parents send their children to public or private schools.[161] Parents also have a constitutional right to decide whether a third party, such as a grandparent, may visit with their children.[162] As the Court has held, "[i]t is

155. *See infra* Part II.B.

156. If a parent defendant lives with their accuser, a full stay-away criminal order of protection excludes them from their shared home and effectively separates them from their children. *See* Newman, *supra* note 7.

157. Some scholars have addressed this problem in the context of endangering the welfare of a child. *See* Jaros, *supra* note 38, at 1447. These criminal protection orders prohibit the parent defendant from having any contact with their child and warrant a hearing to determine whether the temporary removal of custody is reasonable. *See id.*

158. *See* Marianne E. Scott, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy*, 52 U. CIN. L. REV. 901, 906 (1983); *see also* Moore v. Cleveland, 431 U.S. 494, 494–95 (1977) (plurality opinion) (finding that the U.S. Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this country's history and tradition).

159. Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (holding that a state statute prohibiting foreign language instruction at school was impermissible state interference with the autonomous family unit).

160. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (striking down state statute requiring parents to enroll children in public school).

161. *See id.* at 535.

162. Troxel v. Granville, 530 U.S. 57, 61–63 (2000) (finding that parents have the right to limit visitation of their children by third parties).

cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[163] However, this right is not absolute: a state can intervene if the parents' actions constitute harm to the child.[164] Absent a showing of harm, the state cannot intervene in this sacrosanct relationship.[165] This principle has also been recognized by New York state courts.[166]

But it is important to recognize that this fundamental right is not just about a parent being able to decide where the child will go to school or what languages the child will learn; it is also about a parent's right to the companionship and custody of their child.[167] This is particularly relevant in cases in which the state seeks to remove a child from a parent's custody. Indeed, an order of protection that bars a parent from contacting their child is tantamount to an order of removal, requiring the same constitutional protections.[168] In *Stanley v. Illinois*,[169] the Supreme Court protected a parent's right to the custody and care of their children in part because of a longstanding belief in family privacy.[170] In that case, the Court considered a challenge from an unmarried father whose children became wards of the state upon the death of their mother.[171] The Court found that a presumption that unmarried fathers are unsuitable as parents violates due process since parental unfitness must be determined on the basis of individualized proof.[172] As such, it was unconstitutional for the state to remove Mr. Stanley's children from his custody without evidence to suggest that he was unfit to be a parent.[173]

New York courts take a parent's right to the custody of their child just as seriously.[174] In *In re F.W.*, the First Department recognized both a "parent's private interest in having custody of his or her children" and "the children's private interest in residing with their parent . . . ."[175] Moreover, the fact that parents have not been "model parents" or have lost temporary custody of their child does not eliminate the "fundamental liberty interest of natural

163. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
164. *See id.* at 166–67.
165. *See id.*
166. *See In re* F.W., 122 N.Y.S.3d 620, 623 (App. Div. 2020) ("[A] parent's interest 'in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests.'" (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000))).
167. *See* Scott, *supra* note 158, at 907.
168. *See In re* Elizabeth C., 66 N.Y.S. 3d 300, 311–12 (App. Div. 2017) (holding that a TOP against a parent on behalf of a child constitutes a legal removal triggering the same due process rights as if the child were physically removed from the family home).
169. 405 U.S. 645 (1972).
170. *See id.* at 651 ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.").
171. *Id.* at 646.
172. *Id.* at 649.
173. *See id.*
174. *See In re* F.W., 122 N.Y.S.3d 620, 623 (App. Div. 2020).
175. *Id.* at 624.

parents in the care, custody, and management of their child . . . ."[176] When an order of protection prohibits contact between a parent and a child, due process requires that the parent be allowed to challenge the removal through a prompt hearing.[177] In *In re F.W.*, the court emphasized that the time before "a post-deprivation hearing 'should be measured in hours and days, not weeks and months.'"[178] Additionally, the evidentiary standard at these hearings is clear: "[T]he Family Court must find[] that removal is necessary to avoid imminent risk [to the child]."[179]

Thus, given the fundamental nature of the parent-child relationship, certain procedural and evidentiary requirements must be satisfied before the state can separate a parent from their child.[180]

2. Procedural Due Process

Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution,[181] parents are entitled to a hearing on their fitness as a parent before the state can remove their children from their care and custody.[182] The due process clause of the New York State Constitution provides that "no person shall be deprived of life, liberty or property without due process of law."[183] Following the U.S. Supreme Court's decision in *Mathews v. Eldridge*,[184] which set forth a three-part balancing test for evaluating due process challenges in federal criminal proceedings,[185] the New York Court of Appeals held that due process challenges in state criminal proceedings

176. *Id.*

177. *See In re* Elizabeth C., 66 N.Y.S. 3d 300, 311–12 (App. Div. 2017) (extending the requirement for a prompt hearing to situations in which parent and child are prohibited from daily interaction).

178. *In re* F.W., 122 N.Y.S. 3d at 624. Although these hearings are supposed to be prompt, they frequently take three or more months to complete. *See generally* THE BRONX DEFS., PROTRACTED 1028 HEARINGS: FIVE CASE STUDIES RAISING STATUTORY AND CONSTITUTIONAL CONCERNS ABOUT NON-EXPEDITED HEARINGS UNDER SECTION 1028 OF THE FAMILY COURT ACT, https://www.bronxdefenders.org/wp-content/uploads/2013/05/Bronx-Protracted-1028-Hearings.pdf [https://perma.cc/4YVA-M2XF].

179. Nicholson v. Scoppetta, 820 N.E.2d 840, 848 (N.Y. 2004) (internal quotation marks omitted); *see also In re* Kevin W., 144 N.Y.S.3d 563, 564 (App. Div. 2021) ("Accordingly, the applicable standard was whether the relief sought by ACS—a temporary order of protection on behalf of the child—was necessary to eliminate an 'imminent risk' to the child's life or health."). These due process protections—the requirement of a prompt hearing following removal and a high evidentiary standard—were codified by the New York State Legislature into sections 1027 and 1028 of the Family Court Act. N.Y. FAM. CT. ACT §§ 1027–1028 (McKinney 2022).

180. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972); *see also In re* Marie B., 465 N.E.2d 807, 810 (N.Y. 1984) ("Fundamental constitutional principles of due process and protected privacy prohibit governmental interference with the liberty of a parent to supervise and rear a child except upon a showing of overriding necessity.").

181. U.S. CONST. amend. XIV.

182. *Stanley*, 405 U.S. at 649 (invalidating state statute that automatically declared children of unmarried fathers to be wards of the state upon the death of the mother).

183. N.Y. CONST. art. I, § 6.

184. 424 U.S. 319 (1976).

185. *Id.* at 335.

should be evaluated under the same test.[186] According to the standard in *Mathews*, courts must carefully balance: (1) the private interest that will be affected by the official government 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 in the action.[187] A due process hearing must be provided at a "meaningful time and in a meaningful manner,"[188] but the requirements of due process are flexible and evaluated on a case-by-case basis.[189]

In *People v. Forman*,[190] the New York County Criminal Court applied the *Mathews* test to evaluate the adequacy of the procedures afforded to Mr. Forman prior to depriving him of significant property interests.[191] The court found that the defendant's private interest—the use and enjoyment of his home and his property interest in the joint ownership of his residence with his wife—would be substantially affected by a TOP excluding him from the home.[192] The court also found that there was a risk of error in temporarily excluding the defendant from his home.[193]

Applying the third factor of the *Mathews* test, the court found that the state's interest in issuing TOPs pursuant to Criminal Procedure Law section 530.12 was significant.[194] The court recognized domestic violence as a "social scourge of the first order" and, given the danger of injury or intimidation, found that excluding the accused individual from the home is essential to the maintenance of criminal prosecution.[195] On balance, after carefully considering all three factors, the court found that the emergency nature of the decision and the practical difficulties inherent in holding an immediate evidentiary hearing "mitigate against the imposition of such hearings as constitutionally required before a TOP may first be issued at arraignment."[196]

The *Mathews* test can similarly be applied to Ms. Crawford's case to determine whether she was afforded adequate due process. Considering the first *Mathews* factor, the criminal order of protection deprived Ms. Crawford of significant property and liberty interests.[197] The order forced Ms.

186. *See* People v. Ramos, 651 N.E.2d 895, 899 (N.Y. 1995) (applying *Mathews* balancing test to evaluate need for additional process).

187. *Mathews*, 424 U.S. at 321.

188. *Id.* at 333.

189. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (describing due process as a flexible standard).

190. 546 N.Y.S.2d 755 (Crim. Ct. 1989).

191. *See id.* at 763.

192. *Id.* at 764.

193. *Id.* at 765.

194. *Id.* at 764.

195. *Id.* ("Not only does the State have a strong interest in combatting domestic violence through criminal prosecutions, but that interest is severely undermined if victims of domestic violence are too frightened by further threats and acts of violence to participate in the criminal prosecution of their cases.").

196. *Id.* at 765.

197. *See* Crawford v. Ally, 150 N.Y.S.3d 712, 717 (App. Div. 2021).

Crawford to vacate her own home and stop associating with the father of her children.[198] This deprivation posed an enormous risk to Ms. Crawford, since she was the only adult authorized to live in the apartment.[199] With Mr. Mayers—an unauthorized occupant—residing there and refusing to leave, Ms. Crawford was in danger of losing her apartment permanently.[200] Judge Ally, however, remarked that he was "not going to dive so much into the property rights in this case."[201] He also added that the risk that Ms. Crawford could lose her public housing apartment is "another layer of concern for [Ms. Crawford], not for this Court."[202]

The TOP against Ms. Crawford also interfered with her fundamental right to parent her children. Because Ms. Crawford resided in her apartment with her two young children, the order of protection—which prevented her from returning home—effectively separated her from her children for almost three months.[203] This separation constitutes a substantial deprivation[204] and is devastating both for the parent and for the child.[205] For parents, separation from their child can induce feelings of anguish, despair, guilt, blame, and depression.[206] Without an evidentiary hearing to substantiate the risk of harm that Ms. Crawford allegedly posed to Mr. Mayers, Ms. Crawford was at serious risk of an "erroneous deprivation."[207]

Finally, the government has an interest in issuing orders of protection in criminal cases to provide victims of IPV with immediate protection from their alleged abusers.[208] However, a thorough inquiry or evidentiary hearing in this case would have revealed that Ms. Crawford did not pose an immediate threat to Mr. Mayers's safety. In fact, the criminal complaint in this case did not allege that Ms. Crawford perpetrated any act of physical violence against Mr. Mayers.[209] Moreover, Judge Ally failed to make any factual findings that Ms. Crawford had harmed Mr. Mayers or posed a threat

198. *See id.*

199. *See* Brief for Petitioner, *supra* note 1, at 10–11.

200. *Id.* at 32 (citing N.Y.C. HOUS. AUTH., NYCHA MANAGEMENT MANUAL CH. IV: TERMINATION OF TENANCY 4 (2016)). Despite being made aware of the gravity of this situation—Ms. Crawford losing an apartment that she had called home for over five years—Judge Ally refused to address it. *Id.* at 11.

201. *Id.*

202. *Id.*

203. *See Crawford*, 150 N.Y.S.3d at 717.

204. *See In re* F.W., 122 N.Y.S.3d 620, 623–24 (App. Div. 2020) (holding parent-child separation constitutes substantial deprivation triggering due process inquiry).

205. *See* Melissa De Witte, *Separation from Parents Removes Children's Most Important Protection and Generates a New Trauma, Stanford Scholar Says*, STAN. NEWS (June 26, 2018), https://news.stanford.edu/2018/06/26/psychological-impact-early-life-stress-parental-separation/ [https://perma.cc/PE6S-HY55]; *see also infra* Part II.B.3.

206. *See* De Witte, *supra* note 205.

207. People v. Forman, 546 N.Y.S.2d 755, 763–65 (Crim. Ct. 1989) (discussing the second balancing factor of the *Mathews* test).

208. *See id.* at 764.

209. *See* Brief for Petitioner, *supra* note 1, at 7 ("The complaint . . . [alleged that] Ms. Crawford and two unnamed men were 'acting in concert' in that 'they' struck him with 'a' closed fist and kicked him multiple times.").

to his safety.[210] Here, an application of the *Mathews* test would have revealed that a full stay-away order depriving Ms. Crawford of significant property and fundamental rights was not justified by the governmental interest in protecting Mr. Mayers from any alleged harm. Thus, the government's objectives of providing immediate safety would not have been furthered under a careful application of the *Mathews* balancing test.[211]

Some may argue that procedures intended to restore custody—such as going to family court in order to modify a TOP—mitigate the harm posed by separation without adequate process.[212] However, the Supreme Court rejected this proposition in *Stanley*, noting that it has not "embraced the general proposition that a wrong may be done if it can be undone."[213] Children endure significant harm when separated from their parents,[214] and there is often delay when trying to undo an order stripping a parent of custody.[215]

B. The Value of Criminal Orders of Protection

Despite the shortcomings of criminal orders of protection, they are a necessary and important component of the legal system's response to IPV. Many situations involving allegations of IPV are extremely dangerous, and a criminal order of protection may be the only immediate way for a victim to feel safe.[216]

When evaluating whether to issue an order of protection, criminal court judges consider the practical and political ramifications[217] of not granting a TOP.[218] For many judges, declining to issue an order of protection is perceived as extremely risky.[219] Judges often feel pressure to grant prosecutors' requests for protective orders, likely viewing prosecutors as more familiar with the facts and better able to assess the possible level of danger.[220] So long as judges are thoughtful and engage in a thorough inquiry

210. *See id.* at 11.
211. *See* Crawford v. Ally, 150 N.Y.S.3d 712, 717 (App. Div. 2021).
212. *See* Jaros, *supra* note 38, at 1460.
213. Stanley v. Illinois, 405 U.S. 645, 647 (1972).
214. *See infra* Part II.B.3.
215. *See* Jaros, *supra* note 38, at 1460.
216. *See* Ko, *supra* note 11, at 367.
217. In New York City, criminal court judges are appointed to the bench for a ten-year term by the mayor. *See* THE ASSOC. OF THE BAR OF THE CITY OF N.Y., HOW TO BECOME A JUDGE 6 (2018), https://www.nycbar.org/pdf/report/become_a_judge.pdf [https://perma.cc/N9UE-WNA2]. Because judges are not appointed for life, criminal court judges may feel pressure to issue orders of protection and to not appear soft on crimes involving IPV.
218. *See* Jaros, *supra* note 38, at 1458.
219. *See id.*; *see also* Judy Harris Kluger, *Independence Under Siege: Unbridled Criticism of Judges and Prosecutors*, 5 J.L. & POL'Y 535, 536–37 (1997) ("If a defendant commits a new crime while released on bail, the judge who set the bail is often criticized, and the critics ignore any discussion of New York State law which prohibits preventative detention.").
220. *See* David H. Taylor, Maria V. Stoilkov & Daniel J. Greco, *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 92 (2008) ("No judge

of the facts of each case when determining whether to issue a TOP, criminal orders of protection have the potential to do much more good than harm.[221]

In light of the potential difficulties associated with obtaining a conviction against a defendant in a case of IPV,[222] issuing criminal orders of protection may be an even more important legal response.[223] Although IPV between parents has an enormous impact on children, a solution that removes the child from the home cannot be the best option.[224] Thus, on balance, criminal orders of protection are a sufficient compromise even though they, too, raise issues.

1. Issues Impairing the Prosecution of IPV

Cases involving IPV are notoriously difficult for prosecutors.[225] "Scholars have posited a number of theories for the low rate of prosecution" in IPV cases, including prosecutors' doubts that the crimes were serious enough, provable, and of interest to the judges who would be hearing the cases.[226] In cases involving IPV, victims are typically unwilling, often due to fear, to cooperate with the prosecution.[227] The process of testifying can also re-traumatize[228] a victim of IPV.[229] Entering the court system can be intimidating and difficult for any person, and this is especially true in IPV cases, where having to face an abuser in court can be as painful and damaging to the victim as the crime itself.[230] The effect of re-traumatization is even more pronounced for individuals from "already disadvantaged, vulnerable, or marginalized populations."[231]

A witness's refusal to testify presents a problem for prosecutors, because a witness's out-of-court statement is considered testimonial and cannot be introduced at trial in the witness's absence, unless the defendant previously

---

wants to deny an order of protection to a person who is later injured or killed by the person against whom they unsuccessfully sought relief.").

221. *See supra* Part II.A.

222. *See infra* Part II.B.1.

223. *See* Suk, *supra* note 5, at 18–19.

224. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 849 (N.Y. 2004).

225. *See* Suk, *supra* note 5, at 18.

226. GOODMARK, *supra* note 65, at 110.

227. *See* Suk, *supra* note 5, at 18 n.52 (noting that after filing a criminal complaint, 80 percent of IPV victims recant their statements or refuse to cooperate with the prosecution).

228. *See* Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88 (2020) ("Retraumatization, also known as secondary victimization, describes the experience of survivors who encounter 'victim-blaming attitudes, behaviors, and practices' from service providers and institutions 'which result in additional trauma.'" (quoting Rebecca Campbell, *What Really Happened?: A Validation Study of Rape Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55, 56 (2005))).

229. *See id.* at 85 ("[F]acing one's abuser in a courtroom . . . can provide the abuser with an additional opportunity to exert power and control over the victim.").

230. *See id.* at 84–85.

231. *See id.* at 85 (citing *20 Facts About U.S. Inequality That Everyone Should Know*, STAN. CTR. ON POVERTY & INEQ. (2011), https://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know [https://perma.cc/A823-PAXR]).

had the opportunity to cross-examine the witness.[232] Thus, if a victim refuses to testify, the prosecutor cannot bring other witnesses to the stand to repeat what the victim previously said.[233] In a case where the victim refuses to testify at trial, the prosecutor may be unable to pursue the case further, since much evidence will be barred from admission.[234]

Given the noted challenges of prosecuting cases involving IPV, issuing orders of protection in conjunction with an ongoing criminal case can be more efficient and effective at punishing a perpetrator of IPV.[235] By issuing a criminal protective order at the arraignment stage of a criminal case,[236] courts provide victims with immediate protection and the recognition that their situation is being taken seriously.

2. Safety Concerns

In New York City, 44 percent of women killed are killed by their intimate partners.[237] For police officers, domestic violence calls are some of the most dangerous situations because "emotions are running high" and "behavior can be unpredictable."[238] These calls are also the most frequent and take up one-third of all police time.[239]

Given the risk of serious injury or death, many scholars argue that an immediate criminal order of protection in such cases is often the safest measure for combating IPV.[240] Courts have found that the state has a profound interest in protecting a victim from IPV.[241] IPV also has a "significant economic impact."[242] The risk of violence and intimidation is

232. *See* Crawford v. Washington, 541 U.S. 36, 53–54 (2004); *see also* Suk, *supra* note 5, at 18. A victim's statements during a 911 call, however, where the primary purpose was to enable police assistance in an ongoing emergency, are not considered testimonial. Davis v. Washington, 547 U.S. 813, 827–28 (2006).

233. *See Crawford*, 541 U.S. at 68.

234. *See* Suk, *supra* note 5, at 47 (discussing that the "vast majority of cases do not proceed to trial or result in conviction" because proving cases of IPV "beyond a reasonable doubt may be difficult without the victim's participation").

235. *See id.* at 18–19.

236. *See id.* at 48.

237. *See Intimate Partner Violence (IPV)*, *supra* note 29.

238. Samantha Solomon, *Domestic Violence Poses a Danger to All, Including Responding Police Officers. What Can Be Done to Break the Cycle?*, ABC10 (June 1, 2021, 3:28 PM), https://www.abc10.com/article/news/local/domestic-violence-911-calls-police-officers/103-b5f49694-bc7b-4902-8205-a7b1b4e9fe6b [https://perma.cc/FLV8-RBSX].

239. *See* Ko, *supra* note 11, at 361 (citing Joan Zorza, *Woman Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 385 (1994)).

240. *See* Frank, *supra* note 88, at 923–25, 924 n.22 (citing *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1523–24 (1993)).

241. *See, e.g.*, People v. Forman, 546 N.Y.S.2d 755, 764–65 (Crim. Ct. 1989) ("Domestic violence has come to be recognized as a social scourge of the first order. Not only does the State have a strong interest in combatting domestic violence through criminal prosecutions, but that interest is severely undermined if victims of domestic violence are too frightened by further threats and acts of violence to participate in the criminal prosecution of their cases." (citations omitted)).

242. *See* Ko, *supra* note 11, at 361 (describing effect of IPV on absenteeism and productivity in the workplace leading to loss of up to thirteen billion dollars to employers annually).

greater in cases in which the victim and the perpetrator of IPV continue to live under the same roof.[243] Further, where there is a danger of injury to, or intimidation of, the victim, a TOP that excludes the accused from the home may be crucial.[244] Thus, "the state has an interest in issuing the TOP at the earliest possible time, since the danger of intimidation and injury to the complainant, if it exists, is an immediate one."[245]

Issuing a TOP in an IPV case is an emergency decision.[246] Thus, due to the inherent safety concerns and the need for expediency, many courts err on the side of caution when issuing TOPs because of a fear that failure to do so will result in serious injury or death.[247]

3. What About the Children?

The correct legal response to situations involving IPV is not clear. Although orders of protection provide victims with immediate protection, courts often issue them as a procedural default[248]—a practice that can have other harmful effects.[249] Such effects include homelessness, parent-child separation, and negative immigration consequences.[250] Cases of IPV are further complicated when there are children involved.

In general, the law assumes it is better for children to maintain an ongoing relationship with their parents. This right to associate with one's child does not turn on whether the relationship between the parent and child is necessarily good or healthy; a state can intervene in a parent-child relationship only when the child needs protection from harm.[251] Even when parents are referred to the child welfare system for allegations of abuse or neglect, courts must grant reasonable visitation with the child who has been temporarily removed.[252] A denial of visitation to a noncustodial parent is considered a severe remedy, available only where there are compelling reasons that such visitation would be harmful to the child.[253]

Children who are separated from their parents suffer harm.[254] Children, especially young children, rely on and need their parents for their emotional

---

243. *Forman*, 546 N.Y.S.2d at 764 (describing danger as "self-evident").
244. *See id.* at 764–65.
245. *Id.*
246. As such, notwithstanding the constitutional interests of a defendant, the exigent circumstances and the logistics of holding a full and immediate hearing militate against holding that the Constitution requires such hearings before issuing a TOP. *See id.*
247. *See* Jaros, *supra* note 38, at 1458.
248. *See id.* at 1450.
249. *See* Brief of Brooklyn Def. Servs., et al. as Amici Curiae in Support of Petitioner-Appellant, *supra* note 21, at 3–4.
250. *See id.*
251. *See* Prince v. Massachusetts, 321 U.S. 158, 168–69 (1944).
252. N.Y. FAM. CT. ACT § 1030 (McKinney 2022).
253. *See* Sheavlier v. Melendrez, 744 N.Y.S.2d 264, 266 (App. Div. 2002).
254. *See In re* F.W., 122 N.Y.S.3d 620, 624 (App. Div. 2020) (describing the "significant emotional harm" children experience when temporarily separated from their parents (citing Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL'Y REV. 63, 64 n.7 (2006))).

well-being.[255] Clinical research has found that children who are separated from their parents experience feelings of abandonment, rejection, helplessness, and guilt.[256] When children are separated from their parents, their bodies produce a biological response known as "toxic stress."[257] Toxic stress results in elevated stress hormones that can negatively affect memory, behavior, and ability to focus.[258] Over time, a child who experiences toxic stress may be at an increased risk for diabetes, heart disease, depression, and other chronic illnesses as an adult.[259]

The law attempts to balance the impact of the toxic stress arising from parent-child separation with the long-term consequences of childhood exposure to IPV. Children who are exposed to IPV are more likely to become perpetrators of IPV themselves.[260] Exposure to IPV teaches a child dangerous lessons: (1) that it is okay to be physically violent toward someone you love; (2) that if you are frustrated or do not get your way, it is okay to respond with violence; and (3) that those who love you are also those who hit you.[261] Additionally, children who witness IPV in the home often have emotional problems and trouble socializing.[262]

Historically, in order to address the impact that witnessing IPV can have on a child, the New York City Administration for Children's Services (ACS) treated mothers who were victims of IPV—but had perpetrated no violence themselves—as guilty of neglect and removed their children from the home.[263] In 2001, a group of mothers filed a class action in federal district court alleging that their constitutional right to parent and to due process had been violated by ACS's policy.[264] After the issuance of a preliminary injunction by the late Judge Jack B. Weinstein and an appeal, the U.S. Court of Appeals for the Second Circuit certified three questions to the New York Court of Appeals.[265] In a seminal opinion by Chief Judge Judith Kaye, New York's highest court held that in scenarios in which the sole grounds for

255. *See* De Witte, *supra* note 205.

256. *See* AM. BAR ASS'N, TRAUMA CAUSED BY SEPARATION OF CHILDREN FROM PARENTS: A TOOL TO HELP LAWYERS 20 (2020) (citing Rosalind D. Folman, "*I Was Tooken": How Children Experience Removal from Their Parents Preliminary to Placement into Foster Care*, 2 ADOPTION Q., no. 2, 1998, at 7), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf [https://perma.cc/AR9D-FZZC].

257. *See* Jack P. Shonkoff, *Toxic Stress: Issue Brief on Family Separation and Child Detention*, IMMIGR. INITIATIVE HARV., Oct. 2019, at 1, 1, https://immigrationinitiative.harvard.edu/wp-content/uploads/2019/10/brief_1_english.pdf [https://perma.cc/68ES-Q7QG].

258. *Id.* at 2.

259. *See id.*

260. *See* WEISBERG, *supra* note 34, at 311.

261. *See id.* at 312.

262. *See* Ko, *supra* note 11, at 362.

263. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 842–43 (N.Y. 2004).

264. *In re* Nicholson, 181 F. Supp. 2d 182, 183 (E.D.N.Y. 2001), *modified sub nom.* Nicholson v. Williams, 294 F. Supp. 2d 369 (E.D.N.Y. 2003).

265. *See* Justine A. Dunlap, *Judging* Nicholson*: An Assessment of* Nicholson v. Scoppetta, 82 DENV. U. L. REV. 671, 673–74 (2005).

removal of a child are based on witnessing IPV, such "removal may do more harm to the child than good."[266]

At face value, it is seemingly better to remove an abusive parent living in a shared household through a criminal order of protection than to remove and place a child in foster care. Although the effects of parent-child separation are well documented, it is also harmful for a child to remain in the home with an abusive parent.[267] When properly implemented, a criminal order of protection is an important remedy that allows children to remain in the home and avoid foster care. However, these orders may go too far and unnecessarily remove a parent from the home if they are issued as a procedural default without a clear and thorough inquiry.[268] In Ms. Crawford's case, although her children were not removed and placed in foster care, she was the victim of a hastily-granted, full stay-away order that separated her from her children without evidence that she, in fact, posed a danger to their father.[269]

In one case, a woman identified as F.Z. and her partner shared an apartment with their child and had no prior history of DIRs.[270] After getting into an argument, F.Z. called the police.[271] Despite being told that neither party wished to press charges, the police arrested both parties.[272] As is customary in New York criminal courts,[273] at arraignment, the court issued a TOP barring the parents from communicating.[274] As a result, the couple was unable to coordinate childcare, the child remained in their shared apartment occupied by F.Z., and F.Z. was "thrust" into caring for and being the sole provider for their child for the duration of the criminal case.[275] Ultimately, the prosecution dismissed the charges after two months because it could not prove the case beyond a reasonable doubt.[276]

In another case, a man identified as B.P. was separated from his child for months due to a stay-away order of protection issued in conjunction with his prosecution. B.P. was the subject of a misdemeanor charge that was based on a complaint arising from allegations by B.P.'s soon-to-be-separated wife that he had threatened her with a gun.[277] Even though the court made the TOP subject to family court modification, B.P. was unable to modify the TOP

266. *Nicholson*, 820 N.E.2d at 849.
267. *See* Ko, *supra* note 11, at 362.
268. *See generally* Brief of Brooklyn Def. Servs., et al. as Amici Curiae in Support of Petitioner-Appellant, *supra* note 21, at 8–29 (describing impact of hastily issued criminal orders of protection on various individuals).
269. *See* Newman, *supra* note 7.
270. Brief of Brooklyn Def. Servs., et al. as Amici Curiae in Support of Petitioner-Appellant, *supra* note 21, at 18.
271. *Id.*
272. *Id.*
273. *See id.* at 3; *see also* Jaros, *supra* note 38, at 1450.
274. *See* Brief of Brooklyn Def. Servs., et al. as Amici Curiae in Support of Petitioner-Appellant, *supra* note 21, at 19.
275. *See id.*
276. *Id.*
277. *Id.* at 19–20.

in family court due to the COVID-19 pandemic.[278] The TOP stayed in effect even after B.P.'s wife recanted one month later and stated that she herself committed crimes against B.P.'s family.[279] Notwithstanding these disclosures, the TOP remained in place for a total of eight months, after which the case was dismissed.[280]

All three of these cases illustrate that a full TOP issued in conjunction with a criminal case has severe consequences for parent defendants. In B.P.'s case, the prosecution refused to dismiss the case or, at the very least, modify the stay-away order even after the complainant recanted and implicated herself in a crime.[281] In F.Z.'s case, because of a court order, one parent defendant was thrust into having sole custody of the minor child, and the other parent defendant was barred from caring for that child without a determination that he was unfit.[282] Finally, Ms. Crawford was separated from her children for months even though the prosecution produced no evidence that she posed any danger to Mr. Mayers.[283] These cases show how the decision in *Crawford*—finding that the lack of an evidentiary hearing on the necessity of the separation violated Ms. Crawford's due process rights—marks a huge step toward protecting the rights of defendants accused of IPV.

Although some may argue that Ms. Crawford could have sought a modification of the full order of protection in family court, this was not an adequate solution.[284] Scholars have identified problems with making a TOP subject to family court modification, suggesting that it does little to protect a parent's constitutional right to the custody and care of their child.[285] For parent defendants who do not have an active case in family court, seeking a modification of the criminal order in family court could attract unwanted attention from ACS.[286] Thus, some parents are often counseled by their attorneys not to seek a modification in family court.[287]

---

278. *See id.* at 20 ("Because of the pandemic, family court was not available to modify orders of protection that separated families, like B.P. and his son."); *see also infra* note 285 and accompanying text (explaining the inadequacy of making a criminal order of protection subject to family court modification).

279. Brief of Brooklyn Def. Servs., et al. as Amici Curiae in Support of Petitioner-Appellant, *supra* note 21, at 20.

280. *Id.*

281. *See id.* at 20.

282. *See id.* at 18–19; *see also supra* Parts II.A.1–2.

283. *See* Brief for Petitioner, *supra* note 1, at 13.

284. This Note focuses on the effect of parent-child separation due to a temporary order of protection issued by a criminal court. However, it is important to recognize that family court would not have been able to modify the order to permit Ms. Crawford back in her home. The family court would have only been able to address issues of custody and visitation, leaving Ms. Crawford's exclusion wholly unaddressed.

285. *See* Jaros, *supra* note 38 at 1459–60 (discussing issues such as an increased probability that criminal court judges will issue orders of protection in the first place, the possibility of flipping the burden of proof on the defendant, and the lack of a guarantee that the protective order will ever come before a family court judge to be modified).

286. Video Interview with Eli Northrup, Pol'y Couns., the Bronx Defs., and Edward Soto, Staff Att'y, the Bronx Defs. (Aug. 2, 2022).

287. *Id.*

C. The Aftermath of Crawford

For parents like Shamika Crawford, a full stay-away criminal order of protection had far-reaching consequences.[288] Although the appellate court held that Judge Ally should have held a hearing on the full stay-away order, the decision left many questions open to interpretation: What information is required to trigger such a hearing? When is an in-person hearing with live testimony required? How soon must the hearing be scheduled after it is requested? Can a hearing be conducted electronically? What is the appropriate burden of proof?[289]

Three days after the *Crawford* decision, the deputy counsel to the Office of Court Administration[290] (OCA) Anthony R. Perri issued a memorandum to deputy chief administrative judges about the impact of *Crawford*.[291] According to the memorandum, the requirement for a "*Crawford* hearing" is triggered only when a defendant pleads that the TOP may cause an immediate and significant deprivation of a substantial personal or property interest.[292] Such deprivation may include a loss in tenancy or ownership, the exclusion from one's own home, or a separation of a parent from their child.[293] In *Crawford*, this burden was clearly met since the defendant was not only excluded from her residence and separated from her children, but was also in danger of losing her lease permanently.[294]

Additionally, the memorandum set forth some components of an adequate pleading: "[T]he issuing court should review the sworn allegations, the current DIR, any prior DIRs, and any other evidence proffered and hear the defense and prosecution out fully on the record before exercising its independent judgment."[295] However, the memorandum instructs that, unless absolutely necessary and appropriate, courts should not grant motions for full testimonial hearings because of the significant operational impact and the serious safety concerns for victims of IPV.[296] By demonstrating a clear preference for refraining from conducting full testimonial hearings, the memorandum's guidance informally limited the scope of a *Crawford*

---

288. *See* Newman, *supra* note 7.

289. *See* Barry Kamins, *The New 'Crawford' Hearing: What Will It Look Like?*, N.Y.L.J. (Aug. 2, 2021, 12:15 PM), https://www.law.com/newyorklawjournal/2021/08/02/the-new-crawford-hearing-what-will-it-look-like/ [https://perma.cc/PFV6-KP9Z].

290. The OCA operates under Chief Administrative Judge Lawrence K. Marks and functions as the administrative arm of the court system. *See Office of Court Administration (OCA)*, N.Y. STATE UNIFIED CT. SYS., https://ww2.nycourts.gov/Admin/oca.shtml [https://perma.cc/U7HR-7ZLT] (last visited Sept. 2, 2022).

291. *See* Memorandum from Anthony R. Perri, Deputy Couns. to the Hons. Vito C. Caruso, George J. Silver & Edwina G. Mendelson, Deputy Chief Admin. JJ. (June 27, 2021) (on file with author).

292. *See id.*

293. *See e.g.*, Crawford v. Ally, 150 N.Y.S.3d 712, 715 (App. Div. 2021); People v. Forman, 546 N.Y.S.2d 755, 758 (Crim. Ct. 1989).

294. *Crawford*, 150 N.Y.S.3d at 717; *see also* Memorandum from Anthony R. Perri to the Hons. Vito C. Caruso et al., *supra* note 291, at 4.

295. *See* Memorandum from Anthony R. Perri to the Hons. Vito C. Caruso et al., *supra* note 291, at 4.

296. *See id.*

hearing. Some commentators have called the memorandum an "explicitly cynical response" that has served to limit the scope of the *Crawford* decision.[297] In a letter to Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks, the American Civil Liberties Union, on behalf of the New York Civil Liberties Union, criticized OCA for overstepping its authority and usurping the duty of courts to interpret and apply substantive law.[298] Others, however, believe that it is normal practice to issue memoranda providing context on a case that may have a significant impact on court operations.[299]

Moreover, the *Crawford* decision notes that "[t]his Court need not articulate the precise form of the evidentiary hearing required."[300] However, its failure to address the requirements of these hearings in more detail has led to judges' inconsistent compliance.[301] Although some defense attorneys have had success in using the *Crawford* holding to the benefit of their clients,[302] others have reported that judges are still not holding the required evidentiary hearings.[303] Some public defenders in New York City have observed that instead of granting the full evidentiary hearing that *Crawford* requires, courts are now granting more limited orders of protection at arraignment.[304]

Additionally, because the decision does not actually specify that live witness testimony is necessary,[305] prosecutors continue to present the same evidence at hearings that is set forth in criminal complaints.[306] This is problematic because—as was the case for Ms. Crawford—these criminal complaints can be vague, unsubstantiated, and lack evidence of the defendant's specific role in the incident.[307] Some prosecutors present police reports that have not been substantiated or corroborated.[308] The use of criminal complaints or police reports as a basis for issuing TOPs presents a real problem for defendants whose cases will ultimately be dismissed, but for

297. Sam Mellins, *New York Judges Lock the Accused Out of Their Homes, Skirting Review Required by Landmark Ruling, Critics Charge*, THE CITY (July 23, 2021, 5:00 AM), https://www.thecity.nyc/2021/7/23/22589634/new-york-judges-lock-out-accused-despite-ruling [https://perma.cc/8AHA-FDPZ].

298. *See* Letter from Am. Civ. Liberties Union of N.Y., to the Hons. Janet DiFiore, C.J., and Lawrence K. Marks, Chief Admin. J. (Sep. 30, 2021) (on file with author) (expressing serious concern that OCA is instructing judges on how to interpret and apply substantive law through communications not disclosed to the public).

299. *See* Mellins, *supra* note 297.

300. Crawford v. Ally, 150 N.Y.S.3d 712, 717 (App. Div. 2021).

301. *See* Mellins, *supra* note 297.

302. *See id.*

303. *See id.*; *see also* Video Interview with Eli Northrup and Edward Soto, *supra* note 286.

304. Video Interview with Eli Northrup and Edward Soto, *supra* note 286. Since the requirements of *Crawford* are only triggered when a defendant is at risk of being deprived of a significant property or liberty interest, granting more limited TOPs could be a solution for allowing judges to avoid the hearing entirely. *See Crawford*, 150 N.Y.S. 3d at 717.

305. *See* Memorandum from Anthony R. Perri to the Hons. Vito C. Caruso et al., *supra* note 291.

306. *See* Mellins, *supra* note 297.

307. *See* Newman, *supra* note 7; *see also* Brief for Petitioner, *supra* note 1, at 9.

308. *See* Mellins, *supra* note 297.

whom TOPs will nonetheless have severe consequences.[309] Kate Mogulescu, a law professor at Brooklyn Law School, has raised concerns about whether using uncorroborated police reports to argue for orders of protection aligns with the spirit of the *Crawford* decision.[310]

In response to *Crawford*, New York State legislators introduced the Promoting Pre-Trial (PromPT) Stability Act.[311] This bill is intended to address the ambiguity in the First Department's decision and standardize the practice of issuing TOPs in New York State criminal courts.[312] The bill proposes the addition of a new section, section 530.15, to the New York Criminal Procedure Law, as well as a modification to New York Criminal Procedure Law section 530.30 that would address the issuance of TOPs.[313] The memorandum in support of the bill states that prosecutors request TOPs based "almost entirely on the representation of law enforcement officers who act with incomplete information and biases."[314] Consequently, TOPs are issued against people who may be defending themselves, regardless of who the initial aggressor was.[315]

Unlike other states and the District of Columbia, New York does not have a statute that provides an opportunity for the accused to be heard in cases where TOPs are issued.[316] The bill would remedy this disparity and provide additional clarity on the evidentiary hearing requirements.[317] Specifically, section 530.15 would require the court to hold an evidentiary hearing on the TOP, during which the prosecution must show by clear and convincing evidence that the TOP is the "least restrictive means of protecting a designated witness or complainant from intimidation or injury."[318] This means that in order to issue a full stay-away order against the accused, the prosecutor would need to show that such an order was necessary and that issuing a limited TOP would not sufficiently protect the complainant.[319] The bill also prescribes when such a hearing must be held: the hearing must occur within three days of a defendant's request.[320] This requirement removes the ambiguity surrounding the meaning of a "prompt" hearing.[321] Additionally,

309. *See* Brief for Petitioner, *supra* note 1, at 3.

310. *See* Mellins, *supra* note 297 ("That's just restating the facts that are usually recited in the [criminal] complaint. That doesn't seem to fill the role that the *Crawford* court is envisioning.").

311. A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021).

312. *See id.*

313. *Id.*

314. *See* Memorandum in Support of Legislation, A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021), https://nyassembly.gov/leg/?bn=A%2C4558&term=0&Summary=Y&Memo=Y [https://perma.cc/X9HM-SVLC] (last visited Sept. 2, 2022).

315. *See id.*

316. *See id.*

317. *See id.*

318. A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021).

319. In Ms. Crawford's case, the prosecutor would have been required to show that a full stay-away order of protection was the "least restrictive means" of protecting Mr. Mayers from intimidation or injury. *See id.*

320. *Id.*

321. *See* Crawford v. Ally, 150 N.Y.S.3d 712, 717 (App. Div. 2021).

the government must present witnesses subject to cross-examination.[322] And, under the proposed new section, hearsay evidence would be admissible.[323] By allowing hearsay evidence, the bill strikes a balance between requiring live, in-person testimony and simply reciting the allegations in a criminal complaint. Although live, in-person testimony has been lauded for its truth-seeking and confrontational qualities,[324] it can pose a risk for victims of IPV who do not wish to testify.[325]

At the time of publication, the bill is still in committee and has not been passed by either the New York State Assembly or the New York State Senate,[326] and the impact of *Crawford* remains in flux.[327]

III. CRIMINAL ORDERS OF PROTECTION MUST BE SUBJECT TO STRICTER PROCEDURAL RESTRICTIONS

The ruling in *Crawford* has been lauded as a "significant effort by the First Department," but many defense attorneys in New York have reported that courts are still skirting the ruling.[328] This part argues that the holding in *Crawford*[329] was a step in the right direction, but that it did not go far enough to protect parent defendants' rights. Part III.A suggests that the *Crawford* decision was, in spirit, a huge success for defendants like Ms. Crawford. Part III.B then argues that the vague language and the failure to articulate exactly what a *Crawford* hearing should entail undermine the impact of the decision on future similar cases. This part further argues that clearer hearing requirements and a more stringent evidentiary standard are needed when the issuance of a TOP in criminal court would deprive a defendant of their home and separate them from their children.

A. Crawford*: A Step in the Right Direction*

The ruling in *Crawford* was an enormous feat.[330] No defendant should be forced to leave their home or be separated from their children solely on the basis of allegations in a vague complaint and without an articulated reasonable basis to suggest that such an order is necessary.[331] The decision in *Crawford* provides a path for seeking relief for defendants who have been separated from their families or criminalized as a perpetrator when, in fact,

322. A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021).

323. *Id.*

324. *See* Maryland v. Craig, 497 U.S. 840, 846 (1990) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" (quoting Coy v. Iowa, 487 U.S. 1012, 1019–20 (1988))).

325. *See supra* Part II.B.1.

326. A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021).

327. *See* Memorandum in Support of Legislation, *supra* note 314.

328. *See* Mellins, *supra* note 297.

329. 150 N.Y.S.3d 712 (App. Div. 2021).

330. *See* Andy Newman, *A Judge's Order Left Her Homeless. A New Ruling Will Help Others Like Her.*, N.Y. TIMES (June 25, 2021), https://www.nytimes.com/2021/06/25/nyregion/order-of-protection-domestic-violence.html [https://perma.cc/35LK-TSBA].

331. *See* Memorandum from Anthony R. Perri to the Hons. Vito C. Caruso et al., *supra* note 291.

they are survivors.[332] In finding that Judge Ally was wrong to have issued a full stay-away criminal order of protection without holding a proper hearing, the First Department recognized a parent defendant's right to due process.[333] Moving forward, *Crawford* requires that where

> there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP, the Criminal Court should conduct a prompt evidentiary hearing on notice to all parties and in a manner that enables the judge to ascertain the facts necessary to decide whether . . . the TOP should be issued.[334]

For Ms. Crawford, however, the decision came too late. The eighty-eight days that she spent living out of her car and with friends[335] cannot be erased, and time that Ms. Crawford spent separated from her children cannot be restored.

B. More Is Needed

The ruling in *Crawford* did not go far enough. The decision left many questions unanswered and failed to detail what the evidentiary hearings it requires should entail.[336] One way to resolve the ambiguity in the *Crawford* decision would be to enact a legislative response. The PromPT Act[337] has been proposed by the New York State Legislature and would codify the important ruling in *Crawford*, leaving less room for judges to circumvent the First Department's decision.[338] Indeed, the legislative history to the bill indicates that legislators believe that the *Crawford* ruling has been undermined and applied in an inconsistent manner by judges in New York criminal courts.[339] Had this bill been law in Ms. Crawford's case, her case would have unfolded differently. Under the standard in section 530.15, the government would have been required to show by clear and convincing evidence that the full stay-away order they were requesting was the "least restrictive means of protecting" Mr. Mayers.[340] In light of the court's failure to make any such factual finding, this burden of proof would not have been met.

Furthermore, the delay that occurred in Ms. Crawford's case would not have been permissible under this new law. Ms. Crawford was arraigned on November 3, 2019, and a full stay-away order was issued against her at that time.[341] On November 8, the parties returned to court, and Ms. Crawford requested a due process hearing to determine whether the TOP was actually

---

332. *See* Newman, *supra* note 330.
333. *See Crawford*, 150 N.Y.S.3d at 717.
334. *Id.* (citations omitted).
335. *See* Newman, *supra* note 7.
336. *See* Mellins, *supra* note 297; *see also* Memorandum from Anthony R. Perri to the Hons. Vito C. Caruso et al., *supra* note 291.
337. A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021).
338. *Id.*
339. *See* Memorandum in Support of Legislation, *supra* note 314.
340. A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021).
341. Crawford v. Ally, 150 N.Y.S.3d 712, 714 (App. Div. 2021).

necessary.[342] Under section 530.15, the court would have been required to grant the hearing request and set the next court date for no later than three days from November 8.[343] However, the court rejected her request for a separate due process hearing and stated that it was "hearing . . . the issues [now]."[344] But the court's "hearing" was inadequate. Such a hearing under section 530.15 would have required the government to present witnesses subject to cross-examination by Ms. Crawford's attorney and to meet a "clear and convincing" burden of proof.[345]

However, the current bill does not address the specific implications for defendants who are parents.[346] The bill should go further and call for special considerations in circumstances in which an alleged abuser is being excluded from a shared home where children reside. Such an addition should propose that when a criminal order of protection has an impact on a parent-child relationship (i.e., by separating a parent defendant from their child due to exclusion from a shared residence), the criminal court must address the possibility of visitation. For instance, in a case where a parent defendant lives and co-parents with their accuser, the court should be required to determine the appropriateness of shared custody of the minor child, as well as the parents' ability to co-parent through an agreed-upon third party. In the presence of the court, the parents could identify, through the parent defendant's attorney, an appropriate person to help coordinate visitation. Since the issuance of a full order of protection would preclude the parties from communicating, addressing the future care and custody of the children at the hearing would ensure that the parent who is excluded from the shared residence is able to continue a relationship with their children even after a TOP is in place.[347]

Furthermore, when a criminal order of protection has the effect of removing a child from a parent's custody—even if the child is not explicitly named in the TOP—a higher evidentiary burden is critical. The "clear and convincing" standard articulated in the proposed section to the New York Criminal Procedure Law does not adequately safeguard a parent defendant's fundamental right to the care and custody of their child. In the context of a civil proceeding, the New York Court of Appeals has articulated that the standard to be applied is whether removal is necessary to protect the child from "imminent risk of harm."[348] This standard should also be applied in the criminal context because both proceedings may result in parent-child separation.[349]

---

342. *Id.* at 715.

343. *See* A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021) (requiring evidentiary hearing within three days of defendant's request).

344. *Crawford*, 150 N.Y.S.3d at 715.

345. A4558B, 2021 Leg., Reg. Sess. (N.Y. 2021).

346. *See supra* Part II.A.

347. *See supra* Part II.A (discussing parents' fundamental right to the care and custody of their children).

348. *See supra* Part II.A.1 (discussing the removal standard as "imminent risk of harm").

349. *See In re* Elizabeth C., 66 N.Y.S. 3d 300, 311–12 (App. Div. 2017). Although *In re Elizabeth C.* involved an order of protection that was issued on behalf of the child against the

Many criminal courts issue orders of protection that are subject to family court modification, but this unfairly places the burden on parent defendants to seek recourse for a state-imposed restriction in another court. In situations where the state has separated a parent and child, the logical remedy cannot be that the alleged perpetrator should bring suit against the alleged victim for custody or visitation in another court. Parents who have not been charged with abuse or neglect cannot avail themselves of the prompt hearing provided for in sections 1027 and 1028 of the FCA.[350] Instead, parents who wish to modify the criminal court's TOP in family court would be forced to bring a visitation or custody suit against the alleged victim. Although it is important that criminal courts continue to make TOPs subject to family court modification—especially for parent defendants who already have open cases in family court—it should not excuse a criminal court from its responsibility to issue TOPs carefully.

A statutory provision tailored to the concerns of parent defendants excluded from a shared home would have been instrumental in Ms. Crawford's case. It would have required the criminal court to find that removal was necessary to protect Ms. Crawford's children from imminent harm, and this burden would not have been met. Additionally, the court never addressed visitation when it issued a full order of protection. The court noted that there were remedies for her to see the children,[351] but did not articulate what those remedies were. Assuming that this remedy was for Ms. Crawford to seek a modification of the order in family court, this remedy may have done more harm than good in her case.[352] Ms. Crawford did not have an open case in family court and bringing a custody or visitation suit against Mr. Mayers could have exposed her and her family to scrutiny by ACS. Left with no alternatives and no direct order from the criminal court addressing visitation, Ms. Crawford was separated from her children for several months.[353]

When deciding whether to issue an order of protection, judges today are guided by New York Criminal Procedure Law section 530.12, which lists several factors for courts to consider.[354] Although some courts have attempted to interpret this statute,[355] the statute leaves the decision largely up to the judge's discretion. Thus, a legislative provision that requires judges to justify their decisions at an earlier stage could help mitigate inconsistencies across New York criminal courts and decrease the number of overly restrictive orders of protection. One such provision, for example, could require courts to state on the record at arraignment the specific and articulable

parent, *Crawford* recognized that heightened due process is necessary in cases where a TOP between two parents effectively separates one parent from their child. *See Crawford*, 150 N.Y.S.3d at 717.

350. *See* N.Y. FAM. CT. ACT. §§ 1027–1028 (McKinney 2022).
351. *See Crawford*, 150 N.Y.S.3d at 715.
352. *See supra* notes 284–87 and accompanying text.
353. *See* Newman, *supra* note 7.
354. *See supra* notes 92–96 and accompanying text.
355. *See supra* notes 99–106 and accompanying text.

facts that justify the issuance of an order of protection. Although the bill currently provides some clarity on the role of the prosecutor at a subsequent evidentiary hearing, it does not address the arraignment stage. This proposed addition not only holds judges accountable at an earlier stage, but also serves goals of judicial efficiency.

As the memorandum submitted in support of the bill and the remarks of numerous defense attorneys make clear,[356] courts today are not following *Crawford*.[357] Until there is a legislative solution, judges should be mindful of the spirit of *Crawford* and aim to follow the provisions of the proposed legislation in their own courtrooms. Courts should also pay special mind to cases involving allegations of IPV between parents with minor children. In those cases, a higher burden of proof—"imminent risk of harm"—must be applied to comport with constitutionally required protections. Moreover, lawmakers should consider codifying these protections to address these issues.

CONCLUSION

Criminal orders of protection can be valuable tools for dealing with intimate partner violence, but they are not perfect. Ms. Crawford was excluded from her home and kept from living with her children for eighty-eight days on the basis of unsubstantiated, untested allegations that formed the basis of a proceeding that was ultimately dismissed. Unless and until the New York State Legislature passes the PromPT Act and clarifies the many questions that the First Department in *Crawford* left unanswered, defendants—and especially parent defendants—are at the mercy of judges deciding whether to provide a timely hearing on the underlying allegations of abuse. These cases are even more complicated when there are children involved. When a parent defendant faces separation from their child as an indirect consequence of a criminal TOP, heightened due process protections are necessary and constitutionally required. In order to adhere to these requirements, the New York State Legislature should add a provision that addresses visitation and another provision dictating the proper evidentiary standard in these cases: "imminent risk of harm."

356. *See supra* Part II.C (explaining that *Crawford*'s vague decision has enabled courts to circumvent the holding).

357. *See* Mellins, *supra* note 297.