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## How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-State Orders of Protection

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# How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-state Orders of Protection

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and Cara M. Bonomolo

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## Introduction

Recently, a battered woman asked my assistance in getting New York to recognize her New Jersey order of protection. "Joan",<sup>2</sup> armed with a certified copy of a permanent order of pro-

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\* Director of the Pace University Battered Women's Justice Center. I would like to thank "Joan", the victim of domestic violence who made me aware of the procedural gap in the federal legislation. I want to give credit to my research assistant, Cara M. Bonomolo, who discovered useful analogous case law and was the author of Sections II and III. Lisa Frisch and Colleen McGrath, from the New York State Office for the Prevention of Domestic Violence, deserve special mention for convincing me of the need for procedural simplicity. Without all of their contributions, this article could not have been written.

1. Throughout this article, victims of domestic violence will also be called "battered women." This shorthand description is acceptable because FBI statistics state that 91% of those who suffer injury at the hands of an intimate happen to be female. CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 1 (1991). This does not diminish the harm done to male victims of domestic violence, but rather reflects the widespread reality that the vast majority of those who are battered by relatives or lovers are female.

2. For obvious anonymity reasons, this article will use the alias of "Joan" to refer to the battered woman who sought the author's assistance.

tection, had fled New Jersey and moved to New York to escape her batterer. She has good reason to fear this man; he has already violated the order five times, twice by violent behavior, and is currently on probation out of a New Jersey Family Court.

I thought, "piece of cake." In December 1994, Congress enacted the federal Violence Against Women Act (VAWA)<sup>3</sup> which mandated that an out-of-state order of protection be "enforced as if it were the order of the enforcing State."<sup>4</sup> In legalese, the law requires each state to give full faith and credit to out-of-state orders of protection. In plain English, the law requires New York to protect "Joan" from her abuser.

But here is the rub: New York had no procedure to give "Joan" the protection required by VAWA. The family court turned her away because it had no procedural guidelines to effect the protection guaranteed under the Act. The police department turned her away because the family court had not accepted her order. The supreme court followed suit. The police and the courts assured "Joan" that they would rescue her if her abuser violated the New Jersey order in New York. That is similar to saying that one should not worry about contraception when abortion is an option. "Joan" sought what is the essence of an order of protection - prophylactic protection, not an after-the-fact "cure". As "Joan" naively asked me, "What does full faith and credit mean?"

Section I of this article defines the context and purpose of the full faith and credit protection guaranteed by the VAWA. Prior to the passage of the VAWA, most states refused to honor out-of-state orders of protection. Thus, the majority of domestic violence victims who crossed state lines to evade their abusers relinquished their restraining orders just when those orders may have been most important. Section 2265 was enacted as an interstate passport to safety for the battered woman on the run.

Section II describes how five states, Kentucky, New Hampshire, New Jersey, Oregon, and West Virginia, have devised ways to implement this federal guarantee and analyzes the positive and negative aspects of those procedures. Since the safety

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3. The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 16 U.S.C., 18 U.S.C., 28 U.S.C., & 42 U.S.C.).

4. 18 U.S.C. § 2265 (1994).

of the fleeing battered woman is the goal of full faith and credit protection, practices that might jeopardize her anonymity, such as Kentucky and New Jersey's requirement that the respondent receive notice of the petitioner's wish to file her order in her new jurisdiction, are not optimal.<sup>5</sup> Similarly, fees for filing the foreign restraining order in a new jurisdiction or the requirement to register with a statewide computer system are discouraged. These procedures may have a chilling effect on a woman's ability or desire to present her order in her new hometown. It is noteworthy that the VAWA specifies no prerequisite filing procedure.

Section III describes analogous legal settings in which full faith and credit has been given. The purpose of this section is to show that foreign orders of protection should be recognized, although recognizing the order would go against the public policy of the state. Examples are provided in which full faith and credit was granted to foreign judgments even though that grant contravened the public policy of the state.

Section IV creates a procedure and police training protocol; additionally, it recommends how to protect women with restraining orders so they may safely and comfortably cross state lines. While this model is designed for adoption in New York, its basic premises and contours should be appropriate for any other state. Full faith and credit suggests that police, clerks, judges, and lawyers deem a protection order valid until the respondent disproves its validity.

If an out-of-state order appears to be current, either on its face or because of the holder's verification, and if the parties involved are those named on the document, the order should be treated as if it had been issued by a court of the asylum state. This should be so whether the original order outlasts any order issuable in the asylum state, whether it is in reference to a same sex couple, who could not have obtained such an order in the asylum state, or even whether the service boxes had not been filled out. Only a liberal interpretation of section 2265 can fulfill its purpose: to provide optimal security and mobility for every "Joan" in America.

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5. See *infra* note 19 and accompanying text.

I. Section 2265 of the Violence Against Women Act: A Law Designed to Make It Easier for Battered Women to Escape Their Abusers

On August 25, 1994, the Senate passed the Violent Crime Control and Law Enforcement Act,<sup>6</sup> which included the VAWA.<sup>7</sup> On September 13, 1994, President Clinton signed the bill into law. The purpose of the VAWA is "to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence."<sup>8</sup> The VAWA received broad bipartisan backing and allocated 1.6 billion dollars in a massive attempt to curb gender-based violence.<sup>9</sup>

Subtitle B of the VAWA, entitled Safe Homes for Women,<sup>10</sup> sets forth a five-prong approach to curbing the national epidemic known as domestic violence. First, this title authorizes a national, toll-free domestic violence hotline;<sup>11</sup> second, it creates federal crimes and imposes stiff penalties for interstate commission of domestic abuse;<sup>12</sup> third, it requires each state to recognize protection orders issued in other states;<sup>13</sup> fourth, it allocates federal monies to fight domestic violence;<sup>14</sup> and, fifth, it provides states with incentives to treat domestic violence as a serious crime.<sup>15</sup> In short, Safe Homes for Women is designed to secure just that — enhancing options for battered women and providing stiffer penalties for batterers.

This article focuses on section 2265 of the VAWA, which provides for interstate enforcement of orders of protection.<sup>16</sup> Prior

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6. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of 16 U.S.C., 18 U.S.C., 28 U.S.C., & 42 U.S.C.).

7. The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 18 U.S.C. & 42 U.S.C.).

8. S. REP. NO. 138, 103d Cong., 1st Sess. 38 (1993).

9. Jan Hoffman, *Man is First Charged in Spouse Abuse Law*, N.Y. TIMES, Dec. 22, 1995.

10. The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C. & 18 U.S.C.).

11. 42 U.S.C. § 10416(a).

12. 18 U.S.C. § 2261(a) & (b).

13. 18 U.S.C. § 2265.

14. 42 U.S.C. § 3796hh(b).

15. 42 U.S.C. § 3796hh-1(b)(2).

16. 18 U.S.C. §§ 2265-66 provides in pertinent part:

to the enactment of this section, only seven jurisdictions gave full faith and credit to out-of-state orders of protection.<sup>17</sup> Thus, until recently, in more than eighty percent of the states in this country, a woman who crossed state lines to escape her abusive mate voided her own order of protection. The irony in this is apparent: those in the most acute danger (those forced to seek asylum in a foreign state) had to forfeit the only prophylactic protection (the restraining order) their government could afford to pursue their own safety.

Of course, the victim can petition the asylum state's court for another order of protection. However, she might need to satisfy new jurisdictional requirements, such as, that the abuse took place in her new home state. This burden was and is impossible to meet if the batterer has not even set foot in the asylum state. Additionally, the batterer would have to be notified, thus revealing the victim's new address— an obviously undesirable result.

## II. Problems With the Way Certain States Enforce Full Faith and Credit for Foreign Protection Orders

This section focuses on the positive and negative aspects of how five states, Kentucky, New Hampshire, New Jersey, Oregon, and West Virginia, have implemented the full faith and

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§ 2265. FULL FAITH AND CREDIT GIVEN TO PROTECTION ORDERS (a) FULL FAITH AND CREDIT. —Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe. 18 U.S.C. § 2265. See *infra* Appendix A for the full text of §§ 2265-66.

17. Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L. Q. 253, 254 n.8 (1995) [hereinafter Klein]. See KY. REV. STAT. ANN. § 426.955 (Baldwin 1992); N.H. REV. STAT. ANN. § 173-B:11-b (1994); OR. REV. STAT. § 24.185 (1993); R.I. GEN. LAWS § 15-15-8 (1994); W. VA. CODE § 48-2A-3(e) (1995). See also N.M. STAT. ANN. § 40-13-6(D) (Michie 1995) (stating full faith and credit granted only to tribal court orders); NEV. REV. STAT. § 33.090 (1993) (accepting a foreign protection order as evidence of facts on which to base issuance of their civil protection order). *E.g.*, Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1099 (1993).

credit guaranteed by the VAWA. The author analyzes these states' notice, filing, registration, and fee requirements.<sup>18</sup>

Some states, such as Kentucky and New Jersey, require that notice be sent to the batterer once a foreign order of protection is filed with the court.<sup>19</sup> Unfortunately, as soon as the batterer receives notice, he will become aware of the victim's whereabouts and the woman's safety may be jeopardized. Although the VAWA is supposed to increase a battered woman's mobility, the requirement of sending notice to the batterer defeats this purpose. Many battered women move to another state to escape and hide from their batterer. But, if a woman's batterer is sent notice of her whereabouts, she might as well have sent him a change of address card. The requirement of notice actually decreases a woman's mobility because she is unlikely to flee to a state that requires notice. Even if a woman escapes to a state that requires notice, it is unlikely that she will file the foreign order of protection with the local court; thus, her chances of having the foreign order enforced may decrease.

Other states condition the enforcement of foreign orders of protection on whether they are "similar" or "substantially similar" to orders of protection issued in the asylum.<sup>20</sup> In West Virginia, the magistrate determines whether the foreign order is "substantially similar" to those obtained in West Virginia,<sup>21</sup> and in New Hampshire the district court clerk determines the similarity and may consult a judge with any questions.<sup>22</sup> The VAWA contains no requirement that foreign orders of protection be given full faith and credit only if they are "similar" or "substantially similar" to orders of protection issued in the asylum state. The VAWA provides that a state should give full faith and credit to foreign orders of protection and enforce them as if they were issued by the asylum state.<sup>23</sup> The requirement of any sim-

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18. The backdrop for this analysis is that the VAWA created no prerequisite filing procedure whatsoever.

19. See KY. REV. STAT. ANN. § 426.960(2) (Baldwin 1992). The New Jersey policy is not statutory and is currently under review. Interview with Leah Richter, former Coordinator of the Bergen County Domestic Violence Legal Advocacy Project, in New York, N.Y. (Aug. 22, 1995).

20. See, e.g., N.H. REV. STAT. ANN. § 173-B:11-b (1994); W. VA. CODE § 48-2A-3(e) (1995) (respectively).

21. See Klein, *supra* note 17, at 260.

22. *Id.* at 262.

23. 18 U.S.C. § 2265.

ilarity creates a difficulty not intended by the VAWA. A battered woman needs to know that her foreign order of protection will be enforced no matter where she goes, not just in states that issue similar orders of protection.

In some states, foreign orders of protection must be registered or filed with the court or local police before the state will enforce them. In Kentucky, for example, the victim of domestic violence must file a certified copy of the order of protection with the court<sup>24</sup> before the police will make an arrest.<sup>25</sup> West Virginia requires that the foreign order be filed with the local police.<sup>26</sup> Oregon will give full faith and credit to foreign orders of protection for thirty days, but after thirty days the woman must file the foreign order with a circuit court clerk.<sup>27</sup> These registration requirements further impede the purpose of the Act, which does not require that a foreign order of protection be registered in order for it to be given full faith and credit.

Women who possess a valid order of protection need to be protected whether or not their order is registered or filed with the court. In states where registration is required, a woman may enter an asylum state believing that she is automatically protected by her order of protection, unaware of the exact registration requirements; she may need to invoke the protection of her order before she has a chance to register it or she may be fearful to register at all. Under any of those circumstances, her order of protection will not be enforced. Although registration may enhance enforcement, it should not be a prerequisite for arrest.

The procedures outlined above are intended to implement the guarantee of full faith and credit provided by the VAWA. Although these procedures have some positive aspects, they generally make it more difficult for a woman to escape her bat-

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24. See KY. REV. STAT. ANN. § 426.960(1) (Baldwin 1992). Since Kentucky also requires that upon filing an order of protection, notice be sent to the respondent, a battered woman is doubly discouraged from filing her order in this state.

25. See Klein, *supra* note 17, at 258.

26. See Klein, *supra* note 17, at 260 (for further information, contact the West Virginia Coalition Against Domestic Violence at (304) 765-2250).

27. OR. REV. STAT. § 24.185(1) (1993). Oregon officials contend that an unfiled order will still always be honored, even if the 30 day filing period has lapsed. Interview with Jane Zorza, National Center on Women & Family Law, Inc. (May 31, 1995).



terer than the VAWA intended. Under the VAWA, a woman should be able to take her order of protection to another state, and if necessary, present it to a police officer so that the officer may make an arrest. Her safety should not be jeopardized by notice and registration requirements or a "similar" or "substantial similarity" standard. Procedures to implement the full faith and credit guarantee should facilitate the protection of a battered woman, not encumber it.

### III. What Full Faith and Credit Means in Analogous Legal Settings

Since the laws governing orders of protection differ from state to state, situations may arise where, although the order of protection was valid in the state in which it was originally issued, it may appear to be invalid in the asylum. For example, New Jersey orders of protection are often valid for the life of the petitioner<sup>28</sup> while New York orders of protection are generally valid for a maximum of five years.<sup>29</sup> Also, in some states, courts will issue orders of protection to same sex couples, but in New York such orders will only be issued through the criminal courts.<sup>30</sup> Thus, the asylum state may sometimes question whether to give full faith and credit to the foreign order because such an order goes against the public policy of the state.

However, to achieve the purposes of section 2265, full faith and credit must be given to all orders of protection, even if the order of protection could not originally have been obtained in that state.<sup>31</sup> Generally, "a valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State

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28. Interview with Leah Richter, Former Coordinator of the Bergen County Domestic Violence Legal Advocacy Project, in New York, N.Y. (Nov. 22, 1995).

29. N.Y. CRIM. PROC. LAW § 530.12(5) (McKinney 1995); N.Y. Fam. Ct. Act § 842 (McKinney 1983 & Supp. 1995) (as amended by the Family Protection and Domestic Violence Intervention Act of 1994).

30. N.Y. Fam. Ct. Act § 812.

31. The purpose of the Act was to increase a battered woman's mobility. A battered woman must have the security that she will be protected from her batterer no matter where she moves, not just in states that would have issued her the same order of protection. Divorced and separated women, i.e., those who have left their mates, report being battered 14 times as often as women still living with their partners. *NCADV Voice*, Newsletter of the National Coalition Against Domestic Violence, Spring 1992.

would have precluded recovery in its courts on the original claim."<sup>32</sup>

In situations analogous to enforcing orders of protection, full faith and credit has been given to foreign orders and judgments where the laws of the two states differ. For example, while common-law marriages were outlawed in New York, the court in *Ram v. Ramharack*<sup>33</sup> held that a common-law marriage validly consummated in another state can be recognized in New York under the full faith and credit clause of the U.S. Constitution,<sup>34</sup> if the other state recognizes the validation of a common-law marriage. Similarly, the Supreme Court has held in numerous cases that full faith and credit must be given to judgments of another state although the action could not have been originally brought in the forum state.<sup>35</sup>

In *Williams v. North Carolina*,<sup>36</sup> the Court held that divorces granted in a foreign state are entitled to full faith and credit even though the public policy of that state would not have allowed the divorce.<sup>37</sup> The Court recognized that, unless full faith and credit were given to a divorce granted in a foreign state, a more complicated situation would arise.<sup>38</sup> Two people who were legally divorced and remarried in one state could be considered bigamists in another state.<sup>39</sup> Because society has an interest in avoiding polygamous marriages, full faith and credit should be granted to divorce decrees to prevent the situation described above.<sup>40</sup> Although the Court recognized that North Carolina had an interest in the marital status of its domiciliaries, it decided that society's interests outweighed the state's interests.<sup>41</sup> Similarly, society's interest in protecting a battered

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32. Restatement (Second) of Conflict of Laws § 117 (1971).

33. 150 Misc. 2d 1009, 571 N.Y.S.2d 190 (1991) (husband and wife resided in New York but had minimum contacts with the District of Columbia which recognizes common law marriages).

34. U.S. CONST. art. IV, § 1.

35. See, e.g., *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935); *Roche v. McDonald*, 275 U.S. 449, 452 (1928); *Christmas v. Russell*, 5 U.S. (1 Wall.) 290, 302 (1866).

36. 317 U.S. 287 (1942).

37. *Id.* at 303.

38. *Id.* at 299.

39. *Id.* at 300.

40. *Id.* at 303.

41. *Id.*

woman and insuring her mobility outweighs a state's interest in enforcing only those orders of protection that could be issued by its courts.

In another analogous setting, the Court held that a judgment should not be denied full faith and credit in one state merely because it is for taxes owed to another state.<sup>42</sup> In *Milwaukee County v. M.E. White Co.*,<sup>43</sup> a Wisconsin county brought suit in Illinois to recover on a judgment entered in Wisconsin for taxes assessed against an Illinois corporation.<sup>44</sup> The defendant argued that since a suit for taxes owed to Wisconsin could not have originally been brought in Illinois, a judgment for taxes constituted an exception to the requirement of full faith and credit.<sup>45</sup> However, the Court recognized the foreign judgment, noting that "[t]he very purpose of the full faith and credit clause was to . . . make [the several states] integral parts of a single nation . . . [and should not be lightly] set aside out of deference to a local policy . . . ."<sup>46</sup> Once again the Court weighed the interests of society in enforcing the constitutional requirement of full faith and credit against local interests.

States do not always give full faith and credit to out-of-state judgments. For example, the Uniform Child Custody Jurisdiction Act (UCCJA)<sup>47</sup> and the Parental Kidnaping Prevention Act (PKPA)<sup>48</sup> require that states give full faith and credit to out-of-state custody orders, provided that certain conditions are met.<sup>49</sup> Sometimes, courts will find a way around enforcing the foreign order. However, these custody order situations are distinguishable from situations involving orders of protection. First, the UCCJA and PKPA both provide for the modification

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42. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 279 (1935).

43. *Id.* at 268.

44. *Id.* at 269.

45. *Id.* at 270.

46. *Id.* at 276-77.

47. Uniform Child Custody Jurisdiction Act § 13, 9 U.L.A. 276 (1988).

48. Parental Kidnaping Prevention Act § 8(a), 28 U.S.C. § 1738A (1988).

49. See Uniform Child Custody Jurisdiction Act § 13, 9 U.L.A. 276 (stating the courts "shall recognize and enforce [an out of state custody order] . . . [provided that the] statutory provisions [are] substantially in accordance with this Act or . . . made under factual circumstances meeting the jurisdictional standards of the Act . . . ."); 28 U.S.C. § 1738A(a) (stating "every State shall enforce . . . any Child Custody determination made consistently with the provisions of this section by a court of another State.").

of out-of-state custody orders.<sup>50</sup> These statutory provisions allow the courts to avoid giving full faith and credit to the foreign custody orders.<sup>51</sup> Unlike the UCCJA and PKPA, the VAWA does not provide for the modification of out-of-state orders of protection. Because an out-of-state order cannot be modified, it simply must be given full faith and credit and enforced. Furthermore, courts generally do not enforce out-of-state custody orders when enforcement would not be in the best interests of the child: the person whom the order was designed to protect. Enforcement of orders of protection, however, is almost always in the best interests of the battered woman.

When an out-of-state order of protection appears to be invalid because it was not issued in accordance with the laws and policies of the forum state, the purpose of section 2265 will only be satisfied if full faith and credit is given to that order. To enforce such an order, courts should look to the analogous situations described above where full faith and credit was given to foreign judgments that could not have been obtained in the forum state.<sup>52</sup> Courts should also weigh the strong interest in simplifying the process of protecting a battered woman from her batterer against the lesser interests of the state.

#### IV. A Proposal for New York Procedure; The Police Perspective: A Training Protocol

In order for "Joan" to sleep at night knowing that New York would enforce her protection order, she had to navigate a new path carved through a thicket of legalistic concerns. "Joan" took her certified New Jersey order to the County Clerk's office with an affidavit<sup>53</sup> that fulfilled the filing requirements under chapter 54 of the New York Civil Procedure Law & Rules<sup>54</sup> and the

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50. 28 U.S.C. § 1738A(f); UCCJA § 14.

51. A forum court may modify a custody order if it determines that the decree state no longer has jurisdiction. The question of jurisdiction is a question of fact, and the forum state may make a different determination than the decree state would. Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 898 (1992).

52. See *supra* notes 23-31.

53. See *infra* Appendix B.

54. N.Y. CIV. PRAC. L. & R. 5402(a) (McKinney 1978).

substantive and procedural requirements of the Act.<sup>55</sup> I had previously discussed this affidavit with the County Clerk and a Lieutenant in the police department. The clerk notarized the affidavit and certified the New Jersey order. The clerk copied and filed the forms, charged "Joan" a small filing fee, and "Joan" then filed these copies with the police department. "Joan" thanked me profusely and the lawyer in me felt a momentary surge of success.

The battered woman's advocate in me, however, was outraged. Why did this woman, who had a perfectly good protective order, entitled by federal law to be honored in all states,<sup>56</sup> have to make over a dozen calls, traipse to several different courts and agencies, lose time from work, and pay another fee<sup>57</sup> to obtain the peace of mind and safety to which she was entitled? The rest of Section IV takes an in-depth look at this procedural dilemma.

The affidavit route that "Joan" followed has the advantage of allowing the victim of domestic violence to bypass the courts.<sup>58</sup> Certification in a recognizable and predictable manner arguably will foster greater deference to out-of-state orders and accord them the presumption of validity from the New York court system. This presumed validity should increase the comfort level and reduce liability issues for police departments seeking to balance pro-active domestic violence intervention policies with concerns about being sued for false arrest or failure to arrest.

However, a pre-arrest validation process makes the use of an out-of-state order of protection more cumbersome than federal law intended. A woman should not, each time she crosses state lines, have to spend her entire vacation or take time from a business trip to sign documents to ensure her order will be deemed valid. The purpose of full faith and credit in the VAWA is to make it easier for battered women to move from state to state. Whether a woman travels across state lines to visit her

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55. *See supra* note 7.

56. *See* 18 U.S.C. § 2265.

57. The fee ranges from \$8.00 to \$170.00.

58. No new petitions need be filed; the batterer need not be informed where the victim has fled; and no new attorney's fees need be paid nor excessive time lost from the victim's job.

mother, to work in an adjacent state, or to hide from her batterer, her order should be a dependable shield against future abuse. The Act is procedurally silent on how it should be implemented, however, the process should be as simple and efficient as possible. Additionally, this optional affidavit process might be erroneously construed by law enforcement as a prerequisite to arresting a batterer. The purpose of the Act would be defeated by any process that makes it difficult for a woman to have an order of protection honored by the police when she needs it most—when the batterer has discovered the victim's new address and is walking up her front steps.

What should be done? Just as custody orders are presumed valid until they are challenged in court,<sup>59</sup> orders of protection should enjoy the same presumption. Thus, the role of law enforcement becomes crucial. Police training should emphasize that exigent circumstances require law enforcement, operating in good faith, to honor out-of-state orders even without a pre-arrest validation process. It is important that law enforcement officials not perceive a validation process as necessary should an arrest be based on probable cause to believe that a defendant or respondent is currently violating an out-of-state order.

The mandatory arrest provisions of New York's Family Protection and Domestic Violence Intervention Act of 1994<sup>60</sup> do not abate just because an order of protection was not issued in New York; section 2265 requires that an out-of-state order be enforced as if it were a New York order, provided that the substantive and procedural requirements of the Act are met.<sup>61</sup> The officer who answers the call of a Bronx woman whose Iowa order of protection is being violated as her husband knocks on her door should ask her if she has a valid order, and then arrest the husband. Probable cause will exist because the officer will have a good faith belief that there is a valid order. In addition, he will have witnessed the violation of it. If the husband has fled,

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59. Memorandum from Michele Olvera to Marilyn Nejelski *Battered Women's Justice Project* (Jan. 12, 1995) (on file with the Pace University Battered Women's Justice Center).

60. Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, § 32, 1994 N.Y. Laws 786, 796 (codified as amended at Crim. Proc. § 140.10).

61. See 18 U.S.C. § 2265.

the officer should take a statement from the victim and obtain a warrant for the husband's arrest.

If the holder of an out-of-state order is not in imminent danger, but, like "Joan", wants to have her order recognized to ensure her sense of personal safety, she should be able to have a court clerk or law enforcement agent enter the order in the statewide registry of orders of protection. Such a registry has been in operation in New York since October 1, 1995.<sup>62</sup> There should be no charge for this ministerial function.<sup>63</sup> The law enforcement agent or court clerk should presume the order is valid and register it pending speedy verification by the clerk that the minimal jurisdiction, due process, and "no mutual order"<sup>64</sup> provisions are satisfied.

Furthermore, there should not be a time limit for registering an out-of-state order or a penalty for non-registration. Some victims of domestic violence who relocate in another state may not wish to reveal anything about their former lives, including that they possess a valid order of protection. A woman who travels hundreds of miles to escape from a batterer may not want to reveal her whereabouts, even by putting her name on a statewide law enforcement computer link-up. The fact that an order is not in a registry should have no bearing on its validity and enforceability.

The Pennsylvania Battered Women's Justice Project has created a "Certification of Protection/Restraining Order," which the project suggests issuing states fill out, certify, and attach to all orders of protection at the time the victim initially receives the order.<sup>65</sup> This "certification at origin" approach would

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62. New York has recently agreed to input out-of-state protection orders. Such a registration is not mandatory and will take place only at the victim's request. Interview with Jan Fink, Deputy Counsel for the New York Office of Court Administration in New York, N.Y. (Nov. 3, 1995). See Memorandum from Michele Olvera to Marilyn Nejelski for information on registries in other states, *Battered Women's Justice Project* (Jan. 12, 1995) (on file with the Pace University Battered Women's Justice Center) (according to research compiled by the Battered Women's Justice Project in Pennsylvania, 24 states currently have or are creating similar statewide registries).

63. A woman who crosses state lines to hide from a stalking or otherwise dangerous abuser may not have enough money for food, let alone a filing fee.

64. Mutual orders of protection are orders entered against both parties, which are based on the same incident.

65. See *infra* Appendix C.

strengthen a presumption of validity for out-of-state orders, because it enumerates the requirements of section 2265 of the VAWA and certifies that each has been met. Alternatively, a simple stamp, like those notaries use, might be created so that those who issue orders of protection could stamp each order to indicate that the substantive requirements of the VAWA had been satisfied prior to its issuance. Optimally, states should create uniform forms for protection orders with language that guarantees the orders conformity with the requirements of section 2265.<sup>66</sup>

However, the certification attachment or stamped validation would be a boon to litigating on the order, rather than to its procedural implementation. Misunderstanding the purpose and limitations of these processes could be dangerous. For example, what if a certification form gets separated from the order, or if one of thousands of part-time magistrates neglects to affix the "Certification of Protection/Restraining Order" or stamp the document? The absence of such an attachment might result in a police officer's refusal to recognize the enforceability of an order that is perfectly valid under the VAWA.

Moreover, if any certification process is adopted in the hundreds of issuing courts in each of the fifty states,<sup>67</sup> it will not satisfy every concern for those who must litigate a violation of an out-of-state order. For example, New Jersey's permanent orders, unlike those in New York, are valid for the life of the petitioner. If the holder of a 1989 New Jersey order of protection attempts to have it honored in non-exigent circumstances in New York, it would be necessary to determine whether this order is still valid. Similarly, New York family courts, unlike courts in New Jersey and elsewhere, will not grant a restraining order in a family offense case to a member of a same

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66. New York State orders of protection state,

[f]ederal law provides that this order must be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if it is established that the person against whom the order is sought has or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect that person's rights (18 U.S.C. 2265).

N.Y. Temporary Order of Protection, Form SC-1, (Dec. 20, 1994); N.Y. Order of Protection, Form SC-2, (Dec. 20, 1994).

67. This is very unlikely to occur in the near future.



sex couple.<sup>68</sup> Should New York honor orders it could not issue in the first instance? The answer is unequivocally "yes". That, "Joan", is what 'full faith and credit' means. It is important to emphasize that, if exigent circumstances exist, the police should exercise their discretion by first ensuring the safety of the holder of an out-of-state order and, only second, verifying the validity of the order.

In May 1995, the New York State Office for the Prevention of Domestic Violence invited interested agencies to a meeting to create a standard procedure for implementing protection under section 2265 throughout New York State. Representatives from the United States Attorney General's Office, the New York State Office of the Governor, the Office of Court Administration, the Counsel for the State Police, the New York State Coalition Against Domestic Violence, the Division of Criminal Justice Services, the Sheriff's Association, and the Pace University Battered Women's Justice Center discussed this procedural dilemma.

New York has the opportunity to be a trend-setter in this area; no state has yet developed a statewide procedure to register out-of-state orders coupled with a simple, out-of-court filing process that will neither require victims to file a new petition nor to notify their abusers of this petition and thus of the victim's new address. Such a procedure would also be consistent with the New York Legislature's recent amendments to the Family Court Act and the Domestic Relations Law.<sup>69</sup> These amendments require that, in family court and matrimonial proceedings, mutual protection orders may be issued in the absence of a written filing by the party seeking the order and a judicial finding on the record as to the applicant's entitlement to the order.<sup>70</sup> These amendments make New York mutual orders of protection eligible for full faith and credit under the VAWA,<sup>71</sup> and thus, show the state's intent to fully comply with section 2265.

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68. See *supra* note 19 and accompanying text.

69. See N.Y. Assembly Bill 6827, Reg. Sess., 1995-96 (signed by Governor Pataki, August 3, 1995).

70. *Id.*

71. See 18 U.S.C. § 2265.

The challenge is to create a process that does not place more hurdles along the path a battered woman must navigate to insure her own security. An attempt to create such a process follows.

TRAINING PROCEDURES FOR POLICE OFFICERS:  
Relative to Out-of-State Orders of Protection

1. PURPOSE

The purpose of this section is to prescribe a course of action that police officers will follow to enforce a foreign order of protection.

2. POLICY

It shall be the policy of the police department to recognize and enforce foreign orders of protection so that such orders shall have the same impact and effect as if they were orders of protection issued in New York.

3. DEFINITIONS

A. *FOREIGN ORDERS OF PROTECTION* include any protective order issued by any other state, Indian tribe, territory or possession of the United States, Puerto Rico, or the District of Columbia, whether or not the order is similar to a protective order issued in New York state.

B. The *FULL FAITH AND CREDIT* provision of the Violence Against Women Act<sup>72</sup> (VAWA) requires that foreign orders of protection be recognized and enforced as if they were the orders of a New York Court.

C. *MUTUAL ORDERS OF PROTECTION* are orders entered against both parties, which orders are based on the same incident. Under the VAWA, mutual orders of protection are discouraged.<sup>73</sup>

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72. 18 U.S.C. § 2265.

73. 18 U.S.C. § 2265 (c) (1) (2). Under the VAWA, mutual orders of protection are:

Not entitled to full faith and credit if—(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or (2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

*Id.*

#### 4. DISPATCHER PROCEDURES

The dispatcher will give a domestic violence call the same priority as any other life-threatening call whether the order of protection being violated was issued within the state or without.

#### 5. RESPONDING OFFICER PROCEDURES

##### A. Emergency Situations

In an emergency situation a foreign order of protection should be presumed valid when presented to the officer. The police should exercise their discretion by first ensuring the safety of the holder of an out-of-state order and, only second, verifying the validity of the order.<sup>74</sup>

1. When an officer responds to the call of a woman whose out-of-state order of protection is being violated at that moment, the officer should ask the woman if she has a valid order.

2. If the woman's order appears to be facially valid, then the officer should make an arrest. There will be probable cause for arrest because the officer will have a good faith belief that there is a valid order and he or she will witness the violation of it.

3. The minimum requirement of facial validity is satisfied if:

A. the order of protection contains the names of the correct parties, and

B. the order of protection has not expired.

4. Defects on the face of the order, such as no service boxes checked, or a defective certification, do not necessarily defeat the validity of the order for purposes of arrest. In such cases the woman's words can fill in the blanks or correct misconceptions.

5. Just as when a victim has a New York order of protection, lawful arrest may be made even though the woman is unable to present a valid copy of the out-of-state order. When such circumstances exist, the officer shall attempt to verify the existence and terms of the

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74. An officer may receive qualified immunity from liability based on a good faith attempt to enforce a protection order.

order through Department records, the registry, NYS-PIN, or with the issuing court or police department.

#### B. NON-EMERGENCY SITUATIONS

In a non-emergency situation the officer should assist the woman if she wishes to present her foreign order of protection for entry in the statewide registry of orders of protection. The order should be presumed valid and registered. The clerk or officer should verify that service was made.

#### 6. MUTUAL ORDERS OF PROTECTION

In the case of foreign mutual orders of protection the officer should make an arrest unless it can be determined from the face of the order of protection or from speaking with the victim that the foreign order would be an unenforceable order under VAWA.<sup>75</sup> "Yes" answers to the following questions will ensure that even a mutual order is enforceable: 1) Did the petitioner file a written pleading seeking this protection order? AND 2) Did the court make specific findings that the petitioner was entitled to that order?

A reminder: These two questions are only to be asked if the petition you are called upon to enforce is a *mutual order* of protection. These two questions, which arise out of the need to enforce a mutual order of protection, are irrelevant in the vast majority of cases because in most situations the officer will be asked to enforce only one order of protection.

#### 7. APPEARANCE TICKETS

No appearance tickets should be issued when a foreign order of protection is violated. Violation of the order may be a federal offense as well as a state offense. Since the violation may be a federal offense, the officer should contact the U.S. Attorney's office for his or her district.<sup>76</sup>

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75. After an arrest is made the court will determine whether or not the foreign mutual order of protection is entitled to full faith and credit.

76. On November 3, 1995, the Pace Battered Women's Justice Center, invited thirty-seven representatives of federal and New York state groups to review this protocol and to recommend changes. The following groups attended the meeting: New York Assembly, New York State Department of Law, New York State Police Counsel's Office, New York State Office of Court Administration, New York State Office for the Prevention of Domestic Violence, Office of the Governor, New York State Coalition against Domestic Violence, New York State Division of Criminal

### Conclusion

18 U.S.C. section 2265 should be a passport to safety - not a procedural land mine. In addition to the need for a proactive police policy, anyone who routinely comes in contact with victims of domestic violence<sup>77</sup> should assume a duty to educate battered women on using their out-of-state orders as if they were issued by their new home state. The message should be clear and unequivocal: "In the United States, your order of protection is good anywhere; don't leave home without it." We need a national registry of orders of protection, violations of such orders, and warrants based on those orders. And, certainly, the sooner relevant police training procedures are in place throughout the country, the more likely the VAWA will be able to protect what may be, as a class, the most threatened of domestic violence victims - those who are forced to cross state lines to escape and hide from their batterers.

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Justice, New York State Women's Bar Association, Colonie Police Department, New York State Attorney General's Office, New York State Division for Women, Pace University Battered Women's Justice Center, and the Domestic Violence Report/National Center on Women and Family Law. No changes were proposed and the protocol is now the basis for standard police training offered by the Office for the Prevention of Domestic Violence throughout New York State.

77. This involves, among others, matrimonial and family court attorneys, prosecutors, judges, court clerks, shelter workers, and emergency room personnel.

## Appendix A

§ 2265(b) PROTECTION ORDER. —A protection order issued by a State or tribal court is consistent with this subsection if—

- (1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and
- (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) CROSS OR COUNTER PETITION. —A protection order issued by a State or tribal court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if—

- (1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or
- (2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

§ 2266. DEFINITIONS In this Chapter—

'bodily injury' means any act, except one done in self-defense, that results in physical injury or sexual abuse.

'Indian country' has the meaning stated in section 1151.

'protection order' includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil and criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

'spouse or intimate partner' includes—

- (A) a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and

(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides.

'State' includes a State of the United States, the District of Columbia, a commonwealth, territory, or possession of the United States.

'travel across State lines' does not include travel across State lines by an individual who is a member of an Indian tribe when such individual remains at all times in the territory of the Indian tribe of which the individual is a member.

Appendix B  
AFFIDAVIT CONCERNING AN OUT-OF-STATE  
ORDER OF PROTECTION

The attached \_\_\_\_\_ (court of origin)  
Order of Protection, dated \_\_\_\_\_, which is a (temporary  
or permanent) order of protection, was certified by \_\_\_\_\_  
\_\_\_\_\_ on \_\_\_\_\_.  
The order was neither entered by default nor as a confession of  
judgment.

This no contact order was served upon \_\_\_\_\_  
\_\_\_\_\_, my then husband, on \_\_\_\_\_  
in the \_\_\_\_\_ Court. He had the right to have a hearing  
on my petition for this order. There is no mutual order of pro-  
tection that \_\_\_\_\_, my then husband  
ever received.

I request that the County Clerk of \_\_\_\_\_ (asylum state) \_\_\_\_\_  
certify the attached document and retain a copy for your file.  
(optional: I request the \_\_\_\_\_ Police Department  
retain a copy of my order of protection and that it be entered  
into the Statewide Registry of Orders of Protection.)



## Appendix C

\_\_\_\_\_  
 (Name), : IN THE \_\_\_\_\_ COURT OF  
 Petitioner, : \_\_\_\_\_ (County/Judicial District)  
 : \_\_\_\_\_ (State/Territory)  
 vs. : CIVIL ACTION - LAW  
 : PROTECTION/RESTRAINING ORDER  
 \_\_\_\_\_ (Name), :  
 Respondent. : Docket No. \_\_\_\_\_, 199\_\_

## Certification of Protection/Restraining Order

It is hereby certified that the attached is a true and correct copy of the order entered in the above-captioned action on \_\_\_\_\_ (date) and that the original of the attached order was duly executed by the judicial authority whose signature appears thereon. The order expires on \_\_\_\_\_ (date).

The order is: ☐ a civil protection/restraining order  
 OR ☐ a criminal protection/restraining order.

It is further certified that:

(a) the issuing court determined that it had jurisdiction over the parties and the subject matter under the laws of \_\_\_\_\_ (state or Indian tribe).

(b) the defendant was given reasonable notice and opportunity to be heard sufficient to protect the defendant's right to due process before this order was issued; or if the order was issued ex-parte, the court ordered that the defendant be given reasonable notice and opportunity to be heard within the time required by the law of this jurisdiction, and in any event within a reasonable time after the order was issued, sufficient to protect the defendant's due process rights.

(c) the order was otherwise issued in accord with the requirements of the Full Faith and Credit Provisions of the Violence Against Women Act; Title IV, Subtitle B, Chapter 2 of the Violent Crime Control and Law Enforcement Act of 1994. 18 U.S.C. 2265.

(d) the order was issued in accord with the requirements of the Uniform Child Custody Jurisdiction Act of this state/territory and consistent with the strictures of the federal Parental Kidnapping Prevention Act. Parental Kidnapping Prevention Act, Pub.L.No. 96-611, 94 Stat. 3566 (1980).

The attached order shall be presumed to be valid and enforceable in this and other jurisdictions.

Signature of Clerk of Court or other authorized official:

Judicial District: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ Date: \_\_\_\_\_

Seal:

BJH; VAWA; certif; revised; 2/6/95