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Melissa A. Trepiccione

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AT THE CROSSROADS OF LAW AND SOCIAL SCIENCE: IS CHARGING A BATTERED MOTHER WITH FAILURE TO PROTECT HER CHILD AN ACCEPTABLE SOLUTION WHEN HER CHILD WITNESSES DOMESTIC VIOLENCE?

*Melissa A. Trepiccione**

INTRODUCTION

Sharwline Nicholson[1] first became a victim of domestic violence one winter afternoon while her infant daughter was asleep and her son was in school. Claude Barnett, the father of her daughter Destinee, arrived at Sharwline's apartment in a jealous rage. While throwing objects throughout the house, Claude kicked, beat, and severely assaulted Sharwline, leaving her with a broken arm. Sharwline remained overnight in the hospital while her cousin cared for the children. Though separated from Claude, and never before a victim of domestic violence, Sharwline lay in a hospital bed while child welfare caseworkers removed six-year-old Kendall and baby Destinee from Sharwline's cousin. Sharwline was charged with neglect, even though her children had not witnessed domestic violence prior to or during this incident.[2]

Sharlene Tillet was not a first time victim of domestic violence. While pregnant with her second child, she separated from her baby's father and purchased a plane ticket to relocate to California to protect herself from further abuse. Before she left, however, he beat her one

* J.D. Candidate, 2002, Fordham University School of Law. I am grateful to Professor Ann Moynihan for her invaluable insight and encouragement during the writing of this Note. Special thanks to my parents, Michael and Maryann Trepiccione, and to Bill, for their endless patience and support of my endeavors.

1. Ms. Nicholson is the lead plaintiff in a class action lawsuit filed in the Eastern District of New York by the law firm of Lansner & Kubitschek. The suit was brought in June 2000 on behalf of Ms. Nicholson and other battered mothers who have been charged with child neglect solely because their children have witnessed domestic violence. The complaint alleges that the class represents more than 5000 people, and will increase by an additional 1000 people each year. *See* Amended Complaint Class Action at 2, 11-12, Nicholson v. Williams (E.D.N.Y. filed June 15, 2000) (No. 00-CV-2229) [hereinafter Nicholson Amended Complaint].

2. Somini Sengupta, *Tough Justice: Taking a Child When One Parent is Battered*, N.Y. Times, July 8, 2000, at A1.

night in her apartment. After Sharlene gave birth to her son Uganda, a hospital social worker routinely questioned her about any history of domestic violence. Sharlene honestly responded to the social worker, and two days later child welfare caseworkers and police officers removed her newborn from her custody. Sharlene was charged with neglect for allegedly exposing Uganda to domestic violence, though he was not even born when the incident occurred. Sharlene could not regain custody of Uganda for seven weeks, and the court ordered her to attend domestic violence victim workshops, parenting classes, and weekly counseling. Currently, Sharlene and Uganda live in a battered women's shelter.[3]

During legal proceedings, child protective services presumed that both Sharwline and Sharlene's children had actually witnessed domestic violence in the home.[4] As a result, child protective services removed the children from their mothers' care. The experiences of these battered mothers are extremely common, and on the rise. Though the cases vary widely in complexity, the result is the same. In various states, children can be removed from the home and placed in foster care if a parent, usually the mother,[5] is a victim of domestic violence.[6] The battered mother is charged with neglect for exposing her children to domestic violence and for "failing to protect her children from danger."[7] This policy may be a result of the increasing attention given to the plight of domestic violence in the United States today.[8] This practice, however, is enveloped by controversy: "Is it fair to punish an abused woman by taking her children away? Is it wise to return children to a parent who has been unable to shield them from

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3. *Id.*

4. *See id.*

5. *See* Eve S. Buzawa & Carl G. Buzawa, Domestic Violence: The Criminal Justice Response 4, 8 (James A. Inciaradi ed., 2d ed. 1996) (acknowledging "the disproportionate amount of male violence against women," indicating that "[i]n over 90% of the violence by intimates recorded, the victim was female," and describing that "[o]n average, each year women were the victims of over 572,000 violent victimizations committed by an intimate compared to approximately 49,000 incidents committed against men").

6. *See infra* notes 25-78 and accompanying text.

7. Sengupta, *supra* note 2.

8. *See* The "Failure to Protect" Working Group, *Charging Battered Mothers With "Failure to Protect:" Still Blaming the Victim*, 27 Fordham Urb. L.J. 849, 849 (2000):

> In the past several years, efforts to recognize [the harm caused by domestic violence] have led to the passage of new state laws that allow for concurrent criminal and family court jurisdiction in domestic violence cases, mandate arrest in domestic violence situations and require courts to consider domestic violence as a factor in custody decisions. Unfortunately, the heightened awareness of the harm domestic violence causes children has also resulted in a punitive policy towards battered women in the child welfare system.

Id. (citation omitted); *see also* Sengupta, *supra* note 2 ("In some ways, these cases reflect an unintended consequence of new and arguably enlightened perspectives on domestic violence.").

the danger of an abusive partner?"[9] These are only some questions raised in the debate over whether to remove children from the custody of their battered mothers when they witness domestic violence.

This Note examines whether the policy of removing witnessing children from their victimized mothers is acceptable from both a social science viewpoint and a constitutional law perspective. Part I reviews the foundations of this policy in case law and in various state statutes. This part also examines social science literature concerning the effects of witnessing domestic violence on children and highlights the results and flaws in this body of research. Part II discusses the conflict at the heart of this policy by considering the clashing interests and rights of the parties affected by this practice—the battered mother, the child, and the state. Part III argues that this practice must be carefully re-examined because its constitutionality is questionable. This part further asserts that, based on flawed and underdeveloped social science research, a state's uniform, indiscriminate policy of removing children from their battered mothers may not be necessary to further a compelling governmental interest. This Note concludes that the current policy of charging a mother with failure to protect in domestic violence cases should be re-examined in light of numerous, less burdensome alternatives to "across the board" removal.

I. ROOTED IN LAW AND PSYCHOLOGY: FAILURE TO PROTECT WHEN CHILDREN WITNESS DOMESTIC VIOLENCE

A. *Development of the Failure to Protect Doctrine in Child Abuse and Neglect Cases*

1. What is "Failure to Protect"?

The rising number[10] of reported child maltreatment[11] incidents has prompted a widespread judicial and legislative response toward what has been dubbed a parent's "failure to protect" his or her child from abuse or neglect.[12] The failure to protect standard was extrapolated from state child protective statutes, such as child abuse, neglect, aiding

9. Sengupta, *supra* note 2.

10. Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse*, 6 Hastings Women's L.J. 67, 67 n.1 (1995) (describing the rise in reported child abuse cases in the early 1990s from 2.7 million in 1991 to 3 million in 1992, and noting the percentages of reported deaths from abuse and neglect in the mid-1990s).

11. For the purposes of this part, "child maltreatment" refers to both abuse and neglect. However, the remainder of this Note discusses charging battered women with neglect only, under neglect statutes, for failing to protect their non-abused children from witnessing domestic violence.

12. Panko, *supra* note 10, at 67-68.

and abetting, and involuntary homicide laws.[13] Child protective statutes, in particular abuse laws, take two forms.[14] First, commission statutes convict actual, active abusers.[15] Second, omission statutes penalize "passive" abusers who expose children to the risk of harm, or fail to protect a child from maltreatment where a duty to do so exists.[16] Initially, the failure to protect doctrine was used to hold parents liable for child maltreatment under the omission child protective statutes when they failed to prevent *actual* abuse by an identifiable offender.[17]

Under child neglect laws, however, parents may also be liable for "failure to protect" when they "permit" children to remain in an environment where abuse *could* occur or the risk of harm is evident.[18] The most common sources of risk of harm to children are violence in the home and in the community.[19] As such, courts are now widely applying the failure to protect doctrine to families plagued by domestic violence, chiefly where the father is physically and emotionally abusing the mother.

2. "Failure to Protect" in the Realm of Domestic Violence

Despite the fact that the failure to protect doctrine was traditionally used only when a child was actually harmed, a nationwide trend has recently surfaced whereby battered mothers are charged with failure to protect under state neglect statutes for exposing their children to domestic violence.[20] Children of battered women often witness their

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13. *See id.* at 68 nn.6-7 (indicating that parents can be criminally or civilly liable for failure to protect, depending on the statute under which the charges are brought and the context of the child maltreatment); *see also* Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 Alb. L. Rev. 1087, 1089 (1995) (asserting that "the application of child protective statutes in cases where states have brought charges against abused mothers, via the theory of failure to protect" is a method of using abuse and neglect statutes to punish mothers).

14. Panko, *supra* note 10, at 67-68.

15. *Id.*

16. *Id.* at 68.

17. *See id.* at 67; *see, e.g.*, *In re* Dalton, 424 N.E.2d 1226, 1226 (Ill. App. Ct. 1981) (adjudicating mother neglectful where children were beaten, threatened with guns, and subjected to other forms of physical abuse at the hands of their father for many years).

18. Miccio, *supra* note 13, at 1089.

19. *See* Joy D. Osofsky, *Children as Invisible Victims of Domestic and Community Violence*, *in* Children Exposed to Marital Violence: Theory, Research, and Applied Issues 95 (George W. Holden et al. eds., 1998) [hereinafter Children Exposed]; *see also infra* Part I.B. (discussing the effects on children witnessing violence in the home and in the community in further detail).

20. *See* Miccio, *supra* note 13, at 1090 ("We, as a society, are holding mothers accountable for conduct they did not engage in, conduct that, until recently, was socially permissible and conduct that authorities are still loath to stop." (citations omitted)); The "Failure to Protect" Working Group, *supra* note 8, at 849; *see also infra* text accompanying notes 24-78 (highlighting several states where battered mothers are charged with neglect for exposing their children to domestic violence).

mother being beaten and threatened, and/or view the aftermath of partner violence including bruises, black eyes, and broken bones, without being physically abused themselves.[21] In many jurisdictions, child protective services and family courts presume that witnessing abuse harms children and places them at risk for experiencing abuse.[22] As a result, many states, with New York State as the leader, have instituted a policy of charging battered mothers with neglect and temporarily removing[23] their children if the children witness domestic violence.[24]

The rationale for this policy is rooted in state neglect statutes, legislative history, and case law. Several state courts, chiefly those in New York and Illinois, have adopted the failure to protect doctrine in family court and appellate court decisions.

In New York, Article 10 of the Family Court Act ("FCA") provides the statutory basis for finding a parent liable for neglect.[25] The FCA

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21. Leslie D. Johnson, Student Article, *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence*, 22 Law & Psychol. Rev. 271, 273-74 (1998).

22. *See generally infra* notes 48, 54 and accompanying text.

23. This Note primarily deals with failure to protect in the context of temporary removal of a child from a battered mother's care, which allows child protective services to remove a neglected or abused child temporarily from the parents' home. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 748 (1982) (describing the process of temporary removal in New York). A minor child, under age eighteen, is usually placed in a state institution or foster home after removal, and child protective services take steps to reunite the family. *Id.* If the family is unable to be reunited because a positive, healthy parent-child relationship is no longer present, the state may terminate a parent's rights through additional legal proceedings. *Id.* For a detailed discussion of permanent termination of a mother's parental rights for failure to protect in other contexts, see Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect; A Study of Travis County, Texas*, 7 Tex. J. Women & L. 287 (1998) and Amy Haddix, Comment, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 Cal. L. Rev. 757 (1996).

24. *See* The "Failure to Protect" Working Group, *supra* note 8, at 849-51.

25. N.Y. Fam. Ct. Act § 1012 (McKinney 1999). The relevant portion of Article 10 defines "neglected child" as:

> a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so; or (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court . . . ; or (ii) who has been abandoned.

Id. § 1012(f); *see also* The "Failure to Protect" Working Group, *supra* note 8, at 851

provides that a court should find a parent neglectful when the "physical, mental or emotional condition [of the child] has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care."[26] Under the FCA, a neglectful parent unreasonably inflicts or allows another to inflict harm on the child, or condones a substantial risk of harm to the child.[27] The New York Appellate Division has broadly interpreted the FCA to consider domestic violence in general a basis for finding neglect under the statutory language—"any other acts of a similarly serious nature requiring the aid of the court."[28]

In New York, the inclusion of witnessing domestic violence as a basis for finding a battered mother neglectful is a novel development of the past decade. In the early 1990s, family courts often declined to consider acts of violence committed by a father against a mother in the presence of the children a basis for finding neglect.[29] Many family courts actually dismissed neglect petitions where the basis of the complaint was that the children witnessed domestic violence.[30] Family courts instead required proof that a child suffered actual physical, mental, or emotional impairment from witnessing the violence, and that the child was in imminent danger of experiencing harm.[31] Without expert testimony attesting to such harm, New York courts found it difficult to make a finding of neglect based on a child's witnessing of domestic violence.[32] Courts considered the harm substantiated only after psychologists, social workers, and other mental health professionals assessed the children and presented their findings in court.[33] Judges then would attribute the impairment to the

(discussing the requirements for a finding of neglect under the FCA).

26. N.Y. Fam. Ct. Act § 1012(f)(i).

27. *Id.* § 1012(f)(i)(B).

28. *Id.*; *In re* Deandre T., 676 N.Y.S.2d 666, 666-67 (App. Div. 1998); *In re* Lonell J., 673 N.Y.S.2d 116, 117 (App. Div. 1998).

29. *See In re* Bryan L., 565 N.Y.S.2d 969, 971-73 (Fam. Ct. 1991) (dismissing neglect petition against parents where father assaulted mother in presence of their toddler and his eight-year-old daughter, and requiring evidence that the children were in imminent danger for adjudication of neglect).

30. *See, e.g.*, *Deandre T.*, 676 N.Y.S.2d at 666; *Lonell J.*, 673 N.Y.S.2d at 116; *Theresa "CC,"* 576 N.Y.S.2d at 937 (App. Div. 1991); *Bryan L.*, 565 N.Y.S.2d at 969.

31. *Bryant L.*, 565 N.Y.S.2d at 972.

32. *Id.* at 972-73; *Theresa "CC"*, 576 N.Y.S.2d at 938 (holding that children were neglected based on both their witnessing continuous domestic violence over a ten-year period and on the testimony of a clinical psychologist who considered the children seriously emotionally impaired as a result of the violence); *In re* Michael M., 591 N.Y.S.2d 681, 685 (Fam. Ct. 1992) (holding that children were neglected due to exposure to domestic violence where their father abused their mother, and determining that the children were at substantial risk of impairment, according to the expert testimony of psychologist).

33. *See, e.g.*, *Theresa "CC"*, 576 N.Y.S.2d at 938-39 ("We conclude that the weight of the evidence in this record supports a finding of neglect.").

lack of a minimum degree of care exercised by the parents when they engaged in domestic violence, and would therefore find neglect.[34]

By the mid to late 1990s, however, New York courts adopted a new approach to domestic violence cases that was enunciated in the controversial case *In re Lonell J.*[35] The mother in *Lonell J.* admitted that she was severely beaten by her husband and was forced to have intercourse with him.[36] She ultimately obtained an order of protection against him.[37] The police were called to the home on at least six occasions, and the mother fled to her family's home for a period of time.[38] According to an Administration for Children's Services ("ACS")[39] investigation, the father beat the mother in front of the children on various occasions.[40] As a result, ACS filed a neglect petition against both the mother and father, removed the children from the home, and placed them in foster care.[41]

The Appellate Division, First Department,[42] reversed the Family Court's decision to dismiss the neglect petition,[43] and adjudicated both the abusive father and battered mother neglectful in this case.[44] The Appellate Division reasoned that parents' domestic abuse should be considered an act of neglect, as broadly defined under the FCA § 1012(f)(i)(B) as "other acts of a similarly serious nature."[45] The court also determined that nothing in § 1012 of the FCA required

34. *Id.* at 938 (determining that the children's emotional impairment was "clearly attributable to the unwillingness or inability of [the parents] to exercise a minimum degree of care toward the child" as defined by FCA § 1012(h), because the parents engaged in ongoing domestic violence (alteration in original)).

35. *See generally* Theresa "CC", 576 N.Y.S.2d 937 (App. Div. 1991) (adjudicating children neglected based on domestic violence between parents over ten-year period); *In re* Melissa "U", 538 N.Y.S.2d 958 (App. Div. 1989) (reversing Family Court decision and finding mother neglectful when she permitted her boyfriend, who had previously assaulted her in the presence of her children, to move into her home); *In re* Michael M., 591 N.Y.S.2d 681 (Fam. Ct. 1992) (determining that children were neglected due to consistent exposure to domestic violence between parents); The "Failure to Protect" Working Group, *supra* note 8, at 852 ("*Lonell J.* is significant because it is the first case in New York State to hold that a non-abusing mother may be neglectful for failing to protect her children from witnessing domestic violence.").

36. *Lonell J.*, 673 N.Y.S.2d at 116-17.

37. *Id.*

38. *Id.* at 117.

39. The Administration for Children's Services is the child protective services agency of New York City.

40. *Lonell J.*, 673 N.Y.S.2d at 116.

41. *Id.*

42. The New York Court of Appeals, the highest court in New York State, has not yet addressed the issue of failure to protect and child witnessing in domestic violence cases.

43. *See id.* at 119. The Family Court had required that "until the Legislature amended Family Court Act § 1012 to make domestic violence between parents a per se act of neglect, expert testimony was necessary to establish that these children had been traumatized by witnessing their parents' fights." *Id.* at 117.

44. *Id.* at 118.

45. *Id.*

expert testimony in order to find a child neglected, and it subsequently held that expert testimony was not needed to prove harm to a child witness of domestic violence.[46] The court also criticized previous decisions requiring expert testimony, and stated that such evidence is relevant only if the children are old enough to communicate the effects of the violence on their emotional and mental state.[47] The Appellate Division further noted that the legislative history of FCA § 1012, which emphasized the adverse physical and mental effects of domestic abuse on children, was sufficient proof that witnessing domestic violence harms children.[48]

In *Lonell J.*, the Appellate Division also appeared to establish the startling policy of holding a battered mother "strictly" liable for the actions of her batterer.[49] Although the mother had experienced a pattern of severe domestic abuse and made several efforts to escape her situation, the court determined that she was unwilling to leave her batterer and therefore neglected her children by exposing them to the violence.[50] The appellate court's analysis in *Lonell J.* was buttressed by an earlier decision, *In re Glenn G.*,[51] which held that the neglect statute in New York State imposes strict liability on a parent or guardian.[52] In *Glenn G.*, the court stated that a mother's reasons for remaining with her abuser were irrelevant to her liability under the neglect statute.[53]

The repercussions of *Lonell J.* and the resulting change in the interpretation of neglect law are vast and far-reaching. The failure to protect policy applied to the mother of Lonell J. has since been adopted in many New York neglect cases involving children who witness domestic violence.[54] Also, after *Lonell J.*, child protective

46. *Id.* at 117.

47. *Id.* at 118.

48. *See id.* ("[T]he Legislature cited several studies proving that children in violent homes experience delayed development, psychosomatic illness and feelings of fear and depression, and often become the victims of abuse themselves."). The court in *Lonell J.*, however, failed to cite these studies or related psychosocial literature, but rather chose to cite a law review article in support of its contentions. *Id.*; *see also In re* Deandre T., 676 N.Y.S.2d 666, 667 (App. Div. 1998) ("Given the Legislature's awareness of and concern for the detrimental effects of domestic violence on children, Family Court Act § 1012(f)(i)(B) was drafted in sufficiently broad terms to encompass domestic violence as a permissible basis upon which to make a finding of neglect.").

49. The "Failure to Protect" Working Group, *supra* note 8, at 852.

50. *See Lonell J.*, 673 N.Y.S.2d at 118.

51. 587 N.Y.S.2d 467, 470 (Fam. Ct. 1992) (agreeing with the petitioner's argument that "whether the mother was a battered woman is irrelevant" and asserting that "the neglect statute . . . imposes strict liability").

52. Id. at 470.

53. *See id.* (holding that mother neglected her children for failing to protect them from abuse by their father, even if she suffered from Battered Women's Syndrome which made her powerless to stop the abuse). For a description of Battered Women's Syndrome, see *infra* note 184.

54. *See In re* Jasmine R., 683 N.Y.S.2d 848 (App. Div. 1999) (finding neglect of

agencies, such as ACS, are removing children from their homes and sustaining charges of neglect against non-abusing mothers more easily in situations of domestic violence.[55]

Furthermore, other jurisdictions, including Illinois, Nebraska, and California, have embraced this policy. In Illinois, the Juvenile Court Act ("JCA") provides the legal basis for finding a child neglected.[56] Under the JCA, a neglected child is a minor "who is not receiving the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a minor's well-being" or a child "whose environment is injurious to his or her welfare."[57] Illinois courts interpret neglect as an adult's failure to care for a child, including "both willful and unintentional disregard of parental duty."[58] The Illinois Appellate Court, an intermediate appellate court, has repeatedly held that domestic violence between parents will inflict emotional harm on witnessing children and constitutes neglect.[59]

In an older case, *In re A.D.R.*,[60] the Illinois Appellate Court held that the father's abuse of the mother for seven years created an injurious environment for the child.[61] The court reasoned that it could adjudicate neglect before the child was physically abused herself or endured permanent emotional damage from witnessing the beatings

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children because of exposure to domestic violence between parents); *In re* Athena M., 678 N.Y.S.2d 11 (App. Div. 1998) (affirming finding of neglect by the Family Court based on domestic violence between parents and indicating that violent acts in the presence of the children placed them in imminent danger of impairment, "as a matter of common sense"); *In re* Deandre T., 676 N.Y.S.2d 666 (App. Div. 1998) (deciding that father's abuse of mother in presence of child warranted finding of neglect); *see also* Sengupta, *supra* note 2, stating:

> The city can take children into foster care if a parent is believed to 'engage in acts of domestic violence.' Its authority to do so was strengthened by a 1998 state court ruling that declared incidents of domestic violence in the presence of a child to be sufficient grounds for a charge of neglect.

55. *See* The "Failure to Protect" Working Group, *supra* note 8, at 853.

56. 705 Ill. Comp. Stat. Ann. 405 (West 1999).

57. *Id.* at 405/2-3 (1)(a)-(b).

58. *In re* S.S., 728 N.E.2d 1165, 1169 (Ill. App. Ct. 2000) (citing *In re* Ashley F., 638 N.E.2d 368 (Ill. App. Ct. 1994)).

59. *See S.S.*, 728 N.E.2d at 1172, stating:

> We agree that it is reasonable for a trial court to conclude that continuing physical abuse by one parent of another will cause emotional damage to a child and thus constitutes neglect. We also agree that the trial court need not wait . . . until the repeated beatings of his mother cause so much damage that he is permanently affected.

(citations omitted); *see also In re* A.D.R., 542 N.E.2d 487, 492 (Ill. App. Ct. 1989) ("[I]t is not unreasonable for a trial judge to conclude continuing physical abuse by one parent to another will cause emotional damage to a child and thus constitute neglect."). The Illinois Supreme Court, the highest court in the state of Illinois, has not yet addressed the issue of failure to protect and child witnessing in domestic violence cases.

60. 542 N.E.2d 487 (Ill. App. Ct. 1989).

61. *Id.* at 492.

of her mother.[62] The court emphasized the parents' seven-year abusive marriage, commitment to remain together, and apparent lack of "any special relationship" with their infant daughter as further support for a finding of neglect.[63] Although A.D.R.'s mother continually denied or trivialized the extent of the beatings, A.D.R. was temporarily removed from the home by the Department of Children and Family Services and was declared a ward of the state at the termination of appellate court proceedings.[64]

In a more recent case, *In re S.S.*,[65] the Illinois Trial Court previously held a child neglected and removed him from his mother's custody for two years.[66] The Illinois Appellate Court reversed the trial court's finding of neglect because, in this particular case of witnessing domestic violence, the abuse consisted of one incident, the child was not present during the violence, and the couple did not live together.[67] The appellate court, however, adhered to the holding of *In re A.D.R.*.[68] Although the outcome in this specific case was ultimately favorable for the battered mother given the above-mentioned circumstances, the court in *S.S.* affirmed that a child's witnessing of domestic violence indeed remains a basis for a neglect finding in Illinois.[69]

In Nebraska and California, the application of the failure to protect doctrine in witnessing domestic violence cases is prevalent, though less common. Nonetheless, Nebraska's stance on failure to protect may be harsher than her sister states because the Supreme Court of Nebraska not only adjudicated a battered mother neglectful, but also terminated her parental rights for maintaining an ongoing relationship with the batterer.[70] The court reasoned that the mother was unable to create a "loving and safe environment" for her child while in an abusive relationship, despite her multiple efforts to leave and divorce the father.[71] Given that the mother failed to actively extricate herself from the battering, the court determined that she substantially and repeatedly neglected her child and refused to care for and protect him.[72] Although this decision was rendered in the early 1990s, it remains good law in Nebraska.

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62. *Id.*
63. *Id.* at 491.
64. *Id.* at 488-89, 492.
65. 728 N.E.2d 1165 (Ill. App. Ct. 2000).
66. *S.S.*, 728 N.E.2d at 1174.
67. *Id.* at 1172.
68. *See id.*; *see also supra* note 59 (quoting leading Illinois case law on a child's witnessing of domestic violence as a basis for neglect adjudication).
69. *See S.S.*, 728 N.E.2d at 1172.
70. *See In re* C.D.C., 455 N.W.2d 801, 807 (Neb. 1990).
71. *Id.* at 807-08.
72. *Id.* at 807. The Nebraska statute defines "abuse or neglect" as:
knowingly, intentionally, or negligently causing or permitting a minor child to be: (a) Placed in a situation that endangers his or her life or physical or

As early as 1986, California courts[73] recognized that exposure to domestic violence was a potential threat to a child's safety. In one case, *In re Jon N.*,[74] the California Court of Appeal temporarily removed a child from his parents due to the physical violence between them.[75] Most recently, California's application of failure to protect[76] was manifested in the state's acknowledgement that children who witness domestic violence suffer from "secondary abuse."[77] In one case, twin girls were adjudicated neglected by the California Court of Appeal based on the opinion of three experts who stated that the domestic violence perpetrated by the father against the stepmother created a substantial risk of serious physical harm or illness to the children.[78]

States such as New York, Illinois, Nebraska, and California attempt to prevent children from witnessing domestic violence through the uniform policy of finding parents, often the battered mother, neglectful and then removing the children from the home.[79] A handful of states, however, have declined to follow this approach. For example, the District Court of Appeal of Florida refused to maintain a neglect petition against a couple even though the children had witnessed verbal domestic violence and alcohol abuse.[80] The court considered the battered mother's flight to a domestic violence shelter on one occasion a factor in holding that child protective services lacked evidence pointing to significant impairment to the child's

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mental health; (b) Cruelly confined or cruelly punished; (c) Deprived of necessary food, clothing, shelter, or care; (d) Left unattended in a motor vehicle if such minor child is six years of age or younger; (e) Sexually abused; or (f) Sexually exploited by allowing, encouraging, or forcing such person to solicit for or engage in prostitution, debauchery, public indecency, or obscene or pornographic photography, films, or depictions.

Neb. Rev. Stat. § 28-710(3) (1995).

73. In California, the case law considers both parents at fault for exposing their children to domestic violence. Arguably both father and mother are punished in these situations, however this example of failure to protect policy does not minimize the primary effect of this widespread practice on battered mothers.

74. 224 Cal. Rptr. 319 (Ct. App. 1986).

75. *Id.* at 322.

76. For the definition of "neglect," section 4900(e) of the California Welfare & Institutions Code refers to section 11165.2 of the California Penal Code. The California statute defines the term "neglect," in part, as "the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person." Cal. Penal Code § 11165.2 (West 2000). The statute further divides neglect into two categories, "severe" and "general." *Id.*

77. *See In re* Heather A., 60 Cal. Rptr. 2d 315, 316 (Ct. App. 1996) (removing children temporarily from father and stepmother's custody where father continually abused stepmother in presence of four-year-old daughters).

78. *Id.* at 321-22.

79. *See supra* notes 23-78 and accompanying text.

80. *See* Dep't of Children & Family Servs. v. M.B., 717 So. 2d 607, 607-08 (Fla. Dist. Ct. App. 1998).

physical, mental or emotional health or to risk thereof, as required by the Florida neglect statute.[81] The court then ordered that the children, who were temporarily removed from their parents' home, be returned.[82] In another case, the same Florida court refused to remove the children at the request of child protective services because the allegation of domestic violence in the home did not support adjudicating the children wards of the state.[83]

Other states, including Iowa,[84] Oklahoma,[85] and Minnesota, have codified an affirmative defense for a parent's failure to protect in child neglect and abuse cases.[86] Battered mothers in particular may use this defense when there is duress or an inability to act due to reasonable fear of the abuser.[87] The Minnesota statute provides that the affirmative defense can be raised when "at the time of the neglect or endangerment there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the defendant or the child in retaliation."[88] Under these groundbreaking laws, a battered mother's fear of her abuser's violence provides an effective affirmative defense to allegations of neglect in the form of failure to protect.[89]

A common theme woven throughout the case law and statutes regarding failure to protect and neglect is the presumed harm suffered by child witnesses of domestic violence. Courts only allude to the

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81. *Id.* The Florida statute defines "neglect" as:

> when the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment or permits a child to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired.

Fla. Stat. Ann. § 39.01(46) (West Supp. 2001).

82. *Dep't of Children & Family Servs.* 717 So. 2d at 607.

83. Denson v. Dep't of Health & Rehabilitative Servs., 661 So. 2d 934, 936 (Fla. Dist. Ct. App. 1995) (indicating that there was no evidence that the child was neglected or at risk).

84. Iowa Code Ann. § 726.6(e) (West Supp. 2000).

85. Okla. Stat. Ann. tit. 21 § 852.1(a) (West Supp. 2001).

86. *See* Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 Fam. L.Q. 357, 364-65 (1995); *see also* Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 Harv. Women's L.J. 205, 211 n.38 (1997) (citing Davidson, *supra*, at 364).

87. Davidson, *supra* note 86, at 364-65.

88. Minn. Stat. Ann. § 609.378(2) (West Supp. 2001); *see also* Davidson, *supra* note 86, at 365.

89. *See* Stone & Fialk, *supra* note 86, at 211 n.38 ("These laws provide that fear of substantial bodily harm to the defendant [mother] or the child in retaliation for an attempt to stop or prevent abuse is an affirmative defense to charges of failure to protect." (quoting Andrew R. Klein, Quincy Court Spousal/Partner Assault: A Protocol For the Sentencing and Supervision of Offenders 20 (1992))).

source and development of a child's impairment,[90] and do not specify the mechanism and extent of the harm.[91] Although largely ignored by the legal system, a developing body of research explores the psychological effects of witnessing domestic violence on children.[92]

In order to juxtapose the legal system's assessment of failure to protect in the context of domestic violence with the social science community's data on exposing children to domestic violence, it is necessary to explore the current state of the research on child witnesses of domestic abuse. Some studies indicate that witnessing domestic violence produces both long and short-term effects on children, but it is important to examine the results of these studies for their flaws.

B. *Social Science Research Regarding the Psychological Effects of Domestic Violence on Child Witnesses*

1. A Widely-Held View: Witnessing Domestic Violence Harms Children

Studies estimate that anywhere between 3.3 and 17.8 million children are exposed to domestic violence in the United States.[93] Although the research that examines childhood exposure to domestic violence varies in defining what constitutes witnessing, a common description includes seeing and hearing violence between parents, as well as observing the effects of parental physical assaults.[94] Some characteristic results of the violence include seeing blood or bruises on the mother, observing weapons in the home, and having a depressed mother.[95] Though this area of research remains in its fledgling stages,[96] studies performed over the past fifteen years demonstrate that children of battered women are at high risk for both short and long-term emotional and behavioral problems.[97]

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90. *See supra* note 48 and accompanying text.

91. *See supra* Part I.A.

92. *See infra* Part I.B.

93. George W. Holden, *Introduction: The Development of Research Into Another Consequence of Family Violence*, *in* Children Exposed, *supra* note 19 at 1, 2 [hereinafter Holden, *Introduction*].

94. Janis Wolak & David Finkelhor, *Children Exposed to Partner Violence*, *in* Partner Violence: A Comprehensive Review of 20 Years of Research 73, 73 (Jana L. Jasinski & Linda M. Williams eds., 1998).

95. *See id.* at 73, 84-85.

96. Holden, *Introduction*, *supra* note 93, at 3-4 ("[T]he total number of articles on these children published in peer-reviewed journals amounts to only 56 articles... supplemented by a few review articles..., several chapters, and at least three books that focus on the children of battered women.").

97. George W. Holden et al., *Parenting Behaviors and Beliefs of Battered Women*, *in* Children Exposed, *supra* note 19, at 289, 290 [hereinafter Holden, *Parenting Behaviors*].

Studies indicate that short-term effects of witnessing domestic violence vary based on the developmental level of the child. Infants exposed to violence may experience a disruption of their attachment bond to their mother, feeding patterns, and sleeping routines.[98] Children may exhibit emotional and behavioral problems often characterized by aggression or clinginess.[99] Both boys and girls may perform poorly in school and experience shyness, depression, anxiety, low self-esteem, and guilt.[100] Long-term effects are explainable by social learning theory, or the idea that children learn aggression from their parents, and therefore are more likely to become perpetrators of violence as adults.[101] While male children may be more likely to become abusers, female children may learn to accept victimization, and both sexes learn that violence is an acceptable response to interpersonal problems.[102]

Researchers are also concerned with other risks associated with childhood exposure to domestic violence. First, some children may be in danger of direct abuse or inadvertent physical harm in homes plagued by spousal violence[103] because children sometimes interfere in parental disputes and often find themselves amidst flying fists, weapons, and airborne objects.[104] They may also be at risk of becoming victims of direct physical, sexual, or emotional abuse.[105] Second, exposure to violence may increase the incidence of post-traumatic stress disorder ("PTSD") in children.[106] PTSD is defined as "a specific psychiatric disturbance caused by exposure to an extreme stressor" with manifestations that include reliving the experience through dreams or recollections, sleep difficulties, irritability, and feelings of emotional detachment.[107] Third, child witnesses may be adversely affected by the stress that their battered mothers feel as a product of being in an abusive relationship.[108]

The foregoing evidence of alleged harm to children witnessing domestic violence does not reveal the entire story, however, because

98. Alan J. Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 Law & Psychol. Rev. 137, 145 (1994).

99. Wolak & Finkelhor, *supra* note 94, at 83.

100. Tomkins et al., *supra* note 98, at 145-47.

101. *Id.* at 149-52; Wolak & Finkelhor, *supra* note 94, at 83.

102. Tomkins et al., *supra* note 98, at 151-52.

103. *Id.* at 152-53; Wolak & Finkelhor, *supra* note 94, at 82.

104. Wolak & Finkelhor, *supra* note 94, at 82.

105. Tomkins et al., *supra* note 98, at 152.

106. Wolak & Finkelhor, *supra* note 94, at 82.

107. *Id.*

108. *Id.* (describing how children may experience indirect effects of partner violence including "maternal physical and psychological ill health resulting from the stress of being abused, exposure to paternal anger and irritability, and inconsistent or overly harsh parental disciplinary practices by parents who may be particularly distracted and irritable").

many researchers believe that current studies are flawed.[109] While evidence seemingly demonstrates that children are harmed by witnessing domestic violence, critics presently question the accuracy, methodology, and thoroughness of this body of research,[110] and call for new, more comprehensive studies.[111] Clearly, studying the effects of domestic violence on children is necessary and important, both for their immediate and long-term well-being.[112] Currently, however, several areas of this research require improvement in order to more accurately assess the harm that child witnesses of domestic violence experience.

2. The Current Body of Research: Methodological Flaws, Inaccuracies, and Areas for Improvement

Researchers have identified numerous limitations in the studies that find harm to child witnesses of domestic violence. A review of the literature suggests that two such weaknesses are methodological flaws[113] and highly variable results across studies.[114]

The quality of the research on child witnesses of domestic violence is adversely affected by flaws in the methods used to perform these studies. Though some studies discovered a range of variables that may affect the level of harm experienced by a child witness of domestic violence,[115] the methodologies of these studies are erratic.[116]

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109. Gary J. Maxwell, *Women and Children First... Why Not Build Enough Lifeboats? News from the Front: A Report on the Honolulu Conference "Two Systems-One Family, Bringing the Child Abuse and Domestic Violence Communities Together" (March 23-24, 2000)*, 10 Colum. J. Gender & L. 33, 34 (2000) ("A growing body of clinical evidence is emerging with respect to the harm experienced by children who observe incidents of domestic violence or live in a home where violence is occurring. It is problematic that... the clinical assessment tools utilized to determine whether "abuse" has occurred in the child-protective context are imperfect at best and often defective.").

110. *See infra* Part I.B.2.

111. *See infra* Part I.B.2.

112. *See* Kathleen J. Sternberg et al., *Using Multiple Informants to Understand Domestic Violence and Its Effects*, *in* Children Exposed, *supra* note 19, at 121.

113. *See* Holden, *Introduction*, *supra* note 93, at 10-11.

114. *See* Sternberg et al., *supra* note 112, at 121.

> After nearly 30 years of research, researchers should have a good understanding of domestic violence and its effects on child development. No one doubts that domestic violence is harmful to children or that the psychological distress they experience should often be manifest in behavior problems, of course, yet the reported behavioral and psychological characteristics of... witnesses vary considerably across studies.

Id.

115. These variables include: "(a) the nature of the violence (e.g., severity and chronicity); (b) ethnicity; (c) the level of stress experienced by the mother; (d) the quality of mothering; (e) whether the child was also the recipient of verbal or physical abuse; and (f) child characteristics (self-esteem, personality characteristics)." Holden, *Introduction*, *supra* note 93, at 10.

116. *Id.* at 10-11.

First, studies used vastly different, inadequate definitions of "marital abuse" and "domestic violence," which generated inconsistent results.[117] Early studies often failed to distinguish between physical violence to the mother and other family violence, while very few studies examined whether the child had actually observed the violence.[118] These definitions also failed to distinguish children who were direct victims of abuse from those who were only witnesses of spousal violence, thereby creating the potential for an incorrect assessment of harm for two very different experiences.[119]

Second, studies generally used battered mothers' reports as the only source for assessing the nature of the domestic violence.[120] This practice is problematic because the abused women may not be objective, reliance on a single informant in any study decreases the reliability of the study, and children are rarely asked to give separate accounts of the violence.[121] Battered women may deny or underreport the abuse, and may not be aware of their child's witnessing.[122] Furthermore, the assessed battered mothers were most often studied while in a battered woman's shelter.[123] Women in shelters constitute only a small sample size of abused women and "may not be representative of the more general population of battered women and their children."[124] Additionally, research shows considerable differences in how women in shelters view their children's behavior and how other observers or the children themselves assess the same conduct.[125] If children are assessed at all, many reside in shelters with their mothers, and their behavioral problems may be a result of family upheaval rather than the witnessing of domestic violence.[126] A family's time in a shelter is often characterized by heightened stress that may influence the psychological well-being of both battered mothers and their children.[127] Additionally, assessment of the father

117. *Id.*

118. *See* Sandra A. Graham-Bermann, *The Impact of Woman Abuse on Children's Social Development: Research and Theoretical Perspectives*, *in* Children Exposed, *supra* note 19, at 21, 29-30 (discussing parental abuse of the child, which may be included in "other family violence").

119. *See* Sternberg et al., *supra* note 1142, at 129.

120. *See* Holden, *Introduction*, *supra* note 93, at 10-11; Sternberg et al., *supra* note 1142, at 124-27; Wolak & Finkelhor, *supra* note 94, at 97-98.

121. Sternberg et al., *supra* note 1142, at 124-27; *see* Wolak & Finkelhor, *supra* note 94, at 97-98.

122. Holden, *Introduction*, *supra* note 93, at 5.

123. *Id.* at 10-11; Sternberg et al., *supra* note 1142, at 124-27; Wolak & Finkelhor, *supra* note 94, at 98.

124. Holden, *Introduction*, *supra* note 93, at 10-11.

125. Wolak & Finkelhor, *supra* note 94, at 98 (citing two studies, the first in 1983 and the second in 1993, that support the problematic use of battered mothers as a source of data in domestic violence research on child witnesses).

126. *Id.*

127. Timothy E. Moore & Debra J. Pepler, *Correlates of Adjustment in Children at Risk*, *in* Children Exposed, *supra* note 19, at 157, 159.

and his behavior regarding the children is nonexistent because the abusers are rarely interviewed.[128]

Third, the nature of the violence within the family has been virtually ignored.[129] Reports of the type, severity, and frequency of partner violence are rare, and the specifics of a child's exposure to domestic violence are therefore not fully assessed.[130] Some researchers insist that the harm associated with exposure to domestic violence depends on the severity, chronicity, and intensity of the violence, but current studies fail to explore these factors adequately.[131] No substantive conclusions have been drawn on this topic, except for the obvious deduction that an increase in severity of the violence will probably have an impact on the witnessing child.[132]

Other related factors that are not usually measured, but that researchers believe should be, include: "basic demographic information such as socioeconomic status, race, unemployment, family structure, and age of parents, as well as family factors known to affect children adversely, such as substance abuse by parents, paternal or maternal physical and mental health, pathology and stress, parenting ability, and stability of the home environment."[133] Also, relevant "child variables" are not examined carefully.[134] Given that witnessing children experience "no typical pattern of problems," researchers speculate that the harm may be shaped by individual child differences such as age and gender.[135] Age, gender, and intelligence of children, however, are repeatedly overlooked, and studies often lump all ages

128. Sternberg et al., *supra* note 1142, at 125; Wolak & Finkelhor, *supra* note 94, at 85.

129. *See* Holden, *Introduction*, *supra* note 93, at 10.

130. Wolak & Finkelhor, *supra* note 94, at 77, 90, 98.

131. *See id.* at 77 ("Little is known about how many incidents children who witness violence observe and how often violence occurs."); *id.* at 90 ("Scant research has been conducted on [the nature and severity of what is seen] within the field of partner violence."); *see also* E. Mark Cummings, *Children Exposed to Marital Conflict and Violence: Conceptual and Theoretical Directions*, *in* Children Exposed, *supra* note 19, at 55, 56 ("However, the impact of marital violence should not be oversimplified or considered in isolation.... [I]ts impact undoubtedly depends on its severity, chronicity, and intensity."); Graham-Bermann, *supra* note 118, at 30 ("Few researchers have studied or controlled for the number of abusive partners the mother has had, the chronicity of her abuse, or the length of the child's exposure to this violence."). *But see* Nancy E. Johnson, Domestic Violence Research: The Year in Review 55, 55-56 (1998) (describing a psychological study which "suggests that all [domestic violence] has the potential to induce trauma in the child witness regardless of intensity or frequency" and stating that "for the child witness at least, a 'minor' incidence of [domestic violence] would appear to be a myth") (quotation in inset). Dr. Johnson criticized this exploratory study, however, for drawing strong conclusions despite significant flaws and limitations, which include a small sample size, unequal comparison groups in number and composition, and questions too complicated for young children to understand. *Id.*

132. *See* Wolak & Finkelhor, *supra* note 94, at 90.

133. *Id.* at 98.

134. *Id.*

135. Holden, *Introduction*, *supra* note 93, at 7.

into one group without considering developmental variations.[136] Moreover, the majority of research focuses on the middle childhood years, and as a result, largely ignores adolescents.[137] Researchers also acknowledge that, although exposure to domestic violence may be a potential risk to a child's emotional and behavioral well-being, it often operates in tandem with other stressors in a child's life, including substandard housing and financial troubles.[138] Children may also experience other forms of violence, including community violence, other than, or in addition to, witnessing the ill-treatment of their mother.[139]

Studies have also been plagued by problematic research designs. Many studies lack crucial comparison groups of children from nonviolent homes.[140] Furthermore, sample sizes are small and researchers tend to use highly variable, nonstandard surveys that fail to uniformly assess subjects.[141] In addition, current literature is virtually devoid of any significant longitudinal studies that follow and evaluate subjects over an extended period of time.[142] Many studies in this area are retrospective and, therefore, can fall prey to the subjects' bias in recalling their experiences.[143] Other studies in this field are correlational, and investigate how two variables adjust in relation to each other.[144] Standing alone, however, correlational studies cannot be interpreted as showing which variable caused the effect, and thus drawing strong conclusions from them may be troublesome.[145]

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136. Wolak & Finkelhor, *supra* note 94, at 98.

137. *See id.*; Graham-Bermann, *supra* note 118, at 31.

138. *See* Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, *in* Children Exposed, *supra* note 19, at 371, 376-77.

139. *See id.*; *see also* Osofsky, *supra* note 19, at 97 ("[I]t is often difficult to separate the different effects of domestic and community violence on children.").

140. *See* Holden, *Introduction*, *supra* note 93, at 10-11.

141. *Id.*

142. *Id.*; Wolak & Finkelhor, *supra* note 94, at 98 ("No longitudinal studies and virtually no follow-up studies have been conducted."). *But see* Johnson, *supra* note 131, at 82 (describing a longitudinal study involving self-report interviews with parents and their children, suggesting that drug and alcohol abuse places children at additional risk for negative effects later in life, and affirming that a possible long-term effect of witnessing domestic violence is abuse in children's later adult relationships).

143. *See* Holden, *Introduction*, *supra* note 93, at 10-11; *see also* Johnson, *supra* note 131, at 32 (describing an example of a retrospective study, while also admitting that "[r]etrospective self-report is subject to recall bias").

144. Johnson, *supra* note 131, at iii. An example of correlational design is a recent study in which one set of variables, the level of knowledge about divorce and skill in dealing with divorce as acquired through divorce education programs, was measured against another set of variables, the level of domestic violence and parental communication. *Id.* at 57. The study indicated that subjects with greater divorce knowledge and skill had better parental communication and were subjected to less domestic violence. *Id.*

145. *Id.* at iii.

As a result of the methodological limitations and faulty research designs of studies assessing the type of exposure to domestic violence that children experience, the data in this realm is inconsistent.[146] For example, one study indicated that two-thirds of battered women reported that their child was aware of marital arguments.[147] Similarly, a second study found that most mothers reported that their children witnessed either the violence or its effects.[148] A third study, however, discovered a much lower rate of exposure to domestic violence—less than 50%.[149] Researchers question the accuracy of such studies given the limited research in the field and methodological concerns.[150] They also are concerned about relying solely on battered mothers as reporters, who "may deny, minimize, underreport," or simply not know of their children's exposure to domestic violence.[151]

Notably, the data also reveals that not all children are negatively affected by witnessing violence, and some are resilient to any impairment.[152] Irregularities exist, however, regarding exactly how many children fall into this category. For example, one study indicated that 60% of children seem to be unaffected by the violence in their homes.[153] Other studies found an even wider range, indicating that between 25% and 70% of witnessing children do exhibit behavioral problems.[154]

In light of the flawed methodology and inconsistent data highlighted in the current literature, some researchers suggest methods of improving the quality of research. In addition to using comparison groups and doing longitudinal studies, suggestions include looking at children's individual characteristics, child rearing in violent

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146. *See* Holden, *Introduction*, *supra* note 93, at 5. As one commentator states:

> Although numerous researchers have documented an association between children's exposure to spousal conflict and child maladjustment, the association between the two factors is not as consistent as one might expect. Perhaps in part the lack of consistency across studies can be explained by the methods used to assess spousal conflict and children's exposure to the conflict.

Sternberg et al., *supra* note 1142, at 124 (citations omitted).

147. Holden, *Introduction*, *supra* note 93, at 5 (citing a 1991 study by Holden & Ritchie).

148. *Id.* (citing a 1991 study by Hilton).

149. *Id.* (citing a 1994 study by O'Keefe).

150. *Id.*

151. *Id.*; *supra* notes 120-22 and accompanying text.

152. Holden *Introduction*, *supra* note 93 at 11 ("A relatively high number of children who are exposed to marital violence exhibit emotional, behavioral, or other types of problems. Remarkably, at least some of the children from violent homes seem to survive that experience relatively unscathed . . . .").

153. Graham-Bermann, *supra* note 118, at 31; *see also id.* at 21 (indicating that abusive families seem to be outside the range of normality, but "[l]ess clear is just how much woman abuse interferes with normative child development and in what particular ways it may harm the developing child").

154. Holden, *Parenting Behaviors*, *supra* note 97, at 290.

homes, and ethnic, age, and gender variables.[155] These researchers emphasize the need to explore whether a witnessing child's problems endure over time, if these children respond to crisis intervention or to a more stable environment, and how chronic exposure to domestic violence influences a child's development.[156] The variation in the effects of witnessing domestic violence on children, showing that some children are more resistant to harm than others, demands an examination of factors that protect children, including adult role models, community support, and strong mother-child relationships.[157]

Researchers assert that "no single theory or even combination of theories can explain how children are affected by marital violence."[158] Development of the research in this field is therefore key to clarifying if, when, and how children are harmed by witnessing domestic violence. As a Report to the American Bar Association indicated, "[r]esearch can help increase understanding of how domestic violence and child abuse [and neglect] are linked and how, if at all, they interact to create *greater* dangers to children. Research can track case outcomes and indicate which policies promote greater safety."[159]

As previously noted, the policy of charging battered mothers with failure to protect and removing children from their care is a standard response to domestic violence that is currently utilized in several states across the country.[160] Researchers, however, warn against adopting a uniform intervention in light of the conflicting, nascent research on harm to child witnesses of domestic violence. As one researcher stated, "[g]iven the variability in children's responses to spousal violence, it is important to recognize that a single intervention . . . is not likely to address effectively the needs of each and every child with problems."[161] Few studies attempt to link research, social policy, and intervention,[162] but some researchers encourage a "holistic," family systems approach to intervention.[163]

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155. George W. Holden et al., *Appraisal and Outlook*, *in* Children Exposed, *supra* note 19, at 409, 417-19 [hereinafter Holden et al., *Appraisal and Outlook*]; Holden, *Parenting Behaviors*, *supra* note 97, at 293 ("To date, the research available concerning child rearing in violent homes is extremely limited.").

156. Holden et al., *Appraisal and Outlook*, *supra* note 155, at 411-14; Tomkins et al., *supra* note 98, at 154 (indicating that though very few studies exist, some indicate that clinical intervention may help to reduce both short and long-term consequences of witnessing the battering of a child's mother).

157. Jaffe & Geffner, *supra* note 138, at 377.

158. Holden et al., *Appraisal and Outlook*, *supra* note 155, at 410.

159. The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association 18 (2d rev. prtg., 1994) [hereinafter The Impact of Domestic Violence].

160. *See supra* Part I.A.

161. Ernest N. Jouriles et al., *Breaking the Cycle of Violence: Helping Families Departing from Battered Women's Shelters*, *in* Children Exposed, *supra* note 19, at 337, 340.

162. Holden, *Introduction*, *supra* note 93, at 11.

163. The Impact of Domestic Violence, *supra* note 159, at 5 (encouraging

This approach considers family safety and support, and evaluates the child in conjunction with her caretaker.[164]

By not fully integrating research and intervention considerations, states may be applying the failure to protect doctrine in a problematic manner. Examination of the legal reasoning and social science research underlying the policy of failure to protect, however, raises the conflict of interests that are embedded in this form of legal intervention. Clashing interests of the state, the child, and the battered mother (or the primary caretaker) characterize the debate regarding the failure to protect policy as applied in states such as New York.[165] As the state charges mothers with failure to protect and removes children from their care for the benefit of the children, the mother and child struggle to remain together. Part II explores the constitutional issues and conflicting interests raised by the application of failure to protect policy, outlines the constitutional framework used to analyze the conflict, and describes what is at stake for the parties entangled in the failure to protect debate.

II. A BATTLE OF CONSTITUTIONALLY-EMBEDDED INTERESTS: THE CLASHING RIGHTS OF MOTHER, CHILD, AND THE STATE

The policy of charging a battered mother with neglect and removing a child from her care because the child witnessed domestic violence presents a situation with three major components. First, according to the United States Supreme Court, parents have a fundamental right regarding the care and custody of their children which must be considered in cases of removal.[166] Second, children also have rights regarding the parent-child relationship, though the Supreme Court has defined them more narrowly than parental rights.[167] Third, the state, via child protective services, initiates the process to remove a

prosecutors to adopt "holistic child and family safety and support" in Family Violence Units, whereby issues affecting both children and families are addressed (emphasis omitted)); Jaffe & Geffner, *supra* note 138, at 377 (urging the consideration of numerous variables in a context larger than the child, including adult role models, attachments to mother, and community supports, when assessing the effects of witnessing domestic violence on a child); Osofsky, *supra* note 19, at 97-98 ("A systems approach that takes into account not just the child but the interrelated connections that link the child and his or her community offers . . . a useful framework.").

164. *See* The Impact of Domestic Violence, *supra* note 159, at 5.

165. *See supra* text accompanying notes 23-55.

166. *See infra* Part II.A.

167. *See infra* Part II.B.; *see also* Michael Fine, Comment, *Where Have All the Children Gone? Due Process and Judicial Criteria for Removing Children from Their Parents' Homes in California*, 21 Sw. U. L. Rev. 125, 141 (1992) ("Though the United States Supreme Court has spoken in broad terms with respect to parental rights, it has not done the same with regard to children's rights. Supreme Court pronouncements with regard to children's rights have been narrower in scope.").

child when the state identifies a need to protect his or her health, safety, and/or welfare.[168]

The Due Process Clause of the Fourteenth Amendment reads in part "[n]o State shall... deprive any person of life, liberty, or property, without due process of law."[169] The substantive component of the Fourteenth Amendment indicates that "deprivations of life, liberty, or property [must] be substantively reasonable."[170] A due process violation therefore occurs when a state action results in an unreasonable deprivation of a person's life, liberty, or property rights without due process of law.[171]

If the deprivation relates to a liberty interest, whether that interest is fundamental to due process also must be considered.[172] Governmental action infringing on a non-fundamental right is only subject to a weak judicial scrutiny test, whereby the state action will be upheld if it is rationally and reasonably related to a legitimate government interest.[173] When a fundamental right is involved, however, the government action is judicially examined by a rigid, strict scrutiny test which is considerably more difficult to withstand.[174] In these cases, government actions are "subject to a strong presumption of unconstitutionality" and under the strict scrutiny test, the government must show a compelling state interest to rebut that presumption.[175]

When the state threatens to interfere with parental rights and the integrity of the family, its policy is judicially scrutinized to prevent violations of substantive due process.[176] In cases of failure to protect, the state infringes upon a mother's liberty interest in the care and custody of her child when it removes the child from her.[177] Since she is deprived of her fundamental right to care for her child,[178] the due process clause is potentially violated. A mother's fundamental right, however, is not the only interest involved in this complex dynamic—

168. *See infra* Part II.C. (detailing the role of the state in parent-child relations, specifically in the context of failure to protect). *See generally* Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 Wash. L. Rev. 493, 556 (1988) (describing how state intervention may involve separating a child from his parents or even terminating parental rights to the parent-child relationship).

169. U.S. Const. amend. XIV, § 1.

170. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. Rev. 625, 625 (1992).

171. *Id.* at 630-32.

172. *Id.* at 632.

173. *Id.* at 643.

174. *Id.* at 638-42.

175. *Id.* at 638.

176. *See* Fine, *supra* note 167, at 141.

177. Galloway, *supra* note 170, at 631 n.31 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as the Supreme Court's confirmation of a broad view of liberty interest, including an individual's rights to establish a home and raise children).

178. *See infra* Part II.A.

both the interests of the state and the rights of the child must also be considered.

This part examines these three conflicting constitutional interests and the repercussions of the failure to protect policy on the respective rights of the battered mother, the child, and the state. These conflicting interests provide the foundation for effectively addressing the failure to protect controversy.

A. *Battered Mother's Interests in the Parent-Child Relationship*

One of the oldest fundamental liberty interests recognized by the Supreme Court is the right of parents to the care, custody, and control of their children.[179] Substantial precedent has established and reaffirmed the constitutionality of a parent's right to raise her child by determining that this is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[180]

The failure to protect policy of temporarily removing[181] children from the nonviolent mother's care raises a concern that the practice interferes with the mother's fundamental right to the care and custody of her child.[182] There is a developing fear that the battered mother's rights are being undermined and jeopardized for the actions that she

179. Troxel v. Granville, 120 S.Ct. 2054, 2060 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

180. *Troxel*, 120 S. Ct. at 2060; Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the right[] ... to direct the education and upbringing of one's children." (internal citations omitted)); Santosky v. Kramer 455 U.S. 745, 753 (1982) (emphasizing the "fundamental liberty interest of natural parents in the care, custody, and management of their child"); Parham v. J.R., 442 U.S. 584, 602 (1979) (indicating that Supreme Court jurisprudence has recognized "broad parental authority over minor children"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children come[s] to this Court with a momentum for respect. ..." (internal quotation omitted) (citation omitted)); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (citations omitted)); *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399.

181. *See supra* note 23 and accompanying text.

182. *See* Nicholson Amended Complaint, *supra* note 1, at 11-12 (alleging that "[s]aid policy, and the removal and detention effectuated pursuant to said policy, constituted an unlawful interference with plaintiff's liberty interest in the care and custody of her children, the infant plaintiffs herein, in violation of the First and Fourteenth Amendments to the United States Constitution").

takes, or fails to take, concerning her child.[183] Courts often consider a mother neglectful or unfit if she fails to leave her batterer or suffers from Battered Women's Syndrome.[184] Imposing strict liability on the battered mother by automatically removing her children labels her as passive and incapable of leaving an abusive relationship.[185] A woman, however, may remain with her batterer for a multitude of reasons: financial dependency, fear of violence toward herself or her children, social stigma, unavailability of battered woman shelters, or apprehension of losing her children to child protective services.[186] In fact, remaining with her batterer may be a mother's first line of defense, as the most dangerous period for a battered woman and her children occurs immediately after leaving the relationship.[187] Furthermore, paralyzed by a fear of losing her children to child protective agencies, a battered mother may refuse to seek services to help leave her abusive partner.[188]

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183. *See* Amy R. Melner, *Rights of Abused Mothers vs. Best Interest of Abused Children: Courts' Termination of Battered Women's Parental Rights Due to Failure to Protect Their Children from Abuse*, 7 S. Cal. Rev. L. & Women's Stud. 299, 303 (1998); *see also* The Impact of Domestic Violence, *supra* note 159, at 14 ("Frequent attempts to flee an abuser, time spent at a shelter, or the temporary transfer of custody by domestic violence victims to other family members for the purpose of protecting their children should not create any presumption of parental negligence.").

184. *See* Melner, *supra* note 183, at 303-04; *see also supra* Part I.A. (discussing the reasoning of various courts in considering allegedly neglectful mothers). Battered Women's Syndrome, in particular, "is now well accepted by most professionals working in the field as well as by many courts who try to understand victims' behavior." Peter G. Jaffe et al., Children of Battered Women 22 (Developmental Clinical Psychology & Psychiatry Series Vol. 21, 1990). The syndrome is defined by one authority as being

> marked by a victim's increasing sense of helplessness and hopelessness about finding safety and terminating the violence. These feelings are reinforced by a sense of isolation and poor self-esteem, fostered by the batterer. Over time, victims can begin to deny and minimize the extent of the violence and underestimate the lethality of the situation for themselves and their children.

Id. (citation omitted).

185. The "Failure to Protect" Working Group, *supra* note 8, at 854; Melner, *supra* note 183, at 303-04.

186. Melner, *supra* note 183, at 309-15.

187. The "Failure to Protect" Working Group, *supra* note 8, at 858-59 ("Studies reveal that it is during and after separation that the batterer is most likely to stalk, harass and even kill the mother.").

188. *Id.* at 849; Stone & Fialk, *supra* note 86, at 211 ("Women learn that reporting violence inevitably leads to the removal of their children from their homes."); *see also* Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 Alb. L. Rev. 1109, 1111 (1995).

> The paradox of society's treatment of battered women is that the word is 'out': if you report domestic violence in your home, your children might be removed; if you are a child and you make a report, you may be placed in foster care or a group home.... The paradox of the domestic violence situation is, therefore, that it often leads to the separation of women and children.

Id. (citations omitted).

Courts mistreat battered women in a variety of ways, such as ignoring the existence of marital violence; using the psychological and emotional effects of the abuse, such as Battered Women's Syndrome, against the mother; blaming the mother for her denial or mitigation of the battering; turning the mother's failure to leave against her; or insisting that the mother is destined to enter future abusive relationships.[189] Regardless of the reasoning used by the court, failure to protect charges dominate the outcome, removal of children is the protocol, and the mother's fundamental rights to the care and custody of her child are subsequently deprived. Critics of the failure to protect policy claim that the neglectful battered mother meets the same consequences as the mother who directly abuses her children, declaring that this policy renders "the distinction between abuse and neglect . . . meaningless."[190]

A battered mother's interest in the parent-child relationship is only one facet of the fierce conflict over the failure to protect doctrine. The failure to protect policy also involves the child's rights in the parent-child relationship, as defined by the Supreme Court.

B. *Child's Interest in the Parent-Child Relationship*

The rights of children are more narrowly defined than those of their parents, though federal courts have recognized children's constitutional interest in the parent-child relationship.[191] While the Supreme Court has declined to determine "whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship,"[192] some federal courts maintain that the integrity of the family includes "the reciprocal rights of both parent and children."[193] For example, the Second Circuit highlights the emotional bonds that develop from the daily interaction between parent and child as a key reason for refusing to "dislocate[]" a child from his parent.[194] Moreover, the Supreme Court acknowledges that

189. Melner, *supra* note 183, at 304; *see supra* Part I.A.; *cf.* Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents. . . .").

190. Miccio, *supra* note 13, at 1093.

191. *See* Fine, *supra* note 167, at 141-42; *see also* William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 Ga. L. Rev. 473, 489 (1990) (stating that children "have a recognized and critical interest in not being needlessly severed from parental bonds").

192. Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

193. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); *see also* Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983) ("The constitutional interest in the development of parental and filial bonds . . . above all . . . is manifested in the reciprocal rights of parent and child to one another's 'companionship.'" (citations omitted)).

194. *See Duchesne*, 566 F.2d at 825 (citing Smith v. Org. of Foster Families for

the child's interest is advanced while in the care of competent parents,[195] stating "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[196]

Child advocates raise other arguments and suggestions to ensure that children's reciprocal rights to family integrity are protected. In particular, they promote individualized consideration of the child's circumstances whenever an action by child protective services, such as removal from the home, will alter the child's status within the family.[197] For example, advocates criticized a New York state statute that presumed a foster parent convicted of a felony was unfit and mandated removal of the foster child from the parent's care.[198] Citing *Stanley v. Illinois*,[199] advocates argue that such a statute, which irrebuttably presumes that the state action protects the child's welfare, is unconstitutional and a determination based on the individualized assessment of the child's circumstances is necessary.[200]

The failure to protect doctrine removes children from their nonviolent mother's care based on the child's right to be free from abuse and neglect.[201] Critics of failure to protect policy evaluate the child's right to be protected from harm and the mother's right to custody of her child in the context of the reciprocal right to family integrity shared by both.[202] That is, children cannot be protected without protecting their caretakers as well, indicating that removal from the mother's care does little to safeguard the combined rights

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Equal. & Reform, 431 U.S. 816, 844 (1977)).

195. *See* Julie Solomon Rappaport, Note, *The Legal System's Response to Child Abuse: A "Shield" for Children or a "Sword" Against the Constitutional Rights of Parents?*, 9 N.Y.L. Sch. J. Hum. Rts. 257, 264-65 (1991).

196. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

197. *See* Memorandum of Law at 27, 29, *In re* Anonymous (N.Y. Fam. Ct., Oct. 18, 1999) (No. B7738-40/99) (on file with Fordham Law Review) (indicating that a "mandatory, non-discretionary removal of children from a long-term familial relationship" has never been permitted in New York case law without an opportunity to investigate the specific circumstances of "the placement and the best interests of the child") [hereinafter Memorandum of Law].

198. *Id.* at 23-27.

199. 405 U.S. 645, 652-53 (1972) (declaring unconstitutional an Illinois law that mandated removal of children from their unmarried father upon the death of their mother and requiring that parental unfitness be established through individualized proof). In *Stanley*, the Supreme Court stated "that the State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Id.* at 652.

200. Memoranda of Law, *supra* note 197, at 25-27.

201. *See supra* Part I.A.; Rappaport, *supra* note 195, at 264-65.

202. *See* Nicholson Amended Complaint, *supra* note 1, at 12-13 (stating in part that "[a]s a result of defendants' actions [removing children from battered mother], plaintiff and adult class members suffered or will suffer the loss . . . of the custody and services of their children; the infant plaintiffs [sic] infant class members have suffered or will suffer the loss of liberty and of the care and guidance of their mother").

and safety of both mother and child.[203] Rather than remove the child from the mother, suggestions include removing the batterer from the home, and developing a safety plan for both mother and child,[204] or maintaining intact families through services to prevent domestic violence in the home.[205]

The conflicting rights of mother and child enmeshed in the failure to protect policy is further complicated by the interests of the state. States intervene in the family relationship and remove a child from the battered mother's care in order to prevent a child from witnessing domestic violence. Although states intervene to protect the best interests of the child, such state action is still subject to constitutional scrutiny.

C. *State's Interest in the Best Interest of the Child*

The Supreme Court has made clear that the State, in its role as parens patriae,[206] may encroach on parental rights to protect the well-being of a child.[207] Traditionally, the Supreme Court recognizes that

> so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[208]

The law presumes that the emotional bonds of the parent-child relationship prompt the parent to act in the best interest of the child.[209] The State's control over parental rights may be exercised

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203. *See* The Impact of Domestic Violence, *supra* note 159, at 5.

204. *Id.* at 17-18 (encouraging child protective services and courts to decline "pit[ting] battered parents and children against each other" as well as urging the removal of abusers and the promotion of safety plans for both the battered mother and her children); Bernadine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. Chi. L. Sch. Roundtable 1, 8-10 (1995) ("[T]he child protective system should remove the batterer from the home, and it should support the battered mother by providing safety plans that will allow her to protect herself and her children."); Johnson, *supra* note 21, at 271 ("Fresh from the courtroom and wielding a new weapon in the war against domestic violence, California prosecutors have, for the first time, successfully convicted a man for domestic battery based only upon a child witness' mental suffering.").

205. *See* Davidson, *supra* note 86, at 362 ("[Child protective agencies] and courts should use carefully constructed and thoroughly evaluated risk assessment instruments. These instruments should include an appraisal of the family's domestic violence history as well as the present ability of non-abusive parents to keep violence from erupting in the home.").

206. *See* Black's Law Dictionary 1113 (6th ed. 1990)) (defining parens patriae as "the state as a sovereign"); *see also* Rappaport, *supra* note 195, at 264 n.51 (describing the historical development of parens patriae and identifying this doctrine as the origin of state intervention into the family).

207. Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).

208. Troxel v. Granville, 120 S. Ct. 2054, 2061 (2000).

209. Parham v. J.R., 442 U.S. 584, 602 (1979).

when the physical or mental health of the child is endangered.[210] The Supreme Court does not condone state intervention in all family integrity cases, but carefully examines abuse and neglect cases where a parent may be acting against the best interest of his or her child.[211]

Government intervention in the parent-child relationship may be challenged because mother or child could claim that such state action deprives them of a protected right in violation of the Fourteenth Amendment. Furthermore, in any due process claim, the court will consider whether the right involved is a fundamental right.[212] Fundamental rights include the right to privacy,[213] freedom of speech, freedom of the press, freedom of religion, and freedom of association, or "those rights 'explicitly or implicitly guaranteed by the Constitution.'"[214] In these situations, if the government action "substantially interferes with the exercise of the fundamental right in question," the intervention is an infringement on the fundamental right.[215] There is no exact test for infringement, and the totality of the circumstances[216] is evaluated to determine whether substantial interference with a fundamental right has occurred.[217] If the State did infringe upon the fundamental right, then the state action is subject to strict judicial scrutiny.[218] Therefore, the court will inquire whether the government action is necessary, or the only or least burdensome way to achieve a compelling state interest—a governmental interest of the highest order.[219]

The State has a compelling interest when its action is permitted by the Constitution and its reasons for action are extremely strong.[220] The "necessary" component of this test requires that the state action be the only practical, or least burdensome, means for advancing the compelling state interest.[221] On the other hand, if the state action does not affect or infringe on a fundamental right, the intervention is only

210. *Id.* at 603.
211. *Id.* at 602-03.
212. *See supra* text accompanying notes 166-70.
213. Galloway, *supra* note 170, at 633 (indicating that the right of privacy is "by far the most important fundamental right in substantive due process law" and specifying that it includes "the right not to be sterilized, the right to choose a marriage partner, the right to choose family living arrangements, the right to send one's child to parochial school, the right to have one's child study a foreign language, and the freedom of intimate association" (citations omitted)).
214. *Id.* at 635-36 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973)).
215. *Id.* at 636.
216. *See* United States v. Cortez, 449 U.S. 411, 417 (1981) (describing "totality of the circumstances" as a legal test whereby "the whole picture . . . must be taken into account").
217. Galloway, *supra* note 170, at 636.
218. *Id.* at 637-38.
219. *Id.* at 638.
220. *Id.* at 639.
221. *Id.* at 640-41.

subject to a rationality test,[222] and the level of judicial inquiry is less severe than the strict scrutiny test. It merely asks whether the government action is rationally and reasonably related to a legitimate government interest.[223]

In the failure to protect context, the State's interest in protecting children from physical and mental impairment motivates the governmental action of removal from the battered mother's care. But, the practice of removal raises constitutional questions. For example, the Supreme Court has held that a parent cannot lawfully be denied custody of a child without a timely hearing.[224] The standard for removal, however, varies across jurisdictions and in New York, for example, a child may be removed from parental custody before a hearing "where there is an objectively reasonable basis for believing that a threat to the child's health or safety is imminent."[225] In such cases, the State's interest in the child's welfare outweighs the parents' right to a procedural hearing.

The specific removal standards of individual jurisdictions and other related parental rights aside, failure to protect critics condemn the policy at a broader level, labeling it faceless, punitive, and misinterpretive of existing neglect statutes.[226] As such, they call into question the reasonableness of "across the board" removal and the constitutionality of this type of state intervention.[227]

Failure to protect policy fosters a web of conflicting interests. The State's interest in the well-being of its children conflicts with a mother's fundamental right to the care and custody of her child, while the child's interest in remaining with the mother clashes with the State's interest. To resolve this conflict, the failure to protect policy must be re-examined for its appropriateness and constitutionality. Part III argues that because a substantial body of social science research questions the extent and likelihood of harm to witnesses of domestic violence, the failure to protect policy should be reevaluated. Moreover, uniform removal of children from their battered mothers may impermissibly infringe on a mother's fundamental rights and based on the social science research, may not be necessary to further a compelling state interest.

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222. *Id.* at 643-44.

223. *Id.* at 643.

224. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

225. Gottlieb v. County of Orange, 84 F.3d 511, 520 (2d Cir. 1996) (citing the New York Family Court Act § 1024(a) and case law).

226. *See* The "Failure to Protect" Working Group, *supra* note 8, at 849-57 (criticizing the strict liability interpretation of New York's neglect statute as implicating a policy that punishes all battered women without consideration of actions taken to protect their children).

227. Nicholson Amended Complaint, *supra* note 1, at 17 ("Declaring that defendants' policy and/or practice of removing and detaining children from their mothers, based upon the fact that the mothers are victims of domestic violence, is unconstitutional.").

III. BEYOND "COMMON SENSE": A RE-EVALUATION OF FAILURE TO PROTECT POLICY

"'What is difficult is that you're victimizing them twice,' he said of the mothers. 'On the other hand, you have the notion of protecting the children. And they are not necessarily consistent.'"[228] In his own words, Judge Clark T. Richardson of the Bronx Family Court in New York City acknowledged the conflicting interests present in the failure to protect dilemma. In the overwhelming majority of failure to protect cases in his court, he reversed removal decisions and returned children to their nonviolent mothers.[229] Judge Richardson recognized what the case law has revealed: the facts and circumstances surrounding each family differ widely, the reasoning used by judges is subjective and variable, and yet in most cases, the policy of removal is the same.[230]

This uniform policy applied to all battered mothers is objectionable on both social science and legal grounds. State intervention into the privacy of the family in failure to protect cases is the result of judicial interpretation of various state neglect statutes,[231] and as a governmental action that impinges upon a fundamental liberty interest, it is subject to scrutiny for its constitutionality.[232] A mother's fundamental right to the care, custody, and upbringing of her child[233] is infringed upon and deprived by the application of failure to protect doctrine, and therefore may be unconstitutionally violated.[234] Under the totality of the circumstances, when the State removes a battered woman's child from her home without explanation and takes that child into the temporary custody of the state, she can no longer exercise her fundamental right to care for her child.[235] While the law alone generally provides ample procedural protections to a parent for temporary removal,[236] removal according to failure to protect policy

228. Sengupta, *supra* note 2 ("And so for Judge Richardson . . . these cases present an especially daunting exercise in balancing interests.").

229. *Id.* (indicating that over a six month period, Judge Richardson reversed the majority of the thirty-five to forty domestic violence-related neglect petitions on his docket).

230. *See id.*; *see also supra* Part I.A. (surveying the application of failure to protect doctrine in domestic violence cases in the jurisdictions of different states).

231. *See supra* notes 25, 56, 72, 76 and accompanying text.

232. *See supra* notes 206-23 and accompanying text.

233. *See supra* notes 179-89 and accompanying text.

234. *See supra* notes 212-23 and accompanying text; *see also* redacted Brief, 21-27 (on file with Fordham Law Review) (arguing that a New York State statute that mandates removal of foster children from a foster parent based on a prior criminal conviction violates the Due Process Clause of the Fourteenth Amendment because it implicates a fundamental liberty interest and it fails to further a necessary and compelling state interest).

235. *See supra* notes 215-16 and accompanying text.

236. *See* Santosky v. Kramer, 455 U.S. 745, 777-81 (1982) (Rehnquist, J., dissenting) (detailing the legal and notice-related steps taken once a child is temporarily removed from parental custody in New York, including a required petition alleging abuse or

lacks both standards and reason. As the Supreme Court asserted,

> We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'[237]

Thus, the gravity of the stakes for the battered mother, the infringement on her fundamental rights, and the indiscriminate removal in the failure to protect context provide the basis for strictly scrutinizing this governmental policy.[238]

A Fourteenth Amendment Due Process Clause challenge will include an analysis of whether the policy is necessary to achieve a compelling government interest. Failure to protect policy is probably not rooted in a compelling state interest, because social science research demonstrates the unclear extent and nature of harm to child witnesses of domestic violence.[239] Even if the state interest is deemed compelling, however, failure to protect policy is clearly not the only, necessary means by which a state may protect a child's well-being.

First, the existence of flawed and underdeveloped social science data concerning child witnesses of domestic violence shows that the state may not have a compelling interest in removing children from their nonviolent mothers in all cases. As studies indicate, children are at high risk of being harmed by witnessing domestic violence, and may exhibit emotional and behavioral problems as a result.[240] Despite the current evidence of short and long-term effects of witnessing domestic violence, researchers regard these results with caution.[241] The shortcomings of this literature, including small sample sizes, lack of longitudinal studies, and limited exploration of the severity, chronicity, and type of violence, create uncertainty regarding the extent of the effects on individual children of witnessing domestic violence.[242] Given the wide variation of effects[243] and the resilience of

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neglect filed with Family Court, prompt service of summons and copy of petition upon the parents, mandatory fact-finding hearing requiring attendance of parents, admittance of only relevant evidence at the hearing, and periodic review of temporary removal orders by the Family Court).

237. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

238. *See* Galloway, *supra* note 170, at 638-42 (describing the basic principles of strict scrutiny); *see also supra* notes 218-220 and accompanying text (outlining the different tests of constitutional scrutiny); *supra* note 234 (explaining Martin Guggenheim's constitutional challenge of a New York State statute mandating removal of foster care children from their foster parent).

239. *See supra* Part I.B.2.

240. *See supra* Part I.B.2.

241. *See supra* Part I.B.2.

242. *See supra* Part I.B.2.

243. *See supra* notes 152-54 and accompanying text.

many children to impairment,[244] the interest of the state in preventing imminent harm to these children is not the same in every case.[245] The variability in the outcomes of child witnesses of domestic violence and the uncertainty of the cause of any harmful effects qualifies the state's interest in removing every child from a nonviolent mother and may not be a valid basis for the continuation of this policy. In fact, researchers warn against adopting a single policy in dealing with witnessing children because of the developing research in the field and the vast differences in current findings.[246] The burgeoning social science data indicates that it is no longer accurate to consider these children in imminent danger of impairment "as a matter of common sense."[247] Common sense clearly does not warrant uniform state intervention in all cases of domestic violence witnessing; rather, the need for a well-established, compelling interest on the part of the state is imperative and in accordance with constitutional precedent.[248] Consideration of the research on child witnessing is an invaluable tool for determining outcomes in order to develop the most effective and safest policies.[249] The state's concern is always warranted when the mental and physical well-being of a child is in danger,[250] but ignoring the ambiguity of current research in this field threatens "the most essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state."[251]

Even assuming that the state has a compelling interest in continuing the policy of failure to protect, state intervention in the form of removal is not necessary because it is not the only or least burdensome means to further this interest.[252] Researchers encourage the consideration of both the child and mother when developing strategies for intervention.[253] An array of alternative solutions exists that preserves both the mother's and the child's rights in this scenario.

In order to preserve a mother's fundamental rights, options other than mandatory temporary removal of her children may be effective. Some suggestions include removing the perpetrator of domestic abuse from the family[254] or terminating the perpetrator's parental rights when he commits domestic violence in front of his children.[255]

244. *See supra* note 152 and accompanying text.
245. *See supra* note 25 and accompanying text.
246. *See supra* note 161 and accompanying text.
247. *See supra* note 54.
248. *See supra* Part II.C.
249. *See supra* text accompanying note 159.
250. *See supra* text accompanying notes 207-10.
251. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).
252. *See supra* text accompanying note 221.
253. *See supra* notes 161-63, 202-04 and accompanying text.
254. *See supra* note 204 and accompanying text.
255. *See* Haddix, *supra* note 23, at 764-800.

Another alternative codifies an affirmative defense to failure to protect for battered mothers, as exemplified by states such as Iowa, Minnesota, and Oklahoma.[256] Enacting safety plans and access to battered women's services is an additional alternative—a preliminary attempt to help the battered mother by offering her the chance, which she desperately needs, to leave her abuser.[257] These tactics discourage labeling a battered woman as a "bad mother," refuse to essentially punish the victim twice,[258] and respect her fundamental right to raise her child.

Moreover, a child's rights to the companionship of parents and to be free from abuse and neglect can be maintained through ways other than removal.[259] Courts should recognize that "[l]ike their battered mothers, children are often . . . victimized . . . by the state, whose legal and child-care bureaucracies too rarely take into account the truths of the human heart and psyche. . . ."[260] Unnecessary removal from the primary caretaker and disruption of the established, emotional bonds of the family may also jeopardize a child's well-being.[261] Both social

256. *See supra* notes 864-89 and accompanying text.

257. *See* The Impact of Domestic Violence, *supra* note 159, at 18 (indicating that "[c]ourts and child welfare agencies have an affirmative duty, *before* removal . . . decisions, to promote the safety of the victim-parent (typically the mother) and her children"); *see also* Sengupta, *supra* note 2 ("Often, she [the mother] may have done nothing wrong or negligent, but simply lacked the financial or emotional resources to leave an abusive partner.").

258. *See* The Impact of Domestic Violence, *supra* note 159, at 18; *see also* Dohrn, *supra* note 204, at 2 (explaining that when "child neglect or abuse is adjudicated," a mother may be deemed not "good enough" and "[her] need to survive and to protect her children, their economic dependency, or their fear of physical violence" may detrimentally be ignored); Stone & Fialk, *supra* note 86, at 205-06 ("Too often, the legal response to violence in the home has been to victimize abused women further by holding them accountable for their children's exposure to this violence.").

259. *See supra* notes 191-205 and accompanying text.

260. Nancy Ver Steegh, *The Silent Victims: Children and Domestic Violence*, 26 Wm. Mitchell L. Rev. 775, 787 (2000) (quoting Lenore Walker, Terrifying Love 139-40 (1989)).

261. *See* Duchesne v. Sugarman, 566 F.2d 817, 825 n.19 (2d Cir. 1977) (quoting Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L.J. 645, 649-50 (1977)). It should be recognized that "[c]ourt or agency intervention without regard to or over the objection of parents can only serve to undermine the familial bond which is vital to a child's sense of becoming and being an adult in his own right." *Id.*; *see also* Panko, *supra* note 10, at 89 (discussing that upon removal, "[w]hile the children are doubtless safer without the abusive father, it is less clear that they are better off in foster care than in a single-parent home with their mother" (quoting Nancy A. Tanck, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children From Abuse*, 1987 Wis. L. Rev. 659, 684-85)); The "Failure to Protect" Working Group, *supra* note 8, at 857 (explaining that removal from the nonviolent mother "often has severe and long-lasting effects on the family" and may re-victimize children by "increas[ing] [their] fear of abandonment"); Sengupta, *supra* note 2 (indicating that when a battered mother is willing to take steps or has taken precautions to extricate the family from her abuser, Judge Richardson believes "it is unnecessarily harsh to keep their children in foster care"). Though the effects of removal on children and their experience in

science researchers and child advocates assert that individual assessment of a child's circumstances is key to both legal and therapeutic intervention.[262] The current state of research demonstrates the need for evaluation of "child variables" including the age, gender, and intelligence of a child in order to determine the harm to an individual witness of domestic violence.[263] Accordingly, child advocates encourage the individual determination of a child's circumstances when a state action that presumes protection of the child from harm is at issue.[264] Otherwise, the constitutionality of the action is dubious at best.[265] Alternatives to removal promote individualized consideration in order to discern what harm, if any, has been experienced by a child of domestic violence. For example, mandating expert testimony by social science professionals during neglect hearings against battered mothers would promote the goal of individual evaluation of children.[266] This tactic discourages a presumption of harm while highlighting the particularized experience of the child in question. Also, expert testimony educates judges and clarifies widespread myths about domestic violence.[267] Lawyers may be reluctant to use expert testimony in domestic violence because of their unfamiliarity with social science literature and their fear that judges will not apply the literature to their case.[268] However, expert opinion is key in domestic violence cases in determining the effects of domestic violence on children,[269] explaining victim behavior,[270] and protecting mothers from being charged with neglect in the failure to protect context.[271]

In conjunction with expert testimony, submission of amicus curiae briefs by social science professionals during failure to protect

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the foster care system are beyond the scope of this Note, please see Michele Miller, Note, *Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context*, 11 Hastings Women's L.J. 243 (2000) for a discussion of this topic.

262. *See supra* notes 134-35, 197-99 and accompanying text.

263. *See supra* text accompanying notes 134-36.

264. *See supra* notes 197-99 and accompanying text.

265. *See supra* notes 197-99 and accompanying text.

266. *See supra* notes 29-33 and accompanying text.

267. Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 Fam. L.Q. 43, 51 (2000) ("[E]xpert opinion critically educates the fact-finder.").

268. *Id.* at 46-47.

269. *Id.* at 50-51 ("Experts facilitate custody determinations by offering insight into the current and potential effects on children in a domestic violence household.").

270. *Id.* at 49-50 ("Despite some courts' reluctance, . . . [expert] testimony remains critical in domestic violence cases to explain victim behavior. The expert must educate the fact finder regarding the unfathomable dynamics underlying domestic violence relationships, and the subtle, confusing facts of abuse.").

271. *Id.* at 51 (describing that a battered mother often confronts a "Catch 22" whereby reporting domestic abuse may result in loss of custody of her child and failing to report may label her neglectful for failure to protect her child, and indicating that in this situation, expert testimony is imperative to educate the court about the mother's dilemma).

proceedings may facilitate educating the courts about the effects of child witnessing of domestic violence.[272] In a New Jersey case, *State v. Michaels*, Developmental, Social, and Psychological Researchers, Social Scientists and Scholars submitted a brief about scientific findings on interviewing child victims of sexual abuse.[273] The court in *Michaels* relied not only on the holdings of other courts, but also on a "sufficient consensus . . . within the academic, professional, and law enforcement communities" in deciding whether the interviewing techniques utilized in this particular case were suspect.[274] Similar use of amicus briefs in the failure to protect context may be an effective means to broaden a court's perspective on the effects of witnessing domestic violence on children as well as to provide an accurate knowledge base for the fact-finder.

Another alternative would create court programs that provide counseling for child witnesses of domestic violence.[275] These types of curricula are targeted to alleviate the adverse effects of domestic violence on children's lives, ranging in age from three to seventeen.[276] In fact, programs are already in place in Florida and Hawaii, while Minnesota has initiated a "domestic violence prevention curriculum" for elementary school grades.[277]

Another widespread solution advocated by legal experts and social scientists alike is the standardized and improved training of child protective services caseworkers.[278] According to the commissioner of the Administration for Children's Services in New York City, removal is "a judgment call on the part of caseworkers."[279] He further stated, "I would hope they would make that call only when there's evidence that the child is in imminent danger. Do we always get it right? I suspect it doesn't always happen."[280] In handling such a sensitive issue, caseworkers must carefully assess each situation on a case by case basis, and child protective services must issue a protocol for achieving a uniform, yet non-obtrusive result, tailored to every battered mother and her child. Training in the investigation of neglect allegations should focus on whether sufficient cause exists to remove

272. *See* State v. Michaels, 642 A.2d 1372, 1373 (N.J. 1994).
273. *Id.*
274. *Id.* at 1379.
275. *See* The Impact of Domestic Violence, *supra* note 159, at 6-7.
276. *Id.* at 7.
277. *Id.*
278. *See* The "Failure to Protect" Working Group, *supra* note 8, at 867-70 (suggesting a coordinated response by New York City's Administration for Children's Services for dealing with children in domestic violence cases, advocating for a domestic violence coordinator for the agency, and emphasizing the need for funding to adequately train all caseworkers on domestic violence issues).
279. *See* Sengupta, *supra* note 2.
280. *Id.*

the child, and if so, a means to reunify mother and child should be the goal of both the courts and child protective services.[281]

In order to successfully implement alternatives to removal, it is imperative that family courts assume the responsibility to initiate change in failure to protect cases. Courts can transform the current failure to protect policy by embracing collaboration with social science professionals, who are necessary to understanding the legal system's concern with child witnessing of domestic violence.[282] Collaboration may include the foregoing solutions, such as expert testimony by social science professionals, submission of amicus briefs, court-mandated counseling of children, and improvements in case work. Without court-initiated collaboration, the perpetuation of failure to protect policy poses a serious threat to the constitutionally-protected rights of the family.

CONCLUSION

The "overzealous application"[283] of neglect law, as manifested in the failure to protect policy, is unnecessary to achieve a compelling state interest. The widespread flaws in social science research raise fierce doubts regarding the harm to child witnesses of domestic violence in each and every situation where removal occurs. This data minimizes the compelling interest of the state in intervening in the family, and subsequently jeopardizing the fundamental right of the battered mother to raise her child. Even if the state's interest is compelling, clearly there are other practical alternatives that make removal of children from their battered mothers unnecessary. Other solutions, such as counseling, affirmative defenses, family safety plans, and adequate training of caseworkers, preserve the rights of both the nonviolent mother and her child in failure to protect situations. As Judge Clark Richardson emphasized, "I think the worst thing to do at that point is to remove [a battered mother's] children .... Then that person has absolutely nothing, nothing to hope for."[284]

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281. *See* Nicholson Amended Complaint, *supra* note 1, at 18-19.

282. A recent example of related collaborative efforts is evident in the Honolulu Conference, "Two Systems-One Family, Bringing the Child Abuse and Domestic Violence Communities Together." *See* Maxwell, *supra* note 109, at 33. According to one commentator, "[f]or nearly a year, a multi-disciplinary team of professionals designed and sponsored a conference intended to develop a stronger and more effective working relationship between women's rights advocates in the domestic violence context and child protective advocates." *Id.* Family courts may benefit from the fruits of this collaboration, and should be encouraged to adopt similar practices in order to address more effectively cases involving both domestic violence and child protective issues.

283. *See* Sengupta, *supra* note 2.

284. *Id.*