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## The Intersection between Domestic Violence and the Child Welfare System: The Role Courts Can Play in the Protection of Battered Mothers and Their Children

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# THE INTERSECTION BETWEEN DOMESTIC VIOLENCE AND THE CHILD WELFARE SYSTEM: THE ROLE COURTS CAN PLAY IN THE PROTECTION OF BATTERED MOTHERS AND THEIR CHILDREN

## INTRODUCTION

- I. EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN
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## INTRODUCTION

It is late, well beyond the hour children should be asleep. There is a boy sitting on the edge of his bed with his arm around his shaking, sobbing sister. In the background they listen to their father's shouts and their mother's cries as he beats her yet again. These children are witnesses to domestic violence. "Children may be at their bedroom door or at the top of the stairs, or they may enter the kitchen shortly after a violent episode, but they know too well the reality of the violence and the emotional and physical consequences to their mother."<sup>1</sup> Their mother labors under the weight of her partner's abuse and her responsibility to protect her children.

In response to this violence, there has been a division between child advocates who assert that these children's needs must be put first<sup>2</sup> and domestic violence advocates who argue that mothers are doubly victimized when the state removes their children.<sup>3</sup> As one

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1. Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, in CHILDREN EXPOSED TO MARITAL VIOLENCE 371, 374 (George W. Holden et al. eds., 1998).

2. See Annette M. Gonzalez & Linda M. Rio Reichmann, *Representing Children in Civil Cases Involving Domestic Violence*, 39 FAM. L.Q. 197, 213-18 (2005) (suggesting guidelines for representing children in cases involving domestic violence).

3. See V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 244 (1996) (arguing that an overly broad application of the failure to protect doctrine punishes non-perpetrating mothers who are themselves victims); G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 114-21 (1999) (proposing a "reasonable battered mother" test in termination proceedings).

author stated, "[i]f forced to compete for the sympathies and interest of the public, a totally innocent child trumps a battered woman any day."<sup>4</sup> This note will analyze the intersection of domestic violence and child abuse and neglect in terms of how they affect a victim mother. In addition, it will ask if the justice system can play a role in empowering victim mothers to help their children while tackling their own battle to free themselves from abusive relationships.

Social scientists have debated the appropriateness of using the terms "marital violence," "domestic violence," and "spousal abuse" to describe men beating their wives.<sup>5</sup> While this note will concentrate on women who are victims of domestic violence, it will sometimes use gender-neutral terms. Even though children suffer the same ill effects of witnessing domestic violence perpetrated by either partner, this note will focus on mother victims who have not participated in the violence. This focus will avoid the complication of blaming the mother for her active participation in the violence in the home and harm to the child.

Part I of this note will discuss social science research that demonstrates the adverse effects witnessing domestic violence has on children. Part II examines how the lobbying efforts of child advocates and domestic violence advocates have led to a greater awareness of these ill effects. It will also trace how state legislatures have reacted to this lobbying with separate crimes and stiffer penalties for abusers who assault their victims in front of children. Further, it analyzes how the interests of child advocates and domestic violence advocates diverged when child welfare workers began to use the harm children experienced from witnessing abuse as a reason to remove children from the home. Part III discusses the lobbying efforts of domestic violence advocates to prevent the removal of children from mothers for allowing the children to witness domestic violence. It also examines the psychological effects children experience when they are removed because of a mother's inaction. Finally, this note traces the problems battered mothers face in custody disputes with their abusive partners. Part IV will provide a brief overview of the constitutional cases delineat-

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4. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 597 (1998).

5. George W. Holden, *Introduction: The Development of Research into Another Consequence of Family Violence*, in CHILDREN EXPOSED TO MARITAL VIOLENCE 1, 5-6 (George W. Holden et al. eds., 1998); Ernest N. Jouriles et al., *Issues and Controversies in Documenting the Prevalence of Children's Exposure to Domestic Violence*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 13, 14-15 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001).

ing the rights involved in these types of cases, including the *Nicholson* case,<sup>6</sup> which was a major victory for domestic violence advocates. In Part V, this note will analyze the different solutions to help mothers get out of violent relationships while protecting their children. It will explore ways that the justice system might help bridge the ideological divide between child advocates and domestic violence advocates by addressing the needs of all family members in a domestic violence situation, including an integrated court system of one family, one court, in which all the cases concerning a family are joined in a single court.

### I. EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN

Estimates vary on the number of children exposed to domestic violence each year, ranging from 3.3 million to ten million.<sup>7</sup> Additionally, “[i]n a national survey of over 6,000 families, the researchers found that 50% of the men who frequently assaulted their wives also frequently abused their children.”<sup>8</sup> A threshold issue is what it means for a child to be “exposed” to violence. Children’s exposure could be: (1) observing the violence directly;<sup>9</sup> (2) hearing the violence from another room and knowing their mother is being hit,<sup>10</sup> as noted in the example at the opening of this note; (3) observing the results of the violence<sup>11</sup> (for example, the mother’s injuries or evidence of a struggle); (4) hearing about the violence from another;<sup>12</sup> or (5) living in a house where domestic violence occurs but not being aware of it.<sup>13</sup> The level of exposure would seem to determine how much the violence would affect children, but no published research has addressed this specific presumption.

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6. *Nicholson v. William*, 181 F. Supp. 2d 182 (E.D.N.Y. 2002).

7. Jeffrey L. Edleson, *Should Childhood Exposure to Adult Domestic Violence Be Defined as Child Maltreatment under the Law?*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE 8, 9 (Peter G. Jaffe et al. eds., 2004); Lucy Salcido Carter et al., *Domestic Violence and Children: Analysis and Recommendations*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 4, 5 (1999); Holden, *supra* note 5, at 2.

8. Susan Schechter & Jeffrey L. Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, <http://www.mincava.umn.edu/documents/wingsp/wingsp.html> (citing PHYSICAL VIOLENCE IN AMERICAN FAMILIES (M. A. Strauss & R. J. Gelles eds., 1990)) (last visited Apr. 16, 2007).

9. Jouriles et al., *supra* note 5, at 19.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

In 2000, the National Institute of Justice conducted a study called the Spouse Assault Replication Program (SARP).<sup>14</sup> The research team discovered the following things about families with domestic violence: (1) "children were disproportionately present in households where there was a substantiated incident of adult female assault, and young children were disproportionately represented among these witnessing children;"<sup>15</sup> (2) "family violence households included high levels of additional major developmental risk factors including poverty, single-female household, and low educational level of principle care provider;"<sup>16</sup> (3) "a sizable number of children in these violent households appeared to be involved in multiple ways in the abuse incident by: (a) either literally calling for help, (b) being identified as a precipitant cause of the dispute that led to violence, or (c) being physically abused by the perpetrator."<sup>17</sup> This study clearly shows that children are not merely incidental in cases of domestic violence. They are at the center of action, and their needs have to be addressed by any system proposing to work with families of domestic violence.

Issues of domestic violence become even more complicated when race and socioeconomic status are taken into account. Poor families and racial and ethnic minorities suffer disproportionately more from domestic violence than other populations.<sup>18</sup> Two authors assert that "the harder women, especially impoverished and Black women, try to conform to socially prescribed ideals of family life, the more likely they will be judged deviant and fail in the job of parenting."<sup>19</sup> It is very difficult to separate the effects that other factors, such as poverty, may have on children independent of their presence at abusive episodes, but these other factors could be a reason why the state finds it easier to remove children from their victim mothers.

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14. John W. Fantuzzo et al., *Making the Invisible Victims of Violence Against Women Visible Through University/Community Partnerships*, in CHILDREN EXPOSED TO DOMESTIC VIOLENCE: CURRENT ISSUES IN RESEARCH, INTERVENTION, PREVENTION, AND POLICY DEVELOPMENT 9, 17 (Robert A. Geffner et al. eds., 2000) (citing J. Garner & C. Maxwell, *Published Findings from the Spouse Assault Replication Program: A Critical Review*, 11 J. QUANTITATIVE CRIMINOLOGY 3 (1995)).

15. *Id.* at 17-18.

16. *Id.* at 18.

17. *Id.*

18. Sandra A. Graham-Bermann & Hilda M. Halabu, *Fostering Resilient Coping in Children Exposed to Violence: Cultural Considerations*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE 71, 72 (Peter G. Jaffe et al. eds., 2004).

19. Lorraine Radford & Marianne Hester, *Overcoming Mother Blaming? Future Directions for Research on Mothering and Domestic Violence*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 135, 146 (Sandra Graham-Bermann & Jeffrey L. Edleson eds., 2001).

Studies demonstrate that children who witness domestic violence “exhibit more aggressive and antisocial (often called ‘externalized’ behaviors) as well as fearful and inhibited behaviors (‘internalized’ behaviors), and . . . show lower social competence than other children.”<sup>20</sup> Effects on these children can include behavioral problems, aggression, phobias, insomnia, low self-esteem, depression, poor academic performance, poor problem-solving skills, and low levels of empathy.<sup>21</sup> Some studies have shown that children from this group have a higher risk of engaging in delinquent behavior.<sup>22</sup> Continued exposure to domestic violence can cause children to experience symptoms of post-traumatic stress disorder.<sup>23</sup> Children who are exposed to domestic violence can also suffer from physical effects, such as a depressed immune system, probably due to stress.<sup>24</sup>

Studies that have focused on how the effects of marital violence differ between boys and girls have been somewhat inconclusive.<sup>25</sup> It appears clear that gender does control some of the long-term reactions to being exposed to marital violence. Sons of abusers are at an increased risk of modeling the abuser’s behavior and becoming abusers themselves as adults.<sup>26</sup> Indeed, “[t]he majority of abusive husbands have grown up in families where they were exposed to their father’s abuse of their mothers. The landmark studies in this field suggest that sons of severe batterers have wife abuse rates at 10 times the level of sons of nonviolent fathers.”<sup>27</sup> Daughters exposed to domestic violence while growing up are statistically more

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20. JEFFREY L. EDLESON, NAT’L RESOURCE CENTER ON DOMESTIC VIOLENCE, PROBLEMS ASSOCIATED WITH CHILDREN’S WITNESSING OF DOMESTIC VIOLENCE 1 (1999), reprinted in WOMEN’S LAW PROJECT AND SUPPORT CENTER FOR CHILD ADVOCATES, DECIDING CHILD CUSTODY WHEN THERE IS DOMESTIC VIOLENCE: A BENCHMARK FOR PENNSYLVANIA COURTS, APPENDIX D-1 (2005).

21. Carter et al., *supra* note 7, at 6; see also Sandra A. Graham-Bermann, *The Impact of Woman Abuse on Children’s Social Development: Research and Theoretical Perspectives*, in CHILDREN EXPOSED TO MARITAL VIOLENCE 21, 27 (George W. Holden et al. eds., 1998).

22. See Graham-Bermann, *supra* note 21, at 27.

23. Carter et al., *supra* note 7, at 6.

24. Jennifer L. Hardesty & Jacquelyn C. Campbell, *Safety Planning for Abused Women and Their Children*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE 89, 97 (Peter G. Jaffe et al. eds., 2004).

25. Holden, *supra* note 5, at 9.

26. Lundy Bancroft & Jay G. Silverman, *Assessing Abusers’ Risks to Children*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE 101, 103 (Peter G. Jaffe et al. eds., 2004); see also Sarah M. Buel, *Addressing Family Violence Within Juvenile Courts: Promising Practices to Improve Intervention Outcomes*, in THE VICTIMIZATION OF CHILDREN: EMERGING ISSUES 273, 275-76 (Janet L. Mullings et al. eds., 2003).

27. Jaffe & Geffner, *supra* note 1, at 376.

likely to enter into abusive relationships and are less likely to report abuse when it occurs.<sup>28</sup>

As there have been only a limited number of studies that have examined children who were exposed to domestic violence but were not victims of abuse themselves, more studies need to be conducted to know the exact effects on this population.<sup>29</sup> Also, many of the studies that have been done have focused on children in battered women shelters,<sup>30</sup> perhaps because "the only level of children exposed to maternal assault currently visible to researchers and other professionals are those in domestic violence shelters."<sup>31</sup> The problem, however, is that mothers and children in shelters tend to reflect the most serious cases of domestic violence and fail to reflect the wide range of types and severity of domestic violence.<sup>32</sup> Also, it is difficult for researchers to separate the effects of the high stress of leaving the family home and the uncertainty of living in a temporary shelter from the effects of exposure to domestic violence.<sup>33</sup> Additionally, within these studies typically the mother is the sole informant of the level of violence witnessed and the subsequent behavioral and emotional responses in the child.<sup>34</sup> Researchers have pointed out, however, that when children from violent homes are interviewed, they often can detail much more of the abuse than their parents realized.<sup>35</sup> Often the mother is unaware of the full extent of her child's exposure to her partner's abuse or is too ashamed to report it.<sup>36</sup>

One group of researchers studied the parenting of battered women and found that battered mothers showed more aggression toward their children and exhibited more parenting stress than mothers in the control group but did not necessarily show diminished

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28. Bancroft & Silverman, *supra* note 26, at 103; see also Jaffe & Geffner, *supra* note 1, at 376.

29. Edleson, *supra* note 7, at 9.

30. For a discussion of the instruments used in studying children at battered women's shelters see Holden, *supra* note 5, at 6-7.

31. Fantuzzo et al., *supra* note 14, at 15.

32. *Id.*

33. Timothy E. Moore & Debra J. Pepler, *Correlates of Adjustment in Children at Risk*, in CHILDREN EXPOSED TO MARITAL VIOLENCE 157, 159 (George W. Holden et al. eds., 1998).

34. Kathleen J. Sternberg et al., *Using Multiple Informants to Understand Domestic Violence and Its Effects*, in CHILDREN EXPOSED TO MARITAL VIOLENCE 121, 124-25 (George W. Holden et al. eds., 1998).

35. Joy D. Osofsky, *Children as Invisible Victims of Domestic and Community Violence*, in CHILDREN EXPOSED TO MARITAL VIOLENCE 95, 104 (George W. Holden et al. eds., 1998).

36. Sternberg et al., *supra* note 34, at 126-29.

parenting.<sup>37</sup> The study had limitations, however, including using the mothers' self-reports of their own behavior and the difficulty in analyzing the quality of the mother-child relationship.<sup>38</sup>

There are several factors that contribute to how a child reacts to exposure to violence, including the severity of violence.<sup>39</sup> In addition, outside circumstances affect a child's reaction, including the mother and child leaving the family home.<sup>40</sup> These circumstances can include how the community response to family violence affects the way children cope with their exposure; "the amount of television and movie violence, society's tolerance for abusers, and the lack of a strong community response when abuse does occur (e.g., no court sentences for abusers) may all play a part in the extent to which violence in the family affects the child."<sup>41</sup> If how a community responds to family violence affects how a child ultimately adapts, then developing an effective and coordinated response to domestic violence that focuses on all the family members becomes even more important.

Studies have indicated that the strength of the child's relationship with his mother<sup>42</sup> and the mother's ability to provide emotional support may be the most important factors in determining the children's ability to cope with exposure to violence in the home.<sup>43</sup> If the mother is the primary caretaker, her reaction and ability to cope with the violence will affect how the child adjusts.<sup>44</sup> Unfortunately, as the victim of the violence, the mother is often unable to cope with her own emotions and can become depressed and emotionally unavailable to her children.<sup>45</sup> As one author described:

As victims of domestic violence, mothers' problems take on another dimension. They may become so preoccupied with safety and survival that they cannot be mindful of their children's

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37. A discussion of the methodology and complete results of this study are beyond the scope of this note. For more details, see George W. Holden et al., *Parenting Behaviors and Beliefs of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE 289, 326-27 (George W. Holden et al. eds., 1998).

38. *Id.* at 327-29.

39. Peter G. Jaffe et al., *Domestic Violence and High-Conflict Divorce: Developing a New Generation of Research for Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 189, 195 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001).

40. *Id.*

41. Graham-Bermann, *supra* note 21, at 24.

42. Bancroft & Silverman, *supra* note 26, at 102.

43. Carter et al., *supra* note 7, at 6.

44. Graham-Bermann, *supra* note 21, at 24.

45. Osofsky, *supra* note 35, at 106.



needs. They may develop posttraumatic stress disorder symptoms and depression. As they numb themselves to the violence in their lives, they may be unable to be empathic about the effect on their children.<sup>46</sup>

The response of child advocates to this situation has been to focus on the children's best interest, which often leads to the child's removal from the home.<sup>47</sup> Clearly the research on the effect witnessing violence has on children must be considered, and children must be a major focus of any intervention into a family experiencing domestic violence. Just as clear from the research, however, is how much children can be helped by simultaneously helping the battered mother adapt and stabilize her situation.<sup>48</sup>

## II. SOCIETAL RESPONSES TO EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN

Several authors have noted that children in homes with domestic violence are "hidden" or "silent" victims.<sup>49</sup> Other terms used to describe them include "forgotten," "unacknowledged," and "unintended" victims.<sup>50</sup> Psychologist George Holden asserted, "[w]hen these children are compared with other victims of family violence and maltreatment, such as battered women or children who have been physically or sexually abused, these labels are indeed accurate."<sup>51</sup> In light of the above studies on the ill effects witnessing domestic violence has on children, a movement is developing to define the exposure as psychological maltreatment.<sup>52</sup> Originally, domestic violence and child advocates shared the goal of increasing recognition of the detrimental effects that exposure to domestic violence had on children.<sup>53</sup> Professor Bernadine Dohrn addressed the courts' lack of attention to the plight of children in cases of domestic violence and its consequences, stating that

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46. *Id.*

47. Colleen Friend, *Aligning with the Battered Woman to Protect Both Mother and Child: Direct Practice and Policy Implications*, in CHILDREN EXPOSED TO DOMESTIC VIOLENCE 253, 254-56 (Robert A. Geffner et al. eds., 2000).

48. Osofsky, *supra* note 45, at 106-07.

49. Holden, *supra* note 5, at 1.

50. *Id.*

51. *Id.*

52. Jaffe & Geffner, *supra* note 1, at 381.

53. Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 218 (2004).

[a]t the very least, the invisibility of children means domestic violence courts fail to address the trauma children experience as witnesses to violent family relationships, and fail to address the lessons children learn: girls are trained to grow up as victims, and boys are trained to feel powerful by diminishing women.<sup>54</sup>

The combined effort of advocates for women and children led legislatures to draft separate crimes and stiffer penalties for abusers who assault their victims in front of children.<sup>55</sup>

Several states have enacted legislation that recognizes the severe consequences witnessing domestic violence has on children. Utah has enacted a law that makes the commission of domestic violence in the presence of a child a separate offense from the assault itself.<sup>56</sup> In California the penalties for the assault of one's partner can be higher if the event was witnessed by a child.<sup>57</sup> Delaware provides that when a person commits an act of violence against the victim in front of either the perpetrator's or the victim's child, he is guilty of the Class A misdemeanor of endangering the welfare of a child.<sup>58</sup> In Georgia, if a person commits an act of domestic violence when he knows a child is present or sees or hears the act, he is guilty of the second-degree misdemeanor of cruelty to children.<sup>59</sup> Finally, in Oregon, a misdemeanor assault can become a felony if witnessed by a child.<sup>60</sup> These statutes recognize what the research teaches us about the detrimental effects that witnessing domestic violence has on children. Additionally, they can be a part of a larger scheme to hold batterers accountable for their actions.

On the national level, child advocates fight for the child welfare system to address a child's need for safety and permanence.<sup>61</sup> One group of authors "contend that children in abusive environments are entitled to be regarded as *primary* rather than secondary or incidental beneficiaries of professional care, and have the right to protection by the state, with or without parental consent."<sup>62</sup> The

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54. Bernadine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 1 (1995).

55. Billie Lee Dunford-Jackson, *The Role of Family Courts in Domestic Violence: The U.S. Experience*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE 188, 193-95 (Peter G. Jaffe et al. eds., 2004).

56. UTAH CODE ANN. § 76-5-109.1 (LexisNexis 2006); see Dunford-Jackson, *supra* note 55, at 191.

57. CAL. PENAL CODE § 1170.76 (West 2006).

58. DEL. CODE ANN. tit. 11, § 1102 (2006); see Dunford-Jackson, *supra* note 55, at 191.

59. GA. CODE ANN. § 16-5-70 (2006); see Dunford-Jackson, *supra* note 55, at 191.

60. OR. REV. STAT. § 163.160 (2006); see Dunford-Jackson, *supra* note 55, at 191.

61. Ross, *supra* note 53, at 177.

62. Marty H. Rhea et al., *The Silent Victims of Domestic Violence — Who Will Speak?*, 9 J. CHILD & ADOL. PSYCH. NURSING 7, 10 (1996).

Adoption and Safe Families Act of 1997 (ASFA) recognizes a child's right to safety and stability.<sup>63</sup> Professor Catherine Ross posited that there were three major principles on which ASFA is based.<sup>64</sup> First, children have a need for parental continuity, which includes one adult figure to serve as a "psychological parent."<sup>65</sup> Second, children need to feel "safe, protected and loved."<sup>66</sup> Finally, children have a compressed sense of time; therefore, the third principle is a "concomitant urgency of resolution."<sup>67</sup> ASFA provides a timeline that limits the time parents have to fix the problems that led to the removal of the child from the home.<sup>68</sup>

An unintended consequence of the increased awareness of the effects of domestic violence on children was an increase in the removal of these children from their homes.<sup>69</sup> Activist Bonnie Rabin has posited that "[i]n many ways it appears that the more society learns about family violence, the more we victimize the victims."<sup>70</sup> As of yet, no one has developed a defense for battered mothers that the abuse they experience prevents them from protecting their children in the presence of the abuser.<sup>71</sup> Child advocates tend to take a hard line on women who fail to protect their children from witnessing abuse.<sup>72</sup> Professor Michelle S. Jacobs noted that "it is easy to reach the conclusion that [a battered mother] is somehow deviant or unfit because she keeps her children in a household where there is violence. The service provider's inquiry may go no further."<sup>73</sup> Some researchers have posited that child services workers have not focused on the batterer because the mothers are easier to control.<sup>74</sup> These researchers have also asserted that the child welfare system has not been able to hold abusers accountable in the past.<sup>75</sup> In fact, the growing number of accusations by welfare workers that mothers are failing to protect their children from witnessing domestic violence could be "directly attributable to the

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63. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

64. Ross, *supra* note 53, at 195.

65. *Id.*

66. *Id.*

67. *Id.*

68. Adoption and Safe Families Act § 103(a)(3)(E).

69. Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1111 (1995).

70. *Id.*

71. Jacobs, *supra* note 4, at 585.

72. *Id.* at 598-99.

73. *Id.*

74. THE GREENBOOK NAT'L EVAL. TEAM, THE NATIONAL CENTER FOR STATE COURTS, THE GREENBOOK DEMONSTRATION INITIATIVE: INTERIM EVALUATION REPORT 77 (2004).

75. *Id.*

child welfare system's failure to focus on the behavior of batterers."<sup>76</sup> Even if there is an acknowledgment that women are victims, child advocates assert that the children's health and safety must come before the mother's right to keep her children.<sup>77</sup> Child protective services workers must make quick decisions to determine the safety of the child, and in making that determination, it is understandable that a worker might decide that if a woman is unable to protect herself, she in turn cannot protect her child.<sup>78</sup>

Judges often view battered mothers as victims because the battered mothers have come to the court looking for a civil protective order.<sup>79</sup> As battered women may often attain the status of victims in the protective order process, it is not surprising that judges make the assumption during custody proceedings that "the parent so labeled suffers from weakness, ignorance or denial, indifference, or impaired caretaking ability."<sup>80</sup> Analysts Andrea Farney and Roberta Valenti propose two reasons for this assumption:

One reason for this is that lawyers and judges, like so many individuals in our society, are reluctant to acknowledge the possibility that domestic violence can ravage anyone's life — thus, a person suffering from domestic violence must have some kind of vulnerability that makes her particularly susceptible to being victimized. Another reason is the misguided view that leaving the relationship should be the only goal for domestic violence survivors and that failure to do so "proves" that a woman's parental fitness is compromised by "violence-induced mental trauma."<sup>81</sup>

The question remains unanswered whether battered mothers could protect their children if they are helped to get outside the sphere of their batterer. Perhaps "[b]laming the mother avoids the necessity of examining the ways in which the courts, police and public unwillingness to address the issue of violence within the home contributes to the ongoing empowerment of the abuser."<sup>82</sup> Any system, however, that proposes to address domestic violence must include a component that holds batterers accountable for their actions and avoids blaming a mother simply for being a victim of the abuse.

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76. Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 615 (2004).

77. Rabin, *supra* note 69, at 1114.

78. Schechter & Edleson, *supra* note 8.

79. Andrea C. Farney & Roberta L. Valenti, *Creating Justice Through Balance: Integrating Domestic Violence Law into Family Court Practice*, 54 JUV. & FAM. CT. J. 35, 39 (2003).

80. *Id.*

81. *Id.*

82. Jacobs, *supra* note 4.

## III. REMOVAL OF CHILDREN FROM DOMESTIC VIOLENCE SITUATIONS

Domestic violence advocates argue that removing children from their abused mothers perpetrates a double victimization of mothers: first at the hands of their abusers and then at the hands of the State.<sup>83</sup> Bernadine Dohrn asserted that "[t]he ubiquitous legal standard of 'the best interest of the child' . . . has been turned into a bludgeon against women even when there is no evidence of danger to a child."<sup>84</sup> Other commentators have argued that child protective services workers have a bias against mothers and have a single-minded focus on the child's interests without giving the child's situation any context.<sup>85</sup> Even within feminist literature there has been a split in how to view victim mothers. One faction has attempted to bring attention to the type of victimization of women that domestic violence perpetrates and how this victimization inhibits a battered mother's ability to protect her child.<sup>86</sup> Conversely, another group of feminist writers eschews the label of victim for battered mothers.<sup>87</sup> While the latter group acknowledges the ill effects of domestic violence on the lives of women, they emphasize the battered woman's ability to choose and act as a free agent.<sup>88</sup> Of course, the label one ultimately puts on victim mothers frames the way the child welfare system and the courts approach domestic violence cases. Domestic violence advocates complain that the courts do not understand the complicated dynamics of domestic violence relationships and do not do enough for women who are victims of domestic violence.<sup>89</sup> When those women are mothers, the situation only becomes more complicated. One group of researchers asserted that

[i]n effect, it appears that the state fails to intervene on behalf of abused women until such time as it can be shown that her children might also be being abused. . . . The batterer and the state conveniently re-direct the focus onto the battered woman: for being battered in the first place and again for failing to protect.<sup>90</sup>

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83. Ross, *supra* note 53, at 218.

84. Dohrn, *supra* note 54, at 1.

85. Ross, *supra* note 53, at 218-19.

86. Lorraine Radford & Marianne Hester, *Overcoming Mother Blaming? Future Directions for Research on Mothering and Domestic Violence*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 135, 143 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001).

87. *Id.*

88. *Id.*

89. *Id.*

90. MARTHA WADE STEKETEE ET AL., NAT'L CENTER FOR STATE COURTS, IMPLEMENTING AN INTEGRATED DOMESTIC VIOLENCE COURT: SYSTEMIC CHANGE IN THE DISTRICT OF COLUMBIA 12 (2000).

Battered women are often perceived as being susceptible to abusive relationships, and courts and the State often assume that a mother will either remain with her abuser or enter other abusive relationships, leaving the child at risk.<sup>91</sup> Cases in which a mother is accused of failing to protect her child from domestic violence in the home make clear that the State expects that the mother's abuse should warn her that her child is in psychological and physical danger.<sup>92</sup> When a woman comes to the State for assistance, only to discover that she might be found culpable for failing to protect her child from abuse or from witnessing the abuse, she is less likely to seek help in the future.<sup>93</sup> This situation could mean the abuse will continue and neither the mother nor the child will receive the help and services they need.

The manner in which many state statutes define neglect enables easier removal of children who witness domestic violence. For example, "[s]tatutes typically define neglect primarily in terms of parental conduct or home environment, with no requirement for a showing of actual harm."<sup>94</sup> The Virginia Code defines an abused and neglected child as any child "[w]hose parents . . . creates or inflicts [sic], threatens to create or inflict, or *allows to be created or inflicted upon* such child a physical or mental injury by other than accidental means."<sup>95</sup> Under this definition, the State could allege that an abused mother allowed her children to have a mental injury inflicted upon them by letting them witness domestic violence. In *Jenkins v. Department of Social Services*,<sup>96</sup> the Virginia Court of Appeals held that "the statutory definitions of an abused or neglected child do not require proof of actual harm or impairment having been experienced by the child. The term 'substantial risk' speaks *in futuro*."<sup>97</sup> Applied to domestic violence, this holding could mean that children can be removed from their victim mothers for future effects that exposure to domestic violence could cause.

An even more controversial result occurs when states have statutorily defined witnessing domestic violence as child neglect.<sup>98</sup> The National Clearinghouse on Child Abuse and Neglect Information recommends that definitions of child abuse and neglect include

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91. Rabin, *supra* note 69, at 1111-12.

92. *Id.* at 1115.

93. STEKETEE, *supra* note 90, at 13.

94. Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 533 (1996).

95. VA. CODE ANN. § 16.1-228 (2006) (emphasis added).

96. 409 S.E.2d 16 (Va. Ct. App. 1991).

97. *Id.* at 19.

98. Edleson, *supra* note 7, at 17-18.

allowing a child to witness domestic violence.<sup>99</sup> When the statute was changed in Minnesota, the system was flooded with cases of children who had been exposed to domestic violence.<sup>100</sup> The results were so overwhelming and expensive in Minnesota that the state legislature repealed the change in April of 2000.<sup>101</sup>

In Florida, legislators enacted a law making judges mandatory reporters of child abuse.<sup>102</sup> When victims of domestic violence came into court for protective orders, they had to detail the events that brought them to court.<sup>103</sup> Often this meant describing incidents of violence in the home that children witnessed.<sup>104</sup> As mandatory reporters, judges had to report to child protective services that children had been present during the acts of violence.<sup>105</sup> At the same time, Florida's child protective services agency interpreted the child abuse statute to include a child witnessing domestic violence.<sup>106</sup> The result was children being removed from the mothers who filed for protective orders and finally a decrease in the number of women seeking protection in the courts.<sup>107</sup> The protective services agency eventually changed the way they interpreted the child abuse statute.<sup>108</sup>

One topic that has not garnered much attention in this debate is the detrimental effects of removing children from their homes. Catherine Ross discussed the tension between two goals of the child welfare system: 1) protecting children from further harm within the home if the state fails to intervene, and 2) protecting children from the trauma of being removed from their homes.<sup>109</sup> She further stated that "[t]he child suffers the trauma of separation, leading to such symptoms as fear, anxiety, depression, a diminished sense of self and regressive behavior. . . . Children frequently believe that they are responsible for the breakup of the family following domestic violence. . . ."<sup>110</sup> It is important for any response to domestic violence in families to address the damage that can occur to a child upon removal so that the solution does not contribute to further harm to the child.

99. *Id.* at 18.

100. *Id.*

101. *Id.*; see also MINN. STAT. ANN. § 626.556 (repealed 2000).

102. FL. STAT. § 61.13 (2006); see Dunford-Jackson, *supra* note 55, at 195.

103. Dunford-Jackson, *supra* note 55, at 195.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Ross, *supra* note 53, at 221-22.

110. *Id.*

Even children who are abused by their parents develop strong attachments to them and can suffer when separated from them.<sup>111</sup> Professor Marsha Garrison delineated the problems that can arise from a child's separation from his parents:

Without parental contact, the child will tend to base his impressions of the lost parent solely on fantasy; some children may therefore idealize their absent parents and dream about a future reunion. This can impede the child's ability to form realistic current relationships. Conversely, the child may exaggerate the parent's faults. This can hurt the child's own self-esteem, since children tend to identify with the image they hold of their parents.<sup>112</sup>

There can also be a painful separation with other attachments the child has. Often the State cannot keep siblings together in foster care, and upon termination siblings may be permanently separated by adoption.<sup>113</sup> Researchers have noted that children interviewed in foster care cite their separation from siblings as "one of the most painful parts of their experience."<sup>114</sup> More comparison is needed between the cost of foster care and services to children removed from their homes and the costs of up-front measures to prevent removal. Such research might make lobbying for changes in the court's approach to domestic violence cases easier.

Some states have modified their statutes concerning children who witness domestic violence to demonstrate a more moderate approach.<sup>115</sup> Alaska allows the court to hold that a child who has witnessed domestic violence as "in need of aid," so the child can receive services.<sup>116</sup> In addition, the statute does not force a mandatory reporter to report a child if he has reasonable cause to believe the child is not presently in danger of mental or physical injury because of the exposure.<sup>117</sup> In Oregon, domestic violence cases are treated differently in that the victim mothers do not have to follow some of the same requirements as other parents.<sup>118</sup> Particularly, some of the stiff deadlines for obtaining stable housing and employ-

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111. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 465-66 (1983).

112. *Id.*

113. Ross, *supra* note 53, at 224-25.

114. *Id.* at 225

115. Dunford-Jackson, *supra* note 55, at 197-98.

116. ALASKA CODE § 47.10.011, 47.17.020 (2007); *see* Dunford-Jackson, *supra* note 55, at 197.

117. ALASKA CODE § 47.17.020 (2007); *see* Dunford-Jackson, *supra* note 55, at 197.

118. OR. REV. STAT. § 411.117 (2006); *see* Dunford-Jackson, *supra* note 55, at 197-98.



ment are softened for victims of domestic violence.<sup>119</sup> Finally, Minnesota requires the welfare agency to consider the protection of the child and the victim mother and the individual circumstances in each case in deciding what services to provide and whether removal is warranted.<sup>120</sup> These statutes are an important step in recognizing that there are differences between cases where domestic violence is present and other types of child welfare cases.<sup>121</sup> This recognition is essential to any system that is designed to respond to domestic violence cases and effectively meet the needs of the family members.

Another problem that arises when families of domestic violence come to the attention of the State is that the families are often involved with multiple courts.<sup>122</sup> The abuser may be in criminal court facing charges for domestic abuse.<sup>123</sup> The family also may have come to the attention of child protective services and may face termination proceedings.<sup>124</sup> This legal complexity is paired with emotional turmoil:

this same family may be in family court, where the victim hears that contact with their other parent, the abuser, is so important to the children that she faces contempt of court and even loss of custody to that very abuser if she fails to make them available for visitation.<sup>125</sup>

The family may face conflicting court orders and mixed messages from different courts, as one court often does not know what the other court is doing.<sup>126</sup>

These conflicting messages can sometimes send a battered mother back to her abuser.<sup>127</sup> If the State removes the children from the mother because of her instability after leaving the abuser, the woman may believe returning to her abuser will help her regain custody.<sup>128</sup> Bernadine Dohrn delineate the consequences of this action, arguing that the battered mother "may view this as an appropriate legal punishment for her perceived failure as a wife and mother. The abuser will feel confirmed in his practice of 'blaming' her. The couple may be sent to counselling or parenting classes,

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119. OR. REV. STAT. § 411.117 (2006); see Dunford-Jackson, *supra* note 55, at 197-98.

120. MINN. STAT. ANN. § 626.556 (2006); see Dunford-Jackson, *supra* note 55, at 195.

121. See Dunford-Jackson, *supra* note 55, at 189.

122. *Id.* at 194.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 194-95.

127. Dohrn, *supra* note 54, at 8.

128. *Id.*

reinforcing the battered mother's self-blame and low self-esteem."<sup>129</sup> These consequences would clearly be devastating to any meaningful resolution for these families.

While child advocates often blame mothers for not leaving their abusers to protect their children, it is interesting to note that danger to children does not necessarily end when a victim mother leaves her abuser.<sup>130</sup> Two researchers have noted that "[there exists] the mistaken assumption among professionals, including judges and custody evaluators, that children are in less danger from an abuser once a couple is no longer living together, when the reality is often the opposite."<sup>131</sup> For example, there is a high rate of serious assaults by abusers after the couple separates, and the children often witness these episodes.<sup>132</sup> Another group of researchers noted that batterers do not end their attempt to control their victims after separation: "Lengthy and costly litigation, fear of abduction, harassment, intimidation and violence during transfers, and the real possibility of losing custody are issues that may plague battered women during a time which they anticipated being free from abuse."<sup>133</sup> The abuser's constant attempts at controlling the victim, even after she leaves, could be one of the reasons victims return to their husbands.<sup>134</sup> Studies show that these men are often serial abusers.<sup>135</sup> Therefore, even if the victim mother leaves and no longer suffers at the hands of the children's father, the children may witness abuse to his new partner if the court awards custody or visitation to the abuser.<sup>136</sup> Courts should consider this possibility when making custody and visitation determinations.

The misplaced belief that the violence ends when the victim mother leaves the abuser often leads to a premature removal of resources: "Resources and support are then removed much more quickly, so that women coping with contact problems, frequent changes in residence, poverty, and perhaps the disturbed behavior of their children are left to muddle through."<sup>137</sup> All groups that work with these women and their children need to understand the dynamic that exists between the parties after separation to ensure the safety of both the victim mothers and the children.

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129. *Id.*

130. Bancroft & Silverman, *supra* note 26, at 101.

131. *Id.*

132. *Id.* at 102; *see also* Jaffe & Geffner, *supra* note 1, at 382-83.

133. Jaffe et al., *supra* note 39, at 193.

134. Hardesty & Campbell, *supra* note 24, at 90.

135. Bancroft & Silverman, *supra* note 26, at 104.

136. *Id.*

137. Radford & Hester, *supra* note 19, at 145 (citations omitted).

Even if women want to leave their abusers, they often have a difficult time, and it can be even harder for mothers.<sup>138</sup> One researcher describing the problem stated “[mothers] face the dilemma of balancing their own and their children’s need for safety with their belief that children need an ongoing relationship with their father. They may compromise their own safety to ensure the latter, believing that continued father contact is best for their children.”<sup>139</sup> Women may also have economic reasons for remaining with their abusers.<sup>140</sup> After being under the control of her abuser who undermined her confidence in her own abilities, she may feel incapable of supporting herself and her children.<sup>141</sup> Often abusers threaten to seek custody in an effort to control their wives and frighten them into staying.<sup>142</sup> “In this confusing environment, an evaluation that reaches conclusions based on the ‘he said/she said’ of conflicting accounts without recourse to other corroborating sources must be regarded as inherently unreliable.”<sup>143</sup> This confusion on the part of judges would naturally leave battered mothers fearful that they will lose their children to their abuser, and it could lead them to remain silent about domestic violence.

When judges consider custody issues in a divorce case, they have traditionally weighed four factors: (1) who can provide “greater stability for the children;” (2) who is more likely to put the children’s needs first; (3) who has been the primary caretaker; and (4) who is more likely to be cooperative in fostering the children’s relationship and continued visitation with the other parent.<sup>144</sup> In domestic violence cases, abusers are often the breadwinners and can provide more economic stability.<sup>145</sup> Also, the abuser is more likely than his victim to be cooperative about unrestricted visitation.<sup>146</sup> This could lead to the victim’s fear of undermining her chances in a custody dispute, since the judge might misread fear of contact with her abuser as a lack of cooperation in fostering her children’s relationship with their father.<sup>147</sup> One author explained the problems that arise when traditional family law principles conflict with the reality of domestic violence cases:

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138. Hardesty & Campbell, *supra* note 24, at 90 (citations omitted).

139. *Id.* (citations omitted).

140. Jaffe & Geffner, *supra* note 1, at 377.

141. *Id.*

142. *Id.* at 378.

143. CLARE DALTON ET AL., NAVIGATING CUSTODY AND VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES 17 (2004).

144. Dunford-Jackson, *supra* note 55, at 189.

145. *Id.* at 190.

146. *Id.*

147. *Id.*

"Friendly parent" provisions, for example, which can be useful in opening lines of communication in non-abusive family situations, can end up silencing a battered woman who fears reporting abuse lest it make her appear "unfriendly." Stay away provisions in protection orders may offer structure that leads to safety, but may conflict with later visitation provisions in custody court. The challenge facing judges and lawyers is how to integrate the normative assumptions of family law with the safety assumptions that undergird domestic violence law.<sup>148</sup>

Another criticism of the way courts handle custody in divorces between partners where there has been domestic violence is that judges may believe that a child losing his relationship with his father is more damaging than paternal abuse of the mother.<sup>149</sup>

One problem facing abused mothers is the persistent suspicion by judges and other professionals that women who claim their husbands abuse them are trying to gain an advantage in a custody battle.<sup>150</sup> Richard Gardner developed the theory "parental alienation syndrome," or PAS, which claims that some mothers attempt to alienate their children from the fathers by falsifying claims of abuse.<sup>151</sup> Gardner has posited that women who alienate need to be separated from their children.<sup>152</sup> One researcher asserted that Gardner's theory has been "[r]ejected by most professionals as unsupported by any data, unscientific and harmful to children."<sup>153</sup> Many courts have also rejected the theory.<sup>154</sup>

Domestic violence advocates have fought to have legislatures add a consideration of domestic violence in making custody determinations,<sup>155</sup> but legislatures must make clear how much weight to give such a determination. The National Council of Juvenile and Family Court Judges has developed a Model Code on domestic violence and child custody, which recommends: (1) that it is detrimental for a child to be placed in sole custody, joint (physical or legal) custody with the perpetrator of domestic violence; (2) visitation orders can include conditions such as "supervised transfers, supervised access, and treatment orders for the abusers;" and (3) there is a "presumption against mediation in these cases."<sup>156</sup>

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148. Farney & Valenti, *supra* note 79, at 35.

149. Jaffe & Geffner, *supra* note 1, at 379.

150. *Id.*

151. WOMEN'S LAW PROJECT, *supra* note 20, at 40-41.

152. *Id.* at 40.

153. *Id.*

154. *Id.* at 40-41.

155. *Id.*

156. Jaffe et al., *supra* note 39, at 191.

The Women's Law Project found that "[f]orty-eight states and the District of Columbia have adopted legislation requiring courts to consider domestic violence when fashioning custody awards, and eighteen of those states have created a rebuttable presumption against giving custody to a perpetrator of domestic violence."<sup>157</sup>

Louisiana was the first state to add a consideration of domestic violence in its custody statute.<sup>158</sup> In Pennsylvania, the statute governing visitation and custody advises judges to consider both parents' cooperative attitude and either parent's violent or abusive conduct.<sup>159</sup> Many states now have made domestic violence a rebuttable presumption against custody for the abuser, giving the abuser the burden of proving it is in the children's best interest to maintain the relationship.<sup>160</sup> Furthermore, "most domestic violence advocates would probably describe a significant gap between theory and practice when it comes to recognizing domestic violence as a pertinent factor in custody determinations and affording due consideration to maternal and child safety."<sup>161</sup> Legislation that recognizes the dynamics of domestic violence and provides for the safety of a battered mother and her children cannot be effective if judges are unwilling to apply it.

Practitioners note that although these statutes are in place, it is not clear how much weight domestic abuse should be given in custody determinations, and proof is often a difficult matter.<sup>162</sup> Some commentators lament "the disheartening tendency of courts to 'throw up their hands in despair' and characterize cases as 'he said, she said.'"<sup>163</sup> One thing family attorneys representing mothers can do, is help the battered mother to document incidents of domestic abuse and the impact it has had on the child.<sup>164</sup> One practitioner asserted that "[i]n addition to presenting physical evidence and eye witness testimony, lawyers should also use expert testimony concerning the effects of the violence on the specific child."<sup>165</sup>

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157. WOMEN'S LAW PROJECT, *supra* note 20, at 19 (citing data compiled from the Domestic Violence Law Search database of the National Council of Juvenile and Family Court Judges).

158. Jaffe & Geffner, *supra* note 1, at 384.

159. 23 PA. CONS. STAT. ANN. § 5303 (West 2006).

160. Dunford-Jackson, *supra* note 55, at 190.

161. Jaffe, et al., *supra* note 39, at 191.

162. Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL'Y 221, 241-42 (1994).

163. Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1402 (2005).

164. Fields, *supra* note 162, at 242-43.

165. *Id.* at 242.

#### IV. CONSTITUTIONAL ISSUES INVOLVED IN DOMESTIC VIOLENCE SITUATIONS

In discussing legislative solutions to the problem of domestic violence and children's welfare, "any legislative initiative designed to elevate the child's developmental needs over the rights of his or her parents may conflict with generally applicable constitutional principles protecting the family unit as a whole."<sup>166</sup> One must understand the scope of parental rights before determining how to balance them against the interests and rights of the child.<sup>167</sup> Therefore, before crafting a possible solution to the dilemma faced by battered mothers, it is necessary to provide a brief overview of what courts have said about the rights involved in these cases. Once the State makes the decision to remove a child from the home, the interests of children and victim mothers often diverge.<sup>168</sup> Catherine Ross argues that "[b]y making the child's safety and development the priority, [the Adoption and Safe Families Act] weighs the child's security more heavily than the mother's emotional needs and legal rights."<sup>169</sup> A line of constitutional cases including *Stanley v. Illinois*<sup>170</sup> has made the consideration of parental due process rights even more important.

The Supreme Court in *Stanley* found that the State cannot terminate parental rights without an individual determination of the parent's fitness.<sup>171</sup> The Illinois statute at issue in *Stanley* stated that children of unwed mothers became wards of the state upon the death of their mother.<sup>172</sup> The father in the case argued that the termination of his parental rights under the statute violated the Equal Protection Clause of the Fourteenth Amendment.<sup>173</sup> The Court recognized a parent's interest in "the companionship, care, custody, and management of his or her children."<sup>174</sup> The Court agreed that the State had a legitimate interest in protecting the welfare of children.<sup>175</sup> It questioned, however, the means the State chose in this case.<sup>176</sup> The Court noted that

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166. Ross, *supra* note 53, at 181.

167. *Id.*

168. *Id.*

169. *Id.* at 178.

170. 405 U.S. 645 (1972).

171. *Id.* at 657-58.

172. *Id.* at 646.

173. *Id.*

174. *Id.* at 651.

175. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

176. *Id.*

[p]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.<sup>177</sup>

The Court concluded that denying a parent a hearing on his fitness before terminating his parental rights is contrary to the Equal Protection Clause.<sup>178</sup>

In another significant case regarding parental rights, New York's Department of Children and Family Services adopted a policy of removing children from homes where they were exposed to domestic violence.<sup>179</sup> In *In Re Nicholson*, the district court found a substantive due process violation because the Agency of Children Services did not demonstrate that its policy of removing children from a home after witnessing domestic violence was a compelling state interest before removing children from their families.<sup>180</sup> The court held that a child should not be removed solely because the mother is a victim of domestic violence except "where the child is in such imminent danger to life or health that he or she must be removed and there is not reasonably sufficient time to obtain a court order."<sup>181</sup> The court made it clear that automatic removal of children who witness domestic violence will not be tolerated without an individual assessment of the child's situation.<sup>182</sup> The ramifications of this decision are still not completely clear.

Attorney Shima Baradaran-Robison predicted that husbands would bring more due process claims in this area.<sup>183</sup> She proposes using the Thirteenth and Nineteenth Amendments to bolster the due process analysis applied to cases involving the removal of children from victims of domestic violence after the *Nicholson* case.<sup>184</sup> Baradaran-Robison presents the issue from the perspective of the mother as victim of domestic violence and a victim of the

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177. *Id.* at 656-57.

178. *Id.* at 658.

179. 181 F. Supp. 2d 182, 184 (E.D.N.Y. 2002).

180. *Id.* at 185.

181. *Id.* at 190.

182. *Id.*

183. Shima Baradaran-Robison, Case Comment, *Tipping the Balance in Favor of Justice: Due Process and the Thirteenth and Nineteenth Amendments in Child Removal from Battered Mothers*, 2003 BYU L. REV. 227, 230 (2003).

184. *Id.* ("[T]he Thirteenth Amendment's prohibition of slavery-like treatment and the Nineteenth Amendment's guarantee of autonomy bolster a battered mother's Fourteenth Amendment substantive due process claim when her children have been taken from her solely because she was abused.").

State who removes her children.<sup>185</sup> Her premise is that by tying the due process claim to the Thirteenth and Nineteenth Amendments, a mother will strengthen her claim.<sup>186</sup> She stated that “[b]y punishing a woman for her partner’s abuse, state actors deny women an autonomous identity and treat them as co-abusers with their husbands, when, in fact, the women are not the abusers at all.”<sup>187</sup> She only gives passing reference to the fact that witnessing domestic violence can in fact harm children.<sup>188</sup> The question remains whether the state is actually conflating the parents as co-abusers or if it is treating them as two separate actors, both of whom have reasons for not being able to care for their child.

## V. PROTECTING ALL DOMESTIC VIOLENCE VICTIMS

To modify the way courts respond to domestic violence in the lives of battered mothers and their children, judges must acknowledge certain basic principles based on the research about the unique dynamics of these relationships discussed earlier in this note. Researcher Jeffrey Edleson has posited three tenets that he described as a reasoned approach to the issue of children witnessing domestic violence.<sup>189</sup> First, “[e]xposure should not be defined as maltreatment per se.”<sup>190</sup> Edleson argues that data shows the effect of witnessing parental violence varies with individual children.<sup>191</sup> Secondly, Edleson stresses that traditional child protection services are not appropriate for all families.<sup>192</sup> He asserted that “[m]any exposed children and their families may benefit from voluntary, community-based services instead of the traditional child protection services.”<sup>193</sup> Finally, “[s]ome exposed children and their families should be referred to Child Protection Services.”<sup>194</sup> He proposed that states develop screening instruments to help determine which children and families need to have a full child protective services investigation.<sup>195</sup> Edleson also suggests forging collaborative relationships between child protective services workers and domestic violence agencies.<sup>196</sup>

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185. *Id.* at 234.

186. *Id.* at 230.

187. *Id.* at 234.

188. *Id.* at 237.

189. Edleson, *supra* note 7, at 20-22.

190. *Id.*

191. *Id.*

192. *Id.* at 21.

193. *Id.*

194. *Id.*

195. *Id.* at 22.

196. *Id.*



Another framework for approaching domestic violence cases is present in the District of Columbia Domestic Violence, which has implemented integrated services.<sup>197</sup> It is a modified example of one family, one court, in which the District of Columbia has made attempts to consolidate the services a family experiencing domestic violence might need to access and sometimes joins different cases affecting the family to the domestic violence case.<sup>198</sup> In addition, when cases are not joined, the clerks make sure they find all the case files of pending family matters to make sure the judges are at least able to reference interrelated legal issues.<sup>199</sup> In this way, the court can try to ensure that consistent messages are being sent to the family.<sup>200</sup> This consistency could inspire increased confidence in the system and make it more likely that victim mothers will seek help in the courts in the future.

One group of researchers noted that traditional views of the judicial role can sometimes make judges resist specialized courts.<sup>201</sup> They further assert that "[j]udicial demeanor and knowledge of domestic violence dynamics play a significant role in improving the justice system response to these complex cases."<sup>202</sup> The researchers also noted crimes between strangers differ from domestic violence cases; in the former case, the participants typically do not have further out of court contact while in the latter they do.<sup>203</sup> The judge must be aware of the impact his decisions will have on the parties after they leave court.<sup>204</sup> This is especially true in cases involving children.<sup>205</sup> Women may be economically dependent on their batterers, especially when they have to worry about feeding their children.<sup>206</sup> In addition, judges need to understand the implications of ordering visitation between the children and the batterer when the victim mother has obtained a protective order.<sup>207</sup> Researchers have pointed out, "[j]ust as batterers often harass their victims while they wait outside the courtroom, batterers can use the exchange of children on supervised visits to threaten and cause

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197. STEKETEE, *supra* note 90, at 1-5.

198. *Id.*

199. *Id.* at 4.

200. *Id.*

201. Lynn S. Levey, STATE JUSTICE INST., LESSONS LEARNED IN IMPLEMENTING AN INTEGRATED DOMESTIC VIOLENCE COURT: THE DISTRICT OF COLUMBIA EXPERIENCE 7 (2000).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 23.

harm to the abused parents and their children.”<sup>208</sup> Also, joint custody, which is often assumed to be in the children’s best interest, may not be the best choice in cases of domestic violence.<sup>209</sup>

One response to the problem has been called Coordinated Community Response.<sup>210</sup> It brings together a variety of community resources and relevant stakeholders to respond to domestic violence comprehensively.<sup>211</sup> The biggest problem with this approach is the distrust and competing agendas of the different players (i.e., child advocates and domestic violence advocates).<sup>212</sup> Compromise can be hard when each agency has opposing ideological perspectives.<sup>213</sup> For example, domestic violence advocates may focus more on the rights of the mother as a parent while children’s advocates focus on getting the child into a stable placement as quickly as possible, even if that means removal from the mother.

The Honorable Cindy Lederman, a judge in Miami, and Professor Susan Schechter, from the University of Iowa, developed a model to meld the competing interests of domestic violence and child advocates, calling it the Dependency Court Intervention Program for Family Violence (DCIPFV).<sup>214</sup> A group of researchers described the program’s mission: “to promote the safety and well-being of maltreated children by supporting the safety and self-efficacy of mothers who have experienced domestic violence.”<sup>215</sup> DCIPFV is a voluntary and confidential program that provides advocates for battered mothers in their interactions with the dependency court.<sup>216</sup> The project coordinators recommend that domestic violence screenings include, at a minimum, questions “about the frequency and type of current and past domestic violence, including physical, sexual, and emotional abuse.”<sup>217</sup> The program has relationships with the local Legal Aid and a nonprofit police organization to help facilitate a battered mother receiving necessary services.<sup>218</sup>

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208. *Id.*

209. Hardesty & Campbell, *supra* note 24, at 93.

210. Cris M. Sullivan & Nicole E. Allen, *Evaluating Coordinated Community Responses for Abused Women and Their Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 269, 270 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001).

211. *Id.*

212. *Id.*

213. *Id.*

214. Candice L. Maze et al., *The Use of Domestic Violence Advocates in Juvenile Court: Lessons from the Dependency Court Intervention Program for Family Violence*, 54 JUV. & FAM. CT. J. 109, 110 (2003).

215. *Id.*

216. *Id.* at 111.

217. *Id.* at 113.

218. *Id.* at 115.

Peter Jaffe and Robert Geffner have set out necessary features for any system trying to address the problem of domestic violence and its effects on the family members.<sup>219</sup> First, they suggest increasing the education and awareness about the issues surrounding marital violence among the professionals who might come into contact with these families.<sup>220</sup> Next, they recommend putting into place assessment procedures to identify cases of marital violence and determine the level of risk.<sup>221</sup> The researchers also recommend that children be individually screened to identify any trauma.<sup>222</sup> Catherine Ross asserted that "[t]he children of neglectful parents would benefit most from a more sensitive filtering system, in which neglect that does not result in serious harm or danger would trigger benefits in the form of services, rather than potentially unwarranted removal."<sup>223</sup> Treatment programs for both the mother and child are obviously a key feature in addressing the damage caused by marital violence. Jaffe and Geffner specify that such programs should try and be "sensitive to the diverse cultural backgrounds of women and children seeking refuge and counseling from abusive relationships."<sup>224</sup> Other researchers recommend that the court ensure that all information about the whereabouts of the battered mother must remain confidential,<sup>225</sup> and that it is preferable that a child has individual representation in any custody determination, in divorce cases, and in parental termination proceedings.<sup>226</sup>

If the court has to consider removal for the protection of the child, Catherine Ross has posited a predictive approach.<sup>227</sup> She described the predictive approach as an "integrat[ive] consideration of the child's best interests with assessment of parental fault by asking whether this individual parent would be able to resume parenting responsibility for this individual child, considering the child's specific developmental needs and time frame."<sup>228</sup>

In situations in which the battered mother leaves her abuser, special problems arise in the case of divorce.<sup>229</sup> To address the specialized problems of visitation in these cases, supervised

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219. Jaffe & Geffner, *supra* note 1, at 389-96.

220. *Id.* at 390.

221. *Id.*

222. *Id.* at 392.

223. Ross, *supra* note 53, at 192.

224. Jaffe & Geffner, *supra* note 1, at 390.

225. WOMEN'S LAW PROJECT, *supra* note 20, at 63.

226. *Id.* at 67.

227. Ross, *supra* note 53, at 205.

228. *Id.* at 227.

229. WOMEN'S LAW PROJECT, *supra* note 20, at 25.

visitation centers would help the court deal with danger inherent in the batterer and his victim having continued contact because of the children.<sup>230</sup> Jaffe and Geffner noted the importance that visitation be supervised by a neutral observer instead of a family member or new partner of the batterer.<sup>231</sup> The problem is the lack of supervised visitation centers in most communities; a judge cannot utilize a resource that does not exist.<sup>232</sup> Family court judges need to work with the community to instigate the creation of such resources to ensure the safety of battered mothers and their children. In addition, the court needs to be aware of the dynamics of domestic violence in making custody determinations.

There is disagreement regarding whether mediation is an appropriate tool in cases of domestic violence.<sup>233</sup> The obvious imbalance in power between the woman and her batterer leaves her vulnerable to coercion by her abuser.<sup>234</sup> Court-ordered and mediated settlements are very different in that:

Court orders and process are critical because they are public and enforceable. On the other hand, private processes such as mediation, while useful in non-domestic violence cases, can create enormous dangers and inequities for battered women because they are forced to make choices and agreements under threat of violence and coercion.<sup>235</sup>

Yet some researchers believe that as long as certain criteria are met, mediation can be an effective tool in these cases.<sup>236</sup> These criteria include that the mediator be trained in domestic violence, the mediator compensates for the balance of power, and the mediation is not mandated.<sup>237</sup> In Pennsylvania, judges cannot order mediation in cases where there has been domestic violence or child abuse in the twenty-four months prior to the action.<sup>238</sup>

As mentioned previously, one of the major problems is that, currently, different parts of the system are not working in a

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230. *Id.* at 27.

231. Jaffe & Geffner, *supra* note 1, at 393.

232. WOMEN'S LAW PROJECT, *supra* note 20, at app. A. at 2.

233. Farney & Valenti, *supra* note 79, at 42.

234. *Id.*

235. *Id.* (citing Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 VIOLENCE AGAINST WOMEN 597 (2002)).

236. Jaffe & Geffner, *supra* note 1, at 394.

237. *Id.*

238. 231 PA. CODE § 1940.3 (2007).

coordinated effort and may even be giving conflicting advice.<sup>239</sup> Researchers have noted that "[t]his problem is most easily identified in the relationship between shelters and child protection services where advocates for women and those for children may take very different approaches to the same problem."<sup>240</sup> Some reasons why domestic violence advocates and child advocates are sometimes at odds include: "the fact that the respective movements are at different historical points in their development, they abide by different philosophies, sometimes seek different outcomes, use different professional terminologies, and sometimes compete for funding and recognition."<sup>241</sup> In addition, these two groups look at the central issues in different ways, including the best interest of the child, empowerment of the mother, and approach to the perpetrator.<sup>242</sup> Examples of successful collaborations between these two groups do exist however, including the Advocacy for Women's and Kids in Emergencies (AWAKE) program in Boston.<sup>243</sup> In this program the domestic violence advocates and children's advocates work together to make sure that both mothers and children are safe, and the program reports an eighty percent success rate.<sup>244</sup>

The National Council of Juvenile and Family Court Judges has issued recommendations, called the Greenbook, on how domestic violence cases should be handled, and it has started a pilot program in six jurisdictions to implement these recommendations.<sup>245</sup> The Greenbook National Evaluation Team issued an interim report to evaluate the progress of the recommendations, and it found several key features necessary for improving the court's response to domestic violence.<sup>246</sup> Greenbook initiatives included: "collaboration; identification of co-occurring issues" and a change in the response to co-occurrence;<sup>247</sup> information sharing among systems; services and advocacy that promote the safety and well-being of families experiencing co-occurring issues; batterer accountability; improved access to services; and improved advocacy.<sup>248</sup>

239. Jaffe & Geffner, *supra* note 1, at 394.

240. *Id.*

241. Schechter & Edleson, *supra* note 8.

242. *Id.*

243. *Id.*

244. *Id.*

245. GREENBOOK NAT'L EVAL. TEAM, *supra* note 74, at 1.

246. *Id.* at 2.

247. *Id.* "Co-occurrence is defined as domestic violence (1) known to the child welfare agency, (2) occurring within 1 year of a substantiated incident of child maltreatment, and (3) where the domestic violence victim is the child maltreatment victim's primary caregiver." *Id.* at 32.

248. *Id.*

In arguing that the State has an obligation to help remedy the conditions of poverty that lead to neglect, Kay Kindred stated that "[t]he right to family integrity, when coupled with the state's power as *parens patriae*, creates an affirmative obligation on the state to provide income assistance to impoverished families when necessary to protect the welfare of children and maintain the family intact."<sup>249</sup> his argument should be taken a step further requiring the State to have an affirmative obligation to help battered women improve their situation before taking the drastic step of removing their children. As Kindred explains:

Interference in the family is justified if it protects the child from harm. Thus, the form of intervention must be based on a determination of what would be in the child's best interest. However, it must also be narrowly tailored so as to accomplish the state's objective with the least intrusion on the fundamental privacy right of the family unit. . . . The state ought not continually interfere with the integrity of poor families, ostensibly for the purpose of protecting children from harm, by imposing an action that routinely puts such children at greater jeopardy.<sup>250</sup>

Blaming the mother without providing her the means to protect her own interests as well as her child's interests is an unjust and inadequate solution.

### CONCLUSION

This note has traced the detrimental effects that witnessing domestic violence has on children and the bind that battered mothers are put in when they are accused of failing to protect their children from that harm. Social science research demonstrates that domestic violence presents unique challenges for the families who experience it and the courts who attempt to address it. The model that pits child welfare advocates and domestic violence advocates against each other does not work. Advocates must put their ideologies aside and focus on the unique needs of each individual family. The research indicates that there are points of commonality in cases of domestic violence, but there are also variables that affect the level of harm the child may experience from witnessing domestic violence. Professionals who work with these families must keep both of these in mind when addressing the needs of the family. Removal

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249. Kindred, *supra* note 94, at 521.

250. *Id.* at 535-36.

may be warranted if the harm to the child is great and imminent, but a blanket presumption or tendency toward removal ignores that there are harms associated with separation from the battered mother and placement in foster care. Professionals who work with these families must keep both of these in mind when addressing the needs of the family. The models outlined in Part V of this note show that courts and child services are making some progress in crafting systems based on knowledge of the dynamics of domestic violence. Children will clearly benefit if battered mothers are not demonized. If the court system can help address the mother and child's shared need of safety and stability, both will benefit.

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