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# PROTECTING THE EXPECTING: A PROPOSAL TO INCLUDE PREGNANCY AS AN AGGRAVATING CIRCUMSTANCE

BY: NICOLE ATLAK<sup>1</sup>

## I. INTRODUCTION

“[A]ny time an expectant mother is a victim of violence, two lives are in the balance, each deserving protection, and each deserving justice.” – President George W. Bush<sup>2</sup>

It is a cold and dreary November morning. You are seven months pregnant, and today you have a check-up appointment at your doctor’s office. Among your greatest concerns are getting to the appointment on time, and hoping the doctor reports good news about your baby’s health.

You arrive at the doctor’s office. While in the waiting room, you encounter ten other expectant mothers. You make small talk with them, comparing healthy recipes and helpful strategies for getting the best sleep while pregnant. On the surface, it appears that many of the women share the same *struggles* as you: dealing with seemingly perpetual cravings, fatigue, and shortness of breath while climbing the stairs. On the surface, it also appears that many of the women share the same *concerns* as you: making it to the appointment on time and making sure the baby is healthy.

But beneath the surface, an alarming number of women have far greater struggles and concerns during their pregnancies,

<sup>1</sup> J.D. 2018, St. John’s University School of Law. Many thanks to Professor Elaine Chiu and Rosemary LaSala for their guidance and feedback throughout this process. I also thank my family for their continuing love and support, as always.

<sup>2</sup> George W. Bush, President, Address at Signing of Unborn Victims of Violence Act of 2004 (Apr. 1, 2004, 2:57 PM) (transcript available at <https://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040401-3.html>). In 2004, President Bush signed into law the Unborn Victims of Violence Act of 2004, or “Laci and Conner’s Law,” named in memory of expectant Laci and unborn Conner Petersen who were brutally murdered. *Id.*

beyond your wildest nightmares. At least *one* of the ten women you encounter today are victims of domestic violence, and will leave that doctor's office uncertain what abuse—emotional, sexual, psychological, physical, or some combination—lies waiting for her at home.<sup>3</sup> Uncertainty looms whether today is the day her partner throws her down the stairs, as he had been threatening to do for days, or whether today is the day her unborn child is killed by a “loved one.”

For many individuals, violence at the hands of a loved one is not a distant story to be read about or watched on television, but is a daily reality. Domestic violence, also known as intimate partner violence, is the “willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another. It includes physical violence, sexual violence, threats, and emotional/ psychological abuse.”<sup>4</sup> The incidence of such violence is alarming because in the United States alone, more than one in three women and more than one in four men will fall victim to some form of domestic violence throughout their lifetime.<sup>5</sup> However, this problem of epidemic proportions extends beyond the United States, and spans the far corners of the globe.<sup>6</sup> A study conducted by the World Health Organization found that around the world, up to 30% of women will experience

<sup>3</sup> See *Pregnancy and Domestic Violence Facts*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, [http://www.uua.org/sites/live-new.uua.org/files/documents/ncadv/dv\\_pregnancy.pdf](http://www.uua.org/sites/live-new.uua.org/files/documents/ncadv/dv_pregnancy.pdf) (last visited Sept. 29, 2018).

<sup>4</sup> *Domestic Violence National Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, [https://www.speakcdn.com/assets/2497/domestic\\_violence2.pdf](https://www.speakcdn.com/assets/2497/domestic_violence2.pdf) (last visited Sept. 29, 2018).

<sup>5</sup> NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTR. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (2010), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

<sup>6</sup> See DEP'T OF REPROD. HEALTH & RES., WORLD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE 16 (2013), [http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf). Prior to 2010, little information was available respective to the global prevalence of intimate partner violence. Responding to this need for information, the World Health Organization compiled all available global data to establish comprehensive global and regional prevalence estimates. *Id.* The estimates were based off data extracted from 79 countries and two territories. *Id.* The study found that the highest prevalence of intimate partner violence existed in the African, Eastern Mediterranean, and Southeast Asian regions, at a rate of 37% of women. *Id.* The second highest prevalence was reported in the Americas, at around 30% of all women. *Id.* The lowest prevalence estimate was in the European and Western Pacific regions, at 25% of women. *Id.*

domestic violence during their lifetime.<sup>7</sup> Domestic violence affects victims irrespective of age, race, gender, sexual orientation, socioeconomic status, or disability.<sup>8</sup>

Similarly, abusers do not cease to abuse their partners emotionally, physically, sexually, or psychologically simply because their partner becomes pregnant.<sup>9</sup> In fact, a national study revealed that up to 20% of women experience some form of domestic violence during their pregnancy.<sup>10</sup> Due to changes in a woman's physical, social, emotional, and financial needs during pregnancy, this period creates a unique vulnerability to domestic violence abuse.<sup>11</sup> Likewise, abuse during this especially vulnerable time generates unique harms to both mother and child.<sup>12</sup>

Over the past three decades, many nations, including the United States, have adopted legal measures to better assist victims and reduce the frequency of domestic violence. In 1962, New York followed suit and the State Legislature enacted the Family Court Act ("FCA"), which established New York's Family Courts and determined the courts' authority.<sup>13</sup> Within these courts' jurisdiction is the ability to mandate Orders of Protection to protect victims of domestic violence.<sup>14</sup> In 1994, the New York Legislature amended the FCA, and codified the idea of

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Domestic Violence*, N.H. COAL. AGAINST DOMESTIC & SEXUAL VIOLENCE, <https://www.nhcadsv.org/domestic-violence.html> (last visited Sept. 28, 2018).

<sup>9</sup> *Intimate Partner Violence During Pregnancy*, WORLD HEALTH ORG., [http://apps.who.int/iris/bitstream/10665/70764/1/WHO\\_RHR\\_11.35\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/70764/1/WHO_RHR_11.35_eng.pdf) (last visited Sept. 28, 2018).

<sup>10</sup> Julie A. Gazmararian et al., *Prevalence of Violence Against Pregnant Women*, 275 JAMA 1915, 1915 (1996). To arrive at the most accurate conclusion, the researchers in this study gathered data from 13 studies measuring domestic violence during pregnancy. *Id.* The data was compared by study description, methods, and results. *Id.* The data analysis and comparison revealed a prevalence of violence during pregnancy for up to 20.1% of pregnant women. *Id.*

<sup>11</sup> See Douglas A. Brownridge et al., *Pregnancy and Intimate Partner Violence: Risk Factors, Severity, and Health Effects*, 17 VIOLENCE AGAINST WOMEN 858, 858 (2011).

<sup>12</sup> See *id.* at 865 (discussing harms to mother, including physical and mental health issues); see also Eli H. Newberger et al., *Abuse of Pregnant Women and Adverse Birth Outcome Current Knowledge and Implications for Practice*, 267 JAMA 2370, 2371 (1992) (discussing harms to baby, including low birth weight, preterm delivery, and delayed fetal growth).

<sup>13</sup> See N.Y. FAM. CT. ACT §§ 111-115 (McKinney 2013).

<sup>14</sup> See *id.* § 842.

differentiating among domestic violence crimes.<sup>15</sup> It established a list of five “aggravating circumstances,” which are instances recognized to create an elevated risk of harm to the victim.<sup>16</sup> A finding of any of the five circumstances warrants the immediate court-mandated arrest of the abuser.<sup>17</sup>

The recognition that these aggravating circumstances required both immediate and longer protection was an important step in satisfying the Legislature’s goals of integrating the purposes of the family and criminal laws to assure clear and certain standard of protection for New York’s families.<sup>18</sup> Through this amendment, the Legislature established a vehicle for the legal system to rank the relative seriousness and harm of abusive acts, and award greater protection for more serious abuse.<sup>19</sup> Reflected in the aggravating circumstances and the subsequent protection is the Legislature’s consideration of the greater risk of future abuse by abusers associated with these heinous crimes, and the need for greater deterrence.<sup>20</sup>

Despite the merits of these 1994 reforms, the statutory list of aggravating circumstances is incomplete. For instance, another amendment by the New York Legislature is in order because the current FCA, specifically Article 8, fails to account for pregnant victims of domestic violence.<sup>21</sup> The incomplete list of aggravating circumstances fails to recognize the abuse of pregnant victims as another heinous and serious circumstance of domestic violence.

This Note brings attention to the New York Legislature’s failure to consider the unique vulnerability and harms of pregnant victims of domestic violence and proposes a statutory amendment. This Note proposes that Section 827(a)(vii) of New York’s Family Court Act be amended to include an additional aggravating circumstance with language to the effect of “any physical injury or psychological, emotional or sexual abuse to a pregnant woman.” This addition is necessary to ensure the list of aggravating

<sup>15</sup> *See id.* § 827(a)(vii).

<sup>16</sup> *See id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See* S. 8642, 215th Gen. Assem., Reg. Session (N.Y. 1994).

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See generally* N.Y. FAM. CT. ACT, §§ 811-847 (McKinney 2018).

circumstances is thorough, and more complete in encompassing all serious and heinous domestic abuse.

Part II of this Note will offer a deeper understanding of domestic violence, and New York State's response to this important public health and human rights issue. Part III will discuss the prevalence of violence towards pregnant women, and the unique vulnerability and harms to pregnant victims, including harm to both mother and child. Part IV will delve further into the proposed amendment to the FCA, and offer reasons rooted in public policy and rich with scientific evidence as to why the proposed amendment is necessary. Part IV will also address any additional counterarguments to the amendment and offer conclusory notions.

## II. THE DOMESTIC VIOLENCE EPIDEMIC

### A. *What is Domestic Violence?*

What do violence, intimidation, manipulation, humiliation, isolation, and terrorization have in common? They are tactics commonly employed by abusers to exert control, and are examples of domestic violence.<sup>22</sup>

Domestic violence is driven by an abuser's desire to establish and maintain power and control over their partner.<sup>23</sup> The violence can include physical abuse, psychological abuse, economic abuse, and stalking.<sup>24</sup>

Abusers use the aforementioned tactics and many more to influence and exert control, particularly when they feel their control is challenged.<sup>25</sup> Extensive analyses of the behavioral patterns of abusers have revealed that there are many circumstances that may serve as "triggers" to domestic violence,

<sup>22</sup> *Definitions*, STOPABUSE.UMICH.EDU, <http://stopabuse.umich.edu/resources/definitions.html> (last visited Sept. 30, 2018).

<sup>23</sup> See *Facts about Domestic Violence and Physical Abuse*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/files/National%20Statistics%20Domestic%20Violence%20NCADV.pdf> (last visited Sept. 30, 2018).

<sup>24</sup> *Id.*

<sup>25</sup> See *id.*; Rachel Jewkes, *Intimate Partner Violence: Causes and Prevention*, 359 LANCET 1423, 1423 (2002) (stating that violence by men is often used to resolve an inability to control women).

all of which are centered on power and control.<sup>26</sup> For example, an abuser's jealousy, fear of infidelity, and losing his partner to another may trigger an abuser to abuse.<sup>27</sup> The abuser will use physical, sexual, emotional, or psychological abuse tactics to regain control and "[create] feelings of fear, insecurity, worthlessness, and dependency" in their partner to prevent them from leaving.<sup>28</sup>

An additional tactic used by abusers to regain control or prevent a partner from leaving is reproductive coercion, which is defined as "behavior intended to maintain power and control in a relationship related to reproductive health," that interferes with contraception use and pregnancy.<sup>29</sup> Reproductive coercion takes many forms, all of which attempt to impregnate a partner against her will, including sabotage of oral contraceptives, breaking holes in condoms, and coercion to have unprotected sex.<sup>30</sup>

Violence is also often deployed as a strategy in conflict, as well as being an expression of frustration or anger.<sup>31</sup> Conflicts between couples may regard finances, jealousy, and societal gender roles.<sup>32</sup> Similarly, abuse is often a response to stress, which may stem from poverty, unemployment, or even, pregnancy.<sup>33</sup>

<sup>26</sup> See Jewkes, *supra* note 25, at 1423 (stating "poverty or patriarchy, alcohol or aggression; the causes of intimate partner violence have been contested by social scientists for decades").

<sup>27</sup> See Brownridge, *supra* note 11, at 861.

<sup>28</sup> *Id.* at 863.

<sup>29</sup> See *Reproductive and Sexual Coercion*, AM. COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS (February 2013), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co554.pdf?dmc=1&ts=20180501T2029035695>.

<sup>30</sup> See Margaret Conway, *Partner Abuse and Unintended Pregnancy: Making the Connections*, NAT'L DOMESTIC VIOLENCE HOTLINE (Apr. 1, 2010), <http://www.thehotline.org/2010/04/partner-abuse-and-unintended-pregnancy-making-the-connections/>. In a study of women between the ages of 16-29 seeking reproductive health care, approximately one in five women said they experienced pregnancy coercion. This occurs when a male partner may threaten or coerce a woman to get pregnant, perhaps by telling her not to use contraception or threatening to leave her if she does not get pregnant. *Id.* Also, about 15% of the women experienced birth control sabotage, in the form of intentionally breaking or removing condoms during sex and prohibiting the use of oral birth control. *Id.*

<sup>31</sup> Jewkes, *supra* note 25, at 1423.

<sup>32</sup> See *id.*

<sup>33</sup> See *ABUSE DURING PREGNANCY*, MARCH OF DIMES, <https://www.marchofdimes.org/pregnancy/abuse-during-pregnancy.aspx> (last visited Oct. 1, 2018).

The triggers, type of abuse, and degrees of frequency and severity of such abuse varies with each relationship and abuser.<sup>34</sup> Nonetheless, the prevalence of domestic violence is alarming, and the Centers for Disease Control and Prevention reported that a woman in the United States is beaten by an intimate partner every nine seconds.<sup>35</sup>

*B. New York State Recognizes Problem and the Order of Protection is Born*

With the rise of women's rights movements, particularly women's liberation, women's health, and anti-rape movements, the 1960s and '70s in America were a time for societal growth and institutional reform.<sup>36</sup> Domestic violence, which had always been portrayed as a "family matter," was thrown into the spotlight and rapidly demanded attention from society and legislators.<sup>37</sup> Advocates helped to shift the focus "from family cohesion to ending violence."<sup>38</sup>

In 1962, New York State acknowledged the dire necessity to provide protection to victims of domestic violence, and dedicated Article 8 of the newly enacted Family Court Act to provide that relief.<sup>39</sup> The Legislature's intent was to "preserve the family" and provide "practical help" to domestic violence victims through the use of civil proceedings in the family court, as opposed to the previous procedure of punishing abusers in criminal court.<sup>40</sup> The Legislature acknowledged that many victims did not seek the court's help for the purpose of invoking criminal charges, but

<sup>34</sup> *Domestic Violence National Statistics*, *supra* note 4.

<sup>35</sup> *Domestic Violence Statistics*, DOMESTICSHELTERS.ORG (May 1, 2014), <https://www.domesticshelters.org/domestic-violence-articles-information/faq/domestic-violence-statistics>.

<sup>36</sup> See Bonnie Eisenberg & Mary Ruthsdotter, *History of the Women's Rights Movement*, NAT'L WOMEN'S HIST. PROJECT, <http://www.nwhp.org/resources/womens-rights-movement/history-of-the-womens-rights-movement/> (last visited Sept. 30, 2018).

<sup>37</sup> *Id.*

<sup>38</sup> Kelly M. Driscoll, *Severing Ties: The Case for Indefinite Orders of Protection for Survivors of Domestic Violence*, 75 MONT. L. REV. 315, 317 (2014).

<sup>39</sup> See generally N.Y. FAM. CT. ACT, §§ 812-818 (McKinney 2013).

<sup>40</sup> See N.Y. FAM. CT. ACT § 811 (McKinney 1969) (repealed 1981) ("In the past, wives and other members of the family who suffered from disorderly conduct or assaults by other members of the family or Household were compelled to bring a 'criminal charge' to invoke the jurisdiction of a court. Their purpose, with few exceptions, was not to secure a criminal conviction and punishment, but practical help. The purpose of this article is to create a civil proceeding for dealing with such instances of disorderly conduct and assaults.").



rather for the purpose of receiving help in dealing with the aftermath of domestic violence, such as ensuring safety during a period of leaving the relationship.<sup>41</sup>

The FCA's Article 8 established the framework for the Order of Protection.<sup>42</sup> Simply, an Order of Protection is a civil order that commands protection for a victim from a person they are married to, separated from, divorced from, have a child in common with, are/were in an intimate/dating relationship with, or are related to by blood or marriage.<sup>43</sup> To obtain an order in New York, a victim of domestic violence must complete and file a Family Offense Petition with the family court, in which the relationship of the parties, the incidents of abuse, and the specific relief sought, among other information, is recorded.<sup>44</sup> The victim must also allege at least one Family Offense to have been committed against them.<sup>45</sup> To be granted a Final Order of Protection, the court must render a finding that a Family Offense was in fact committed.<sup>46</sup> Upon such finding, the court will grant the relief sought by the victim, and/or any it sees fit and just.<sup>47</sup>

In most jurisdictions, including New York, the court is afforded wide discretion in issuing relief, to the extent that such relief is constitutionally defensible.<sup>48</sup> The New York Legislature detailed the remedies available to recipients of Orders of Protection in section 842 of the FCA.<sup>49</sup> The court may issue a stay-away order, which requires the abuser to "stay away from the home, school, business or place of employment" of the victim, and may be extended beyond the victim to the child in common or any

<sup>41</sup> See § 811 (repealed 1981).

<sup>42</sup> See *id.* § 842.

<sup>43</sup> See *id.* §§ 812, 842; see also *Orders of Protection*, WOMENSLAW.ORG, [http://www.womenslaw.org/laws\\_state\\_type.php?id=561&state\\_code=NY](http://www.womenslaw.org/laws_state_type.php?id=561&state_code=NY) (last updated Feb. 1, 2018) (summarizing the valid parties under FCA's Article 8 for which an Order of Protection may be executed against).

<sup>44</sup> See generally N.Y. Family Offense Petition, available at <https://www.nycourts.gov/forms/familycourt/pdfs/8-2.pdf>. Petitioners must also record if the parties have any children in common, if the respondent has a weapon or access to firearms, any prior Orders filed or granted, any violations of previous Orders, and if respondent has any criminal convictions, among other information.

<sup>45</sup> See *id.*

<sup>46</sup> See § 842.

<sup>47</sup> See *id.*

<sup>48</sup> See Christopher T. Benitez et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHIATRY LAW 376, 376 (2010).

<sup>49</sup> See § 842.

necessary third party.<sup>50</sup> This commonly used remedy gives teeth to the order because it essentially has the power to force an abuser from a place they call home and require they seek other living accommodations. The court may also order child custody, visitation, child and spousal support, and other monetary relief for the victim.<sup>51</sup>

One of the principal ways in which the court ensures both the abuser obeys the order and the victim receives the court-ordered relief is by police enforcement.<sup>52</sup> Section 812 requires that officers make all arrests pursuant to the requirements in section 140.10 of the Criminal Procedure Law.<sup>53</sup> Sub-section (4) of 140.10 relates to police involvement with domestic violence incidents, specifically instances requiring mandatory arrest.<sup>54</sup> One instance requiring mandatory arrest is a violation of an existing Order of Protection.<sup>55</sup> In this instance, when the police become aware of a violation, either by police observation or a police report filed by the

<sup>50</sup> *Id.* § 842(a).

<sup>51</sup> *See id.* § 842. The FCA also leaves the court discretion to order the abuser to participate in batterer's education programs, or drug and alcohol counseling. *Id.* The court may also order the abuser to pay all the medical costs stemming from the abusive incidents that form the basis of the order. *Id.*

<sup>52</sup> *See* § 812(2). The Legislature first introduces police involvement within the FCA in Section 812(2), which states that police, among other enumerated qualified personnel, must inform victims seeking to initiate Family Offense proceedings of certain procedural aspects. *Id.* One procedural aspect enumerated in the FCA that must be disclosed regards arrest of the abuser; a police officer must tell a victim that "an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement of commencing either proceeding . . ." *Id.* § 812(2)(f). Section 812 further requires that police officers give the victim written notice (available in English and Spanish) of the rights and remedies available under the FCA, and notice of available local resources and shelters. *Id.* § 812(5). Additionally, FCA § 812 mandates the officer to notify the victim of his or her right to request that the officer assist in (a) providing for the victim's safety, (b) procuring the victim's important personal belongings, and (c) obtaining necessary medical treatment. *Id.*

<sup>53</sup> *See id.* § 812(2)(f).

<sup>54</sup> *See* N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2013).

<sup>55</sup> *Id.* § 140.10(4)(b). The existing order may be one issued by Criminal or Family Court. *Id.* A violation of an existing order is just one instance requiring mandatory arrest; additional instances include a perpetrator's commission of a felony "other than [a felony enumerated in] subdivision three, four, nine or ten of section 155.30 of the penal law" or commission of a misdemeanor that constitutes a Family Offense (as defined in section 812 of the FCA). *Id.* However, when the perpetrator commits a misdemeanor offense, there is an exception to mandatory arrest. *Id.* § 140.10(4)(c). The officer has additional discretion in choosing to arrest and must identify which individual is the victim and which individual is the primary aggressor. *Id.* Similarly, an officer may take into consideration the victim's request that the perpetrator not be arrested. *Id.*

victim, the police must arrest the perpetrator.<sup>56</sup> Because mandatory arrest serves as the remedy for violations of an order, police enforcement is imperative to the victim's ability to enjoy court-ordered relief.

*C. Acknowledging a Time for Change: The Family Protection and Domestic Violence Intervention Act of 1994*

“The legislature further finds and declares that domestic violence is criminal conduct occurring between members of the same family or household which warrants stronger intervention than is presently authorized under New York's laws.”<sup>57</sup>

In 1994, thirty-two years after the creation of the Article 8 Orders of Protection, the New York State Legislature made its most recent, most important legislative overhaul.<sup>58</sup> With hundreds of additions and amendments, the Family Protection and Domestic Violence Intervention Act of 1994 (“FPDVIA”) ensured that the law reflected the most up-to-date understandings about domestic violence.<sup>59</sup> Among the most current understandings was the idea that not all incidents of domestic violence are the same; some incidents are more severe, and pose a greater risk of harm, than others.<sup>60</sup> To differentiate among the different types of domestic violence, the Legislature ranked incidents by severity and the elevated risk of harm they create.<sup>61</sup>

This ranking of domestic violence incidents was codified in one of the most notable amendments made by the FPDVIA: the enactment of Section 827(a)(vii).<sup>62</sup> This sub-section established a list of five “aggravating circumstances”:

<sup>56</sup> *Id.* In these instances, the perpetrator is the one against whom the order has been issued.

<sup>57</sup> See S. 8642, 215th Gen. Assem., Reg. Session (N.Y. 1994).

<sup>58</sup> See *Matter of Richardson v. Richardson*, 910 N.Y.S.2d 149, 155 (App. Div. 2d Dep't 2010).

<sup>59</sup> See S. 8642. The Legislature noted the effect of domestic violence on children and crafted many amendments around the notion that “[a]buse of a parent is detrimental to children whether or not they are physically abused themselves.” *Id.* at 1.

<sup>60</sup> See N.Y. FAM CT. ACT § 827(a)(vii) (McKinney 2013).

<sup>61</sup> See *id.*

<sup>62</sup> *Id.*

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[P]hysical injury or serious physical injury to the petitioner caused by the respondent;

[T]he use of a dangerous instrument against the petitioner by the respondent;

[A] history of repeated violations of prior orders of protection by the respondent;

[P]rior convictions for crimes against the petitioner by the respondent; or

[T]he exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.<sup>63</sup>

A finding of aggravating circumstances creates two benefits for the victim: an immediate, court-mandated arrest of the abuser, and an extended duration of the Order of Protection.<sup>64</sup>

The first of the two benefits associated with a court's finding of aggravating circumstances is the availability of an immediate, court-mandated arrest of the abuser.<sup>65</sup> Although section 812 of the FCA requires police involvement, those enumerated instances are left to the discretion of the arresting officer.<sup>66</sup> As discussed, one instance in which section 140.10 dictates mandatory arrest is when a violation of an existing order has occurred.<sup>67</sup> However, that statute requires the officer to have reasonable cause to arrest, which will be ascertained through personal observation or the victim coming to the precinct to report.<sup>68</sup>

But, under section 827(a), it is a court's finding of one of the five enumerated aggravating circumstances that provides an additional, court-mandated path to the arrest of an abuser.<sup>69</sup> This section states, "the court may issue a warrant, directing that the

<sup>63</sup> *Id.* This list of five recognized aggravating circumstances has remained unchanged since its enactment.

<sup>64</sup> *See id.*; N.Y. FAM. CT. ACT § 842 (McKinney 2013).

<sup>65</sup> *See* § 827(a)(vii).

<sup>66</sup> *See* § 812(2); N.Y. CRIM. PROC. LAW § 140.10(1) (McKinney 2016).

<sup>67</sup> *See* § 140.10(4)(a)(i).

<sup>68</sup> *See id.* § 140.10(1)(a).

<sup>69</sup> *See* § 827(a).

respondent be brought before the court, when a petition is presented to the court under section eight hundred twenty-one and it appears that...aggravating circumstances exist which require the immediate arrest of the respondent.”<sup>70</sup> This additional avenue, a court-mandated arrest, is different than the remedy of mandatory arrest under section 812 and CPL 140.10.<sup>71</sup> Here, the victim files a petition in court, the judge reviews it, and if there is a finding of aggravating circumstances, the judge may issue an arrest warrant for the immediate arrest of the abuser.<sup>72</sup> Therefore, unlike mandatory arrest, where arrest is statutorily required based on enumerated circumstances and the arresting officer’s discretion, court-mandated arrest is entirely up to the discretion of the judge.<sup>73</sup> This additional opportunity for judicial decision-making is beneficial for a very important reason: it provides an opportunity to utilize judicial training and familiarity with the complexities of domestic violence abuse.

As previously discussed, since the enactment of the FCA and creation of the Family Court system in 1962, an important legislative and judicial goal has been protecting victims of domestic violence.<sup>74</sup> To achieve this goal, the Office of the Statewide Coordinating Judge for Family Violence Cases (OFVC) requires all New York judges presiding over domestic violence cases and their staff to receive training every year, including attending symposiums and seminars.<sup>75</sup> These trainings are to ensure awareness of the relevant, applicable law, and are based on issues specific to domestic violence cases, such as “risk assessment, cultural competency and implicit bias, as well as health and wellness.”<sup>76</sup> In 2015, The Family Violence Task Force offered information on victim trauma, and the power of language in preventing re-victimization.<sup>77</sup> To the contrary, there is a lack of

<sup>70</sup> *Id.*

<sup>71</sup> *See* § 812(2)(f); § 140.10(4).

<sup>72</sup> *See* § 827(a)(vii).

<sup>73</sup> *See id.*; § 140.10(4); § 812(2)(f).

<sup>74</sup> *See generally* Merrill Sobie, Commentary, *Introductory Practice Commentaries*, N.Y. FAM. CT. ACT ART. 8 (2018).

<sup>75</sup> *See* *Integrated Domestic Violence*, NYCOURTS.GOV, <https://www.nycourts.gov/courts/family-violence/idv/index.shtml> (last updated June 5, 2017).

<sup>76</sup> *Id.*

<sup>77</sup> *See id.*

data and evidence available to support the idea that every police officer in every New York county handling domestic violence cases has received similar training on the unique nature of domestic violence. For example, narrowing in on one county in particular and looking at the government-run official websites of Dutchess County, New York, it is evident that a “Domestic Violence Bench Manual” has been developed for judges, but there is no mention on the Sheriff’s website of any specialized domestic violence task forces or training for police officers.<sup>78</sup> Further, statistics generated by the New York State Division of Criminal Justice Services indicate that in 2016, Dutchess County Police Departments reported that for at least ten months, there were no domestic violence victims.<sup>79</sup> This is highly problematic, and rather difficult to believe, given the widely accepted statistic that a woman in the United States is beaten by her partner every nine seconds.<sup>80</sup>

Specialized training for police and judges is important given the unique nature of domestic violence, and the tendency for many victims to recant or minimize their abuse or injuries.<sup>81</sup> Having personnel trained to understand the nature of domestic violence, and how to question victims is crucial to assessing abuse.<sup>82</sup> Therefore, the opportunity for an additional trained professional

<sup>78</sup> See Dutchess County, *Dutchess County Domestic Violence Bench Manual* (2002), available at <https://www.nycourts.gov/ip/dv/benchmanual.pdf>; see generally *Sheriff’s Office, DUTCHESS COUNTY GOV’T*, <http://www.dutchessny.gov/CountyGov/Departments/Sheriff/SHIndex.htm> (last visited Sept. 30, 2018). After an extensive search through the Sheriff’s Office’s website, it was clear that there was no specialized unit or division dedicated to domestic violence. Additionally, in the long list of crime-prevention programs, not one was dedicated to domestic violence. See Sheriff’s Office, *supra* note 78.

<sup>79</sup> See *DOMESTIC VIOLENCE REPORTING AGENCIES THAT REPORTED NO DOMESTIC VICTIM DATA FOR 2016*, CRIMINALJUSTICE.NY.GOV, [http://www.criminaljustice.ny.gov/crimnet/ojsa/domesticviolence2016/no\\_dv\\_crimes.pdf](http://www.criminaljustice.ny.gov/crimnet/ojsa/domesticviolence2016/no_dv_crimes.pdf) (last updated Mar. 27, 2017). Dutchess County is divided into three police precincts. The Dutchess County Park Police Department reported 12 months without a single domestic violence victim; Millerton Village Police Department reported 10 months without a victim; and Pine Plains Town Police Department reported 12 months without a victim. *Id.*

<sup>80</sup> See *Domestic Violence Statistics*, *supra* note 35.

<sup>81</sup> See *Why Some Survivors Minimize Their Abuse*, DOMESTICSHELTERS.ORG (Apr. 27, 2016), <https://www.domesticshelters.org/domestic-violence-articles-information/why-some-survivors-minimize-their-abuse>; *How Police Are Trained to Respond to Domestic Violence*, DOMESTICSHELTERS.ORG (May 4, 2016), <https://www.domesticshelters.org/domestic-violence-articles-information/how-police-are-trained-to-respond-to-domestic-violence>.

<sup>82</sup> *How Police Are Trained to Respond to Domestic Violence*, *supra* note 81; Jim Leckrone & Mary Wisniewski, *Study shows why domestic violence victims drop charges*, REUTERS (Aug. 19, 2011, 5:21 PM), <https://www.reuters.com/article/us-domestic-violence-study/study-shows-why-domestic-violence-victims-drop-charges-idUSTRE7716FE20110819>.

to evaluate the abuse under FCA section 827(a), and decide whether aggravating circumstances exist, only serves to further benefit the victim seeking protection.

The inclusion of this court-mandated immediate arrest provision is consistent with the Legislature's acknowledgment of the elevated risks of harm and severity presented by aggravating circumstances.<sup>83</sup> Based solely on the allegations of an aggravated circumstance in the petition, the court has the power to require the immediate arrest of the abuser in the hopes of preventing future harm.<sup>84</sup>

The second benefit of a finding of aggravating circumstances is the court's ability to extend the time in which the order must be obeyed.<sup>85</sup> Consistent with the notion of helping the victim, a longer Order of Protection gives victims a longer "sense of security and peace of mind" in knowing an enforceable order is in effect.<sup>86</sup> The 1994 FPDVIA had determined an Order of Protection to be observed for a period "not in excess of one year."<sup>87</sup> If aggravating circumstances were found, the order was to be observed for a period "not in excess of three years."<sup>88</sup> In 2003, the State Legislature, through bill 2003 N.Y.S. 5532, amended the periods of time to the following: Orders of Protection to be observed for a period "not in excess of two years"; orders with aggravating circumstances to be observed for a period "not in excess of five years."<sup>89</sup>

The acknowledgement that not all domestic violence incidents are the same, and that specific circumstances require additional

<sup>83</sup> See N.Y. FAM. CT. ACT § 827(a)(vii) (McKinney 2013).

<sup>84</sup> See *id.*; Steve Albrecht, *Do Domestic Violence Restraining Orders Ever Really Work?*, PSYCHOL. TODAY (Jul. 27, 2012), <https://www.psychologytoday.com/blog/the-act-violence/201207/do-domestic-violence-restraining-orders-ever-really-work>. For example, upon serving the abuser with an order of protection, often abusers may become enraged and seek to further victimize the victim.

<sup>85</sup> See N.Y. FAM. CT. ACT § 842 (McKinney 2013).

<sup>86</sup> See H.R. Res. A4581, 2015 State Assemb., Reg. Sess. (N.Y. 2015). In 2015, this legislation to permit the issuance of lifetime orders of protection in the presence of aggravating circumstances was introduced. *Id.* Ultimately the bill did not pass, but the rationale behind extra protection for aggravating circumstances presenting elevated risks of harm is applicable here.

<sup>87</sup> See S. 8642, 215th Gen. Assem., Reg. Session (N.Y. 1994).

<sup>88</sup> *Id.*

<sup>89</sup> See S. 5532, 226th Gen. Assem., Reg. Session (N.Y. 2003); § 842. As it currently stands, the FCA permits Orders of Protection with aggravating circumstances to be imposed for up to five years. See N.Y. FAM. CT. ACT § 842.

protection, was a crucial advancement to accomplishing the goals the FPDVIA aimed to achieve.<sup>90</sup> By creating the ability to impose court-mandated immediate arrest requirements and longer orders for victims in aggravated and complex situations, the Legislature provided victims of family offenses the “fullest protections of [New York’s] civil and criminal laws.”<sup>91</sup>

### III. THE UNACKNOWLEDGED VICTIMS: EXPECTANT MOTHER AND CHILD

#### A. *Domestic Violence and Pregnancy*

“Women tend to think pregnancy is a safety zone, especially if they are already in an abusive relationship. . . . But what we’re seeing is that no woman is safe from domestic violence or its most severe consequences.”<sup>92</sup>

Surprising to many Americans is the fact that domestic violence victimization does not cease or halt during the most sacred part of a woman’s life: motherhood.<sup>93</sup> Instead, the abuse continues, and approximately 50-70% of women abused before pregnancy are still abused during pregnancy.<sup>94</sup> In the United States alone, more than 300,000 pregnant women experience domestic violence every year.<sup>95</sup> One explanation for why the violence continues is quite simple: domestic violence occurs most frequently when women are

<sup>90</sup> See S. 8642.

<sup>91</sup> *Id.* The Legislature also acknowledges strengthening the material of New York’s statutes to achieve the goals of “providing for immediate deterrent action by law enforcement officials and members of the judiciary, [] increasing penalties for acts of violence within the household, and [] integrating the purposes of the family and criminal laws to assure clear and certain standards of protection for New York’s families consistent with the interests of fairness and substantial justice.” *Id.*

<sup>92</sup> *Laci Peterson case: When pregnancy ends in Murder*, CNN, <http://www.cnn.com/2007/US/law/12/11/court.archive.peterson8/index.html> (last updated Dec. 31, 2017, 10:59 AM).

<sup>93</sup> See Jennifer Chait, *Domestic violence during pregnancy - common misconceptions about abuse*, SHEKNOWS: HATCH BLOG (Apr. 11, 2008, 7:12 PM), <http://pregnancyandbaby.com/the-hatch-blog/articles/930643/domestic-violence-during-pregnancy-common-misconceptions-about-abuse>.

<sup>94</sup> *Pregnancy and Domestic Violence Facts*, *supra* note 3.

<sup>95</sup> Beth A. Bailey, *Partner Violence During Pregnancy: Prevalence, Effects, Screening, and Management*, 2 INT’L J. WOMEN’S HEALTH 183, 183 (2010). Due to a reluctance to disclose intimate partner violence during pregnancy, the actual prevalence may be even higher than reported.



of reproductive age and hence, there is a natural temporal link between pregnancy and abuse.<sup>96</sup>

Many studies have concluded that these assumptions about pregnancy as a source of safety are wrongheaded. They analyzed the unique aspects of pregnancy violence and have identified risk factors that appear to trigger this type of violence.<sup>97</sup> However, despite the fact that these risk factors revolve around pregnancy of the victims, the identified reasons for abuse still originate in the abusers' desire for power and control.<sup>98</sup> For example, one trigger is infidelity. Studies show "paternal uncertainty and accusations of infidelity" have been associated with an increased risk of violence among pregnant women.<sup>99</sup> "A man who is sexually jealous and frequently accuses his partner of infidelity would be more likely to question the paternity of the child," which may increase abusive behavior towards his pregnant partner.<sup>100</sup> Relatedly, women face an increased risk of domestic abuse if they separate or divorce their partner while pregnant.<sup>101</sup>

Additionally, the type of pregnancy may serve as a trigger to increased violence. Women with *unintended* pregnancies are two to four times more likely to experience violence than women with planned pregnancies.<sup>102</sup> A study conducted in 2010 found that 53% of women with unintended pregnancies experienced physical or sexual violence from their intimate partner.<sup>103</sup> An unintended pregnancy often brings greater economic burdens and huge changes in lifestyle for both parents. For the abuser, these changes translate to a loss of control and autonomy over their own finances, future, and life, which may lead to increased abuse for

<sup>96</sup> See *Get the Facts & Figures*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/statistics/> (last visited Sept. 27, 2018).

<sup>97</sup> See Brownridge, *supra* note 11 at 859-60.

<sup>98</sup> See *Why do People Abuse?*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/is-this-abuse/why-do-people-abuse/> (last visited Sept. 27, 2018).

<sup>99</sup> See Brownridge, *supra* note 11, at 861; Rebecca L. Burch & Gordon G. Gallup Jr., *Pregnancy as a Stimulus for Domestic Violence*, 19 J. FAM. VIOLENCE 243, 244 (2004) (discussing paternal uncertainty and stating "because of internal fertilization, men can rarely be certain that their children are actually their own" and "instead of serving as the marker of his own reproductive fitness, [pregnancy] raises doubts about paternity and suspicions of infidelity").

<sup>100</sup> Burch & Gallup Jr., *supra* note 99, at 244.

<sup>101</sup> See Brownridge, *supra* note 11, at 861.

<sup>102</sup> *Pregnancy and Domestic Violence Facts*, *supra* note 3.

<sup>103</sup> See Conway, *supra* note 30.

their pregnant partner – whom in the abuser’s eyes, is the “source” of their loss of control.<sup>104</sup>

Last, a pregnant woman’s changing body may have a significant impact on the power dynamics of the relationship, which may serve as a trigger for violence.<sup>105</sup> Consistent with the notion of power and control, pregnancy may symbolize a time when a woman assumes more control over her body, thus the victim’s changing body may lead to the abuser’s perception of “a degree of independence from her male partner.”<sup>106</sup> An abuser may assert violence - physical, emotional, psychological, or sexual - against the pregnant woman in an attempt to regain control.<sup>107</sup>

As with domestic violence in general, certain women are at an increased risk of violence during pregnancy than others due to age, or socioeconomic, marital, or minority status.<sup>108</sup> One study revealed that income and education levels were significant predictors of violence during pregnancy, with the highest risk of violence for women of lower socioeconomic status and education.<sup>109</sup> Additionally, unmarried women and women from minority groups are at an increased risk for domestic violence during pregnancy.<sup>110</sup>

In addition to these many triggers of violence against pregnant victims, domestic violence during pregnancy also results in heightened vulnerabilities and unique harms. The following sections of the Note will separately discuss the unique harms to the expectant mother, the baby, and both the mother and baby.

### *B. Abuse During Pregnancy: Unique Vulnerabilities and Elevated Risks of Harm*

#### i. Unique Harms to the Mother

Women experiencing violence during pregnancy are often subject to a number of detrimental physical and mental health

<sup>104</sup> See *ABUSE DURING PREGNANCY*, *supra* note 33.

<sup>105</sup> See Brownridge, *supra* note 11, at 862.

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

<sup>107</sup> See *id.*

<sup>108</sup> Bailey, *supra* note 95, at 183.

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

<sup>110</sup> *Id.* (stating that some national surveys report almost a double risk of domestic violence during pregnancy for women under 20 years old).

outcomes.<sup>111</sup> Pregnant women are very physically vulnerable.<sup>112</sup> In fact, some abusers see this particularly vulnerable time as a window of opportunity to regain control and exert dominance over their partners.<sup>113</sup> Due to a changing figure and expanding stomach, women are prevented from moving with similar speed, stamina, and agility as non-pregnant women.<sup>114</sup> Thus, pregnant victims are less able to defend themselves from a physical or sexual attack. Women have reported being “kicked, punched, thrown down stairs, threatened with knives, choked, scalded, [and] pushed out of moving cars” by their partners while pregnant.<sup>115</sup> Studies have estimated that ten percent of hospitalizations due to injury during pregnancy are the result of intentional injuries inflicted on the victim.<sup>116</sup> In addition to the general consequences of physical abuse, pregnant victims of physical violence also are susceptible to complications from assault to the abdomen, increased likelihood of premature labor, placenta eruptions, and miscarriages.<sup>117</sup>

Empirical data has repeatedly shown that emotional and psychological abuse to a pregnant woman has the same, or potentially worse harm on both mother and child as physical violence.<sup>118</sup> Abuse during pregnancy has been linked to the mother’s feelings of depression, manifestations of psychopathology, stress, and feelings of being fearful, misunderstood, anxious, and isolated.<sup>119</sup> A study conducted in

<sup>111</sup> See Brownridge, *supra* note 11, at 865.

<sup>112</sup> See Burch & Gallup Jr., *supra* note 99, at 246; Brownridge, *supra* note 11, at 868 (stating that women who experienced violence during pregnancy were “twice as likely to be sexually assaulted, 2.9 times more likely to be beaten up, 3.5 times more likely to have been hit with something that could hurt, and 3.7 times more likely to be kicked, bit, or hit with a fist”).

<sup>113</sup> See *Domestic violence and abuse*, BABYCENTRE, <https://www.babycentre.co.uk/a563127/domestic-violence> (last updated June 2017).

<sup>114</sup> See generally *14 Things That Get Harder When You’re Pregnant*, BELLYBELLY, <https://www.bellybelly.com.au/pregnancy/things-that-get-harder-when-youre-pregnant/> (last updated Apr. 3, 2018) (stating that bending down and everyday things become harder to do with a growing belly).

<sup>115</sup> Brownridge, *supra* note 11, at 865.

<sup>116</sup> *Id.*

<sup>117</sup> Sarah McMahon et al., *The Impact of Emotional and Physical Violence During Pregnancy on Maternal and Child Health at One Year Post-Partum*, 33 *CHILD. & YOUTH SERVS. REV.* 2103, 2104 (2011).

<sup>118</sup> NAT’L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 5, at 9.

<sup>119</sup> Brownridge, *supra* note 11, at 865.

2004 revealed that women abused during pregnancy were 2.5 times more likely to report depression than women not abused during pregnancy.<sup>120</sup> Women abused during pregnancy were also found to self-blame, and hold themselves responsible for their partner's abusive behavior.<sup>121</sup> Not surprisingly then, a significant association exists between pregnant victims of domestic violence and increased use of tobacco, alcohol, or illegal drugs.<sup>122</sup> Victims may initiate or sustain use of various substances as coping mechanisms to deal with the violence.<sup>123</sup>

ii. Unique Harms to Baby

The association between abuse during pregnancy and physical, emotional, and psychological harms to the mother evinces the particular vulnerability of pregnant victims of domestic violence.<sup>124</sup> However, the baby in utero also faces significant harms.

Many studies have proven that *all* forms of domestic violence inflicted during pregnancy – physical, sexual, psychological, and emotional – lead to numerous negative consequences for the baby.<sup>125</sup> These consequences include both immediate and long-term health problems.<sup>126</sup> The most significant harms to the baby resulting from violence to the mother are low birth weights and pre-term births.<sup>127</sup> These two harms are leading causes of neonatal morbidity and mortality.<sup>128</sup>

Physical violence to the pregnant mother, such as a blow to the abdominal area, can lead to preterm birth or fetal death.<sup>129</sup> Sexual violence to the pregnant mother may result in infections or sexually transmitted diseases, which also places the baby at an

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 866.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 874.

<sup>125</sup> See Newberger, *supra* note 12, at 2370; Bailey, *supra* note 95, at 186; BM Donovan et al., *Intimate Partner Violence During Pregnancy and the Risk for Adverse Infant Outcomes: A Systematic Review and Meta-Analysis*, 123 AN INT'L J. OBSTETRICS & GYNECOLOGY (2016).

<sup>126</sup> See Bailey, *supra* note 95, at 188.

<sup>127</sup> See *id.*

<sup>128</sup> *Id.* at 186.

<sup>129</sup> *Id.* at 187.

increased risk for preterm birth.<sup>130</sup> Emotional and psychological violence to the pregnant mother has led to increased rates of depression,<sup>131</sup> which has been associated with both preterm birth and low birth weight.<sup>132</sup>

A baby is considered born with a low birth weight if born under 2,500 grams, or about 5.5 pounds.<sup>133</sup> Low birth weight causes “cognitive defects, motor delays including cerebral palsy, academic difficulties, language delays, and significantly increased rates of attention, behavioral, and psychological problems.”<sup>134</sup> According to one study, abused women faced an increased risk of delivering a low birth weight baby at 16%, compared to non-abused women at only 6%.<sup>135</sup>

A baby born before 37 completed weeks gestation is considered preterm.<sup>136</sup> Children born preterm are at an increased risk of developing “cognitive deficits, including neurological impairment, delayed mental development and decreased IQ, memory problems and increased need for special education services.”<sup>137</sup> When comparing pregnant victims of domestic violence against non-abused pregnant women, pregnant victims had significantly increased rates of preterm deliveries, at a rate of 22% to 9%.<sup>138</sup>

In addition to the physical and mental effects of pregnancy violence, abuse has also been linked to many negative health behaviors by the mother, such as smoking, drinking, or using illegal substances.<sup>139</sup> Numerous studies have linked these behaviors to low birth weight and preterm birth.<sup>140</sup> In particular, one national study found that 11.5% of babies born to light

<sup>130</sup> *Id.*

<sup>131</sup> *See id.* Depression has been identified as the most common mental health consequence of domestic violence, with nearly 40% of abused women reporting depression symptoms. *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 186.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Research within women in China, South Africa, and Saudi Arabia revealed similar findings of low birth weight babies born to abused versus non-abused mothers. *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 187.

<sup>140</sup> *Id.* at 187–88. Multiple projects have described an increased risk of alcohol and substance abuse among pregnant battered women, and as much as 50% of alcoholism in women may be precipitated by abuse. *See id.*

cigarette smokers were born low birth weight, which was a rate more than 50% higher than non-smokers.<sup>141</sup>

### iii. Unique Harms to Both Mother and Baby

Apart from the harms that mother and baby face individually as a result of domestic violence, together both mother and baby face a frighteningly elevated risk of death. Very rarely is it the case that a pregnant woman is murdered by a stranger.<sup>142</sup> Domestic violence is the leading cause of female homicides and injury-related deaths during pregnancy.<sup>143</sup> Relatedly, domestic violence is the leading cause of injuries and death among women of childbearing age in the United States.<sup>144</sup>

One national study reviewed pregnancy-related deaths of females over a four-year period.<sup>145</sup> Within the sample, there were “139 counts of pregnancy-associated homicides.”<sup>146</sup> The victims of these homicides were predominately at the extremes of the reproductive age and African American.<sup>147</sup> The study revealed that 45.3% of the pregnancy-associated homicides were domestic violence related.<sup>148</sup> Over a four-year period in New York City, 1/5<sup>th</sup> of the 105 pregnancy-related homicides were determined to be domestic violence related.<sup>149</sup>

<sup>141</sup> *Id.* at 188. This study indicated that effects on low birth weight were not limited to expectant mothers who were heavy cigarette smokers. *See id.* Additionally, there are dozens of studies that report a common link between cigarette exposure and both low birth weight and preterm birth. *Id.*

<sup>142</sup> *See* Diana Cheng & Isabelle L. Horon, *Intimate-Partner Homicide Among Pregnant and Postpartum Women*, 115 *OBSTETRICS & GYNECOLOGY* 1181, 1181 (2010) (finding that “[t]he majority of pregnancy-associated homicides were committed by current or former intimate partners . . .”).

<sup>143</sup> *See Intimate Partner Violence*, AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/violence/intimate-partner-violence.pdf> (last visited Sep. 28, 2018).

<sup>144</sup> Bailey, *supra* note 95, at 184.

<sup>145</sup> Christie Lancaster Palladino et al., *Homicide and Suicide During the Prenatal Period: Findings from the National Violent Death Reporting System*, 118(5) *OBSTETRICS & GYNECOLOGY* 1056, 1056 (2011).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*; *see* Jeani Chang et al., *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991-1999*, 95(3) *AM. J. PUB. HEALTH* 472 (2005). The researchers concluded that for every characteristic examined, the pregnancy-associated homicide ratios were about seven times higher among Black women than for White women. *Id.* at 472.

<sup>148</sup> Palladino, *supra* note 145, at 1056.

<sup>149</sup> Anemona Hartocollis, *High Rate for Deaths of Pregnant Women in New York State*, *N.Y. TIMES* (June 18, 2010), <http://www.nytimes.com/2010/06/19/nyregion/19obese.html>.

Abusers that batter pregnant women are more dangerous and more likely to kill their partner.<sup>150</sup> The increased danger is a combination of the vulnerable state of the victim and the morally depraved abuser that lacks regard for not one, but two lives. Pat Brown, a criminal profiler and president of the Sexual Homicide Exchange, perceived that “[m]en who cross the line to murder their pregnant wives and girlfriends show signs of being psychopathic long before the murder.”<sup>151</sup> She warned that women should be highly cautious about getting pregnant with partners who exhibit a lack of concern for her happiness and well-being, grandiose thinking, and a history of dishonesty, and who are manipulative and pathological liars, as these are the common psychological profiles of the highly dangerous abusers she studied.<sup>152</sup>

Recall the concerns of the pregnant women sitting next to you in the doctor’s office. The women’s fears of their unborn children being killed by their abusive partners are warranted, and very real concerns. Studies have shown that women abused during pregnancy are three times more likely to be murdered by their intimate partner than women not abused during pregnancy.<sup>153</sup>

#### IV. MAKING A CHANGE, COUNTERARGUMENTS, AND CONCLUSORY STATEMENTS

##### A. *The Unique Vulnerability and Elevated Risks of Harm to Pregnant Victims Requires Statutory Amendment*

The New York State Legislature should not ignore the high-risk association between domestic violence, pregnancy, homicide, and the unique harms to mother and baby. The ranking process that began in 1994, capitalized on the growing knowledge about domestic violence in our social sciences, and it must continue. This Note proposes that the pregnancy of victims should be added as a new aggravating circumstance, warranting the option for a court-

<sup>150</sup> *When Pregnancy Triggers Violence*, DOMESTICSHELTERS.ORG (Aug. 3, 2015), <http://www.domesticshelters.org/domestic-violence-articles-information/when-pregnancy-triggers-violence#.WAW2BpMrJR0>.

<sup>151</sup> *Laci Peterson case: When pregnancy ends in murder*, *supra* note 92.

<sup>152</sup> *Id.*

<sup>153</sup> Chang, *supra* note 147, at 474.

mandated arrest of the abuser and extending protection under Section 827(a)(vii) of the Family Court Act.<sup>154</sup>

Within the United States, protecting pregnant women is a strong public policy concern, both nationally and on the state level. In 2004, President Bush enacted the Unborn Victims of Violence Act, or “Laci and Conner’s Law,” in memory of murdered mother and unborn child, Laci and Conner Petersen.<sup>155</sup> The purpose of the Act was to change federal laws regarding the death of a child upon the injury of an expectant mother.<sup>156</sup> The tremendous support of Congress further solidified the consensus that violence to pregnant women is particularly heinous and stronger punishment, justice, and relief is required.<sup>157</sup> In a less forward way, the vulnerability of pregnant women and the need for additional protection is acknowledged and accepted everyday by many New Yorkers with the MTA’s friendly suggestion to offer your seat on the subway or bus to a pregnant person.<sup>158</sup>

To ensure this group of victimized women is eligible to receive all protections under the law, the new amendment should include language to the effect of, “any physical injury or psychological, emotional, or sexual abuse to a pregnant woman,” and be added to the existing five aggravating circumstances under Section 827(a)(vii) of Article 8.<sup>159</sup> The addition of this aggravating circumstance would be simply an addition; it would not impede or alter any of the existing circumstances.<sup>160</sup> Most importantly, this amendment would further the intent of the Legislature.<sup>161</sup> It would recognize and enumerate a circumstance that presents an

<sup>154</sup> See N.Y. FAM. CT. ACT § 827(a)(vii) (McKinney 2013).

<sup>155</sup> George W. Bush, *supra* note 2.

<sup>156</sup> See *id.* The law changed the current laws, which did not recognize an unborn child as a victim when injured or killed in utero, to include unborn children as victims separate from the harm to their pregnant mother. See *id.* This change allowed a defendant to be criminally charged with the death or injury of two victims. See *id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Courtesy Counts on Buses*, MTA, <http://web.mta.info/nyct/service/CourtesyCountsBus.htm#OFFERYOURSEAT> (last visited Sept. 19, 2018). The MTA repeatedly advocates for offering your seats to pregnant women, along with disabled and elderly persons. *Id.* This acknowledgment of physical vulnerability and a need for public support further evinces the policy to protect.

<sup>159</sup> See N.Y. FAM. CT. ACT § 827(a)(vii) (McKinney 2013).

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* at § 827(a)(v)-(vii).



elevated risk of harm and serious injury to the victim, and that is inflicted by a perpetrator of particularly heinous character.<sup>162</sup>

To illustrate that the addition of pregnancy violence would remain in accord with the current list, it is helpful to envision two different, but equally destructive incidents of domestic violence.

Victim A seeks an Order of Protection against Abuser A. Within her petition, Victim A alleges that in addition to verbal and sexual abuse, Abuser A grabbed a baseball bat, hit her in the head causing a concussion, and pushed her down the stairs, causing her to break her ribs. She has already satisfied that at least one Family Offense has been committed against her, so a Temporary Order of Protection would be issued for her.<sup>163</sup> However, because she has additionally alleged the presence of two aggravating circumstances, the court would have discretion in seeking immediate arrest of Abuser A, and granting a Final Order of up to 5 years.<sup>164</sup>

Victim B, a pregnant woman, seeks an Order of Protection against Abuser B. Victim B alleges in her petition that she has received threatening phone calls from Abuser B, and he has extensively abused her, verbally and psychologically. Like Victim A, she will be granted a Temporary Order for alleging a Family Offense.<sup>165</sup> However, she will not be able to receive the additional protections of FCA section 827(a)(vii), because she has not alleged an existing aggravating circumstance.<sup>166</sup>

The Legislature's intent is to protect Victim A from future harm.<sup>167</sup> It recognizes the elevated risk of harm presented to her when Abuser A used a deadly instrument and caused serious physical injury, and it acknowledges the morally depraved person capable of inflicting such aggravating harm.<sup>168</sup>

The Legislature's intent is to also protect Victim B from future harm.<sup>169</sup> However, without an amendment to make pregnancy its

<sup>162</sup> *See id.*

<sup>163</sup> *Id.* at § 842.

<sup>164</sup> *Id.* at § 827(a)(vii).

<sup>165</sup> N.Y. FAM. CT. ACT § 842.

<sup>166</sup> *Id.* at § 827(a)(vii).

<sup>167</sup> *See id.* at § 827(a)(v)-(vii).

<sup>168</sup> *Id.* at § 827(a)(vii). Consistent with the notion of severity and elevated risk of harm, the finding of an aggravating circumstance eludes to the type of abuser and their capability and propensity to inflict such harm. *See* Brownridge, *supra* note 11, at 872.

<sup>169</sup> *See id.* at § 827(a)(v)-(vii).

own aggravating circumstance, as the facts stand, Victim B will not receive the greatest level of protection from Abuser B that is available under the FCA.<sup>170</sup> This disregards the fact that Abuser B is as equally morally depraved as Abuser A, if not more. The desire and ability to abuse a woman emotionally, sexually, physically, or psychologically while pregnant is an even greater measure of the deep criminal underpinnings of an individual.<sup>171</sup> The current state of section 827(a)(vii) fails to acknowledge the serious vulnerabilities and elevated risks of harms to pregnant victims of domestic violence, which must be taken into consideration.<sup>172</sup>

*B. Counterarguments to Amending the List of Aggravating Circumstances*

There are a few noteworthy counterarguments and criticisms to the proposed amendment, which will now be addressed. First and foremost, a common misconception exists that Orders of Protections are merely ineffective “pieces of paper.”<sup>173</sup> However, numerous studies conducted throughout the past two decades have found Orders of Protection to be effective in re-empowering victims and deterring violence.<sup>174</sup>

Some studies have measured the effectiveness of Orders of Protection from the victim’s perspective by considering their impact on the victim’s well-being.<sup>175</sup> One study found that 89% of protection order recipients felt more in control of their relationships, and 98% felt more in control of their lives.<sup>176</sup> Having the assurance of legal protections re-empowers victims who lost that power to their abuser. Also, 79% of victims believed that the Order of Protection helped relay the message to their partners that battering was wrong.<sup>177</sup> Thus, from the victims’ standpoint,

<sup>170</sup> See § 827(a)(vii).

<sup>171</sup> See Brownridge, *supra* note 11, at 868.

<sup>172</sup> See § 827(a)(vii).

<sup>173</sup> See Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of “Efficacy”*, 11 S. CAL. INTERDISC. L.J. 361, 367-69 (2002).

<sup>174</sup> See *id.* at 369.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 370. According to one victim, “[o]nce I got the order I thought, it’s time to start all over. When you go to court to get the order and you walk out with it in your hand, you feel like you have a little bit of power over your life again.” *Id.*

<sup>177</sup> *Id.*

Orders of Protections can be effective in helping victims of domestic violence and preventing future abuse.<sup>178</sup>

Another indicator of the success of protection orders is the rate of violations of the orders.<sup>179</sup> However, despite the prevalence of restraining orders and solid efforts, very few empirical studies accurately document how well restraining orders prevent future incidents of abuse.<sup>180</sup> This lack of data is due, in part, to methodological errors stemming from variations in the implementation of orders; the amount of time since the placement of the order to the violation; and characteristics of the victim, abuser, and their relationship.<sup>181</sup> Two additional methodological limitations are the underreporting of order violations by the victim and the bias associated with the inability to recall traumatic events.<sup>182</sup>

In 2010, a team of researchers led by Doctor Christopher T. Benitez reviewed 15 empirical studies conducted on the effectiveness of protection orders.<sup>183</sup> These empirical studies differed in study design, sample size, specific study limitations, and findings.<sup>184</sup> However, despite acknowledging and accounting for these differences, their meta-analysis concluded that available research “supports the conclusion that protective orders are associated with the reduced risk of violence towards the victim.”<sup>185</sup> Similarly, a 2002 meta-analysis reviewed 32 empirical studies and found that on average, about 40% of orders were violated and thus again concluded that orders are more effective in reducing future harm than not.<sup>186</sup> Despite the existence of contradictory studies with higher percentages of order violations, the findings of these two meta-analyses encompassing almost 50 individual studies of

<sup>178</sup> *See id.*

<sup>179</sup> *See id.* at 372.

<sup>180</sup> *Id.*

<sup>181</sup> *See* Benitez, *supra*, note 48 at 381. This 2010 review analyzed and compared 15 empirical studies on the effectiveness of protection orders. *See id.* at 377.

<sup>182</sup> *See id.* at 384.

<sup>183</sup> *See id.* at 377.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 385.

<sup>186</sup> *Id.* at 384.

various designs and sample sizes from various national populations deserve greater deference.<sup>187</sup>

An additional counterargument by proponents in favor of the current state of Article 8 is that the current law, and specifically Section 827(a)(vii), does not exclude or bar pregnant victims from receiving an extended order through the existing aggravating circumstances.<sup>188</sup> While true, pregnant victims should not have to qualify for extra protection only if their abuse is witnessed by another person or done with a dangerous instrument or weapon.

The purpose of the FPDVIA's amendment to Section 827(a)(vii) to include specific circumstances that *alone* warrant immediate arrest and longer protection was in acknowledgment that some incidents of domestic violence are more heinous and present elevated risks of harm.<sup>189</sup> Pregnancy violence and the harms to both mother and baby evince just that – heinous violence and an elevated risk of harm. Since this violence *alone* is the exact type the Legislature intended to provide extra protection against, it should be included as an additional independent aggravating circumstance in the statute.

Similarly, another criticism to the proposal is that pregnant victims of domestic violence always have the option to ask the court for an extension of the order set to expire.<sup>190</sup> While this procedural fact is also true, not only does this burden the victim to reappear in court, such extensions are entirely within the court's discretion. Thus, a victim must hope her request is granted, or she

<sup>187</sup> See *id.* See also N.Y. FAM. CT. ACT § 812(5) (McKinney 2013); N.Y. CRIM. PROC. LAW § 140.10(1)-(4) (McKinney 2016). A largely recognized restraint to the effectiveness of Orders of Protection is not the fact that the orders are judgment decrees on pieces of paper, but rather that the papers require the cooperation and enforcement of the police. See N.Y. FAM. CT. ACT § 812(5); N.Y. CRIM. PROC. LAW § 140.10(1)-(4). As discussed, FCA section 812 and CPL 140.10 dictate the enforcement of orders by police officers, and require officer's cooperation in various measures of the victim's safety planning. See *id.* Thus, the ability of protective orders to reduce violence depends significantly on law enforcement. While the lack of uniformity in enforcing violations is not the focus of this paper, it may be an area in need of future research, because police inconsistency leads to ineffective orders. For example, imagine County A actively enforces orders and responds to all reports of violations with arrests, and County B only responds to 50% of violations and has a low arrest rate. The effectiveness of the orders, both objectively by percentage and from the victim's standpoint, is correlated to police cooperation.

<sup>188</sup> See N.Y. FAM. CT. ACT § 827(a)(vii).

<sup>189</sup> See S. 8642, 215th Gen. Assem., Reg. Session (N.Y. 1994).

<sup>190</sup> See N.Y. FAM. CT. ACT § 842 (stating a court “may also, upon motion, extend [an] order of protection for a reasonable period of time upon a showing of good cause or consent of the parties”).

will be forced to face the uncertainty of her abuser, now with the new addition of a young child. In every case of abuse against a pregnant victim, the longer time period of protection is warranted. That protection should not vary with the biases of the judge to whom her case is assigned.<sup>191</sup>

*C. One Amendment, Two Powerful Impacts*

It is a warm and sunny May afternoon. You return to your doctor's office for a visit, this time cradling your cooing newborn in your arms. Again, you encounter ten other expectant mothers during your wait. But in this moment, the proposed legislation has been passed and enacted.

This Note and proposal will not eliminate the problem of violence against pregnant women. Nor will it have reduced the rate of two out of ten pregnant women suffering from domestic violence in the waiting room to zero out of ten pregnant women. But, as result of this proposal, more pregnant victims will be able to petition a court for the arrest of their abuser. In addition, more pregnant women will seek Orders of Protections with longer enforceable durations.

Because studies have proven the effectiveness of Orders of Protections for a significant number of families, I urge that Orders of Protection be regarded as an important anchor in the approach to deterring future domestic violence. The enactment of this proposed amendment to include a sixth aggravating circumstance would improve and strengthen this anchor upon which many victims rely. Not only will this proposed amendment remain consistent with the intentions of the Legislature, it will achieve better outcomes for pregnant victims of domestic violence, whose unique vulnerability and elevated risks of harm are currently not recognized by our State.

<sup>191</sup> See Driscoll, *supra* note 38, at 324. While judicial discretion is important in permitting a judge to tailor an order to the specific needs of the petitioner, discretion can be a dangerous tool when the judge harbors misconceptions about survivors of domestic violence. *Id.*